



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

ALL MATERIAL NONCIRCULATING

CALL NUMBER

VOLUME

COPY

71

COPY 3

AUTHOR

TITLE
SOUTHERN REPORTER

NAME AND ADDRESS

COPY 3

**INSERT IN VOL. 71,
SOUTHERN REPORTER.**

State Report Citation of Cases in the SOUTHERN REPORTER VOL. 71.

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Glasen v. Biggio* is in South. Rep., vol. 71, p. 204. It can be cited as from the State Report by giving the citation opposite "204" (Reporter page column) in this table, i. e., "139 La. 23."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
1	110 Miss. 806	171	111 Miss. 32	296	111 Miss. 113	378	111 Miss. 244	540*	Miss.
2	110 Miss. 812	173*	Miss.	296*	111 Miss. 116	380	111 Miss. 250	540*	Miss.
3	110 Miss. 821	173*	Miss.	298*	111 Miss. 121	382*	111 Miss. 253	540*	Miss.
4	110 Miss. 826	173*	Miss.	298*	111 Miss. 123	382*	111 Miss. 256	540*	Miss.
5	110 Miss. 844	173*	Miss.	300	111 Miss. 129	385	111 Miss. 264	540*	Miss.
5*	110 Miss. 848	173*	Miss.	302	111 Miss. 133	386	111 Miss. 267	540*	Miss.
9	110 Miss. 834	173*	Miss.	303*	Miss.	388	111 Miss. 278	540*	Miss.
9*	110 Miss. 859	173*	Miss.	303*	Miss.	391	111 Miss. 285	540*	71 Fla. 469
10	110 Miss. 841	173*	Miss.	303*	Miss.	394*	Miss.	543	71 Fla. 438
11	110 Miss. 861	173*	Miss.	303*	Miss.	394*	Miss.	552	71 Fla. 390
12	110 Miss. 871	174*	Miss.	303*	Miss.	394*	Miss.	561*	111 Miss. 297
12*	110 Miss. 864	174*	Miss.	303*	Miss.	394*	Miss.	561*	111 Miss. 294
13	110 Miss. 813	174*	Miss.	304*	Miss.	394*	Miss.	562	111 Miss. 299
14	110 Miss. 874	174*	Miss.	304*	Miss.	394*	Miss.	563*	111 Miss. 301
16	110 Miss. 881	174*	Miss.	304*	Miss.	394*	Miss.	563*	111 Miss. 303
16*	110 Miss. 883	174*	Miss.	304*	Miss.	394*	Miss.	565*	111 Miss. 311
17	110 Miss. 890	174*	Miss.	304*	Miss.	394*	Miss.	565*	111 Miss. 307
20*	Miss.	174*	71 Fla. 250	304*	Miss.	395*	Miss.	567*	111 Miss. 318
20*	Miss.	177	195 Ala. 601	304*	Miss.	395*	Miss.	567*	111 Miss. 313
20*	Miss.	180	195 Ala. 594	304*	Miss.	395*	Miss.	568	111 Miss. 320
20*	Miss.	183	196 Ala. 4	304*	Miss.	395*	Miss.	570*	111 Miss. 326
20*	Miss.	187	139 La. 1070	305	111 Miss. 137	395*	Miss.	570*	111 Miss. 329
20*	Miss.	180*	138 La. 1078	306	111 Miss. 144	395*	Miss.	571	111 Miss. 331
20*	Miss.	190*	138 La. 1079	308	111 Miss. 151	395*	Miss.	572	111 Miss. 335
20*	Miss.	191*	138 La. 1081	309*	111 Miss. 153	40	196 Ala. 327	573	111 Miss. 337
21*	Miss.	191*	138 La. 1082	309*	111 Miss. 159	40	196 Ala. 45	574	111 Miss. 339
21*	Miss.	193	138 La. 1087	310*	111 Miss. 161	409	196 Ala. 304	575	111 Miss. 349
21*	Miss.	194*	138 La. 1089	310*	111 Miss. 163	411	196 Ala. 591	576	111 Miss. 352
27	71 Fla. 236	194*	138 La. 1090	312*	110 Miss. 898	413	196 Ala. 608	577	111 Miss. 354
31*	71 Fla. 192	195*	138 La. 1092	312*	111 Miss. 171	415	196 Ala. 641	578	Miss.
31*	71 Fla. 145	196*	138 La. 1094	314	111 Miss. 175	416	196 Ala. 428	578*	Miss.
34	71 Fla. 210	196	138 La. 1096	315	111 Miss. 180	417*	196 Ala. 699	578*	Miss.
41	71 Fla. 189	197	139 La. 1	316	111 Miss. 192	417*	196 Ala. 508	578*	Miss.
42	71 Fla. 158	200	139 La. 9	317	111 Miss. 181	419	196 Ala. 647	578*	Miss.
51	14 Ala. A. 591	203	139 La. 19	318*	111 Miss. 196	422	196 Ala. 67	578*	Miss.
62	14 Ala. A. 619	204	139 La. 23	318*	111 Miss. 198	427	196 Ala. 447	578*	Miss.
63	14 Ala. A. 484	206	139 La. 28	320	111 Miss. 205	430	196 Ala. 620	579*	Miss.
67	14 Ala. A. 493	209	139 La. 35	321	111 Miss. 208	439	196 Ala. 337	579*	Miss.
70	14 Ala. A. 501	213	139 La. 46	322	111 Miss. 219	443	196 Ala. 438	579*	Miss.
75†	14 Ala. A. 666	214	139 La. 49	323	111 Miss. 223	448	196 Ala. 614	579*	Miss.
75*	14 Ala. A. 621	215	139 La. 51	324*	111 Miss. 228	450	196 Ala. 643	579*	Miss.
76	14 Ala. A. 57	238	139 La. 85	324*	111 Miss. 225	452	196 Ala. 681	579*	Miss.
79*	14 Ala. A. 62	239	139 La. 88	325*	Miss.	455	196 Ala. 77	579*	Miss.
79*	14 Ala. A. 63	240	139 La. 92	325*	Miss.	461	196 Ala. 1	579*	Miss.
82	14 Ala. A. 511	241	139 La. 92	326*	Miss.	462	196 Ala. 434	579*	Miss.
89	14 Ala. A. 392	244	139 La. 101	326*	Miss.	463	196 Ala. 56	579*	Miss.
91	195 Ala. A. 420	248	139 La. 113	326*	Miss.	465	196 Ala. 465	579*	Miss.
92	195 Ala. A. 568	259	111 Miss. 36	326*	Miss.	467	196 Ala. 430	580*	Miss.
93	195 Ala. A. 569	260*	Miss.	326*	Miss.	469*	196 Ala. 687	580*	Miss.
94	195 Ala. A. 20	260*	111 Miss. 39	326*	Miss.	469*	196 Ala. 656	580*	Miss.
95	195 Ala. A. 7	262	111 Miss. 44	326*	Miss.	473	196 Ala. 666	580*	Miss.
96	195 Ala. A. 671	264	111 Miss. 55	326*	Miss.	474	71 Fla. 225	580*	Miss.
97	195 Ala. A. 579	265*	111 Miss. 60	326*	Miss.	487	139 La. 217	580*	Miss.
99	195 Ala. A. 118	266*	111 Miss. 62	326*	Miss.	490	139 La. 213	580*	Miss.
100	195 Ala. A. 691	269	111 Miss. 75	327*	Miss.	492	139 La. 228	580*	Miss.
106	195 Ala. A. 572	270	111 Miss. 78	327*	Miss.	496	139 La. 242	580*	Miss.
103†	195 Ala. A. 692	272	111 Miss. 82	327*	Miss.	499*	139 La. 250	580*	Miss.
106	195 Ala. A. 277	273	111 Miss. 87	327*	Miss.	499*	139 La. 251	581*	Miss.
106	195 Ala. A. 272	274*	Miss.	327*	Miss.	501	139 La. 255	581*	Miss.
108	195 Ala. A. 121	274*	Miss.	327*	Miss.	503*	139 La. 261	581*	Miss.
109	195 Ala. A. 584	275*	Miss.	327*	Miss.	503*	139 La. 262	581*	Miss.
111	195 Ala. A. 256	275*	Miss.	327*	71 Fla. 208	505	139 La. 267	581*	Miss.
114	195 Ala. A. 588	275*	Miss.	328	71 Fla. 195	507*	139 La. 273	581*	Miss.
115	195 Ala. A. 675	275*	Miss.	329	71 Fla. 257	507*	139 La. 274	581*	Miss.
118	195 Ala. A. 124	275*	Miss.	331	71 Fla. 354	509	139 La. 277	581*	Miss.
126	195 Ala. A. 279	275*	Miss.	332	71 Fla. 342	510	139 La. 280	581*	Miss.
128	138 La. A. 978	275*	Miss.	334	196 Ala. 17	511	139 La. 285	581*	139 La. 364
130	138 La. A. 985	275*	Miss.	335	196 Ala. 25	512	139 La. 286	585	139 La. 375
131	138 La. A. 989	275*	Miss.	338	196 Ala. 21	513	139 La. 288	598	139 La. 411
133†	138 La. A. 992	276*	Miss.	340	196 Ala. 290	519	139 La. 305	607	71 Fla. 522
133*	138 La. A. 993	276*	Miss.	344	139 La. 138	521	139 La. 312	608	71 Fla. 419
133*	138 La. A. 993	276*	Miss.	346	139 La. 145	522*	139 La. 316	614†	14 Ala. A. 663
134†	138 La. A. 995	276*	Miss.	347	139 La. 147	522*	139 La. 316	614†	14 Ala. A. 663
134*	138 La. A. 997	276*	Miss.	349	139 La. 153	523*	139 La. 317	614†	14 Ala. A. 663
137	138 La. A. 1005	276*	Miss.	353	139 La. 163	523*	139 La. 318	614†	14 Ala. A. 69
147	138 La. A. 1033	276*	Miss.	355	139 La. 170	523*	139 La. 318	615	14 Ala. A. 527
149	138 La. A. 1038	276*	71 Fla. 274	358	139 La. 177	524*	139 La. 319	616	14 Ala. A. 71
150	138 La. A. 1043	277	71 Fla. 267	360	139 La. 185	524*	139 La. 320	617	14 Ala. A. 72
152	138 La. A. 1046	278*	71 Fla. 340	364	139 La. 194	524*	139 La. 321	618	14 Ala. A. 623
153	138 La. A. 1049	278*	71 Fla. 352	365	139 La. 197	525	139 La. 324	620	14 Ala. A. 558
161†	111 Miss. 3	279	71 Fla. 270	366	139 La. 201	527	139 La. 329	623	14 Ala. A. 75
161*	111 Miss. 1	280	71 Fla. 338	369	71 Fla. 526	529	139 La. 336	625	71 Fla. 545
162	111 Miss. 6	281	71 Fla. 348	372	71 Fla. 356	534	139 La. 347	627	71 Fla. 536
163	111 Miss. 10	282	71 Fla. 346	374*	71 Fla. 89	536	139 La. 354	630	71 Fla. 499
164	111 Miss. 12	283	71 Fla. 276	374*	111 Miss. 231	539*	Miss.	634	71 Fla. 514
166	111 Miss. 16	285	71 Fla. 282	375*	111 Miss. 232	539*	Miss.	636	111 Miss. 357
167	111 Miss. 21	289	111 Miss. 92	375*	111 Miss. 234	539*	Miss.	643*	111 Miss. 377
169	111 Miss. 26	291	111 Miss. 98	376	111 Miss. 237	540*	Miss.	643*	111 Miss. 379
170	111 Miss. 30	295	111 Miss. 110	377	111 Miss. 240	540*	Miss.	645	111 Miss. 385

*Not reported in State Reports.

† Not reported in full in Official Reports; reported in full in Southern Reporter.

State Report Citation of Cases in the SOUTHERN REPORTER, VOL. 71—Cont'd.

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
648	111 Miss. 393	737 ¹⁰	111 Miss. 412	834 ¹⁰	Miss.	907	111 Miss. 656	1000 ⁹	196 Ala. 696
653	111 Miss. 409	738 ¹⁰	Miss.	834 ¹⁰	Miss.	909	111 Miss. 662	1000 ⁹	196 Ala. 698
654 ¹⁰	Miss.	739	111 Miss. 419	834 ¹⁰	Miss.	910 ¹	111 Miss. 665	1000 ⁹	196 Ala. 698
654 ¹⁰	Miss.	741	111 Miss. 420	834 ¹⁰	Miss.	910 ¹	111 Miss. 664	1000 ⁹	196 Ala. 698
654 ¹⁰	Miss.	742	111 Miss. 434	834 ¹⁰	Miss.	911	111 Miss. 668	1000 ⁷	196 Ala. 698
654 ¹⁰	Miss.	743	111 Miss. 442	834 ¹⁰	Miss.	912	111 Miss. 669	1000 ⁸	196 Ala. 699
654 ¹⁰	Miss.	745	111 Miss. 449	834 ¹⁰	Miss.	913 ¹⁰	Miss.	1000 ¹⁰	14 Ala. A. 697
655 ¹⁰	Miss.	746	111 Miss. 453	835 ¹⁰	Miss.	913 ¹⁰	Miss.	1000 ¹¹	14 Ala. A. 698
655 ¹⁰	Miss.	749	111 Miss. 480	835 ¹⁰	Miss.	913 ¹⁰	Miss.	1000 ¹²	14 Ala. A. 698
655 ¹⁰	Miss.	750	111 Miss. 468	835 ¹⁰	Miss.	913 ¹⁰	Miss.	1000 ¹³	14 Ala. A. 698
655 ¹⁰	Miss.	752	111 Miss. 471	835 ¹⁰	Miss.	913 ¹⁰	Miss.	1000 ¹⁴	14 Ala. A. 698
655 ¹⁰	Miss.	757	111 Miss. 486	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1000 ¹⁵	14 Ala. A. 699
655 ¹⁰	Miss.	759	71 Fla. 562	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1000 ¹⁶	14 Ala. A. 699
655 ¹⁰	Miss.	760	71 Fla. 566	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1000 ¹⁷	14 Ala. A. 699
655 ¹⁰	Miss.	763 ¹	139 La. 449	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1001 ¹	14 Ala. A. 699
656 ¹⁰	Miss.	763 ¹	139 La. 451	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1001 ²	14 Ala. A. 699
656 ¹⁰	Miss.	765 ¹	139 La. 454	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1001 ³	14 Ala. A. 699
656 ¹⁰	Miss.	765 ¹	139 La. 456	835 ¹⁰	Miss.	914 ¹⁰	Miss.	1001 ⁴	14 Ala. A. 699
656 ¹⁰	Miss.	768	139 La. 465	836 ¹⁰	Miss.	914 ¹⁰	Miss.	1001 ⁵	14 Ala. A. 699
656 ¹⁰	Miss.	769	139 La. 466	836 ¹⁰	71 Fla. 479	915	71 Fla. 639	1001 ⁶	14 Ala. A. 699
656 ¹⁰	Miss.	770	139 La. 470	842	71 Fla. 575	917	71 Fla. 633	1001 ⁷	14 Ala. A. 699
656 ¹⁰	Miss.	771	139 La. 473	844	139 La. 547	919	71 Fla. 624	1001 ⁸	14 Ala. A. 699
656 ¹⁰	Miss.	773	139 La. 478	845	139 La. 549	922 ¹	71 Fla. 612	1001 ⁹	14 Ala. A. 699
658	196 Ala. 299	774	139 La. 481	846	139 La. 551	922 ²	71 Fla. 615	1001 ¹⁰	14 Ala. A. 699
659	196 Ala. 355	776	139 La. 486	849	139 La. 558	926	71 Fla. 606	1001 ¹¹	14 Ala. A. 699
660	196 Ala. 162	779	139 La. 496	860	139 La. 590	928	139 La. 635	1001 ¹²	14 Ala. A. 699
661 ¹	196 Ala. 167	781	139 La. 500	862	139 La. 616	931 ¹	139 La. 643	1001 ¹³	14 Ala. A. 699
661 ¹	196 Ala. 169	784	139 La. 510	865	111 Miss. 589	931 ²	139 La. 644	1001 ¹⁴	14 Ala. A. 699
664	196 Ala. 287	787	139 La. 518	866	111 Miss. 592	934	139 La. 651	1001 ¹⁵	14 Ala. A. 699
666	196 Ala. 356	791	139 La. 531	867	111 Miss. 596	936	139 La. 658	1001 ¹⁶	14 Ala. A. 699
667	196 Ala. 469	792	139 La. 534	868	111 Miss. 599	945	139 La. 681	1002 ¹	14 Ala. A. 699
670	196 Ala. 322	797	139 La. 537	871	111 Miss. 605	947 ¹	139 La. 685	1002 ²	14 Ala. A. 699
672	196 Ala. 475	798 ¹	139 La. 538	872	111 Miss. 607	947 ²	139 La. 687	1002 ³	14 Ala. A. 699
674	196 Ala. 32	798 ²	139 La. 541	874	111 Miss. 614	949	139 La. 692	1002 ⁴	14 Ala. A. 699
676	196 Ala. 37	800	139 La. 545	877	111 Miss. 621	951	139 La. 697	1002 ⁵	14 Ala. A. 699
678	196 Ala. 453	801	111 Miss. 492	878	111 Miss. 623	955	139 La. 708	1002 ⁶	14 Ala. A. 699
679	196 Ala. 455	802	111 Miss. 496	879	111 Miss. 627	961	139 La. 719	1002 ⁷	14 Ala. A. 699
681	196 Ala. 158	804	111 Miss. 502	880 ¹⁰	Miss.	963	14 Ala. A. 529	1002 ⁸	14 Ala. A. 699
682	196 Ala. 14	805	111 Miss. 507	880 ¹⁰	Miss.	967	14 Ala. A. 78	1002 ⁹	14 Ala. A. 699
683	196 Ala. 260	806	111 Miss. 509	880 ¹⁰	Miss.	971	14 Ala. A. 87	1002 ¹⁰	14 Ala. A. 699
684	196 Ala. 285	807	111 Miss. 512	880 ¹⁰	Miss.	972	14 Ala. A. 89	1002 ¹¹	14 Ala. A. 699
685 ¹	196 Ala. 153	808	111 Miss. 516	880 ¹⁰	Miss.	973	14 Ala. A. 91	1002 ¹²	14 Ala. A. 699
685 ²	196 Ala. 52	809	111 Miss. 520	880 ¹⁰	Miss.	974	14 Ala. A. 93	1002 ¹³	14 Ala. A. 699
687	196 Ala. 333	811	111 Miss. 525	880 ¹⁰	Miss.	976	14 Ala. A. 97	1002 ¹⁴	14 Ala. A. 699
689	196 Ala. 42	812	111 Miss. 528	881 ¹⁰	Miss.	977	14 Ala. A. 99	1002 ¹⁵	14 Ala. A. 699
690	196 Ala. 478	816	111 Miss. 542	881 ¹⁰	Miss.	978 ¹	14 Ala. A. 664	1002 ¹⁶	14 Ala. A. 699
692	196 Ala. 302	817	111 Miss. 547	881 ¹⁰	Miss.	979 ¹	14 Ala. A. 103	1002 ¹⁷	14 Ala. A. 699
693	196 Ala. 584	818	111 Miss. 550	881 ¹⁰	Miss.	979 ²	14 Ala. A. 103	1003 ¹	71 Fla. 696
694	196 Ala. 346	821	111 Miss. 559	881 ¹⁰	Miss.	979 ³	14 Ala. A. 665	1003 ²	71 Fla. 694
695	196 Ala. 520	824 ¹	110 Miss. 703	881 ¹⁰	Miss.	979 ⁴	14 Ala. A. 539	1003 ³	71 Fla. 699
696	196 Ala. 164	824 ²	111 Miss. 566	881 ¹⁰	Miss.	981 ¹	14 Ala. A. 665	1003 ⁴	71 Fla. 698
697	196 Ala. 154	827	111 Miss. 574	881 ¹⁰	Miss.	981 ²	14 Ala. A. 665	1003 ⁵	71 Fla. 698
699	196 Ala. 460	830	111 Miss. 584	881 ¹⁰	Miss.	981 ³	14 Ala. A. 663	1003 ⁶	71 Fla. 695
700	196 Ala. 513	832 ¹⁰	Miss.	881 ¹⁰	Miss.	981 ⁴	14 Ala. A. 664	1004 ¹	71 Fla. 695
701	196 Ala. 61	832 ¹⁰	Miss.	882 ¹⁰	Miss.	982 ¹	14 Ala. A. 104	1004 ²	71 Fla. 697
704	196 Ala. 481	832 ¹⁰	Miss.	882 ¹⁰	Miss.	982 ²	14 Ala. A. 664	1004 ³	71 Fla. 694
706	196 Ala. 590	832 ¹⁰	Miss.	882 ¹⁰	Miss.	983 ¹	14 Ala. A. 630	1004 ⁴	71 Fla. 695
707	196 Ala. 88	832 ¹⁰	Miss.	882 ¹⁰	Miss.	983 ²	14 Ala. A. 664	1004 ⁵	71 Fla. 693
709	196 Ala. 486	832 ¹⁰	Miss.	882 ¹⁰	Miss.	983 ³	14 Ala. A. 106	1004 ⁶	71 Fla. 696
715	196 Ala. 516	832 ¹⁰	Miss.	882 ¹⁰	Miss.	986 ¹	196 Ala. 160	1005 ¹	71 Fla. 690
717	196 Ala. 96	832 ¹⁰	Miss.	882 ¹⁰	Miss.	986 ²	196 Ala. 180	1005 ²	71 Fla. 690
719	196 Ala. 349	832 ¹⁰	Miss.	882 ¹⁰	Miss.	987	196 Ala. 175	1005 ³	71 Fla. 694
722	196 Ala. 593	832 ¹⁰	Miss.	883	139 La. 595	989	196 Ala. 362	1005 ⁴	71 Fla. 695
724	196 Ala. 500	832 ¹⁰	Miss.	886	139 La. 606	990	196 Ala. 59	1005 ⁵	71 Fla. 690
726 ¹	196 Ala. 696	833 ¹⁰	Miss.	891	139 La. 622	991	196 Ala. 506	1005 ⁶	71 Fla. 692
726 ²	196 Ala. 695	833 ¹⁰	Miss.	893	139 La. 626	993	196 Ala. 89	1006 ¹	71 Fla. 692
727 ¹	196 Ala. 696	833 ¹⁰	Miss.	894	139 La. 630	994	196 Ala. 462	1006 ²	71 Fla. 687
727 ²	196 Ala. 696	833 ¹⁰	Miss.	895	139 La. 633	995	196 Ala. 94	1006 ³	71 Fla. 686
727 ³	139 La. 425	833 ¹⁰	Miss.	897 ¹	111 Miss. 629	996	196 Ala. 151	1006 ⁴	71 Fla. 699
730	139 La. 430	833 ¹⁰	Miss.	897 ²	111 Miss. 631	997	196 Ala. 103	1006 ⁵	71 Fla. 693
733	139 La. 439	833 ¹⁰	Miss.	900	111 Miss. 638	999 ¹	196 Ala. 699	1006 ⁶	71 Fla. 692
734	139 La. 442	833 ¹⁰	Miss.	902	111 Miss. 643	999 ²	196 Ala. 697	1007 ¹	71 Fla. 691
735 ¹	139 La. 445	833 ¹⁰	Miss.	904	111 Miss. 649	999 ³	196 Ala. 697	1007 ²	71 Fla. 696
735 ²	139 La. 446	834 ¹⁰	Miss.	905	111 Miss. 652	999 ⁴	196 Ala. 697	1007 ³	71 Fla. 693
737 ¹	111 Miss. 417	834 ¹⁰	Miss.	906 ¹	111 Miss. 654	1000 ¹	196 Ala. 697	1007 ⁴	71 Fla. 691
				906 ²	111 Miss. 637	1000 ²	196 Ala. 697		

*Not reported in State Reports. † Not reported in full in Official Reports; reported in full in the Southern Reporter.

[End of Table.]

Th
page c
Ill
port b

repr.
Page

1....
2....
3....
4....
5 ¹
5 ²
9 ¹
9 ²
10....
11....
12 ¹
12 ²
13....
14....
16 ¹
16 ²
17....
20 ¹
20 ²
20 ³
20 ⁴
20 ⁵
20 ⁶
21 ¹
21 ²
21 ³
21 ⁴
27....
31 ¹
31 ²
34....
41....
42....
51....
62....
63....
67....
70....
75 ¹
75 ²
76....
79 ¹
79 ²
82....
89....
91....
92....
93....
94....
95....
96....
97....
99....
100....
100 ¹
103 ¹
105....
106....
108....
109....
111....
114....
115....
118....
120....
128....
130....
131....
133 ¹
133 ²
133 ³
134 ¹
134 ²
137....
147....
149....
150....
152....
153....
161 ¹
161 ²
162....
163....
164....
166....
167....
169....
17 ¹



This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section ➡ under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point---*This is the Key-Number Annotation.*

NATIONAL REPORTER SYSTEM—STATE SERIES

THE
SOUTHERN REPORTER

VOLUME 71

PERMANENT EDITION

COMPRISING

THE DECISIONS OF THE SUPREME AND APPELLATE
COURTS OF ALABAMA AND THE SUPREME
COURTS OF FLORIDA, LOUISIANA
AND MISSISSIPPI

WITH KEY-NUMBER ANNOTATIONS

APRIL 8 — JULY 8, 1916

ST. PAUL
WEST PUBLISHING CO.
1916

**COPYRIGHT, 1916
BY
WEST PUBLISHING COMPANY**

(71 SO.)

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ALABAMA—Supreme Court.

JOHN C. ANDERSON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS C. McCLELLAN.

ORMOND SOMERVILLE.

JAMES J. MAYFIELD.

LUCIEN D. GARDNER.

A. D. SAYRE.

WM. H. THOMAS.

Court of Appeals.

JOHN PELHAM, PRESIDING JUDGE.

ASSOCIATE JUDGES.

E. P. THOMAS.¹

J. B. BROWN.

RICHARD V. EVANS.²

FLORIDA—Supreme Court.

R. FENWICK TAYLOR, CHIEF JUSTICE.

JUSTICES.

THOMAS M. SHACKLEFORD.

JAMES B. WHITFIELD.

ROBERT S. COCKRELL.

W. H. ELLIS.

LOUISIANA—Supreme Court.

FRANK A. MONROE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

OLIVIER O. PROVOSTY.

WALTER B. SOMMERVILLE.

ALFRED D. LAND.

CHARLES A. O'NIELL.

MISSISSIPPI—Supreme Court.

SYDNEY SMITH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAM C. COOK.

J. MORGAN STEVENS.

Division A.³

SYDNEY SMITH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

J. B. HOLDEN.

E. O. SYKES.

Division B.³

SAM C. COOK, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

J. MORGAN STEVENS.

CLAYTON D. POTTER.

¹ Resigned April 1, 1916.

² Appointed April 1, 1916.

³ Beginning January 27, 1916.

CASES REPORTED

	Page		Page
Abbott v. Bailey (Fla.).....	1003	Armstrong & Co., Yazoo & M. V. R. Co. v. (Miss.).....	905
Abbott Lumber Co., Red Cross Lumber Co. v. (La.).....	191	Arthur Delapierre Co. v. Chickasaw Lumber Co. (Miss.).....	872
Abraham v. Bounds (Miss.).....	275	Asa W. Allen Co., Hickman Ebbert Co. v. (Miss.).....	810
Abraham, State v. (La.).....	193	Ashby v. Park (Miss.).....	858
Abraham, State v. (La.).....	769	Ashworth, State v. (La.).....	800
Adams County v. Catholic Diocese of Natchez (Miss.).....	17	Athens Bank, Sims v. (La.).....	525
Adams County v. St. Joseph's Society for Colored Missions (Miss.).....	20	Atlanta & St. A. B. R. Co., Panama Ice & Fish Co. v. (Fla.).....	608
Admore v. Meridian Light & Ry. Co. (Miss.).....	395	Atlantic Coast Line R. Co., Aultman v. (Fla.).....	283
Ætna Ins. Co. v. Cowan (Miss.).....	746	Atlantic Coast Line R. Co. v. Ryals (Fla.).....	1003
Ætna Ins. Co., Mitchell v. (Miss.).....	382	Aultman v. Atlantic Coast Line R. Co. (Fla.).....	283
A. K. McInnis Lumber Co. v. Rather (Miss.).....	264		
Alabama Co., Allgood v. (Ala.).....	726	Backous, Louisville & N. R. Co. v. (Miss.)..	833
Alabama Great Southern R. Co. v. Johnson (Ala. App.).....	620	Bagdad Land & Lumber Co., Newman v. (Fla.).....	1005
Alabama Great Southern R. Co. v. Skotzy (Ala.).....	335	Bailey, Abbott v. (Fla.).....	1003
Alabama Great Southern R. Co. v. Smith (Ala.).....	455	Bailey, Village of Scobey v. (Miss.).....	656
Alabama Great Southern R. Co. v. Taylor (Ala.).....	676	Baker, Blocker v. (Miss.).....	882
Alabama Power Co., Middleton v. (Ala.)..	461	Balkan & Bernstein, Postal Telegraph Cable Co. v. (Miss.).....	539
Alabama Steel & Wire Co. v. Budwig & Myers Fire Brick Co. (Ala.).....	999	Balkin v. Southern R. Co. in Mississippi (Miss.).....	580
Alabama & V. R. Co., Boyd v. (Miss.)....	164	Ball, Gasque v. (Fla.).....	329
Alabama & V. R. Co., Boyd v. (Miss.)....	655	Ballard v. Thompson (La.).....	505
Alabama & V. R. Co. v. Doolittle (Miss.)..	826	Baltimore Bargain House, Long v. (Ala. App.).....	75
Alabama & V. R. Co. v. Hill (Miss.).....	655	B. Altman & Co. v. Wall (Miss.).....	318
Alabama & V. R. Co., Jones v. (Miss.)....	276	Bank of Anguilla, Alexander Lumber Co. v. (Miss.).....	579
Alabama & V. R. Co. v. Jones (Miss.)....	318	Bank of Collins v. Miller (Miss.).....	12
Alabama & V. R. Co. v. Stingily (Miss.)....	876	Bank of Coushatta v. Yarborough (La.)...	784
Alabama & V. R. Co. v. Williams (Miss.)...	303	Bank of Decatur v. Robinson (Miss.).....	654
Alabama & V. R. Co. v. Willing (Miss.)...	580	Bank of Hazlehurst v. McCardle (Miss.)...	880
Alexander, State v. (Miss.).....	579	Bank of Inverness, Island City Nat. Bank v. (Miss.).....	566
Alexander Lumber Co. v. Bank of Anguilla (Miss.).....	579	Bank of Itta Bena v. Cockrell (Miss.)...	304
Allen, Murphree v. (Ala. App.).....	1002	Bank of Jennings v. Jennings (Fla.).....	31
Allen, Stevens v. (La.).....	936	Bank of Lauderdale v. Cole (Miss.).....	260
Allen v. Yazoo & M. V. R. Co. (Miss.).....	386	Bank of New Albany, Kitchens v. (Miss.)..	21
Allen Co., Hickman Ebbert Co. v. (Miss.)..	310	Bank of Newton, Harper v. (Miss.).....	835
Allgood v. Alabama Co. (Ala.).....	726	Banks, State v. (La.).....	194
Allgood v. Dwight Mfg. Co. (Ala.).....	726	Banning, Brown v. (Fla.).....	327
Allgood v. Grasselli Chemical Co. (Ala.)..	727	Barbour, Yazoo & M. V. R. Co. v. (Miss.)..	275
Allgood v. Semet Solvay Co. (Ala.).....	727	Barham, Yazoo & M. V. R. Co. v. (Miss.)..	832
Allgood v. Sloss-Sheffield Steel & Iron Co. (Ala.).....	724	Barnes v. Jones (Miss.).....	573
Allgood v. Standard Oil Co. (Ala.).....	726	Barnes v. White (Ala.).....	114
Altman & Co. v. Wall (Miss.).....	318	Barr v. Foster (Miss.).....	394
Altom, Moore v. (Ala.).....	681	Barringer, National City Bank of Chicago v. (La.).....	894
Amason, Harton v. (Ala.).....	180	Barron v. State (Miss.).....	374
American Bank & Trust Co. v. Johnson (Miss.).....	808	Barton v. Burbank (La.).....	134
American Export Co., Lee Line Steamers v. (Miss.).....	275	Barton-Parker Mfg. Co. v. Moore (Miss.)..	909
American Lumber & Export Co., Bower v. (Ala.).....	100	Barton-Parker Mfg. Co. v. Walker & Norman (Miss.).....	656
American Mercantile Co. v. Circular Advertising Co. (Fla.).....	607	Bass v. Van Horn (Miss.).....	882
American Sugar Refining Co., State v. (La.).....	137	Bassett, Western Union Tel. Co. v. (Miss.).....	750
American Trust & Savings Bank, O'Rear v. (Ala.).....	105	Batesville Southwestern R. Co. v. Mims (Miss.).....	827
Anderson, Elixson v. (Miss.).....	834	Bayer Steam Soot Blower Co., Meridian Light & Ry. Co. v. (Miss.).....	835
Anderson v. Owen (Miss.).....	833	Bayou De Lisle Lumber Co., Louisville & N. R. Co. v. (Miss.).....	832
Anderson, Town of Port Gibson v. (Miss.)..	882	Beatty v. Palmer (Ala.).....	422
Andrews, Stuyvesant Ins. Co. v. (Miss.)..	914	Beavers & Co., Rice v. (Ala.).....	659
Annonist City Land Co., Phinizy v. (Ala.)	469	Beck, City of New Orleans v. (La.).....	883
Armour Fertilizer Works, Coe v. (Fla.)....	374	Behr, Yazoo & M. V. R. Co. v. (Miss.)....	580
Armstrong, Gilliland v. (Ala.).....	700	Bell v. Bell (Ala.).....	465
Armstrong, Sykes v. (Miss.).....	262		

	Page		Page
Bell, City of Durant v. (Miss.)	325	Bridger, Illinois Cent. R. Co. v. (Miss.)	540
Bell, Seals Piano & Organ Co. v. (Ala.)	340	Brinson v. Scott (La.)	763
Bell v. State (Ala. App.)	1000	Brister, Southworth v. (Miss.)	173
Bell, Yazoo & M. V. R. Co. v. (Miss.)	272	Bristo v. Christine Oil & Gas Co. (La.)	521
Benedict Warren Hardware Co. v. Sander- son (Miss.)	539	Broom, Standard Acc. Ins. Co. v. (Miss.)	653
Bennett, Currie v. (Miss.)	324	Brothers v. Russell & Duke (Ala.)	450
Bennett, Currie v. (Miss.)	830	Brouff, Durrett v. (Miss.)	326
Bennett, First Nat. Bank v. (Miss.)	169	Brown, Ex parte (Miss.)	581
Bennett, Mississippi Cent. R. Co. v. (Miss.)	310	Brown v. Banning (Fla.)	327
Bennett, Mobile & O. R. Co. v. (Miss.)	275	Brown v. Shorter (Ala.)	103
Bennett v. Tishomingo County (Miss.)	304	Brown v. Tuscaloosa (Ala.)	672
Benoit, Trahan v. (La.)	893	Brownen, Yazoo & M. V. R. Co. v. (Miss.)	882
Berryhill, Illinois Cent. R. Co. v. (Miss.)	832	Browning v. St. Clair County (Ala.)	108
Berthold & Jennings Lumber Co. v. Geo. W. Phalin Lumber Co. (Ala.)	989	Brunet, Darcourt v. (La.)	776
Betts Naval Stores Co. v. Whitton (Fla.)	281	Buchan, Charlotte Harbor & N. R. Co. v. (Fla.)	842
Beugnot v. New Orleans Land Co. (La.)	947	Buchheit, Citizens' Nat. Bank v. (Ala. App.)	82
Biggio, Glisson v. (La.)	204	Buckley, Terry & Co., Hopkins v. (Miss.)	877
Big Pine Lumber Co., O'Neal v. (La.)	355	Budwig & Myers Fire Brick Co., Alabama Steel & Wire Co. v. (Ala.)	999
Birmingham Ry., Light & Power Co. v. Gray (Ala.)	689	Bufford v. State (Ala. App.)	614
Birmingham Ry., Light & Power Co. v. Harris (Ala.)	999	Bugg, State v. (Ala.)	699
Birmingham Ry., Light & Power Co. v. McDonough (Ala. App.)	1000	Burbank, Barton v. (La.)	134
Birmingham Ry., Light & Power Co. v. Vin- zant (Ala.)	999	Burdine, Senter v. (Miss.)	832
Birmingham Waterworks Co. v. Hernandez (Ala.)	443	Burkhalter, Illinois Cent. R. Co. v. (Miss.)	656
Bland v. Fidelity Trust Co. (Fla.)	630	Burkhalter v. Sanders (Miss.)	303
Bloch, Holmes v. (Ala.)	670	Burnecke v. O'Neal (La.)	395
Blocker v. Baker (Miss.)	882	Burns v. Denton (Miss.)	173
Board of Administrators of Charity Hospi- tal v. Richhart (La.)	735	Burris v. McClure (Miss.)	326
Board of Com'rs of Orleans Levee Dist., Reynolds v. (La.)	787	Burroughs Adding Mach. Co., Millsaps v. (Miss.)	590
Board of Levee Com'rs for Yazoo-Missis- sippi Delta v. Foote & Davies Co. (Miss.)	163	Busch-Everett Co., Saunders v. (La.)	153
Board of Levee Com'rs for Yazoo-Missis- sippi Delta v. Mary Mac Plantation Co. (Miss.)	835	Bush, Russell v. (Ala.)	397
Board of Sup'rs of Bolivar County, Wil- mot v. (Miss.)	656		
Board of Sup'rs of Chickasaw County, Boyd & Bradshaw v. (Miss.)	654	Cahill v. New Orleans Ry. & Light Co. (La.)	360
Board of Sup'rs of Sunflower County, Hen- ry v. (Miss.)	742	Cahn v. Wright (Miss.)	567
Bogue Hasty Drainage Dist. v. Bolivar County (Miss.)	395	Cain v. State (Ala. App.)	1000
Bolivar County, Bogue Hasty Drainage Dist. v. (Miss.)	395	Calcasieu Trust & Savings Bank v. Weth- erell (La.)	765
Bolivar County, Northern Drainage Dist. v. (Miss.)	380	Caledonian Fire Ins. Co. v. Shepherd (Miss.)	314
Bond, Kennedy & Co. v. (Miss.)	881	Calhoun v. Christine Oil & Gas Co. (La.)	522
Bonvillain, Swift & Co. v. (La.)	849	Campbell, Ex parte (Miss.)	20
Bostic Lumber & Mfg. Co., Molpus v. (Miss.)	16	Cannon, Martin v. (Ala.)	996
Bouanchaud, Moniotte v. (La.)	735	Carbajal, Succession of (La.)	774
Bounds, Abraham v. (Miss.)	275	Carbon Hill Banking Co., Ray v. (Ala.)	1000
Bower v. American Lumber & Export Co. (Ala.)	100	Carland, Jefferson County Sav. Bank v. (Ala.)	128
Boyd v. Alabama & V. R. Co. (Miss.)	164	Carlton v. Malloy (Fla.)	1003
Boyd v. Alabama & V. R. Co. (Miss.)	655	Carmichael, Pythress v. (Miss.)	326
Boyd v. Kelley (Miss.)	897	Carol v. Monteleone (La.)	798
Boyd & Bradshaw v. Board of Sup'rs of Chickasaw County (Miss.)	654	Carr, Cumberland Telephone & Telegraph Co. v. (Miss.)	303
Boyer, Village of Moreauville v. (La.)	187	Carter, New Orleans, M. & C. R. Co. v. (Miss.)	394
Boykin, McKenzie v. (Miss.)	382	Carter v. Veith (La.)	792
Boylan v. New Orleans Ry. & Light Co. (La.)	360	Catholic Diocese of Natchez, Adams County v. (Miss.)	17
Brackin v. Owens Horse & Mule Co. (Ala.)	97	Central Alabama Dry Goods Co., Wylar, Ackarland & Co. v. (Ala. App.)	1002
Bradford v. Steele (Miss.)	834	Central Nat. Bank of St. Petersburg v. Fillmon (Fla.)	1003
Brahan v. Meridian (Miss.)	170	Central of Georgia R. Co. v. Mathis (Ala.)	674
Bramlette v. Joseph (Miss.)	643	Chambless v. Jones (Ala.)	987
Brana, In re (La.)	519	Chambless v. State (Miss.)	590
Brana v. Brana (La.)	519	Chandler v. Chandler (Miss.)	811
Brannan v. Sherry (Ala.)	106	Chapman, Logan & Co. v. (Miss.)	807
Brassfield v. New Orleans, M. & C. R. Co. (Miss.)	174	Chapman, Tarrance v. (Ala.)	707
Brazell v. Brazell (Miss.)	540	Chapman, Watkins v. (Ala.)	473
Brewer, De Soto County v. (Miss.)	276	Chappelle, McGill v. (Fla.)	836
Brewster, Franek v. (La.)	213	Charlotte Harbor & N. R. Co. v. Buchan (Fla.)	842
		Chatwin, City of Shreveport v., two cases (La.)	791
		Chavigny, Reems v. (La.)	798
		Cherry v. Mobile & O. R. Co. (Miss.)	20
		Chesbrough & Graves, Eldridge v. (La.)	152
		Cheshire, Johnson v. (Fla.)	1004
		Chickasaw Lumber Co., Arthur Delapierre Co. v. (Miss.)	872
		Christina, Orleans-Kenner Electric R. Co. v. (La.)	770
		Christine Oil & Gas Co., Bristo v. (La.)	521

	Page		Page
Christine Oil & Gas Co., Calhoun v. (La.)	522	Cox, Mahoning Pottery Co. v. (Ala. App.)	1002
Christopher v. Mungen (Fla.)	625	Craig v. Birmingham (Ala. App.)	983
Circular Advertising Co., American Mercantile Co. v. (Fla.)	607	Craig & Co., Yazoo & M. V. R. Co. v. (Miss.)	561
Citizens' Ins. Co. v. Hebert (La.)	955	Crane v. Montgomery (Miss.)	914
Citizens' Nat. Bank v. Bucheit (Ala. App.)	82	Creed, O. J. & Bruce Knox v. (Miss.)	581
City of Alexandria v. Police Jury of Rapides Parish (La.)	928	Crosby v. Crosby (Miss.)	913
City of Birmingham, Craig v. (Ala. App.)	983	Crosthwait, Wallace v. (Ala.)	606
City of Birmingham, McKinnon v. (Ala.)	463	Crow, Warren v. (Ala.)	92
City of Brookhaven, Moses v. (Miss.)	655	Crowley Bank & Trust Co. v. Hurd (La.)	128
City of Corinth, Perkins v. (Miss.)	20	Cudd, Mitchell v. (Ala.)	660
City of Durant v. Bell (Miss.)	325	Cullman County, Searcy v. (Ala.)	664
City of Hattiesburg, Shemper v. (Miss.)	304	Culp v. Wooten & Agee (Miss.)	276
City of Jasper, Copeland v. (Ala. App.)	1000	Cumberland Telephone & Telegraph Co. v. Carr (Miss.)	303
City of Key West v. Page (Fla.)	1003	Cumberland Telephone & Telegraph Co., Kleinpeter v. (Miss.)	326
City of Macon, Oliver v. (Miss.)	575	Currie v. Bennett (Miss.)	324
City of Meridian, Brahan v. (Miss.)	170	Currie v. Bennett (Miss.)	830
City of Meridian, Dahmer v. (Miss.)	321	Currie, Kid v. (La.)	947
City of Meridian, Edwards v. (Miss.)	394	Currie, McKethan v. (La.)	346
City of Meridian v. Hudson (Miss.)	574	Curry, Lord v. (Fla.)	21
City of Mobile, Fleuron v. (Ala. App.)	1001	Cusack Co. v. Ford (La.)	196
City of New Orleans v. Beck (La.)	883	Dabbs v. Dabbs (Ala.)	696
City of New Orleans, Hills v. (La.)	797	Dahmer v. Meridian (Miss.)	321
City of New Orleans v. Le Blanc (La.)	248	Dalberni v. New Orleans Can Co. (La.)	214
City of New Orleans v. Mangiarisina (La.)	886	Dampeir, Yazoo & M. V. R. Co. v. (Miss.)	880
City of Prattville, Glenn v. (Ala. App.)	75	Danal v. State (Ala. App.)	976
City of Shreveport v. Chatwin, two cases (La.)	791	Daniel v. State (Ala. App.)	79
City of Shreveport v. Hester (La.)	779	Dannelley v. Jennings Naval Stores Co. (Fla.)	1003
City of Shreveport v. Robinette (La.)	791	Darby v. New Orleans, T. & M. R. Co. (La.)	490
City of Shreveport v. Victoria Lumber Co. (La.)	791	Darcourt v. Brunet (La.)	776
City of Tuscaloosa, Brown v. (Ala.)	672	Dardone v. State (Ala. App.)	1000
City of Tuscaloosa, Morgan v. (Ala. App.)	1002	Davidson v. Roberts (Ala. App.)	1000
City of West Tampa, Graham v. (Fla.)	926	Davis, Consumers' Coal & Fuel Co. v. (Ala.)	1000
Clark, McLeod v. (Miss.)	11	Davis v. Florida Power Co. (Fla.)	1004
Clark v. Watson (Ala.)	95	Davis, House v. (Ala.)	685
Clarke v. Natal (La.)	149	Davis, Louisville & N. R. Co. v. (Ala.)	682
Clavijo, In re (La.)	774	Davis v. Phillips (Miss.)	580
Clay v. State (Ala. App.)	982	Davis & Andrews Co., D. Rosenbaum's Sons v. (Miss.)	388
Clifford, Houston Bros. v. (Miss.)	579	Davis & Co., Illinois Cent. R. Co. v. (Miss.)	578
Clopton, Edmondson v. (Ala. App.)	1000	Davison, State v. (Ala.)	678
Cobb v. McPherson (Miss.)	304	Dawson v. State (Ala.)	722
Cochran v. Latimer (Miss.)	316	Dean, Dunn v. (Ala.)	709
Cockrell, Bank of Itta Bena v. (Miss.)	304	Defatta, State v. (La.)	195
Coe v. Armour Fertilizer Works (Fla.)	374	De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, Stewart v. (Fla.)	42
Cohn, Ford v. (Miss.)	303	Delapierre Co. v. Chickasaw Lumber Co. (Miss.)	872
Cole, Bank of Lauderdale v. (Miss.)	260	Delta Table & Chair Co., Yazoo & M. V. R. Co. v. (Miss.)	276
Cole v. State (Ala. App.)	616	Denton, Burns v. (Miss.)	173
Coleman, Mayes v. (Miss.)	14	De Soto County v. Brewer (Miss.)	276
Collins v. Jandon (Miss.)	540	Deubler, Succession of (La.)	846
Collins, Ryan v. (Ala.)	690	Diamond Rubber Co. v. Foley (Miss.)	906
Collins v. State (Miss.)	578	Dickerson, State v. (La.)	347
Colonial Trust Co. v. St. John Lumber Co. (La.)	147	Dickerson v. Western Union Tel. Co. (Miss.)	385
Colson v. State (Fla.)	277	Dickerson v. Yazoo & M. V. R. Co. (Miss.)	312
Columbus v. Yazoo & M. V. R. Co. (Miss.)	174	Dillon, Illinois Cent. R. Co. v. (Miss.)	809
Comeaux, Primeaux v. (La.)	845	Dinsmore v. Hardison (Miss.)	567
Commercial Finance Co. v. Cooper Bros. (Ala.)	684	Dinwiddie v. Glass (Miss.)	745
Commercial Nat. Bank v. Jordan (Fla.)	760	Dixon, Gulf & S. I. R. Co. v. (Miss.)	906
Commercial Nat. Bank v. Sanders (La.)	891	Dixon v. Southern R. Co. (Miss.)	306
Commissioners of Camp Creek Drainage Dist. v. Johnston (Miss.)	320	Dixon v. Vicksburg, S. & P. R. Co. (La.)	527
Coulée, Inzer v. (Miss.)	655	Doddsville Land & Mercantile Co., Yazoo & M. V. R. Co. v. (Miss.)	174
Consumers' Coal & Fuel Co. v. Davis (Ala.)	1000	Doke v. State (Fla.)	917
Cook v. Cook (Ala.)	986	Dolph v. State (Miss.)	911
Cook v. Lamb (Ala.)	1000	Donley v. Southern R. Co. in Mississippi (Miss.)	914
Cook v. State (Ala. App.)	1000	Donovan, Trichel v. (La.)	130
Coon v. Patterson (Miss.)	824	Dooley, Temple v. (Ala.)	683
Cooper Bros., Commercial Finance Co. v. (Ala.)	684	Doolittle, Alabama & V. R. Co. v. (Miss.)	326
Copeland v. Jasper (Ala. App.)	1000	Dorr, State v. (La.)	509
Coplin, Woodmen of the World v. (Miss.)	260	Doster-Northington Drug Co., State v. (Ala.)	427
Corinth Bank & Trust Co. v. Wallace (Miss.)	266	Dotson, Masonic Ben. Ass'n of Stringer Grand Lodge of Mississippi v. (Miss.)	266
Cottam & Co., In re (La.)	206	Doty v. Morehead (Miss.)	880
Cotton States Lumber Co. v. Shirley (Miss.)	327		
Couris, State v. (La.)	240		
Covington v. Yazoo & M. V. R. Co. (Miss.)	821		
Cowan, Aetna Ins. Co. v. (Miss.)	746		

	Page		Page
Dougherty, Salassi v. (La.).....	194	Foots & Davies Co., Board of Levee Com'rs for Yazoo-Mississippi Delta v. (Miss.)...	163
Douglas v. State (Ala. App.).....	614	Ford v. Cohn (Miss.).....	303
Douthard v. State (Ala. App.).....	979	Ford, Thomas Cusack Co. v. (La.).....	196
Dowdle, Western Union Tel. Co. v. (Miss.)	394	Foster, Barr v. (Miss.).....	394
Dowe, Wilder v. (Miss.).....	832	Fountain v. Joullian (Miss.).....	2
Drago Grain Co., Myers v. (Miss.).....	874	Francher, Plummer-Lewis Co. v. (Miss.)...	907
Drennan, Polk v. (Miss.).....	914	Francingues v. Dupieris (La.).....	503
D. Rosenbaum's Sons v. Davis & Andrews Co. (Miss.).....	388	Franek v. Brewster (La.).....	213
Dunaway v. Roden (Ala. App.).....	70	Frank I. Abbott Lumber Co., Red Cross Lumber Co. v. (La.).....	191
Duncan, Gardner v. (Miss.).....	173	Franklin v. Franklin (Miss.).....	880
Dunham v. McCormick (La.).....	523	Franklin v. Franklin (Miss.).....	881
Dunkin, Mobile & O. R. Co. v. (Miss.).....	832	Franklin v. Snow (Ala.).....	93
Dunn v. Dean (Ala.).....	709	Frazier v. State (Ala. App.).....	981
Dupieris, Francingues v. (La.).....	503	Fricke, Pilsbery v. (La.).....	349
Dupuy, Iberville Bank & Trust Co. v. (La.)	206	Fricks, Southern R. Co. v. (Ala.).....	701
Durham, Roe v. (Ala.).....	109	Frost-Johnson Lumber Co., Gilmore v. (La.).....	536
Durrett v. Brouff (Miss.).....	326	Frye v. State (Ala. App.).....	1001
Dwight Mfg. Co., Allgood v. (Ala.).....	726	Fugitt v. Seaman (Miss.).....	303
Eason v. State (Miss.).....	304	Fulco, State v. (La.).....	133
Easterling v. Easterling (Miss.).....	394	Fulco, State v. (La.).....	134
East Tennessee Nursery Co. v. Robbins (Miss.).....	834	Fulmer v. Williams (Miss.).....	579
Eaton v. Hopkins (Fla.).....	922	Funchess v. Wade (Miss.).....	913
Eeru Mercantile Co. v. Grace (Miss.).....	881	Furr, Ward v. (Miss.).....	835
Edgington v. Mabry (Miss.).....	901	Garden, Knight v. (Ala.).....	715
Edmondson v. Clopton (Ala. App.).....	1000	Gardner v. Duncan (Miss.).....	173
Edwards, J. K. Orr Shoe Co. v. (Miss.)...	816	Garnett v. Southern R. Co. in Mississippi (Miss.).....	304
Edwards v. Meridian (Miss.).....	394	Garrett v. Louisville & N. R. Co. (Ala.)...	685
Edwards v. State (Fla.).....	331	Gasque v. Ball (Fla.).....	329
Edwards & Sons v. Farve (Miss.).....	12	Gassaway, New Orleans, M. & C. R. Co. v. (Miss.).....	806
Eldridge v. Chesbrough & Graves (La.)...	152	Gaston, Yazoo & M. V. R. Co. v. (Miss.)...	173
Elloxon v. Anderson (Miss.).....	834	Gates v. Modern Order of Praetorians (Miss.).....	21
Elliott v. Illinois Cent. R. Co. (Miss.).....	741	Geiger, Ingram-Dekle Lumber Co. v. (Fla.)	552
Elliott v. Tartt (Ala. App.).....	1000	George, Southern R. Co. v. (Miss.).....	833
Elmore, Fidelity Mut. Life Ins. Co. v. (Miss.).....	305	Geo. W. Phalin Lumber Co., Berthold & Jennings Lumber Co. v. (Ala.).....	989
Eminent Household of Columbian Wood- men v. Lundy (Miss.).....	16	Georgetown Mercantile Co. v. J. B. & E. O. Smith (Miss.).....	654
Embry, Yazoo & M. V. R. Co. v. (Miss.)...	833	Georgia Home Ins. Co. v. Hoskins (Fla.)...	285
Ensley Motor Co. v. O'Rear (Ala.).....	704	Gibson v. State (Ala. App.).....	614
Erickson, Yazoo & M. V. R. Co. v. (Miss.)	581	Gibson Grocery Co., Mohlenbrock Milling Co. v. (Miss.).....	835
Evans v. Gidwitz (Miss.).....	913	Gidwitz, Evans v. (Miss.).....	913
Everage v. State (Ala. App.).....	983	Gillespie, Knights of Modern Maccabees v. (Ala. App.).....	67
Fairbanks Co., Till v. (Miss.).....	298	Gilliland v. Armstrong (Ala.).....	700
Faison v. Vestal (Fla.).....	759	Gilmore v. Frost-Johnson Lumber Co. (La.)	536
Farley v. State (Ala. App.).....	1001	Glass, Dinwiddie v. (Miss.).....	745
Farrell, Ex parte (Ala.).....	462	Glenn v. Prattville (Ala. App.).....	75
Farrell v. Farrell (Ala.).....	661	Glisson v. Biggio (La.).....	204
Farrow Mercantile Co. v. Riggins (Ala. App.).....	963	Godsey, J. M. Robinson, Norton Co. v. (Miss.).....	312
Farve, Mrs. K. Edwards & Sons v. (Miss.)	12	Goehns v. Wallace (Miss.).....	303
Faulk & Co. v. Williams (Ala. App.).....	1002	Golden, Gordon v. (Miss.).....	326
Favish, Western Union Tel. Co. v. (Ala.)...	183	Goldstein, Standard Oil Co. v. (Miss.)...	21
Fay & Egan Co., Millbrook Lumber Co. v. (Miss.).....	327	Goldstein, Standard Oil Co. v. (Miss.)...	570
Feibel, Watson v. (La.).....	585	Goodman, Metropolitan Life Ins. Co. v. (Ala.).....	409
Ferguson, Wilder v. (Miss.).....	324	Gordon v. Golden (Miss.).....	326
Fernwood Lumber Co. v. Rowley (Miss.)...	3	Gorey v. State (Fla.).....	328
Ferrell, Springfield Fire & Marine Ins. Co. v. (Ala. App.).....	615	Grace, Eeru Mercantile Co. v. (Miss.)...	881
Fidelity Bank of New Smyrna, McMillan v. (Fla.).....	1004	Grace, State ex rel. Albritton v. (La.)...	203
Fidelity Mut Life Ins. Co. v. Elmore (Miss.).....	305	Graham v. West Tampa (Fla.).....	926
Fidelity Mut. Life Ins. Co. v. Oliver (Miss.)	302	Grand Benev. Ass'n v. Thomas (Ala. App.).....	1001
Fidelity Trust Co., Bland v. (Fla.).....	630	Grand Lodge Colored K. P. v. Wynn (Miss.).....	833
Fields, Nicholson v. (Miss.).....	900	Grand Lodge Colored K. P. v. Yelvington (Miss.).....	576
Fillmon, Central Nat. Bank of St. Peters- burg v. (Fla.).....	1003	Grand Lodge Knights of Pythias of Missis- sippi v. Strauther (Miss.).....	275
Finger v. Taylor (Miss.).....	269	Granger, Thomas v. (Fla.).....	1007
First Nat. Bank v. Bennett (Miss.).....	169	Grasselli Chemical Co., Allgood v. (Ala.)...	727
First Nat. Bank v. Marengo County Bank (Ala. App.).....	1001	Gray, Birmingham Ry., Light & Power Co. v. (Ala.).....	689
First Nat. Bank v. Trenholm (Miss.).....	274	Gray v. Mobile & O. R. Co. (Miss.).....	540
Fleuron v. Mobile (Ala. App.).....	1001	Gray, State v. (Miss.).....	296
Fleuron v. State (Ala. App.).....	1001	Gray, Yazoo & M. V. R. Co. v. (Miss.)...	578
Florida East Coast R. Co., State v. (Fla.)	543	Gray, Yazoo & M. V. R. Co. v. (Miss.)...	581
Florida Fire & Casualty Ins. Co., Richard- son v. (Fla.).....	1006		
Florida Power Co., Davis v. (Fla.).....	1004		
Flynt v. Royals (Miss.).....	654		
Fohey, Diamond Rubber Co. v. (Miss.)....	906		

	Page		Page
Green, State v. (Miss.).....	171	Hesdorffer v. Hiller (Miss.).....	166
Green v. Taylor (Miss.).....	375	Hester, City of Shreveport v. (La.).....	779
Green Bay Lumber Co. v. Mangum (Miss.)	579	Hewes v. Hewes (Miss.).....	4
Green River Lumber Co., Johnston v.		Hewitt, Hundley v. (Ala.).....	419
(Miss.).....	832	Hewitt v. Virginia-Carolina Chemical Co.	
Grenada County v. Little (Miss.).....	871	(Fla.).....	1005
Griffin v. State (Miss.).....	572	Hibernia Bank & Trust Co., Hyman v.	
Guerard v. Howard (La.).....	501	(La.).....	598
Guice v. Illinois Cent. R. Co. (Miss.).....	259	Hickman Ebbert Co. v. Asa W. Allen Co.	
Gulf & S. I. R. Co. v. Dixon (Miss.).....	906	(Miss.).....	310
Gulf & S. I. R. Co. v. Lack (Miss.).....	913	Hicks, Illinois Cent. R. Co. v. (Miss.).....	579
Gwaltney v. State (Miss.).....	805	Hicks v. Meridian Coca-Cola Bottling Co.	
		(Miss.).....	835
Haile v. Mason Hotel & Investment Co.		Hill, Ex parte (Ala.).....	994
(Fla.).....	540	Hill, Alabama & V. R. Co. v. (Miss.).....	655
Hall v. Shean (Miss.).....	323	Hill v. Petty (Miss.).....	910
Hall, Southern Exp. Co. v. (Miss.).....	173	Hill, Wertheimer Bag Co. v. (Ala. App.).....	618
Hamburger v. Purcell (La.).....	765	Hiller, Hesdorffer v. (Miss.).....	166
Hamilton, Stovall v. (Ala. App.).....	63	Hills v. New Orleans (La.).....	797
Hammond, Reed v. (Ala.).....	692	Hillsborough County, Keggins v. (Fla.).....	372
Hampton, Thomas v. (Fla.).....	1007	Hix-Gravely Cigar Co., Teasley v. (Ala.).....	100
Hancock v. State (Ala. App.).....	973	Hodges, Mayer Bros. v. (Miss.).....	327
Hand v. Hathorn (Miss.).....	579	Hoggatt, Lanier v. (Miss.).....	173
Hansen, Riser v. (Miss.).....	394	Holder, Nathanson v. (Fla.).....	1005
Harbour v. Laurel Oil & Fertilizer Co.		Holmes v. Bloch (Ala.).....	670
(Miss.).....	914	Home Ade Bottling Co., Sethness Co. v.	
Harden v. Louisville & N. R. Co. (Ala.).....	1000	(Miss.).....	308
Hardie & Sons, Montgomery-Ferguson Co.		Home Mut. Fire Ins. Co. v. Pittman	
v. (La.).....	931	(Miss.).....	739
Harrison, Dinsmore v. (Miss.).....	507	Hopkins v. Buckley, Terry & Co. (Miss.).....	877
Harkness v. State (Ala. App.).....	1001	Hopkins, Eaton v. (Fla.).....	922
Harlee v. Manatee Title Guarantee Co.		Horst v. Pake (Ala.).....	430
(Fla.).....	1004	Horton v. King (Miss.).....	9
Harper v. Bank of Newton (Miss.).....	835	Hoskins, Georgia Home Ins. Co. v. (Fla.).....	285
Harper, Henderson v. (Miss.).....	835	House v. Davis (Ala.).....	685
Harrington v. State (Ala. App.).....	1001	Houston Bros. v. Clifford (Miss.).....	579
Harris, Birmingham Ry., Light & Power		Howard, Guerard v. (La.).....	501
Co. v. (Ala.).....	999	Howard v. Kelly (Miss.).....	391
Harris, Headley v. (Ala.).....	695	Howcott, Klumpp v. (La.).....	353
Harris, Illinois Cent. R. Co. v. (Miss.).....	395	Howell, State ex rel. John T. Moore	
Harris v. Illinois Cent. R. Co. (Miss.).....	878	Planting Co. v. (La.).....	529
Harris, Meek v. (Miss.).....	1	H. T. Cottam & Co., In re (La.).....	206
Harris, Meridian & M. R. Co. v. (Miss.).....	654	Hubbard, Yazoo & M. V. R. Co. v. (Miss.).....	880
Harris, New Orleans & N. E. R. Co. v.		Huber Marble & Granite Co., Southern	
(Miss.).....	913	Seating & Cabinet Co. v. (Miss.).....	882
Harris v. Ragsdale (Miss.).....	579	Hudson, City of Meridian v. (Miss.).....	574
Harris v. Sovereign Camp, Woodmen of the		Huff, Mississippi & A. R. Co. v. (Miss.).....	832
World (Miss.).....	835	Huff, Yazoo & M. V. R. Co. v. (Miss.).....	757
Harrison, Lewis v. (Miss.).....	5	Hughes, Imperial Coal & Coke Co. v.	
Harrison County, Midland Chemical Co. v.		(Ala. App.).....	1001
(Miss.).....	833	Humphrey & Co., Western Union Tel. Co.	
Hart v. Kimball Piano Co. (Miss.).....	835	v. (Miss.).....	880
Hart Lumber Co., Ingram-Dekle Lumber		Hundley v. Hewitt (Ala.).....	419
Co. v. (Fla.).....	1004	Hunt, Illinois Cent. R. Co. v. (Miss.).....	275
Hartford Fire Ins. Co. v. Smith Bros.		Hurd, Crowley Bank & Trust Co. v. (La.).....	128
(Miss.).....	833	Hurlburt v. Westbrook (Miss.).....	902
Harton v. Amason (Ala.).....	180	H. Weston Lumber Co. v. Lott (Miss.).....	20
Hartsell v. Turner (Ala.).....	658	Hyman v. Hibernia Bank & Trust Co. (La.).....	598
Harvey v. Hayes (Fla.).....	282		
Harvey v. Johnson (Miss.).....	824		
Hathorn, Hand v. (Miss.).....	579		
Hattiesburg Grocery Co. v. Tompkins			
(Miss.).....	866		
Hawkins, Succession of (La.).....	492		
Hayes, Harvey v. (Fla.).....	282		
Haynes v. Police Jury of Ouachita Parish			
(La.).....	244		
Headley v. Harris (Ala.).....	695		
Headley v. State (Ala. App.).....	1001		
Hearn, Yazoo & M. V. R. Co. v. (Miss.).....	561		
Hebert, Citizens' Ins. Co. v. (La.).....	955		
Hemmer v. Smith (Miss.).....	578		
Henderson v. Harper (Miss.).....	835		
Henry v. Board of Suprs of Sunflower			
County (Miss.).....	742		
Henry Rose Mercantile & Mfg. Co. v. Smith			
(La.).....	487		
Hensley, Patrick v. (Miss.).....	914		
Henson v. Southern Pav. Const. Co. (Miss.).....	832		
Herbert v. Yazoo & M. V. R. Co. (Miss.).....	540		
Hernandez, Birmingham Waterworks Co.			
v. (Ala.).....	443		
Herring, State v. (Ala.).....	679		
Herring v. State (Ala. App.).....	974		
Herrman Bros. & Co. v. Watson (Miss.).....	375		

	Page		Page
Interstate Mortgage & Bond Co., Todd v. (Ala.)	661	Jung & Sons Co. v. Trosclair (La.)	524
Inzer v. Conlee (Miss.)	655	Justice, Western Union Tel. Co. v. (Ala. App.)	1002
Inzer v. McDaniel (Miss.)	655	Kantrovitz v. McNeill (Miss.)	13
Irwin, Schaffter v. (La.)	241	Kearns v. Mobile Light & R. Co. (Ala.)	993
Irwin, Ward v. (Miss.)	913	Keggin v. Hillsborough County (Fla.)	372
Island City Nat. Bank v. Bank of Inverness (Miss.)	565	Keirn, Yazoo & M. V. R. Co. v. (Miss.)	326
Jackson v. People's State Bank of Ruleville (Miss.)	580	Kelley, Boyd v. (Miss.)	897
Jackson, Smith v. (Fla.)	1006	Kelly, Howard v. (Miss.)	391
Jackson v. State (Fla.)	41	Kelly v. Millsaps (La.)	844
Jackson v. State (Fla.)	332	Kenamer v. State (Ala. App.)	981
Jackson v. State (Ala. App.)	977	Kennedy & Co. v. Bond (Miss.)	881
Jackson v. State (Ala. App.)	1001	Kennington, Providence-Washington Ins. Co. v. (Miss.)	378
Jackson Oil & Refining Co., Illinois Cent. R. Co. v. (Miss.)	568	Kerr, Prudential Casualty Co. v. (Ala. App.)	979
Jacksonville Terminal Co., State v. (Fla.)	474	Kerr, Tynes v. (Miss.)	578
Jacobs, In re (La.)	213	Key v. State (Ala. App.)	1001
J. A. Fay & Egan Co., Millbrook Lumber Co. v. (Miss.)	327	Key, Yazoo & M. V. R. Co. v. (Miss.)	579
James, Yazoo & M. V. R. Co. v. (Miss.)	834	Kid v. Currie (La.)	947
Jamison, Smith v. (Miss.)	580	Kimball Piano Co., Hart v. (Miss.)	835
Jandon, Collins v. (Miss.)	540	King, Horton v. (Miss.)	9
Jayne v. Nash Lumber Co. (Miss.)	10	Kirschler, Parrott v. (La.)	524
Jayne v. W. B. Nash Lumber Co. (Miss.)	276	Kitchens v. Bank of New Albany (Miss.)	21
J. B. & E. O. Smith, Georgetown Mercantile Co. v. (Miss.)	654	Kleinpeter v. Cumberland Telephone & Telegraph Co. (Miss.)	326
J. C. Walden Auto Co. v. Mixon (Ala.)	694	Klump v. Howcott (La.)	353
Jeffcoat, Smith v. (Ala.)	717	Knight v. Garden (Ala.)	715
Jefferson v. Myers (Miss.)	833	Knights of Modern Maccabees v. Gillespie (Ala. App.)	67
Jefferson County Sav. Bank v. Garland (Ala.)	126	Knox v. Creed (Miss.)	581
Jefferson Plumbers & Mill Supply Co. v. Peebles (Ala.)	413	Kosciusko Tel. Co. v. McCool Tel. Co. (Miss.)	304
Jennings, Bank of Jennings v. (Fla.)	31	Kyle v. Jordan (Ala.)	417
Jennings Naval Stores Co., Dannelley v. (Fla.)	1003	Lack, Gulf & S. I. R. Co. v. (Miss.)	913
J. H. Beavers & Co., Rice v. (Ala.)	659	Ladner v. New Orleans Terminal Co. (La.)	503
J. J. Newman Lumber Co. v. Lucas (Miss.)	20	Lake v. Lake (Miss.)	882
J. J. White Lumber Co. v. McComb City Turpentine Co. (Miss.)	5	Lamb, Cook v. (Ala.)	1000
J. J. White Lumber Co. v. McComb City Turpentine Co. (Miss.)	643	Lamb v. Johnson (Miss.)	580
J. K. Orr Shoe Co. v. Edwards (Miss.)	816	Land v. State (Fla.)	279
J. L. Ross & Co. v. Moore (Miss.)	881	Landry, State v. (La.)	763
J. L. Ross & Co. v. Stegall (Miss.)	881	Langston v. Tremont Lumber Co. (La.)	771
J. M. Robinson, Norton Co. v. Godsey (Miss.)	312	Lanier v. Hoggatt (Miss.)	173
Johnson, Alabama Great Southern R. Co. v. (Ala. App.)	620	Latimer, Cochran v. (Miss.)	316
Johnson, American Bank & Trust Co. v. (Miss.)	808	Laurel Bottling Works, Wheeler v. (Miss.)	743
Johnson v. Cheshire (Fla.)	1004	Laurel Compress Co. v. Power (Miss.)	161
Johnson, Harvey v. (Miss.)	824	Laurel Oil & Fertilizer Co., Harbour v. (Miss.)	914
Johnson v. Johnson (Ala.)	415	Laurel Plumbing & Metal Co., Seay v. (Miss.)	9
Johnson, Lamb v. (Miss.)	580	Le Blanc, City of New Orleans v. (La.)	248
Johnson v. Peyton (Miss.)	276	Lee v. State (Ala. App.)	1001
Johnson v. State (Ala. App.)	79	Lee Line Steamers v. American Export Co. (Miss.)	275
Johnson v. State (Ala. App.)	1001	Lefort, Succession of (La.)	215
Johnson v. State (Miss.)	540	Leigh, Pickett v. (Miss.)	833
Johnson, Vanderburg v. (Miss.)	326	Lester v. State (Miss.)	326
Johnson, Yazoo & M. V. R. Co. v. (Miss.)	578	Lett, Wood v. (Ala.)	177
Johnston, Commissioners of Camp Creek Drainage Dist. v. (Miss.)	320	Levy v. Levy (La.)	507
Johnston v. Green River Lumber Co. (Miss.)	832	Levy Sons Co. v. Orlansky (Miss.)	571
Johnston v. Puffer Mfg. Co. (Miss.)	377	Lewis v. Harrison (Miss.)	5
Jones v. Alabama & V. R. Co. (Miss.)	276	Lewis v. State (Ala. App.)	617
Jones, Alabama & V. R. Co. v. (Miss.)	318	Lightner v. State (Ala.)	469
Jones, Barnes v. (Miss.)	573	Lisso v. Schenberger (La.)	365
Jones, Chambless v. (Ala.)	987	Lisso v. Williams (La.)	365
Jones v. State (Ala. App.)	1001	Lister, Marshall v. (Ala.)	411
Jones v. Tremont Lumber Co. (La.)	862	Litchfield, Meyer Bros. v. (Miss.)	540
Jones v. Walls (Miss.)	881	Little, Grenada County v. (Miss.)	871
Jones v. Yazoo & M. V. R. Co. (Miss.)	275	Littlejohn v. Littlejohn (Ala.)	448
Jones, Yazoo & M. V. R. Co. v. (Miss.)	309	Lochbaum, Maggiore v. (La.)	727
Jordan, Commercial Nat. Bank v. (Fla.)	760	Logan & Co. v. Chapman (Miss.)	807
Jordan, Kyle v. (Ala.)	417	Long v. Baltimore Bargain House (Ala. App.)	75
Joseph, Bramlette v. (Miss.)	643	Lord v. Curry (Fla.)	21
Joseph, Metzger v. (Miss.)	645	Lott, H. Weston Lumber Co. v. (Miss.)	20
Joullian, Fountain v. (Miss.)	2	Lott, Poplarville Sawmill Co. v. (Miss.)	656
J. Supple's Sons Planting Co., Union Seed & Fertilizer Co. v. (La.)	949	Louise Lumber Co. v. Wester (Miss.)	174
Julius Levy Sons Co. v. Orlansky (Miss.)	571	Louisiana Ry. & Nav. Co., In re (La.)	895
		Louisiana Ry. & Nav. Co., Ragan v. (La.)	895
		Louisville & N. R. Co. v. Backous (Miss.)	833
		Louisville & N. R. Co. v. Bayou De Lisle Lumber Co. (Miss.)	832
		Louisville & N. R. Co. v. Davis (Ala.)	682
		Louisville & N. R. Co., Garrett v. (Ala.)	685

	Page		Page
Louisville & N. R. Co., Harden v. (Ala.)	1000	Madison v. State (Ala.)	706
Louisville & N. R. Co. v. Lovell (Ala.)	995	Madrid Cotton Oil Co., Portsmouth Cotton	
Louisville & N. R. Co. v. Lynne (Ala.)	338	Oil Refining Corp. v. (Ala.)	111
Louisville & N. R. Co. v. Porter (Ala.)	334	Maggiore v. Lochbaum (La.)	727
Louisville & N. R. Co. v. Price (Miss.)	161	Mahon Live Stock Co., Illinois Cent. R.	
Louisville & N. R. Co. v. Rhoda (Fla.)	369	Co. v. (Miss.)	802
Louisville & N. R. Co., Wester v. (Fla.)	1007	Mahoning Pottery Co. v. Cox (Ala. App.)	1002
Louisville & N. R. Co. v. Western Union		Malloy, Carlton v. (Fla.)	1003
Tel. Co. (Ala.)	118	Manatee County v. Whitaker (Fla.)	1005
Lovell, Louisville & N. R. Co. v. (Ala.)	995	Manatee Title Guarantee Co., Harlee v.	
Lovett, Tinsley v. (Miss.)	817	(Fla.)	1004
Lowrey v. Lowrey (Miss.)	309	Mandeville Ice & Light Co. v. Mandeville	
Lowy v. Rosengrant (Ala.)	439	(La.)	512
Lucas, J. J. Newman Lumber Co. v. (Miss.)	20	Mangiarisina, City of New Orleans v. (La.)	886
Luckett, Postal Telegraph & Cable Co. v.		Mangum, Green Bay Lumber Co. v. (Miss.)	579
(Miss.)	275	Marengo County Bank, First Nat. Bank v.	
Lundy, Eminent Household of Columbian		(Ala. App.)	1001
Woodmen v. (Miss.)	16	Marks v. State (Ala. App.)	983
Lurie v. Titcomb (La.)	200	Marks, Yazoo & M. V. R. Co. v. (Miss.)	581
Lynch v. Lynch (La.)	195	Maroun, State v. (La.)	133
Lynchard, Yazoo & M. V. R. Co. v. (Miss.)	881	Marshall v. Lister (Ala.)	411
Lynne, Louisville & N. R. Co. v. (Ala.)	338	Martin v. Cannon (Ala.)	996
Lyons, State ex rel. Henry v. (La.)	507	Martin v. State (Ala.)	693
		Martin v. State (Ala. App.)	981
Mabry, Edgington v. (Miss.)	801	Martin v. Walker (Ala.)	667
McAdams v. Wells Fargo & Co. Express		Martin, Yazoo & M. V. R. Co. v. (Miss.)	274
(La.)	945	Marx v. Smith (Miss.)	563
McAllum v. Standard Drug Co. (Miss.)	540	Mary Mac Plantation Co., Board of Levee	
McCabe v. State (Ala. App.)	1001	Com'rs for Yazoo-Mississippi Delta v.	
McCardle, Bank of Hazlehurst v. (Miss.)	880	(Miss.)	835
McCardle, New Orleans, M. & O. R. Co. v.		Mason Hotel & Investment Co. v. Halle	
(Miss.)	880	(Fla.)	540
McClannahan, Yazoo & M. V. R. Co. v.		Masonic Ben. Ass'n of Stringer Grand	
(Miss.)	835	Lodge of Mississippi v. Dotson (Miss.)	266
McClure, Burris v. (Miss.)	326	Massey v. Newton Lumber & Mfg. Co.	
McComb City Turpentine Co., J. J. White		(Miss.)	325
Lumber Co. v. (Miss.)	5	Matassa, State v. (La.)	190
McComb City Turpentine Co., J. J. White		Matassa, State v. (La.)	191
Lumber Co. v. (Miss.)	643	Mathis, Central of Georgia R. Co. v. (Ala.)	674
McCool Tel. Co., Kosciuszko Tel. Co. v.		Mathis v. Meadows (Ala.)	1000
(Miss.)	304	Mayer Bros. v. Hodges (Miss.)	327
McCord & Walthall, Southern R. Co. v.		Mayes v. Coleman (Miss.)	14
(Miss.)	581	Mayfield v. Mayfield (Miss.)	276
McCormick, Dunham v. (La.)	523	Meadows, Mathis v. (Ala.)	1000
McCormick, Nervis v. (La.)	523	Meek v. Harris (Miss.)	1
McCormick, Parrott v. (La.)	523	Mellon v. State Life Ins. Co. (Miss.)	173
McCormick, Threefoot Bros. & Co. v.		Mercier v. Yazoo & M. V. R. Co. (La.)	150
(Miss.)	882	Meredith, School Board of Caldwell Parish	
McCormick, Williams v. (La.)	523	v. (La.)	209
McCoy, United States Cast Iron Pipe &		Meridian Coca-Cola Bottling Co., Hicks v.	
Foundry Co. v. (Ala.)	406	(Miss.)	835
McCurdy, Yazoo & M. V. R. Co. v. (Miss.)	581	Meridian Light & Ry. Co., Admore v.	
McDaniel, Inzer v. (Miss.)	655	(Miss.)	395
McDaniel, Moody v. (Miss.)	834	Meridian Light & Ry. Co. v. Bayer Steam	
McDaniel, Moore Bros. Grocery Co. v.		Soot Blower Co. (Miss.)	835
(Miss.)	394	Meridian Light & Ry. Co., Powell v. (Miss.)	304
McDaniel, Taylor v. (Miss.)	304	Meridian & M. R. Co. v. Harris (Miss.)	654
McDavid, New Orleans & N. E. R. Co. v.		Merryman, Otstott v. (Fla.)	278
(Miss.)	834	Metropolitan Life Ins. Co. v. Goodman	
McDonald, Richardson v. (La.)	934	(Ala.)	409
McDonough, Birmingham Ry., Light &		Metzger v. Joseph (Miss.)	645
Power Co. v. (Ala. App.)	1000	Meyer Bros. v. Litchfield (Miss.)	540
McDowell, State v. (Miss.)	867	Middleton v. Alabama Power Co. (Ala.)	461
McGarrity, State v. (La.)	730	Midland Chemical Co. v. Harrison County	
McGill v. Chappelle (Fla.)	836	(Miss.)	833
McGinnis v. State (Ala. App.)	1002	Milano, State v. (La.)	131
McGowan, New Orleans Great Northern R.		Miles v. Miles (Miss.)	295
Co. v. (Miss.)	317	Millbrook Lumber Co. v. J. A. Fay & Egan	
McGuire, State v. (La.)	239	Co. (Miss.)	327
McInnis v. Pierce (Miss.)	581	Miller, Bank of Collins v. (Miss.)	12
McInnis Lumber Co. v. Rather (Miss.)	264	Miller v. Illinois Cent. R. Co. (Miss.)	578
McKenzie v. Boykin (Miss.)	382	Miller, Mississippi Beneficial Ins. Co. v.	
McKethan v. Currie (La.)	346	(Miss.)	656
McKinnon v. Birmingham (Ala.)	463	Miller v. Pace (Fla.)	276
McLeod v. Clark (Miss.)	11	Miller v. State (Fla.)	280
McMillan v. Fidelity Bank of New Smyrna		Mills v. St. Tammany & New Orleans Ry.	
(Fla.)	1004	& Ferry Co. (La.)	511
McNeill, Kantrovitz v. (Miss.)	13	Millsaps v. Burroughs Adding Mach. Co.	
McNeill, New Orleans & N. E. R. Co. v.		(Miss.)	580
(Miss.)	881	Millsaps, Kelly v. (La.)	844
McPherson, Cobb v. (Miss.)	304	Millsaps, State ex rel. Elfer v. (La.)	499
McPherson Bros. v. Stinson (Miss.)	327	Millsaps, State ex rel. Labbe v. (La.)	496
Mac Plantation Co., Board of Levee Com'rs		Mims, Batesville Southwestern R. Co. v.	
for Yazoo-Mississippi Delta v. (Miss.)	835	(Miss.)	827
McRaven, New Standard Club v. (Miss.)	289	Minderhout, Postal Telegraph-Cable Co. v.	
McRee, White v. (Miss.)	804	(Ala.)	91

	Page		Page
Minderhout, Postal Telegraph-Cable Co. v. (Ala. App.).....	89	New Orleans, M. & C. R. Co., Brassfield v. (Miss.).....	174
Mississippi Beneficial Ins. Co. v. Miller (Miss.).....	656	New Orleans, M. & C. R. Co. v. Carter (Miss.).....	394
Mississippi Cent. R. Co. v. Bennett (Miss.).....	310	New Orleans, M. & C. R. Co. v. Gassoway (Miss.).....	806
Mississippi & A. R. Co. v. Huff (Miss.).....	832	New Orleans, M. & C. R. Co. v. McCardle (Miss.).....	880
Mitchell, In re (Ala.).....	467	New Orleans, M. & C. R. Co. v. Wood (Miss.).....	394
Mitchell v. Aetna Ins. Co. (Miss.).....	382	New Orleans Ry. & Light Co., Boylan v. (La.).....	360
Mitchell v. Cudd (Ala.).....	660	New Orleans Ry. & Light Co., Cahill v. (La.).....	360
Mitchell v. State (Ala. App.).....	982	New Orleans Ry. & Light Co., Viator v. (La.).....	733
Mixon, J. C. Walden Auto Co. v. (Ala.).....	694	New Orleans Terminal Co., Ladner v. (La.).....	503
Mizell Live Stock Co. v. Pollard (Fla.).....	31	New Orleans, T. & M. R. Co., Darby v. (La.).....	490
Mobile Light & R. Co., Kearns v. (Ala.).....	993	New Orleans & N. E. R. Co. v. Harris (Miss.).....	913
Mobile & O. R. Co. v. Bennett (Miss.).....	275	New Orleans & N. E. R. Co. v. McDavid (Miss.).....	834
Mobile & O. R. Co., Cherry v. (Miss.).....	20	New Orleans & N. E. R. Co. v. McNeill (Miss.).....	681
Mobile & O. R. Co. v. Dunkin (Miss.).....	832	New Orleans & N. E. R. Co., Sander v. (La.).....	238
Mobile & O. R. Co., Gray v. (Miss.).....	540	New Standard Club v. McRaven (Miss.).....	289
Mobile & O. R. Co., Petti v. (Miss.).....	834	Newton Lumber & Mfg. Co., Massey v. (Miss.).....	325
Mobile & O. R. Co. v. Pickle (Miss.).....	834	Nicholson v. Fields (Miss.).....	900
Modern Order of Praetorians, Gates v. (Miss.).....	21	Noble v. Young (Fla.).....	1005
Mohlenbrock Milling Co. v. Gibson Grocery Co. (Miss.).....	835	Norris v. Snyder & McCormick (La.).....	522
Molpus v. Bostic Lumber & Mfg. Co. (Miss.).....	16	Northern Drainage Dist. v. Bolivar County (Miss.).....	380
Moniotte v. Bouanchaud (La.).....	735	O. J. & Bruce Knox v. Creed (Miss.).....	581
Monteleone, Carol v. (La.).....	798	Oliver, Fidelity Mut. Life Ins. Co. v. (Miss.).....	302
Montgomery, Crane v. (Miss.).....	914	Oliver v. Macon (Miss.).....	575
Montgomery v. Mutual Life Ins. Co. of New York (Miss.).....	162	O'Neal v. Big Pine Lumber Co. (La.).....	355
Montgomery, State ex rel. Powell v. (La.).....	768	O'Neal, Burnecke v. (La.).....	395
Montgomery-Ferguson Co. v. William T. Hardie & Sons (La.).....	931	Onley v. Onley (Fla.).....	1006
Montgomery Light & Water Power Co. v. New Farley Nat. Bank (Ala.).....	1000	O'Rear v. American Trust & Savings Bank (Ala.).....	105
Moody v. McDaniel (Miss.).....	834	O'Rear, Ensley Motor Co. v. (Ala.).....	704
Moody v. Moody (Miss.).....	654	Orlansky, Julius Levy Sons Co. v. (Miss.).....	571
Moore v. Altom (Ala.).....	681	Orleans-Kenner Electric R. Co. v. Christina (La.).....	770
Moore, Barton-Parker Mfg. Co. v. (Miss.).....	909	Orr Shoe Co. v. Edwards (Miss.).....	816
Moore, J. L. Ross & Co. v. (Miss.).....	881	O'Shields, Tynes v. (Miss.).....	579
Moore v. Moore (Fla.).....	1005	Ostott v. Merryman (Fla.).....	278
Moore Bros. Grocery Co. v. McDaniel (Miss.).....	394	Owen, Anderson v. (Miss.).....	833
Morehead, Doty v. (Miss.).....	880	Owens Horse & Mule Co., Brackin v. (Ala.).....	97
Morgan v. Tuscaloosa (Ala. App.).....	1002	Pace, Miller v. (Fla.).....	276
Moses v. Brookhaven (Miss.).....	655	Page, City of Key West v. (Fla.).....	1003
Moses v. State (Miss.).....	655	Paillet, State v. (La.).....	951
Mrs. K. Edwards & Sons v. Farve (Miss.).....	12	Pake, Horst v. (Ala.).....	430
Mullins, Soule v. (Miss.).....	832	Palmer, Beatty v. (Ala.).....	422
Mungen, Christopher v. (Fla.).....	625	Panama Ice & Fish Co. v. Atlanta & St. A. B. R. Co. (Fla.).....	608
Munn v. Potter (Miss.).....	315	Park, Ashby v. (Miss.).....	656
Munroe v. Reeves (Fla.).....	922	Parker v. Southern R. Co. in Mississippi (Miss.).....	912
Murphree v. Allen (Ala. App.).....	1002	Parrish & Co., Yazoo & M. V. R. Co. v. (Miss.).....	173
Murphy v. State (Ala. App.).....	967	Parrott v. Kirschler (La.).....	524
Murray, State v. (La.).....	510	Parrott v. McCormick (La.).....	523
Mutual Alliance Trust Co., Walker v. (Ala.).....	697	Patrick v. Hensley (Miss.).....	914
Mutual Life Ins. Co. of New York, Montgomery v. (Miss.).....	162	Patterson, Coon v. (Miss.).....	824
Myers v. Drago Grain Co. (Miss.).....	874	Peacock, Wilson v. (Miss.).....	296
Myers, Jefferson v. (Miss.).....	833	Pearce, State v. (Ala. App.).....	656
Nail, Wall v. (Miss.).....	394	Peebles, Jefferson Plumbers & Mill Supply Co. v. (Ala.).....	413
Nash Lumber Co., Jayne v. (Miss.).....	10	Penniman v. Thompson (Fla.).....	1006
Nash Lumber Co., Jayne v. (Miss.).....	276	People's Shoe Co. v. Skally (Ala.).....	719
Natal, Clarke v. (La.).....	149	People's State Bank of Ruleville, Jackson v. (Miss.).....	580
Nathan Furniture Co. v. Wallace (Miss.).....	836	Perkins v. Corinth (Miss.).....	20
Nathanson v. Holder (Fla.).....	1005	Perkins, Shoub v. (Miss.).....	270
National City Bank of Chicago v. Barringer (La.).....	894	Perry, Ex parte (Fla.).....	174
Neal, Southern R. Co. in Mississippi v. (Miss.).....	578	Petti v. Mobile & O. R. Co. (Miss.).....	834
Necaise v. Sellers (Miss.).....	882	Petty, Hill v. (Miss.).....	910
Neely v. State (Ala. App.).....	981	Peyton, Johnson v. (Miss.).....	276
Nejim, State v. (La.).....	123		
Nervis v. McCormick (La.).....	523		
Newell, Woodmen of Union v. (Miss.).....	174		
New Farley Nat. Bank, Montgomery Light & Water Power Co. v. (Ala.).....	1000		
Newman v. Bagdad Land & Lumber Co. (Fla.).....	1005		
Newman Lumber Co. v. Lucas (Miss.).....	20		
New Orleans Can Co., Dalbarni v. (La.).....	214		
New Orleans Great Northern R. Co. v. McGowan (Miss.).....	317		
New Orleans Land Co., Beugnot v. (La.).....	947		

Page		Page
Phalin Lumber Co., Berthold & Jennings		Richardson v. McDonald (La.)..... 984
Lumber Co. v. (Ala.)..... 989		Richhart, Board of Administrators of Char-
Philadelphia & Gulf S. S. Co., Teal v. (La.)	364	ity Hospital v. (La.)..... 735
Philip v. Quenqui (La.)..... 900		Riggins, T. L. Farrow Mercantile Co. v.
Phillips, Davis v. (Miss.)..... 580		(Ala. App.)..... 963
Phillips v. Shotts (Miss.)..... 94		Riser v. Hansen (Miss.)..... 394
Phinizy v. Anniston City Land Co. (Ala.)...	469	Rivers v. State (Miss.)..... 580
Pickens & Fincher, Yazoo & M. V. R. Co.		Rizan v. Rizan (La.)..... 581
v. (Miss.)..... 914		Robbins, East Tennessee Nursery Co. v.
Pickett v. Leigh (Miss.)..... 833		(Miss.)..... 834
Pickle, Mobile & O. R. Co. v. (Miss.).....	834	Robbins, Yazoo & M. V. R. Co. v. (Miss.)...
Pierce, McInnis v. (Miss.)..... 581		326
Pierce, Standard Drug Co. v. (Miss.).....	577	Roberts, Davidson v. (Ala. App.)..... 1000
Pilsbury v. Fricke (La.)..... 349		Robertson, Stedham v. (Ala. App.)..... 62
Pittman, Home Mut. Fire Ins. Co. v. (Miss.)	739	Robinette, City of Shreveport v. (La.).... 791
Planters' Cotton Oil Co. v. Texas & P. R.		Robinson, Bank of Decatur v. (Miss.)..... 654
Co. (La.)..... 866		Robinson, Norton Co. v. Godsey (Miss.)... 312
Planters' Lumber Co., Strickland v. (Miss.)	655	Roden, Dunaway v. (Ala. App.)..... 70
Planters' Lumber Co. v. Tompkins (Miss.)	565	Rodriguez, Walker v. (La.)..... 499
Plummer-Lewis Co. v. Francher (Miss.)...	907	Roe v. Durham (Ala.)..... 109
Poe v. Southern R. Co. (Ala.)..... 997		Rose Mercantile & Mfg. Co. v. Smith (La.)
Police Jury of Ouachita Parish, Haynes v.		487
(La.)..... 244		Rosenbaum's Sons v. Davis & Andrews Co.
Police Jury of Rapides Parish, City of		(Miss.)..... 388
Alexandria v. (La.)..... 928		Rosengrant, Lowy v. (Ala.)..... 439
Polk v. Drennan (Miss.)..... 914		Ross, Postal Telegraph-Cable Co. v. (Miss.)
Pollard, Mizell Live Stock Co. v. (Fla.)...	81	904
Pontotoc Cotton Co. v. Well Bros. (Miss.)	327	Ross, Ragland v. (Miss.)..... 879
Poplarville Sawmill Co. v. Lott (Miss.)...	656	Ross & Co. v. Moore (Miss.)..... 881
Porter, Louisville & N. R. Co. v. (Ala.)...	334	Ross & Co. v. Stegall (Miss.)..... 881
Porter v. Watkins (Ala.)..... 687		Rowley, Fernwood Lumber Co. v. (Miss.)... 3
Portsmouth Cotton Oil Refining Corp. v.		Royal Indemnity Co. v. Wainwright (Miss.)
Madrid Cotton Oil Co. (Ala.)..... 111		579
Postal Telegraph Cable Co. v. Balkan &		Royals, Flynt v. (Miss.)..... 654
Bernstein (Miss.)..... 539		Ruge v. Webb Press Co. (Fla.)..... 627
Postal Telegraph-Cable Co. v. Minderhout		Russell v. Bush (Ala.)..... 397
(Ala.)..... 91		Russell v. State (Fla.)..... 27
Postal Telegraph-Cable Co. v. Minderhout		Russell & Duke, Brothers v. (Ala.)..... 450
(Ala. App.)..... 89		Rutledge, Tennessee Coal, Iron & R. Co.
Postal Telegraph-Cable Co. v. Ross (Miss.)	904	v. (Ala.)..... 990
Postal Telegraph & Cable Co. v. Luckett		Ryals, Atlantic Coast Lane R. Co. v. (Fla.)
(Miss.)..... 275		1003
Poston, Young v. (Fla.)..... 1007		Ryan v. Collins (Ala.)..... 690
Potter, Munn v. (Miss.)..... 315		St. Clair County, Browning v. (Ala.)..... 108
Powell v. Meridian Light & Ry. Co. (Miss.)	304	St. John Lumber Co., Colonial Trust Co.
Power, Laurel Compress Co. v. (Miss.).....	161	v. (La.)..... 147
Poythress v. Carmichael (Miss.)..... 326		St. Joseph's Society for Colored Missions,
Price, Louisville & N. R. Co. v. (Miss.)...	161	Adams County v. (Miss.)..... 20
Price v. State (Ala. App.)..... 972		St. Tammany & New Orleans Ry. & Ferry
Primeaux v. Comeaux (La.)..... 845		Co., Mills v. (La.)..... 511
Providence-Washington Ins. Co. v. Ken-		Salassi v. Dougherty (La.)..... 194
nington (Miss.)..... 378		Sample v. State (Ala. App.)..... 1002
Prudential Casualty Co. v. Kerr (Ala.		Sander v. New Orleans & N. E. R. Co. (La.)
App.)..... 979		238
Puffer Mfg. Co., Johnston v. (Miss.)...	377	Sanders, Burkhalter v. (Miss.)..... 308
Pugh, Ex parte (Ala.)..... 999		Sanders, Commercial Nat. Bank v. (La.)...
Pugh v. State (Ala. App.)..... 1002		891
Purcell, Hamburger v. (La.)..... 765		Sanderson, Benedict Warren Hardware Co.
Quenqui, Philip v. (La.)..... 800		v. (Miss.)..... 539
Ragan v. Louisiana Ry. & Nav. Co. (La.)...	895	Saucier, Wells Lumber Co. v. (Miss.)..... 834
Ragland v. Ross (Miss.)..... 879		Saunders v. Busch-Everett Co. (La.)..... 153
Ragsdale, Harris v. (Miss.)..... 579		Schaffter v. Irwin (La.)..... 241
Ragsdale, Western Union Tel. Co. v. (Miss.)	818	Schenberger, Lisso v. (La.)..... 365
Rather, A. K. McInnis Lumber Co. v.		Schick, In re (La.)..... 534
(Miss.)..... 264		Schick, Wagnon v. (La.)..... 534
Ray v. Carbon Hill Banking Co. (Ala.)...	1000	School Board of Caldwell Parish v. Mere-
Read v. State (Ala.)..... 98		dith (La.)..... 209
Red Cross Lumber Co. v. Frank I. Abbott		Scott, Brinson v. (La.)..... 763
Lumber Co. (La.)..... 191		Scott v. State (Ala.)..... 1000
Reed v. Hammond (Ala.)..... 692		Scott, Tate v. (Miss.)..... 174
Reems v. Chavigny (La.)..... 798		Scottish American Mortg. Co., State v.
Reeves, Munroe v. (Fla.)..... 922		(Miss.)..... 291
Reeves Grocery Co. v. Thompson (Miss.)...	914	Seals Piano & Organ Co. v. Bell (Ala.)... 340
Register of Conveyances, State ex rel. New		Seaman, Fugitt v. (Miss.)..... 303
Orleans Land Co. v. (La.)..... 773		Searcy v. Cullman County (Ala.)..... 664
Reynolds v. Board of Com'rs of Orleans		Seay v. Laurel Plumbing & Metal Co.
Levee Dist. (La.)..... 787		(Miss.)..... 9
R. F. Walden & Co. v. Yates (Miss.).....	897	Security Co. v. Warrington (Fla.)..... 1006
Rhoda, Louisville & N. R. Co. v. (Fla.)...	369	Seeberg S. S. Line v. Willis (Ala. App.)...
Rice v. J. H. Beavers & Co. (Ala.)..... 659		1002
Rice, Stringfellow v. (Fla.)..... 1006		Sellers, Necaise v. (Miss.)..... 882
Richardson v. Florida Fire & Casualty Ins.		Semet Solvay Co., Allgood v. (Ala.)..... 727
Co. (Fla.)..... 1006		Semmes, Willis v. (Miss.)..... 865
		Senter v. Burdine (Miss.)..... 832
		Serio v. Trainor (La.)..... 215
		Setaro, Yazoo & M. V. R. Co. v. (Miss.)...
		832
		Sethness Co. v. Home Ade Bottling Co.
		(Miss.)..... 308
		Shackleford, Illinois Cent. R. Co. v. (Miss.)
		298
		Shean, Hall v. (Miss.)..... 323
		Shemper v. Hattiesburg (Miss.)..... 304

	Page		Page
Shepherd, Caledonian Fire Ins. Co. v. (Miss.)	314	Standard Drug Co., McAllum v. (Miss.)	540
Sherrod v. State (Ala. App.)	76	Standard Drug Co. v. Pierce (Miss.)	577
Sherry, Brannon v. (Ala.)	106	Standard Oil Co., Allgood v. (Ala.)	726
Shirley, Cotton States Lumber Co. v. (Miss.)	327	Standard Oil Co. v. Goldstein (Miss.)	21
Shorter, Brown v. (Ala.)	103	Standard Oil Co. v. Goldstein (Miss.)	570
Shotts, Phillips v. (Ala.)	84	Star Land Co., Waterhouse v. (La.)	358
Shoub v. Perkins (Miss.)	270	State v. Abraham (La.)	193
Shreveport Mill & Elevator Co., In re (La.)	961	State v. Abraham (La.)	769
Shreveport Mill & Elevator Co. v. Stoehr (La.)	961	State v. Alexander (Miss.)	579
Sibley, Yazoo & M. V. R. Co. v. (Miss.)	167	State v. American Sugar Refining Co. (La.)	137
Simmons v. State (Ala. App.)	979	State v. Ashworth (La.)	860
Simmons v. State (Fla.)	278	State v. Banks (La.)	194
Simmons v. State (Miss.)	327	State, Barron v. (Miss.)	374
Sims v. Athens Bank (La.)	525	State, Bell v. (Ala. App.)	1000
Skally, People's Shoe Co. v. (Ala.)	719	State, Bufford v. (Ala. App.)	614
Skotzy, Alabama Great Southern R. Co. v. (Ala.)	335	State v. Bugg (Ala.)	699
Slaughter, State v. (Ala.)	416	State, Cain v. (Ala. App.)	1000
Slaughter, State v. (Ala.)	417	State, Chambliss v. (Miss.)	580
Sloss-Sheffield Steel & Iron Co., Allgood v. (Ala.)	724	State, Clay v. (Ala. App.)	982
Smith, Alabama Great Southern R. Co. v. (Ala.)	455	State, Cole v. (Ala. App.)	616
Smith, Georgetown Mercantile Co. v. (Miss.)	654	State, Collins v. (Miss.)	578
Smith, Hemmer v. (Miss.)	578	State, Colson v. (Fla.)	277
Smith, Henry Rose Mercantile & Mfg. Co. v. (La.)	487	State, Cook v. (Ala. App.)	1000
Smith v. Jackson (Fla.)	1006	State v. Couris (La.)	240
Smith v. Jamison (Miss.)	580	State, Danal v. (Ala. App.)	976
Smith v. Jeffcoat (Ala.)	717	State, Daniel v. (Ala. App.)	79
Smith, Marx v. (Miss.)	563	State, Dardone v. (Ala. App.)	1000
Smith v. State (Ala. App.)	979	State v. Davison (Ala.)	678
Smith v. State (Fla.)	915	State, Dawson v. (Ala.)	722
Smith, State v. (La.)	734	State v. Defatta (La.)	195
Smith v. Williams-Brooke Co. (Miss.)	648	State v. Dickerson (La.)	347
Smith v. Wilson (Fla.)	919	State, Duke v. (Fla.)	917
Smith, Yazoo & M. V. R. Co. v. (Miss.)	752	State, Dolph v. (Miss.)	911
Smith Bros., Hartford Fire Ins. Co. v. (Miss.)	833	State v. Dorr (La.)	500
Smithart, Yazoo & M. V. R. Co. v. (Miss.)	562	State v. Doster-Northington Drug Co. (Ala.)	427
Smythe v. State (Miss.)	540	State, Douglas v. (Ala. App.)	614
Snow, Franklin v. (Ala.)	93	State, Douthard v. (Ala. App.)	979
Snyder & McCormick, Norris v. (La.)	522	State, Eason v. (Miss.)	304
Sorenson v. Webb (Miss.)	273	State, Edwards v. (Fla.)	331
Soule v. Mullins (Miss.)	832	State, Everage v. (Ala. App.)	983
Southern Exp. Co. v. Hall (Miss.)	173	State, Farley v. (Ala. App.)	1001
Southern Pav. Const. Co., Henson v. (Miss.)	832	State, Fleuron v. (Ala. App.)	1001
Southern R. Co., Dixon v. (Miss.)	306	State v. Florida East Coast R. Co. (Fla.)	543
Southern R. Co. v. Fricks (Ala.)	701	State, Frazier v. (Ala. App.)	981
Southern R. Co. v. George (Miss.)	833	State, Frye v. (Ala. App.)	1001
Southern R. Co. v. McCord & Walthall (Miss.)	581	State v. Fulco (La.)	133
Southern R. Co., Poe v. (Ala.)	997	State v. Fulco (La.)	134
Southern R. Co., Wheeler v. (Miss.)	812	State, Gibson v. (Ala. App.)	614
Southern R. Co. v. Williams (Miss.)	835	State, Gorey v. (Fla.)	328
Southern R. Co. in Mississippi, Balkin v. (Miss.)	580	State v. Gray (Miss.)	296
Southern R. Co. in Mississippi, Donley v. (Miss.)	914	State v. Green (Miss.)	171
Southern R. Co. in Mississippi, Garnett v. (Miss.)	304	State, Griffin v. (Miss.)	572
Southern R. Co. in Mississippi v. Neal (Miss.)	578	State, Gwaltney v. (Miss.)	805
Southern R. Co. in Mississippi, Parker v. (Miss.)	912	State, Hancock v. (Ala. App.)	973
Southern Seating & Cabinet Co. v. Victor Huber Marble & Granite Co. (Miss.)	882	State, Harkness v. (Ala. App.)	1001
Southwestern Co. v. Wynnegar (Miss.)	737	State, Harrington v. (Ala. App.)	1001
Southwestern Co. v. Wynnegar (Miss.)	738	State, Headley v. (Ala. App.)	1001
Southworth v. Brister (Miss.)	173	State v. Herring (Ala.)	679
Sovereign Camp of Woodmen of the World v. Ward (Ala.)	404	State, Herring v. (Ala. App.)	974
Sovereign Camp, Woodmen of the World, Harris v. (Miss.)	835	State, Jackson v. (Ala. App.)	977
Sparkman v. State (Fla.)	34	State, Jackson v. (Ala. App.)	1001
Spinks v. State (Ala. App.)	623	State, Jackson v. (Fla.)	41
Springfield Fire & Marine Ins. Co. v. Ferrell (Ala. App.)	615	State, Jackson v. (Fla.)	332
Standard Acc. Ins. Co. v. Broom (Miss.)	653	State v. Jacksonville Terminal Co. (Fla.)	474
		State, Johnson v. (Ala. App.)	79
		State, Johnson v. (Ala. App.)	1001
		State, Johnson v. (Miss.)	540
		State, Jones v. (Ala. App.)	1001
		State, Kenamer v. (Ala. App.)	981
		State, Key v. (Ala. App.)	1001
		State, Land v. (Fla.)	279
		State v. Landry (La.)	763
		State, Lee v. (Ala. App.)	1001
		State, Lester v. (Miss.)	326
		State, Lewis v. (Ala. App.)	617
		State, Lightner v. (Ala.)	469
		State, McBride v. (Ala. App.)	1001
		State v. McDowell (Miss.)	867
		State v. McGarrity (La.)	730
		State, McGinnis v. (Ala. App.)	1002
		State v. McGuire (La.)	239
		State, Madison v. (Ala.)	706
		State, Marks v. (Ala. App.)	983
		State v. Maroun (La.)	133

	Page		Page
State, Martin v. (Ala.).....	693	Stinson, McPherson Bros. v. (Miss.).....	327
State, Martin v. (Ala. App.).....	981	Stoebr, Shreveport Mill & Elevator Co. v. (La.)	961
State v. Matassa (La.).....	190	Stone v. State (Fla.).....	634
State v. Matassa (La.).....	191	Stone v. Stein Grocery Co. (Miss.).....	327
State v. Milano (La.).....	131	Stovall v. Hamilton (Ala. App.).....	63
State, Miller v. (Fla.).....	280	Strauther, Grand Lodge Knights of Pythias of Mississippi v. (Miss.).....	275
State, Mitchell v. (Ala. App.).....	982	Strickland v. Planters' Lumber Co. (Miss.).....	655
State, Moses v. (Miss.).....	655	Stringfellow v. Rice (Fla.).....	1006
State, Murphy v. (Ala. App.).....	967	Studervant v. State (Ala. App.).....	1002
State v. Murray (La.).....	510	Sturdivant v. State (Ala. App.).....	978
State, Neely v. (Ala. App.).....	981	Stuyvesant Ins. Co. v. Andrews (Miss.).....	914
State v. Nejim (La.).....	133	Supple's Sons Planting Co., Union Seed & Fertilizer Co. v. (La.).....	949
State v. Paillet (La.).....	951	Suttle v. Williams (Miss.).....	20
State v. Pearce (Ala. App.).....	656	Sweat v. State (Ala. App.).....	1002
State, Price v. (Ala. App.).....	972	Sweeney v. Sweeney (Ala.).....	1000
State, Pugh v. (Ala. App.).....	1002	Swift & Co. v. Bonvillain (La.).....	849
State, Read v. (Ala.).....	96	Sykes v. Armstrong (Miss.).....	262
State, Rivers v. (Miss.).....	580	Tandy, Illinois Cent. R. Co. v. (Miss.)....	174
State, Russell v. (Fla.).....	27	Tanner v. Tanner (Miss.).....	749
State, Sample v. (Ala. App.).....	1002	Tarrance v. Chapman (Ala.).....	707
State, Scott v. (Ala.).....	1000	Tartt, Elliott v. (Ala. App.).....	1000
State v. Scottish American Mortg. Co. (Miss.).....	291	Tarver v. State (Ala. App.).....	1002
State, Sherrod v. (Ala. App.).....	76	Tate v. Scott (Miss.).....	174
State, Simmons v. (Ala. App.).....	979	Taylor, Alabama Great Southern R. Co. v. (Ala.).....	676
State, Simmons v. (Fla.).....	278	Taylor, Finger v. (Miss.).....	269
State, Simmons v. (Miss.).....	327	Taylor, Green v. (Miss.).....	875
State v. Slaughter (Ala.).....	416	Taylor v. McDaniel (Miss.).....	304
State v. Slaughter (Ala.).....	417	Teal v. Philadelphia & Gulf S. S. Co. (La.).....	364
State, Smith v. (Ala. App.).....	979	Teasley v. Hix-Gravely Cigar Co. (Ala.)..	100
State, Smith v. (Fla.).....	915	Temple v. Dooley (Ala.).....	683
State v. Smith (La.).....	734	Tennessee Coal, Iron & R. Co. v. Rutledge (Ala.).....	990
State, Smythe v. (Miss.).....	540	Texas & P. R. Co., In re (La.).....	366
State, Sparkman v. (Fla.).....	34	Texas & P. R. Co., Planters' Cotton Oil Co. v. (La.).....	366
State, Spinks v. (Ala. App.).....	623	Thames v. Thames (Miss.).....	395
State, Steward v. (Miss.).....	881	Thomas, Grand Benev. Ass'n v. (Ala. App.).....	1001
State, Stone v. (Fla.).....	634	Thomas v. Granger (Fla.).....	1007
State Studervant v. (Ala. App.).....	1002	Thomas v. Hampton (Fla.).....	1007
State, Sturdivant v. (Ala. App.).....	978	Thomas v. Long Beach (Miss.).....	570
State, Sweat v. (Ala. App.).....	1002	Thomas v. State (Ala. App.).....	1002
State, Tarver v. (Ala. App.).....	1002	Thomas Cusack Co. v. Ford (La.).....	196
State, Thomas v. (Ala. App.).....	1002	Thompson, Ballard v. (La.).....	505
State, Tidwell v. (Ala. App.).....	1002	Thompson, Penniman v. (Fla.).....	1006
State v. Tingle (Ala.).....	991	Thompson, Reeves Grocery Co. v. (Miss.)..	914
State v. Tuminello (La.).....	190	Thrash v. Vicksburg, S. & P. R. Co. (La.).....	197
State v. Underwood (La.).....	513	Threefoot Bros. & Co. v. McCormick (Miss.).....	882
State, Walton v. (Miss.).....	895	Tidwell v. State (Ala. App.).....	1002
State, Ware v. (Miss.).....	868	Till v. Fairbanks Co. (Miss.).....	298
State, Washington v. (Ala. App.).....	1002	Tillman, Ex parte (Miss.).....	910
State, Watkins v. (Miss.).....	581	Tingle, State v. (Ala.).....	991
State, Webb v. (Ala. App.).....	1002	Tinsley v. Lovett (Miss.).....	817
State, Webb v. (Miss.).....	738	Tishomingo County, Bennett v. (Miss.)....	304
State, Webster v. (Miss.).....	655	Titcomb, Lurie v. (La.).....	200
State, Westbrook v. (Miss.).....	539	T. L. Farrow Mercantile Co. v. Riggins (Ala. App.).....	963
State, White v. (Ala.).....	452	Todd v. Interstate Mortgage & Bond Co. (Ala.).....	681
State, Williams v. (Ala.).....	99	Tompkins, Hattiesburg Grocery Co. v. (Miss.)	866
State, Wilson v. (Ala.).....	115	Tompkins, Planters' Lumber Co. v. (Miss.).....	565
State, Wilson v. (Ala. App.).....	971	Town of Long Beach, Thomas v. (Miss.)..	570
State, Woods v. (Ala. App.).....	614	Town of Mandeville, Mandeville Ice & Light Co. v. (La.).....	512
State ex rel. Albritton v. Grace (La.).....	203	Town of Poplarville v. Stewart (Miss.)....	833
State ex rel. Elfer v. Millsaps (La.).....	490	Town of Port Gibson v. Anderson (Miss.)..	882
State ex rel. Henry v. Lyons (La.).....	507	Trahan v. Benoit (La.).....	893
State ex rel. John T. Moore Planting Co. v. Howell (La.).....	529	Trainor, Serio v. (La.).....	215
State ex rel. Labbe v. Millsaps (La.).....	496	Tremont Lumber Co., Jones v. (La.).....	862
State ex rel. New Orleans Land Co. v. Register of Conveyances (La.).....	773	Tremont Lumber Co., Langston v. (La.).....	771
State ex rel. Powell v. Montgomery (La.)..	768	Trenholm, First Nat. Bank v. (Miss.).....	274
State ex rel. Progressive Party of State of Louisiana, In re (La.).....	496	Trichel v. Donovan (La.).....	130
State ex rel. Progressive Party of State of Louisiana, In re (La.).....	499	Trosclair, Jung & Sons Co. v. (La.).....	524
State Life Ins. Co., Mellon v. (Miss.).....	173	T. S. Faulk & Co. v. Williams (Ala. App.).....	1002
Stedham v. Robertson (Ala. App.).....	62	Tuminello, State v. (La.).....	190
Steele, Bradford v. (Miss.).....	834	Turner, Hartsell v. (Ala.).....	658
Stegall, J. L. Ross & Co. v. (Miss.).....	881	Tyler, Williams v. (Ala. App.).....	51
Stein Grocery Co., Stone v. (Miss.).....	327	Tynes v. Kerr (Miss.).....	578
Stevens v. Allen (La.).....	936	Tynes v. O'Shields (Miss.).....	579
Steward v. State (Miss.).....	881		
Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County (Fla.).....	42		
Stewart, Town of Poplarville v. (Miss.)....	833		
Stewart, Yarbrough v. (Ala.).....	986		
Stingily, Alabama & V. R. Co. v. (Miss.)..	376		

	Page		Page
Underwood, State v. (La.).....	513	Western Union Tel. Co. v. Dowdle (Miss.)	394
Union Seed & Fertilizer Co. v. J. Supple's Sons Planting Co. (La.).....	949	Western Union Tel. Co. v. Fawiah (Ala.)..	183
United States Cast Iron Pipe & Foundry Co. v. McCoy (Ala.).....	406	Western Union Tel. Co. v. Humphrey & Co. (Miss.).....	880
Vanderburg v. Johnson (Miss.).....	326	Western Union Tel. Co. v. Justice (Ala. App.).....	1002
Van Horn, Bass v. (Miss.).....	882	Western Union Tel. Co., Louisville & N. R. Co. v. (Ala.).....	118
Veith, Carter v. (La.).....	792	Western Union Tel. Co. v. Ragsdale (Miss.)	818
Ventress v. Wallace (Miss.).....	636	Western Union Tel. Co. v. Wilder (Miss.)	834
Vestal, Faison v. (Fla.).....	759	Weston Lumber Co. v. Lott (Miss.).....	20
Viator v. New Orleans Ry. & Light Co. (La.).....	733	Wetherell, Calcasieu Trust & Savings Bank v. (La.).....	765
Vicksburg, S. & P. R. Co., Dixon v. (La.)..	527	Wheeler v. Laurel Bottling Works (Miss.)..	743
Vicksburg, S. & P. R. Co., Thrash v. (La.)	197	Wheeler v. Southern R. Co. (Miss.).....	812
Victor Huber Marble & Granite Co., Southern Seating & Cabinet Co. v. (Miss.).....	882	Whitaker, Manatee County v. (Fla.).....	1006
Victoria Lumber Co., City of Shreveport v. (La.).....	791	White, Barnes v. (Ala.).....	114
Victoria Lumber Co. v. Wells (La.).....	781	White v. McRee (Miss.).....	804
Village of Moreauville v. Boyer (La.).....	187	White v. State (Ala.).....	452
Village of Scobey v. Bailey (Miss.).....	656	White v. White (Miss.).....	322
Vinzant, Birmingham Ry., Light & Power Co. v. (Ala.).....	999	White v. Willis (Miss.).....	737
Virginia-Carolina Chemical Co., Hewitt v. (Fla.).....	1006	White Lumber Co. v. McComb City Turpentine Co. (Miss.).....	5
Wade, Funchess v. (Miss.).....	913	White Lumber Co. v. McComb City Turpentine Co. (Miss.).....	643
Wagnon v. Schick (La.).....	534	Whitton, Betts Naval Stores Co. v. (Fla.)..	281
Wainwright, Royal Indemnity Co. v. (Miss.).....	579	Wilder v. Dowe (Miss.).....	832
Walden Auto Co. v. Mixon (Ala.).....	694	Wilder v. Ferguson (Miss.).....	324
Walden & Co. v. Yates (Miss.).....	897	Wilder, Western Union Tel. Co. v. (Miss.)	834
Walker, Martin v. (Ala.).....	667	Williams, Alabama & V. R. Co. v. (Miss.)	303
Walker v. Mutual Alliance Trust Co. (Ala.)	697	Williams, Fulmer v. (Miss.).....	579
Walker v. Rodriguez (La.).....	499	Williams, Lissou v. (La.).....	365
Walker & Norman, Barton-Parker Mfg. Co. v. (Miss.).....	656	Williams v. McCormick (La.).....	523
Wall, B. Altman & Co. v. (Miss.).....	318	Williams, Southern R. Co. v. (Miss.).....	835
Wall v. Nail (Miss.).....	394	Williams v. State (Ala.).....	99
Wallace, Corinth Bank & Trust Co. v. (Miss.).....	266	Williams, Suttle v. (Miss.).....	20
Wallace v. Crosthwait (Ala.).....	666	Williams, T. S. Faulk & Co. v. (Ala. App.).....	1002
Wallace, Goehns v. (Miss.).....	303	Williams v. Tyler (Ala. App.).....	51
Wallace, Nathan Furniture Co. v. (Miss.)..	836	Williams v. Williams (Miss.).....	300
Wallace, Ventress v. (Miss.).....	636	Williams-Brooke Co., Smith v. (Miss.)..	648
Walls, Jones v. (Miss.).....	881	William T. Hardie & Sons, Montgomery-Ferguson Co. v. (La.).....	931
Walther v. Walther (La.).....	344	Willig, Alabama & V. R. Co. v. (Miss.)..	580
Walton v. State (Miss.).....	395	Willis, Seeborg S. S. Line v. (Ala. App.)..	1002
Ward v. Furr (Miss.).....	835	Willis v. Semmes (Miss.).....	865
Ward v. Irwin (Miss.).....	913	Willis, White v. (Miss.).....	737
Ward, Sovereign Camp of Woodmen of the World v. (Ala.).....	404	Willis, Yazoo & M. V. R. Co. v. (Miss.)..	563
Ware v. State (Miss.).....	868	Willis v. Yazoo & M. V. R. Co. (Miss.)..	275
Warren v. Crow (Ala.).....	92	Wilmot v. Board of Sup'rs of Bolivar County (Miss.).....	650
Warren Hardware Co. v. Sanderson (Miss.)	539	Wilson v. Peacock (Miss.).....	296
Warrington, Security Co., v. (Fla.).....	1006	Wilson, Smith v. (Fla.).....	919
Washington v. State (Ala. App.).....	1002	Wilson v. State (Ala.).....	115
Waterhouse v. Star Land Co. (La.).....	358	Wilson v. State (Ala. App.).....	971
Watkins v. Chapman (Ala.).....	473	Wilson v. Yazoo & M. V. R. Co. (La.)....	931
Watkins, Porter v. (Ala.).....	687	Wood v. Lett (Ala.).....	177
Watkins v. State (Miss.).....	581	Wood, New Orleans, M. & C. R. Co. v. (Miss.).....	394
Watson, Clark v. (Ala.).....	96	Woodmen of the World v. Coplin (Miss.)..	260
Watson v. Feibel (La.).....	585	Woodmen of Union v. Newell (Miss.).....	174
Watson, Herrman Bros. & Co. v. (Miss.)..	875	Woods v. State (Ala. App.).....	614
W. B. Nash Lumber Co., Jayne v. (Miss.)..	276	Wooten & Agee, Culp v. (Miss.).....	276
W. C. Craig & Co., Yazoo & M. V. R. Co. v. (Miss.).....	561	Wright, Cahn v. (Miss.).....	567
Webb, Sorenson v. (Miss.).....	273	Wright, Ideal Lumber Co. v. (Fla.).....	1004
Webb v. State (Ala. App.).....	1002	Wylar, Ackarland & Co. v. Central Alabama Dry Goods Co. (Ala. App.).....	1002
Webb v. State (Miss.).....	738	Wynn, Grand Lodge Colored K. P. v. (Miss.).....	833
Webb Press Co., Ruge v. (Fla.).....	627	Wynnegar, Southwestern Co. v. (Miss.)...	737
Webster v. State (Miss.).....	655	Wynnegar, Southwestern Co. v. (Miss.)...	738
Weil Bros., Pontotoc Cotton Co. v. (Miss.)	827	Yarborough, Bank of Coushatta v. (La.)...	784
Wells, Victoria Lumber Co. v. (La.).....	781	Yarbrough v. Stewart (Ala.).....	986
Wells Fargo & Co. Express, McAdams v. (La.).....	945	Yates, R. F. Walden & Co. v. (Miss.).....	897
Wells Lumber Co. v. Saucier (Miss.).....	834	Yazoo & M. V. R. Co., In re (La.).....	931
Wertheimer Bag Co. v. Hill (Ala. App.)..	618	Yazoo & M. V. R. Co., Allen v. (Miss.)...	386
Westbrook, Hurlburt v. (Miss.).....	902	Yazoo & M. V. R. Co. v. Armstrong & Co. (Miss.).....	905
Westbrook v. State (Miss.).....	539	Yazoo & M. V. R. Co. v. Barbour (Miss.)..	275
Wester, Louise Lumber Co. v. (Miss.).....	174	Yazoo & M. V. R. Co. v. Barham (Miss.)..	832
Wester v. Louisville & N. R. Co. (Fla.)...	1007	Yazoo & M. V. R. Co. v. Behr (Miss.)...	580
Western Union Tel. Co. v. Bassett (Miss.)..	750	Yazoo & M. V. R. Co. v. Bell (Miss.)...	272
Western Union Tel. Co., Dickerson v. (Miss.).....	385	Yazoo & M. V. R. Co. v. Brownen (Miss.)..	882
		Yazoo & M. V. R. Co., Columbus v. (Miss.)	174
		Yazoo & M. V. R. Co., Covington v. (Miss.)	821

	Page		Page
Yazoo & M. V. R. Co. v. Dampeer (Miss.)..	880	Yazoo & M. V. R. Co. v. McCurdy (Miss.)	581
Yazoo & M. V. R. Co. v. Delta Table & Chair Co. (Miss.).....	276	Yazoo & M. V. R. Co. v. Marks (Miss.)....	581
Yazoo & M. V. R. Co., Dickerson v. (Miss.)	312	Yazoo & M. V. R. Co. v. Martin (Miss.)..	274
Yazoo & M. V. R. Co. v. Doddsville Land & Mercantile Co. (Miss.).....	174	Yazoo & M. V. R. Co., Mercier v. (La.)....	150
Yazoo & M. V. R. Co. v. Embry (Miss.)...	833	Yazoo & M. V. R. Co. v. Parrish & Co. (Miss.)	173
Yazoo & M. V. R. Co. v. Erickson (Miss.)	581	Yazoo & M. V. R. Co. v. Pickens & Fin- cher (Miss.).....	914
Yazoo & M. V. R. Co. v. Gaston (Miss.)...	173	Yazoo & M. V. R. Co. v. Robbins (Miss.)..	326
Yazoo & M. V. R. Co. v. Gray (Miss.)....	578	Yazoo & M. V. R. Co. v. Setaro (Miss.)....	832
Yazoo & M. V. R. Co. v. Gray (Miss.)...	581	Yazoo & M. V. R. Co. v. Sibley (Miss.)...	167
Yazoo & M. V. R. Co. v. Hearn (Miss.)...	561	Yazoo & M. V. R. Co. v. Smith (Miss.)...	752
Yazoo & M. V. R. Co., Herbert v. (Miss.)..	540	Yazoo & M. V. R. Co. v. Smithart (Miss.)	562
Yazoo & M. V. R. Co. v. Hubbard (Miss.)..	880	Yazoo & M. V. R. Co. v. W. C. Craig & Co. (Miss.)	561
Yazoo & M. V. R. Co. v. Huff (Miss.)....	757	Yazoo & M. V. R. Co. v. Willis (Miss.)...	563
Yazoo & M. V. R. Co. v. James (Miss.)....	834	Yazoo & M. V. R. Co., Wills v. (Miss.)....	275
Yazoo & M. V. R. Co. v. Johnson (Miss.)	578	Yazoo & M. V. R. Co., Wilson v. (La.)....	931
Yazoo & M. V. R. Co., Jones v. (Miss.)....	275	Yazoo & M. V. R. Co. v. Young (Miss.)..	173
Yazoo & M. V. R. Co. v. Jones (Miss.)...	809	Yelvington, Grand Lodge Colored K. P. v. (Miss.)	576
Yazoo & M. V. R. Co. v. Keirn (Miss.)...	326	Young, Noble v. (Fla.).....	1006
Yazoo & M. V. R. Co. v. Key (Miss.)....	579	Young v. Poston (Fla.).....	1007
Yazoo & M. V. R. Co. v. Lynchard (Miss.)	881	Young, Yazoo & M. V. R. Co. v. (Miss.)...	173
Yazoo & M. V. R. Co. v. McClannahan (Miss.)	835		

See End of Index for Tables of Southern Cases in State Reports

†

THE
SOUTHERN REPORTER
VOLUME 71

MEEK v. HARRIS. (No. 18040.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

THREATS \Leftrightarrow 10—PUNITIVE DAMAGES—RIGHT TO RECOVER.

Where the mayor commissioner and ex officio justice of the peace for a city informed plaintiff that her minor son was suspected of burning buildings, and in a friendly manner advised her to take him and leave the city, and he was acting in good faith and without malice or desire to oppress, punitive damages in an action for threatening malicious prosecution of the son cannot be recovered.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 34-52; Dec. Dig. \Leftrightarrow 10.]

Appeal from Circuit Court, Jones County;
J. M. Arnold, Judge.

Action by Mrs. Lydia Harris against F. M. Meek. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Deavours & Hilbun, of Laurel, for appellant. Halsell & Welch, of Laurel, for appellee.

HOLDEN, J. Mrs. Lydia Harris, plaintiff in the court below and appellee here, sued for damages and obtained a judgment against F. M. Meek, defendant below and appellant here, for what seems to be an alleged threat of malicious prosecution of her son; and from this judgment, the defendant appeals to this court.

The appellee claimed in her declaration that in February, 1913, the appellant, F. M. Meek, while mayor commissioner and ex officio justice of the peace for the city of Laurel, willfully and maliciously ordered appellee to leave Laurel, and threatened to have her son, Ledyard Harris, arrested and put in jail if she did not take him away from Laurel. The appellee and her son, Ledyard Harris, 16 years of age, were both joined as plaintiffs in the declaration; but upon the filing of a demurrer by defendant a nonsuit was taken by the plaintiff Ledyard Harris, leaving it a suit by the appellee, Mrs. Lydia Harris, in her own right against the appellant for damages.

The plaintiff below testified, in substance, that F. M. Meek, the appellant, came to her and told her that he would have her son,

Ledyard Harris, arrested and put in jail if she (Lydia Harris) did not take him away from Laurel. We copy the important part of appellee's testimony verbatim from the record:

"He said that he and all of his men were notified to arrest my boy the first time they caught him on the street, and put him in jail. We confined the boy strictly to my home premises for quite awhile. He finally told me after that time if I did not leave by Saturday he was coming to my home and arrest my boy and put him in jail. It scared me to think he would come to my home and arrest my boy and put him in jail, and I consented to leave with him. I was gone for three weeks."

The plaintiff's testimony was the only evidence introduced in her behalf. At this juncture in the trial the defendant moved to exclude the evidence of the plaintiff and to instruct the jury to return a verdict for the defendant, which motion was by the court overruled.

The appellant, F. M. Meek, was then introduced as a witness, and testified, in substance, that he was, at the time of the alleged conversation with the appellee, mayor commissioner of the city of Laurel, and that for some time previous there had been an unusually large number of incendiary fires in the city of Laurel, and that he, in conjunction with other citizens, had endeavored to discover the party causing the fires, and to that end had made up \$345 and employed a detective, one McKervery, to investigate the situation; that he was informed by the detective that Ledyard Harris, the son of the appellee, was the guilty party, and that upon receiving this information he sent for the appellee, with whom he was upon friendly terms, and when she arrived at the office, the detective, McKervery, told the appellee that the evidence pointed strongly to her son as being the person who had caused the fires in Laurel, and that the detective said to her they wanted to put a stop to these fires, and advised her, in a private and friendly way, that it would be best for her to take her son away from Laurel, as he was a young boy, and would do better with other associations and surroundings; that the appellee, then much distressed, asked the appellant what she should do about it, and he (appel-

lant) advised and suggested to her in a kind and friendly way that it would be best for her to take the advice of the detective and take her boy away from Laurel, for awhile at least, and that that would probably cure the evil of the situation; that he advised and suggested to the appellee to take her boy away to some other field and away from his present surroundings, and that this would save her a good deal of trouble, because the grand jury would meet soon; that he gave her this advice in a friendly way in order to keep the boy out of trouble, and that he at no time threatened her nor the boy; that the appellee was a frequent visitor at the home of appellant, and often dined with his family, and that they were on friendly and cordial terms; that he had no malice or feeling against her, but, on the other hand, his feeling towards her was friendly and considerate; and that he had treated her as a neighbor and had no desire whatever to do a wrong to her or her boy, but was attempting to suggest or advise her in a way that was for her good and the good of her son. The son was subsequently indicted for arson. The appellee waited one year before filing suit. With this state of case before the court, the plaintiff was granted one instruction that the jury might find punitive damages for the plaintiff. No actual damages were claimed. The jury returned a verdict for the plaintiff in the sum of \$1,600 as punitive damages.

We think the testimony shows conclusively that the appellant was acting in good faith, without malice, and with probable cause, and with no desire to oppress the appellee, but that his intentions were good. Therefore punitive damages cannot be recovered, if, indeed, any recovery whatever may be had. *Railroad v. Fite*, 67 Miss. 373, 7 South. 223; *Taft v. Taft*, 40 Vt. 229, 94 Am. Dec. 389; 12 Am. & Eng. Enc. 24, 25; 3 Black. Com. 120; *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129. Under the facts in this case the verdict and judgment are erroneous.

Reversed and remanded.

FOUNTAIN et al. v. JOULLIAN. (No. 18098.)
(Supreme Court of Mississippi. Division A.
March 13, 1916.)

TAXATION Ⓒ669—ASSESSMENTS—CHANGES.

Where taxes were assessed to the joint owners of lands, the collector, one of the owners having paid one-half of the assessment, is not empowered to change the original assessment and apportion a separate half interest in each owner, and upon failure of the other owner to pay one-half the tax sell his undivided interest in the land, so such a sale is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1352; Dec. Dig. Ⓒ669.]

Appeal from Chancery Court, Hancock County; J. Morgan Stevens, Chancellor.

Bill by J. Q. Fountain and others against E. C. Joullian. From a decree for defendant

sustaining demurrer to the bill, complainants appeal. Affirmed.

McDonald & Marshall, of Bay St. Louis, for appellants. Ford & White, of Gulfport, for appellee.

HOLDEN, J. The appellants filed their bill in the chancery court of Hancock county, seeking to confirm their tax title to an undivided one-half interest in certain real estate sold to them by the tax collector of Hancock county in March, 1896, for taxes of 1895. A demurrer, filed by the defendant below, appellee here, was sustained to the bill. It appears from the record that blocks 61, 62, 63, 64, 65, 66, 67, 68, and 69, Gulf View, section 19, township 9, range 15 west, 36 acres, were assessed to "Waits and Burns" at a value of \$360, and that Waits and Burns owned this property jointly, each owning an undivided one-half interest therein. Burns went to the tax collector and paid the taxes on his undivided one-half interest in the land and received a receipt from the tax collector. No taxes being paid on the other undivided one-half interest of Waits, the tax collector advertised and sold Waits' undivided half interest in the property, when it was bought by Fountain and Farve, and upon this tax title the appellant relied in the court below. The appellee contended before the chancellor, with which contention the chancellor agreed, and urges here that the tax sale of Waits' undivided half interest in this property was void, and the appellee here being the owner of Waits' undivided half interest in the land has a good title to it. It appears from this record that the tax collector attempted to change the original assessment of this land and to apportion an undivided one-half interest in Wait and the other interest in Burns, and that upon the failure of the payment of the taxes due on Waits' undivided half interest he proceeded to sell this portion of the land "as an undivided one-half interest." The tax collector did not endeavor to separate or apportion the land so that a distinct portion of it could be sold for the taxes, but he undertook to apportion an undivided one-half interest in the whole land not as originally assessed, and sell the undivided interest. An assessment of taxes against land is a proceeding primarily against the land and the sale is of the fee in the real estate. It is immaterial as to whom it is assessed. We have no statute authorizing a tax collector to change an assessment and apportion the different undivided interests to any number of parties who may claim such interests therein and sell such undivided interests, and we think to do this would be bad policy and illegal, and in all instances he should collect the tax on the land, and not on any individual, undivided, inseparable, interest therein. If it were permissible for the collector to change the assessment and collect separately

the taxes upon as many different interests as he might apportion out, this would lead to confusion and complications not authorized by law, and against public policy. *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; 37 Cyc. 1340, 1341; *Corbin v. Inslee*, 24 Kan. 154; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Macdonough v. Elam*, 1 La. 489, 20 Am. Dec. 284; *Savings Bank et al. v. Todd*, 47 Conn. 190.

In view of these conclusions we hold that the tax sale in this case was void, and the decree of the lower court is affirmed.

Affirmed.

FERNWOOD LUMBER CO. v. ROWLEY et al. (No. 17627.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. PUBLIC LANDS §55 — LEASE — SALE OF TIMBER—VALIDITY.

A conveyance of timber by a lessee of land in a sixteenth section, whose unexpired term continues for 55 years, is valid as against one who with notice thereafter purchased from the board of supervisors the right to cut all the timber growing on the land.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 170-174; Dec. Dig. §55.]

2. PUBLIC LANDS §55 — LEASE — CUTTING LOGS—POWERS OF BOARD OF SUPERVISORS.

The only control which the board of supervisors has over timber in a sixteenth section is to prevent its being cut or destroyed contrary to the rules of good husbandry, unless the right to cut it is purchased, and it can sell such right only to the lessee, or to or with the consent of the person to whom the lessee has sold the timber.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 170-174; Dec. Dig. §55.]

3. TRESPASS §52—MEASURE OF DAMAGES— WRONGFUL CUTTING OF TIMBER.

The measure of damages recoverable by the grantee of such lessee for the wrongful cutting of the timber is the value of the timber cut and removed.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137, 138; Dec. Dig. §52.]

Appeal from Chancery Court, Marion County; R. E. Sheehy, Chancellor.

Action by the Fernwood Lumber Company against William Rowley and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Mounger & Ford, of Columbia, for appellant. Dale & Rawls, of Columbia, for appellees.

SMITH, C. J. In March, 1900, Cyrus Lewis, being the lessee of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a sixteenth section situated in Marion county, the unexpired term of his lease being about 55 years, sold and warranted to appellant the timber growing thereon by deed duly acknowledged and recorded. In October, 1910, Lewis, by deed, conveyed to appellee Rowley all his interest in the lease. In January, 1912, Rowley purchased from the board of supervisors of Marion

county all the timber growing on this land, and afterwards sold it to appellees Bourn and Williamson, who, over the protest of appellant, proceeded to cut and remove it, whereupon appellant filed its bill in the court below against them, and also against Rowley, praying that they be enjoined from cutting the timber, and that an account be taken of that cut and removed, and that he be awarded damages therefor. No injunction was issued, and the case proceeded to trial solely upon appellant's claim for damages. On final hearing, the bill was dismissed on the ground, as recited in the decree, that appellant had no interest in the timber.

[1] As we understand this record, the only question presented to us for decision is: Did appellant have an interest in the timber; and, if so, what was the character thereof, and the measure of damages sustained by him because of its removal? The conveyance of the timber by Lewis to appellant was valid, and vested in appellant the right to appropriate it whenever it could be lawfully cut and removed from the land. *Caston v. Lumber Co.*, 69 South. 668. And since appellee Rowley had notice of this conveyance when he purchased the land, he obtained by this purchase no title or right to the timber.

[2] The only control which the board of supervisors had over the timber was to prevent its being cut or destroyed, except in accordance with the rules of good husbandry, unless the right so to do should be purchased from it, and this right it could sell only to, or with the consent of, the lessee of the land (*Dantzier Lumber Co. v. State*, 97 Miss. 355, 53 South. 1), or to or with the consent of the person to whom the lessee had sold the timber, and his assignees. In the case at bar the only person to whom this right could have been lawfully sold was appellant, so that Rowley and his assignees, Bourn and Williamson, acquired no right to appropriate the timber by virtue of Rowley's contract with the board. The board of supervisors had no authority either to cut and remove the timber, or to authorize appellees so to do. The only right which it did have in this connection, and consequently the only right which Rowley and his assignees acquired by virtue of Rowley's contract with the board, was simply the right to sell to appellant, or its assignees, the right to cut and remove the timber for uses not within the rules of good husbandry.

[3] The interest of appellant in the timber being as hereinbefore outlined, and appellees having neither title thereto nor right of possession thereof, the case, as to the measure of damages, falls within the rules laid down in 38 Cyc. 2089, par. 4. From which it necessarily follows that the measure of appellant's damages is the value of the timber cut and removed.

Reversed and remanded.

HEWES et al. v. HEWES et al. (No. 18011.)
(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. WILLS 130—VALIDITY—HOLOGRAPHIC WILLS.

Under Code 1906, § 5078, providing that a will, to be valid, must be either wholly written and subscribed by the testator, or attested by two witnesses in his presence, a letter directing the disposition the testatrix wished made of her property after her death, in the event she should not make another and more formal will, fully written and subscribed by the testator, was properly admitted to probate as a part of her last will and testament.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. 130.]

2. WILLS 132—INCORPORATION.

Code 1906, § 5078, provides that a will, if not wholly written and subscribed by the testator, must be attested by two witnesses in his presence. On April 30, 1911, the testatrix executed a will bequeathing and devising a life estate in all of her property to J. S. without making any distribution of the remainder. On the same day J. S. executed a will by which she bequeathed and devised all the property she might inherit from the testatrix. A letter admitted to probate as a holographic will mentions both of these wills. Held, that the will executed by J. S. was improperly admitted to probate and incorporated as a part of the will of testatrix; as an extrinsic document, if incorporated in a will by reference, becomes a part of it, it necessarily follows that to incorporate an extrinsic document in a will, valid only if wholly written by the testator, the document must also be written by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 341; Dec. Dig. 132.]

Appeal from Chancery Court, Harrison County; J. Morgan Stevens, Chancellor.

Petition by Newton L. Hewes and others for the probate of the will of Fannie G. Henderson, deceased. From a decree in favor of the proponents allowing the probate, the contestants Charley L. Hewes and others appeal. Reversed and remanded.

T. A. Wood, W. G. Evans, and J. L. Taylor, all of Gulfport, for appellants. Ford & White, of Gulfport, for appellees.

SMITH, C. J. This is an appeal from a decree of the court below admitting to probate three instruments as the will of Mrs. Fannie G. Henderson, deceased. On the 30th day of April, A. D. 1911, Mrs. Henderson executed a will, the only item of which reads as follows:

"Whatever property I may die seized and possessed of real or mixed wherever situate I will, and devise & bequeath to Julia R. Smith to take & enjoy the usufruct thereof for & during her natural life time, for the sole support & maintenance of herself & her sister Helen L. Sheffield both of the city of Norfolk, state of Virginia."

On the same day, Julia R. Smith executed a will by which she bequeathed and devised all the property that she might inherit from Mrs. Fannie G. Henderson, to Newton H., Frederick S., William H., Francis G., George P., Henry L., and Finley B. Hewes. After

the death of Mrs. Henderson there was found with her will a sealed envelope addressed to "Miss M. S. Hewes—for Sophie to give Idie in case of my death [Signed] F. G. H.") containing the following letter:

"Pass Christian July 1st 1913

"My dear Idie: I am writing to you today fearing something might happen to me before I can get a deed properly drawn up, and signed, and I feel confident that you will carry out my wishes.

"I desire that Sophie Tibbler shall at my death, be given the house, I have just built, and the furniture. The silver you can divide as you think best, also the house linen, and any pictures you wish. My clothes are not worth much and can be given to Lizzie. Also a hundred dollars when the estate is settled. The home place is for you four girls that is you, Lillie, Cora & Emma.

"I give the house to Sophie for two reasons, first, I tore down her house, and second because of the loving attention she gave to my dear husband and myself. There is a will of mine leaving to Julia Smith all unsold lands and one from her, leaving them to your brothers.

"I do not suppose this would stand in the courts, but there is no need of going to law. Later I will make a will. I only want to secure Sophie in case of my sudden death.

"Always Your loving Aunt

"Fanny G. Henderson."

These three instruments were propounded in the court below for, and upon final hearing were admitted to, probate, the decree reciting that:

"After due consideration of all of the evidence in this case, and after hearing full legal arguments, the chancellor finds from the evidence:

"First. That the two writings designated as Exhibits A and C to the petition of proponents constitute the true and last will and testament of Fannie G. Henderson, deceased, and should be admitted to probate as such.

"Secondly. That the writing designated Exhibit B to said petition of proponents, and referred to as the 'will of Julia R. Smith,' was by adoption and implication made a part and is now a part of the true last will and testament of Mrs. Fannie G. Henderson, deceased, and should be admitted to probate as explanatory of said will of Mrs. Henderson and in aid of the construction thereof—to which findings of the court the contestants excepted."

[1, 2] The two questions presented to us for decision are: Should the court below have admitted to probate, first, the letter from Mrs. Henderson to Idie? and, second, the will of Mrs. Julia R. Smith as having been 'by adoption and implication made a part' of the will of Mrs. Henderson? The answer to the first of these questions must be in the affirmative, and to the second in the negative.

The letter directs what disposition the writer wished to be made of certain property after her death in event she should die without making another and more formal will, and is therefore testamentary in character; and, conceding for the sake of the argument that the reference in the letter to the will of Mrs. Julia R. Smith indicates an intention to incorporate it therein as a part thereof, the attempt so to do must fall under the provisions of section 5078, Mississippi

Code 1906, for the reason that it was not written by Mrs. Henderson herself.

When an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof; and since a will not attested by witnesses must be "wholly written" by the testator himself, it necessarily follows that for an extrinsic document to be incorporated into and thereby become a part and parcel of a will valid only if "wholly written" by the testator himself, such document must also be so written; for should it not be, the whole will would not be in the handwriting of the testator. *Gibson v. Gibson*, 28 Grat. (69 Va.) 44.

Reversed and remanded.

LEWIS v. HARRISON et al. (No. 17292.)
(Supreme Court of Mississippi, Division A.
March 13, 1916.)

EXEMPTIONS §48(2)—WAGES OF LABORER.

A county warrant, issued in favor of two persons who had been working a road under contract with the supervisors at a fixed rate per mile, is not exempt from execution as the wages of a laborer, or a person working for wages.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 71; Dec. Dig. §48(2).]

Appeal from Circuit Court, Neshoba County; C. L. Dobbs, Judge.

Action by W. M. Lewis against B. H. Harrison and another. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

This case was tried by agreement before the circuit judge, a jury being waived, upon an agreed statement of facts, hereinafter set out, and resulted in a judgment for the defendants below, from which plaintiff appeals.

"Agreed Statement of Facts.

"It is agreed by counsel for plaintiff and defendants that the facts in this case are as follows:

"B. H. Harrison and R. A. Weathers are both resident citizens of Neshoba county, Miss., and are both heads of families.

"That R. A. Weathers entered into a contract with the board of supervisors of Neshoba county, Miss., to work certain portions of the public road of said county, as shown by the minutes of said board, shown on pages 12 and 18 of Minute Book 6, a copy of which is to be taken as part of this agreement.

"That the contract was for a stipulated amount per mile. That the said R. A. Weathers afterwards, as contractor, subcontracted with B. H. Harrison for one-half the proceeds of said contract, as shown by said minutes, to do part of the work.

"Afterwards and in pursuance of said contract the said board of supervisors made an allowance to said B. H. Harrison for \$99.50 for work on said road.

"That after said allowance a warrant was issued to B. H. Harrison, which was in full payment of the aforesaid allowance to him, which warrant was for \$99.50. That said warrant was levied on by the sheriff of Neshoba county,

Miss., under an execution issued on a judgment rendered in favor of W. M. Lewis against both B. H. Harrison and R. A. Weathers; said warrant being in the warrant book in the chancery clerk's office in Neshoba county, Miss., when the sheriff levied on it. That the work done on the road was done by B. H. Harrison and R. A. Weathers, for which said allowance was made, in the month of December, 1912, and which said work for which said warrant was issued required the labor of the said parties for the month; and, further, the said Harrison and others had been working said road off and on for two years, drawing warrants on the same."

J. C. Ward, of Sumner, and W. M. Lewis, of Philadelphia, for appellant. E. S. Richardson, of Philadelphia, and Wells, May & Sanders, of Jackson, for appellees.

SMITH, C. J. This case is ruled by the case of *Heard v. Crum*, 73 Miss. 157, 18 South. 934, 55 Am. St. Rep. 520.

Reversed, and judgment here for appellant.

J. J. WHITE LUMBER CO. v. McCOMB CITY TURPENTINE CO. (No. 17556.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. LANDLORD AND TENANT §48(1)—TURPENTINE LEASES—ACTIONS—EVIDENCE.

In a suit where a lessee of timber for turpentine purposes contended that the land did not contain the amount of timber specified in the contract, evidence held insufficient to show that, if all the timber on the property, and not just the virgin timber, had been included in the survey, the lessee would not have had the amount of timber for which the lease called.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 115; Dec. Dig. §48(1).]

2. LANDLORD AND TENANT §48(1) — DEFICIENCY IN LEASED LANDS—RECOVERY—BURDEN OF PROOF.

Where a lessee of timber lands averred that there was a deficiency of acreage, it has the burden of establishing the amount of the shortage.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 115; Dec. Dig. §48(1).]

3. LANDLORD AND TENANT §122 — TIMBER LEASES—CONSTRUCTION.

Defendant leased to complainant for the purpose of turpentine lands, which were described as containing approximately 6,913 acres of timber. The contract or lease recited that the total consideration to be paid for the lease was \$25,000, making the rate per acre \$3.60, and further provided that the lessee might box for turpentine purposes all merchantable pine timber, and that the term "merchantable pine timber" should mean any tree of sufficient size to square not less than four inches. Held, that the lessor was not bound to furnish all virgin timber of the acreage specified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 435; Dec. Dig. §122.]

4. LANDLORD AND TENANT §122 — TIMBER LEASES—CONSTRUCTION—DEFICIENCY.

In such case, the contract of lease was a contract in gross or in bulk, so that no recovery for shortage in the acreage of the timber

could be maintained where the shortage did not amount to deception or fraud.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 435; Dec. Dig. § 122.]

Appeal from Chancery Court, Pike County; R. B. Mayes, Special Chancellor.

Bill by the McComb City Turpentine Company against the J. J. White Lumber Company. From a decree for complainant, defendant appeals. Reversed in part, and affirmed in part.

J. S. Sexton, of Hazlehurst, and W. B. Mixon, of McComb City, for appellant. Price & Price, of Magnolia, and J. R. Tally, of Hattiesburg, for appellee.

HOLDEN, J. This is an appeal from a decree of the chancery court of Pike county, Hon. Robert B. Mayes, special chancellor. The appellee, McComb City Turpentine Company, complainant in the court below, filed its bill, claiming, among other things, that the appellant, J. J. White Lumber Company, defendant below, leased to appellee, through Carr Bros., for turpentine purposes, 6,913 acres of merchantable pine timber, suitable for turpentine purposes, for which it paid appellant \$25,015.80, and that appellant failed to deliver the quantity, 6,913 acres of pine timber as contracted; that the shortage in the delivery amounted to 1,411 acres, which was a breach of the contract—and seeking to recover the purchase price and damages of appellant therefor. The lumber company, defendant below, answered, and, among other things, contended that appellee could not recover for the alleged shortage of 1,411 acres, for two reasons: First, that as a matter of fact, under the contract of lease, there is no shortage of 1,411 acres, or any amount whatever, and if there be any shortage at all, it is inconsiderable; second, that the contract of lease is a contract "in bulk" or "in gross," and that the shortage or variation, if any, is allowable to the lessor, under the contract here involved. There was a decree in favor of appellee as to the shortage of 1,411 acres, and for other damages claimed in the bill, and appellant prosecutes this appeal. We here set out the material parts of the contract involved:

This contract and agreement made and entered into in duplicate this the 27 day of October, A. D. 1905, by and between the J. J. White Lumber Company, a corporation existing under the laws of the state of Mississippi, herein called the party of the first part, and Carr Bros., composed of the individuals J. A. Carr and A. S. Carr, partners of Hattiesburg, Miss., hereinafter called the parties of the second part. Witnesseth: The party of the first part for and in consideration of the rent hereinafter reserved to be paid and the covenants to be performed by the parties of the second part, does by these presents hereby demise, farm, let and lease unto the said parties of the second part, their heirs or assigns all of the pine timber suitable for turpentine purposes located on the lands hereinafter described, which lands are owned by the party of the first part, and all of the merchantable pine timber suit-

able for turpentine purposes on the lands hereinafter described, upon which the party of the first part owns on them merchantable pine timber to wit:

	Sec.	Acres.
S ½ of S ½	22	120
S ½ of S ½	23	150
W ½ of NE ¼, SW ¼, W ½ of SE ¼, and SE ¼ of SE ¼	25	340
All on section	26	480
" "	27	520
S ½ of NE ¼	28	400
S ½	28	400
E ½ of SE ¼	29	80
SE ¼	31	50
S ½	32	200
All on	33	630
N ½ and N ½ of SE ¼	34	360
N ½ of NW ¼ of SW ¼	34	360
N ½ and N ½ of S ½	35	560
SW ¼ of SW ¼ and S ½ of SE ¼	35	560
W ½ of N ½ and S ½ of NW ¼	36	360
SW ¼ of NE ¼ and N ½ of SE ¼	36	360
All in Township One (1) North of Range Six (6) East, Amite County, Miss.		
NE ¼ and NW ¼ of NW ¼	31	440
S ½ of NW ¼, E ½ of SW ¼, and W ½ of SE ¼	31	440
Township One (1) North of Range 7 East, Pike County, Mississippi.		
N ¼ of NW ¼ and SW ¼ of NW ¼	1	120
NE ¼ of NW ¼, E ½ of NW ¼ of NW ¼	12	50
Township One (1) South, Range Six (6) East, Tangipahoa Parish, Louisiana.		
S ½ of NE ¼, E ½ of NW ¼, and E ½ of W ½ of NE ¼	2	400
SW ¼, NW ¼ of SE ¼	2	400
E ½ of SW ¼ of SE ¼	3	16
SE ¼ of NE ¼ and NE ¼ of SE ¼	9	40
NE ¼ S ½ of NW ¼, and NW ¼ of SW ¼	10	220
SW ¼ of NW ¼ and NW ¼ of SW ¼	11	40
W ½ of NW ¼	4	50
N ½ of NE ¼ and S ½ of SE ¼	5	60
All in section	37	437
W ½ of NW ¼	6	40
NW ¼ of NW ¼, N ½ of SW ¼ of NW ¼ and SE ¼ of NE ¼, and fraction of SE ¼	7	165
N ½ of NW ¼, SW ¼ of NW ¼, and fraction of SW ¼	8	123
Ninety acres on the N ½, N and W sides	38	90
Township One (1) South, Range Six (6) East, St. Helena Parish, Louisiana.		
Lots 1, 2 and 3	1	70
And fractional NE corner of the George Gordon section 55 to make 90 acres with lot 1 of	1	90
Fraction E ½ of NW ¼ of NE ¼ and NE ¼ of NE ¼	12	40
Fractional SE corner	56	20
Fractional east side section 37		143
Township, One (1) South of Range Five (5), St. Helena Parish, Louisiana.		

—being in all approximately 6913 acres of timbered land.

It is understood and agreed by this contract, First. That the term merchantable pine timber shall mean any pine tree of sufficient size to square not less than four inches (4") by four inches (4").

Second. That the parties of the second part hereby pay unto the party of the first part the sum of five thousand dollars (\$5,000.00) to bind this contract, receipt whereof is hereby acknowledged, the balance or deferred payments to twenty thousand fifteen & ⁸⁰/₁₀₀ (\$20,015.80), making the total amount to be paid for the lease of the aforesaid lands for turpentine purposes at the rate of \$3.60 per acre, to be paid by the parties of the second part to the party of the first part on or before the first day of December, A. D. 1905.

Third. For the above consideration the party of the first part conveys and warrants to the parties of the second part their heirs or assigns the right to enter upon said lands, to box, work and use for turpentine purposes the aforesaid pine timber for the purpose of producing and

manufacturing resin and spirits of turpentine for the full end and term of three (3) years from the date of entry thereon as hereinafter provided or until the third crop of turpentine is gathered from the said pine timber.

Fourth. It is agreed and understood that the party of the second part shall not commence operation upon said land before the first day of January 1907, and may box for turpentine purposes not more than fifteen hundred acres (1500) of said timber each year or turpentine season during the life of this contract, except that should the parties hereafter agree to use more or less of said timber each year, the same shall be agreed to in writing. Provided, however, that on January the first, 1910, that the said party of the first part shall have the right to proceed to take the timber from not exceeding 1,500 acres of said lands during the year 1910 and not to exceed 1,500 acres during each year thereafter; during the life of this contract.

Fifth. The party of the first part shall on or before the first day of November in each year, locate and designate the land upon which the pine timber shall be turpented for the first time during the next twelve months and furnish to the parties of the second part, abstracts of the title to said lands and maps showing the location of said land.

Sixth. It is the purpose of this contract to allow the parties of the second part to take the turpentine from the pine timber on said lands for three (3) consecutive years, in such locations as will be convenient for the party of the first part to cut and manufacture the pine timber so turpented at its sawmill plant at McComb City, Mississippi, as soon after the termination of the turpentine period of three (3) years as is practicable.

Seventh. The party of the first part agrees to allow the parties of the second part and hereby conveys to them the right to erect, construct and locate stores, storehouses, turpentine distilleries and other buildings necessary to be used in gathering, storing or manufacturing the turpentine and resin products gathered from said lands on the lands owned by the party of the first part, and to remove or sell for purpose of removal of said buildings or other fixtures at or before the termination of this contract, and the party of the first part further grants unto the parties of the second part to cut wood, building and barrel timber from its said lands necessary to be used in the manufacture and barreling the turpentine or resin products that are gathered from the aforesaid land, and the rights granted in this section shall be free from cost to the parties of the second part.

Twelfth. The parties of the second part, their heirs or assigns shall have the right to assign or transfer this lease, to lease or sublet the whole or any part of said timber for the whole or any part of said term to any reasonable person, firm or corporation, or to place any agent, employé or representative upon said land in the operation of such turpentine business without the knowledge or consent of the party of the first part.

Thirteenth. In consideration of the foregoing covenants and promises and the consideration paid and to be paid, the party of the first part hereby warrants and defends and will during the term of this contract and lease, warrant and defend the parties of the second part in the possession of the above-described land and premises.

In witness whereof, the parties to this contract and lease have hereunto set their hands and seals in duplicate this the 24th day of October, A. D. 1905.

J. J. White Lumber Company,
By J. J. White, Pres. [Seal].

J. A. Carr, for Carr Bros.

Attest: H. L. White, Sec.

The record in this case is voluminous, and we have given it a careful examination and patient consideration. We find it necessary, in order to properly construe the contract here, to take into consideration the circumstances and surroundings of the parties at the time the lease was agreed upon. The appellee wanted to lease the pine timber for turpentine purposes. The appellant lumber company had about 8,300 acres of land lying scattered in two counties in this state and two parishes in Louisiana, upon which stood merchantable pine trees suitable for turpentine purposes. Mr. Carr, appellee, testified that just prior to entering into the contract:

"They represented to me that they had something like about 8,000 acres of land there in Amite and Pike counties, and in St. Helena and St. Tammany parishes, which contained something like 6,900 acres of timber."

Appellee, Carr, drove out through the timber, inspecting it west of Osyka, in company with a timber man and engineer (Burke); and he and Burke afterwards examined the timber on the east side; that at this time appellant stated to appellee that they, appellant, had on the lands, "6,913 acres there or thereabouts, of timber"; that appellee understood "approximately" to mean "near about"; that "virgin timber" is a natural forest where the timber has never been removed." The testimony introduced by appellant as to the situation and conditions immediately preceding the making of the contract tends to show in substance, that appellant intended to lease to appellee only the timber which might be on the 8,300 acres of land, and that the 6,913 acres of timber was an estimate of the amount of acres of timber on the whole body of land, and, also, that the appellee's surveyor, Clark, in making his survey of the alleged shortage, wrongfully excluded from the survey certain timber included in the terms of the lease. The chancellor may have, in weighing the testimony, given only slight credence to appellant's proof. As to this, we do not question his discretion to do so; but the testimony of appellee may be considered by us as true in construing the contract of lease. With these surroundings and circumstances, the contract was entered into, and appellee boxed the trees for turpentine purposes for several years, until the storm of September, 1909, when all the timber was destroyed. Afterwards, this lawsuit followed.

[1-3] The lower court arrived at the shortage of 1,411 acres of timber by the survey made by Clark and Ball, employed by appellee. Clark testified as to the survey, and said that he had not surveyed the timber, but surveyed the old fields and swamps, and arrived at the amount of shortage in this way; and that he surveyed and included "only virgin timber," leaving out of his survey all other timber regardless of size, or whether or not it was merchantable pine timber suit-

able for turpentine purposes; and that he also left out certain timber land claimed by outside parties, the title to which is admitted in this record to be in the appellant. The whole testimony shows that there were "old field pines" and other pines that would square "more than four inches by four inches," and a large amount of timber that was not counted in the survey because it was not "virgin timber," but which was in fact merchantable pine timber, suitable for turpentine purposes. Clark further testified that he left out all 4x4 inches, square timber, unless it was "virgin timber," and that if his survey had taken in the timber in the old fields and swamps, appellee "would probably had as much as the lease called for"; that there were suitable pines in the swamps and old fields, but this was not "virgin timber." We cannot say from the whole proof in the record that the timber left out by appellee's surveyors, without authority of the contract, would not amount to 1,411 acres of merchantable pine timber suitable for turpentine purposes; and we think it would be more reasonable to conclude that the appellee's surveyor, Clark, was right when he said that, if the merchantable pine timber suitable for turpentine purposes in the old fields and swamps and on the lands claimed by outside parties, the cut-over lands, and timber squaring 4x4 inches, not "virgin timber," had been included in his survey, that appellee would have gotten all the lease called for. Now, let us look at the contract signed by all the parties to this controversy. It cannot be said to be a contract of warranty as to the quantity, but merely warrants the use and possession of the approximated quantity covered by the lease. It is to be construed against both parties alike. We think an examination of the contract will disclose the clear intent of the parties that the timber on the 8,300 acres of land was leased for \$25,015.80; and, while the instrument attempts to apportion or specify the number of acres of timber in each subdivision of land, yet this appears to be a mere estimate, and is qualified by the clause in the contract, "being in all approximately 6,913 acres of timbered land." "At the rate of \$3.60 per acre" is only a calculation based on the estimate of the number of timbered acres, which, when figured out, does not harmonize with the total amount of the purchase price. Appellee, Carr, testified that \$3.60 per acre was merely a basis for the lease. The appellee knew that no survey of the timbered land had been previously made by appellant, and that all parties were depending on an estimate of the timbered acreage made by Engineer Burke, as to the amount of timber on the 8,300 acres of land.

After an exhaustive study of the contract and evidence, and the authorities bearing on the questions involved, we are firmly convinced that the able chancellor erred in his

finding against appellant for the 1,411 acres under the terms of the contract in this case. There is no escape from the conclusion that the contract includes all merchantable pine timber suitable for turpentine purposes, regardless of whether it be virgin timber, cut-over timber, old field timber, swamp timber, or 4x4 timber, on the 8,300 acres of land. The surveyors Clark and Ball, for appellee, testified that they left out of their survey all of the merchantable pine timber suitable for turpentine purposes, except the "virgin timber." This was wrong. The contract does not specify "virgin timber." This being true, there was no way for the chancellor to determine, from the evidence before him, how much timber was left out by appellee's surveyors in their survey; and, being unable to say how much of the 6,913 acres is short, if any at all, and the burden of proof being on the complainant below to prove its case, the chancellor certainly could not rightfully decree that there were 1,411 acres short, or that there was any shortage whatever, or if any number of acres were short, that it was such a shortage or variation as to show fraud or deception, for which the lessee may recover the purchase money from the lessor. Taking all the testimony together, and considering the contract in connection therewith, we hold that appellee, under the terms of the lease, failed to establish the shortage of 1,411 acres of timber, as he excluded in his survey certain merchantable pine timber, suitable for turpentine purposes, which is included within the terms of the lease, and this excluded timber may have amounted to 1,411 acres, or it may have amounted to enough to make the variation, if any, inconsiderable; consequently, no recovery can be had. And this is true even though the contract here be construed as a contract "in acres" and not a contract in "gross," as urged by learned counsel for appellee. *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 210; *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64; *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *King v. Brown*, 54 Ind. 368; *Young v. Craig*, 2 Bibb (Ky.) 270; *Rogers v. Garnett*, 4 T. B. Mon. (Ky.) 269; *Clark v. Scammon*, 62 Me. 47; *Hurt v. Stull*, 3 Md. Ch. 24; *Hall v. Mayhew*, 15 Md. 551; *Slothower v. Gordon*, 23 Md. 1; *Phipps v. Tarpley*, 24 Miss. 597; *Mann v. Pearson*, 2 Johns. (N. Y.) 39; *Ketchum v. Stout*, 20 Ohio, 453; *Pendleton v. Stewart*, 5 Call (Va.) 1, 2 Am. Dec. 583; *Caldwell v. Craig*, 21 Grat. (Va.) 132.

[4] We hold, also, from the whole record in this case that the contract of lease is a contract "in gross," or "in bulk," and that no recovery can be maintained for the shortage or variation here, if any, it not amounting to deception or fraud, in the quantity of timbered land. *Am. & Eng. Ency. Law*, vol. 20, p. 875; *Phipps v. Tarpley*, *supra*; *Kerr v. Kuykendall*, 44 Miss. 137; *Tyson v. Har-*

desty, 29 Md. 305; *Hurt v. Stull*, supra; *Oaks v. De Lancey*, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628; *Pendleton v. Stewart*, supra; *Melick v. Dayton*, 34 N. J. Eq. 245; *Wadlington v. Hill*, 10 Smedes & M. (Miss.) 580; *Atkinson v. Sinnott*, 67 Miss. 502, 7 South. 289; *Waddell v. De Jet*, 76 Miss. 104, 23 South. 437; *Eps v. Saunders*, 109 Va. 99, 63 S. E. 428, 132 Am. St. Rep. 904; *Hodges et al. v. Denny*, 86 Ala. 226, 5 South. 492; 39 Cyc. 1314; *Phifer v. Steenburg et al.*, 66 Fla. 555, 64 South. 265.

In view of these conclusions, the case is reversed as to that part of the decree for the 1,411 acres of timber, and the claim dismissed, and in all other respects is affirmed. Let all the court costs be assessed equally against appellee and appellant.

Reversed in part, and affirmed in part.

SEAY v. LAUREL PLUMBING & METAL CO. (No. 18000.)

(Supreme Court of Mississippi. March 13, 1916.)

STATUTES ~~§~~138(2)—AMENDMENT—REFERENCE TO TITLE—CONSTITUTIONALITY.

Laws 1912, c. 232, entitled "an act to amend and enlarge section 3074, Code of 1906, and to extend and enlarge the provisions of same, so as to provide more effective liens for subcontractors, laborers and others employed"; section 1 being headed "Liens of Laborers and Subcontractors Extended—Code Amended," which amends and enlarges section 3074, without setting it forth, is violative of Const. § 61, providing that no law shall be revived or amended by reference to its title only, but the section or sections as amended or revived shall be inserted at length.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 206; Dec. Dig. ~~§~~138(2).]

In Banc. Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Suit by the Laurel Plumbing & Metal Company against T. H. Seay and another. From a judgment for plaintiff, defendant Seay appeals. Reversed and remanded.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. Halsell & Welch, of Laurel, for appellee.

SYKES, J. The Laurel Plumbing & Metal Company, a corporation, brought this suit in the circuit court of the second district of Jones county, against Dr. T. H. Seay and E. R. Russell, claiming a balance due of \$475.03, upon the following statement of facts, viz.: The appellant, Dr. Seay, let a contract to E. R. Russell for the building of a residence in the city of Laurel. The contractor, E. R. Russell, sublet to the appellee the plumbing and heating of the residence. Dr. Seay settled in full with the contractor, Russell, but the contractor failed to settle with the appellee, whereupon the appellee brought this suit, claiming a lien under chapter 232, Laws 1912, and obtained judgment for the amount sued for.

It is the contention of the appellant that this act is unconstitutional; and that is the only question to be decided by this court. The title to chapter 232, Laws 1912, is:

"An act to amend and enlarge section 3074, Code of 1906, and to extend and enlarge the provisions of same, so as to provide more effective liens for subcontractors, laborers and others employed."

Section 1 of said act is headed:

"Liens of Laborers and Subcontractors Extended—Code Amended."

As the title to the above act states, it is clearly intended by this act to amend and enlarge section 3074 of the Code of 1906. This act cannot be understood without a reference to the above section of the Code. It speaks of certain designated persons having a lien, but does not state upon what this lien attaches. It utterly fails to comply with section 61 of the Constitution of the state of Mississippi, which reads as follows:

"No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length."

The act in question is unconstitutional, because it fails to insert at length, in chapter 232, section 3074 of the Code of 1906, as amended.

Reversed and remanded.

HORTON v. KING et al. (No. 17280.)

(Supreme Court of Mississippi, Division A. March 13, 1916.)

TAXATION ~~§~~44—ASSESSMENT—VALIDITY OF STATUTE.

Laws 1908, c. 239, empowering the supervisors of Lincoln county to order an assessment for the year 1908 to be made in all respects as required for regular land assessments, and to be in lieu of the last regular assessment, does not violate Const. § 112, providing that taxation shall be uniform and equal throughout the state, and that property shall be assessed for taxes under general laws and by uniform rules.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. ~~§~~44.]

Appeal from Chancery Court, Lincoln County; G. G. Lyell, Chancellor.

Suit by Dr. W. H. Horton against George King and others. Decree for defendants, and plaintiff appeals. Reversed and remanded.

On March 16, 1912, appellant filed his bill in chancery for the confirmation of a tax title to certain land in Lincoln county described in the bill, alleging that said land was sold on the first Monday in April, 1909, for the taxes for the year 1908. Appellees answered, alleging that the land was assessed and sold under the provisions of chapter 239 of the Laws of 1908, which appellees alleged to be unconstitutional, as violative of section 112 of the Constitution of the state of Mississippi, which provides that:

"Taxation shall be uniform and equal throughout the state. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

The law of 1908 referred to is an act empowering the board of supervisors of Lincoln county to order an assessment of lands thereon for the year 1908; said assessment to be made in all respects as required by law for regular land assessments. The act provides that the board may within its discretion order this assessment at the regular April meeting 1908, and that it shall be in lieu of the last regular assessment of lands in said county, and be approved by the board at the time and in the manner prescribed by law for general land assessments and shall constitute the land assessment of said county till the next regular land assessment.

The board ordered the assessment authorized by this act, and taxes were not paid on the land in question, which was bought by appellant at the tax sale. The validity of the act of 1908 is the only question for decision.

H. H. Creekmore, of Water Valley, for appellant.

HOLDEN, J. The assessment of the property was made by the county assessor under chapter 239, Acts of 1908. We hold that the assessment and tax sale were valid.

Reversed and remanded.

JAYNE v. NASH LUMBER CO. (No. 17339.)
(Supreme Court of Mississippi, Division A.
March 18, 1916.)

LOGS AND LOGGING \S 3(15)—**TRESPASS—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.**

A complaint alleging that pursuant to a contract between plaintiff and defendant lumber company, the defendant, in 1911, cut timber to the amount of 53,000 feet, in 1912, to the amount of 10,000 feet, and owed a balance thereon of \$38.62, that the plaintiff notified defendant that he would expect rent for a mill site after 1911, for the first eight months of 1912 at \$10 a month and after that at \$20 a month, that after notice the defendant kept trespassing on complainant's land, and asking for the statutory damage for a willful trespass, with an itemized statement of indebtedness annexed thereto, and praying judgment for the amount thereof, stated a good cause of action.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. \S 12; Dec. Dig. \S 3(15).]

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Action by R. K. Jayne against the Nash Lumber Company. Demurrer to declaration sustained, and complainant appeals. Reversed and remanded.

This is an appeal from a judgment of the circuit court sustaining a demurrer to plaintiff's declaration, which is as follows:

Comes R. K. Jayne, plaintiff, and sues Nash Lumber Company, a corporation or partnership, which has been operating a mill on the lands of said Jayne, in Rankin county, state of Mississippi, and for cause of action says:

That in pursuance of a contract made and entered into by and between Nash Lumber Com-

pany (through its agent W. B. Nash) and said Jayne on the fourteenth (14) day of February, 1911, the said Nash Lumber Company did in the year 1911 cut timber to the amount of 53,201 feet and in the year 1912 did cut timber to the amount of 10,044 feet, besides a small amount of oak timber, and that he still owes a balance on said timber of \$38.62, the last money paid by him being June 8, 1911.

Jayne further states that in October, 1911, he wrote Nash insisting that he finish cutting his timber and not stray off onto other places, and notified said Nash that as he had had plenty of time to cut his timber, he should expect pay for the use of the mill site. Jayne has a copy of the letter to this effect. A little later, however, in a personal interview, Nash urged that he was doing the best he could and Jayne agreed not to charge for the use of the mill site for the balance of said year 1911, but notified Nash that he would expect rent after that. Still later, in the latter part of December, Nash approached Jayne and stated that he had bought the timber on the school eighty and would like to keep his mill there good part of the following year and would be willing to pay a reasonable rent. The rate of rent was never fixed. On July 31, 1912, Jayne wrote W. B. Nash, agent for said Nash Lumber Company, stating that he should expect rent for the mill for the first eight months (through August 31st) at \$10 a month, and that after that date the rent would be \$20 a month. In the same letter he notified Nash that he must not cut any more timber off of his (Jayne's) land. But contrary to this notice Nash did cut five trees, for which he has made no accounting. Jayne regards this a willful trespass and asks for statutory damage.

Furthermore Jayne states that he was the owner of the timber on the Country Club land, he having bought it of the county at the same time he bought that on his own place, that the Country Club afterward confirmed and ratified this purchase and that Nash and the Nash Lumber Company, not only had no right to cut any of this timber, but that they were especially shown the line between the two tracts and guarded against getting on the said club land, and for over a year they did strictly regard this line, but finally they did deliberately, as it appears, invade the said Country Club land and cut therefrom one hundred and fifty one (151) trees. That Jayne asks for this willful trespass full statutory damage of \$15 a tree.

That Jayne claims, therefore, that Nash Lumber Company is indebted to him:

Balance on timber during 1911 and 1912	\$ 38.62
Rent of mill site January 1 to August 31, inclusive.....	80.00
Rent of mill site September 1 to November 1, 1912.....	40.00
The willful cutting and removing of five (5) trees.....	75.00
The willful cutting and removing of 151 trees.....	2,265.00
Total	\$2,498.62

Now, therefore, the plaintiff, R. K. Jayne, sues the said Nash Lumber Company for the sum of \$2,498.62, and prays that judgment be given him.

Stingily & McIntyre, of Brandon, for appellant.

HOLDEN, J. This is an appeal from the circuit court of Rankin county. The declaration of plaintiff in the court below states a good cause of action, and the court erred in sustaining the demurrer thereto.

Reversed and remanded.

McLEOD v. CLARK. (No. 18009.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. VENDOR AND PURCHASER ⇨239(1)—BONA FIDE PURCHASERS—NOTICE OF PAROL RESERVATION.

Where an owner of land occupied by a storehouse sold a portion of the land onto which the building extended for a distance of nine feet, with a parol reservation of the right to remove the building, a subsequent purchaser of the land without notice of the reservation could maintain an action for trespass against the original grantor for removing the building against plaintiff's protest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 590; Dec. Dig. ⇨239(1).]

2. FIXTURES ⇨21—WHAT CONSTITUTES.

As between the vendor and vendee of land, a storehouse building erected on a solid foundation consisting of brick and wooden pillars and extending onto plaintiff's property for a distance of nine feet constituted a fixture, and the vendor had no right to remove the same against the protest of plaintiff, a successor in interest of the vendee.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 47-56; Dec. Dig. ⇨21.]

3. FRAUDS, STATUTE OF ⇨72(4)—PAROL RESERVATION OF INTEREST IN LAND.

A storehouse 30 feet wide and 100 feet long resting on brick and wooden pillars constitutes a part of the realty, and a parol reservation by the owner of the land on his conveyance of the part of the land occupied by the building of a right to remove such building was void under the statute of frauds as to the grantee and his successors in interest.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 118; Dec. Dig. ⇨72(4).]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action by Louis B. Clark against John A. McLeod. Judgment for plaintiff, and defendant appeals. Affirmed.

Stevens, Stevens & Cook, of Hattiesburg, for appellant. Tally & Mayson, of Hattiesburg, for appellee.

SYKES, J. The appellant, John A. McLeod, was the owner of a lot in the business portion of the town of Hattiesburg. This lot fronted 50 feet on Pine street and was 150 feet deep; on which lot was situated a one-story frame storehouse building about 30 feet wide and 100 feet long. This storehouse stood on pillars; some being brick, and some brick and wood. Appellant sold 20 front feet of this lot to one William Moffett, Jr., on April 3, 1907. Nine feet of the storehouse building was located on the part of the lot sold to Moffett. A number of the brick pillars and brick and wooden pillars were also on Moffett's land. There was also a side door opening on the Moffett side of the lot. The appellant gave Moffett a warranty deed to said 20 feet, but attempted to reserve, orally, title to the storehouse above mentioned. Shortly thereafter, Moffett sold the land to

one M. B. King, giving King notice of the oral reservation of title to the house in McLeod. On May 7, 1907, for a cash consideration of \$3,800, King sold the said lot by warranty deed to Louis B. Clark, the appellee in this case. Clark was not informed of the oral agreement reserving to McLeod the title to the house. The testimony in the case shows that, at the time of purchase by Clark of the lot, the storehouse was rented by the appellant to a tenant who was paying the rent to the appellant. The appellee Clark, however, did not know to whom the rents were being paid at the time of his purchase, neither did he know of the claim of McLeod to the entire house. Shortly after purchasing the lot, the appellee took the question of rents of the house up with the appellant, requesting that he pay him his part of the rent. This appellant declined to do, and told Clark that he claimed title to the entire house under the oral reservation above set forth. The appellee then, through his agent, notified Mr. McLeod in writing that he claimed his portion of the rents, and also that the appellant must not move or interfere with the house. Appellant subsequently removed the house from the land of the appellee, and appellee filed this suit in trespass for conversion and damages against appellant; which trial resulted in a verdict and judgment for the appellee for about \$325, from which appellant prosecutes this appeal.

[1-3] Before the sale of the 20 feet of the lot by McLeod to Moffett, he (McLeod) had placed the said storehouse, or rather about 9 feet of it, upon the lot sold to Moffett. When this was done, this fixture immediately became a part of the realty; consequently, any agreement or oral reservation of title as to the storehouse is absolutely null and void because contrary to the statute of frauds. It is an attempt, in effect, to convert real property into personal property by an oral agreement. After once becoming a part of the realty, the fixtures must always be dealt with as real property. This is quite different from an agreement made between parties that fixtures may be erected upon the land but are to remain personal property, because when the agreement is made the property is personal property and because of the agreement it never becomes real property. It needs no citation of authorities on our part to the effect that a house when built becomes a part of the real property; and, when it once becomes a part of the realty, any oral agreement as to its title is absolutely void.

"It is generally held in America that a parol sale of fixtures, part of the realty, by the owner of the fixture, is within the statute and void, and that to be valid it must be with the formalities prescribed for the sale of real estate. If by deed land is sold on which there is a fixture part thereof, a parol exception of the fixture is invalid. To be effective the exception must be according to the form requisite for the exception of other real estate." 19 Cyc. 1072.

Affirmed.

BANK OF COLLINS et al. v. MILLER.
(No. 17880.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

**ATTORNEY AND CLIENT —168—SUIT FOR FEE
—DECREE.**

In a suit in equity by an attorney against another attorney, the judgment debtor, its sureties, and the bank in which the amount of the judgment was deposited to recover the balance due plaintiff, he is entitled to a decree only against the bank which is shown to be in possession of the money.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 376; Dec. Dig. —168.]

Appeal from Chancery Court, Covington County; R. L. Bullard, Special Chancellor.

Suit by R. N. Miller against the Bank of Collins, E. L. Dent, and others. Decree for complainant against the named defendants, and they appeal, and complainant appeals from the decree dismissing the other defendants. Affirmed on the cross-appeal and as to the defendant bank, and reversed and dismissed as to defendant Dent.

Appellee filed a bill in chancery alleging that he and appellant Dent, as attorneys for one Parker, had recovered a judgment in the circuit court against the Wood Lumber Company and Rutledge, surety on the bond of said company, and that thereafter said lumber company had paid the amount of said judgment over to the Bank of Collins of which Rutledge was cashier, and that appellee and Dent were entitled to a portion of said amount as attorney's fees; that said bank had paid over to Dent the amount due appellee, except \$300, and Dent had remitted all of appellee's fees except said \$300. It seems from the record that appellant Dent claimed that appellee owed him \$300, and the Bank of Collins claimed that Dent owed it \$300, and that, after the bank had paid over to Dent all of the attorney's fees due appellee and Dent except the \$300, Dent then marked the judgment satisfied of record, and had receipted the bank for the full amount. Appellee prayed that he be given a personal decree against the defendants for the amount due him. The court entered a decree discharging the Wood Lumber Company and Rutledge, and against the Bank of Collins and Dent for the sum of \$300 and interest, from which decree both of said defendants appeal, and appellee prosecutes a cross-appeal from that part of the decree relieving the lumber company and Rutledge of liability.

D. A. McIntosh, of Collins, and R. B. Ricketts, of Jackson, for appellant Bank of Collins. Hirsh, Dent & Landau, of Vicksburg, for appellant E. L. Dent. R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, for appellee.

SYKES, J. The appellee R. N. Miller filed his original bill in the chancery court

of Covington county against the Wood Lumber Company, the Bank of Collins, J. F. Rutledge, and E. L. Dent, claiming that they were due him the sum of \$330, as a balance arising from several different transactions. The questions involved here are purely questions of fact, and were decided in the court below in favor of the appellee and against the Bank of Collins and E. L. Dent. The testimony in the case, however, shows that the Bank of Collins is in possession of this money, and not the defendant Dent. The appellee has filed in this court a confession of error as to the appellant E. L. Dent, and has agreed thereby that the decree of the chancery court may be reversed as to the said Dent, and the said Dent dismissed from this suit.

It is the opinion of the court that the decree of the court below is correct as to the defendant Bank of Collins, and is affirmed to that extent. Under the facts in the case, the decree as to the defendant Dent is erroneous, and is reversed and dismissed as to the said Dent.

Affirmed on cross-appeal.

MRS. K. EDWARDS & SONS v. FARVE.
(No. 17990.)

(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. FRAUDS, STATUTE OF —50(2) — AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

Under the provision of the statute of frauds, providing that contracts not to be performed within the space of one year from the making thereof must be in writing, the possibility of the death of the promisor within the year would not take the contract out of the statute, unless the death leaves the contract fully performed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 76, 77; Dec. Dig. —50(2).]

2. FRAUDS, STATUTE OF —49 — AGREEMENTS "NOT TO BE PERFORMED WITHIN ONE YEAR."

In an action on a contract for the delivery of 90,000 logs at the rate of 200 per day, an instruction that a suit cannot be maintained on an oral contract which was not to be performed within one year and if the jury believed that the logs could not be handled within one year at the rate of 200 a day they shall find for the defendant, was improperly refused, as the contract was within the statute of frauds, since the clause "not to be performed within one year" includes any agreement which by a reasonable interpretation in view of all the circumstances does not admit of its performance, according to its language and intention, within one year from the time of its making.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 74; Dec. Dig. —49.]

For other definitions, see Words and Phrases, First and Second Series, Not to be Performed.]

Appeal from Circuit Court, Hancock County; J. I. Ballenger, Judge.

Action by Cameron Farve against Mrs. K. Edwards & Sons. From verdict for the plain-

tiff, the defendants appeal: Reversed and remanded.

Bowers & Griffith, of Gulfport, and E. J. Gex, of Bay St. Louis, for appellants. Gex & Waller, of Bay St. Louis, for appellee.

SMITH, C. J. Appellee instituted this suit in the court below to recover of appellants damages alleged to have been sustained by him because of the breach by appellants of a parol contract, by which, according to his evidence, he agreed to deliver to appellants' mill all of the logs which could be obtained from the timber on certain described land, appellants agreeing to pay him therefor 35 cents per log, 200 logs, neither more nor less, to be delivered each day, excluding Sundays, till the entire number thereof which could be obtained from the land had been delivered. One of appellants' defenses is that the contract was void under the statute of frauds, because it was "not to be performed within the space of one year from the making thereof." In support thereof, evidence was introduced by them to the effect that there were between 90,000 and 100,000 logs on the land. The evidence for appellee was to the effect that the number of logs on the land was between 40,000 and 50,000. One of the instructions requested by appellants and refused by the court was as follows:

"The court instructs the jury for the defendant that a suit cannot be maintained on any oral contract which is not to be performed within the space of one year from the making thereof, and that therefore if the jury believed from the evidence that the number of logs to be handled could not be handled under the contract at the rate of 200 per day within one year from the beginning of said work they shall find for the defendant."

If the number of logs to be delivered under this contract amounted to 90,000, the contract could not have been performed within one year from the making thereof, for, since appellee could not be required to deliver nor appellants to receive more than 200 logs per day, it would have required 450 days to deliver them.

[1] But it is said by counsel for appellee "that this contract, being personal, could and would terminate with the death of either individual," which death might have occurred within the year, and therefore the contract is not within the statute. Conceding for the sake of the argument that the death of either party to this contract would have terminated it, it would certainly not thereby have been fully performed, and the rule is that:

"If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute (*Mallett v. Lewis*, 61 Miss. 105); but if his death would leave the agreement completely performed and its purpose fully carried out, it is not." *Jackson v. Railroad Company*, 78 Miss. 607, 24 South. 874; *Doyle v. Dixon*, 97 Miss. 208, 93 Am. Dec. 80.

[2] If the number of logs to be delivered amounted to 90,000, the contract sued on is within the statute of frauds and the instruction hereinbefore set out should have been given, for:

"The clause of the statute in regard to agreements 'not to be performed within the space of one year from the making thereof' means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making." 2 Elliott on Contracts, §§ 1277 and 1287.

Reversed and remanded.

KANTROVITZ v. McNEILL. (No. 17241.)
(Supreme Court of Mississippi, Division B.
March 13, 1916.)

JUSTICES OF THE PEACE \S 44(10)—JURISDICTION—AMOUNT IN CONTROVERSY—REDUCTION OF CLAIM.

A justice of the peace had jurisdiction of an action on an open account which was originally for more than \$200, but was reduced to a sum below that amount by the elimination of items, liability for which was denied by defendant.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 170, 171; Dec. Dig. \S 44(10); Action, Cent. Dig. § 552.]

Appeal from Circuit Court, Leflore County; Monroe McClurg, Judge.

Action by Jake Kantrovitz against Mrs. J. Y. McNeill. The circuit court on appeal from a justice of the peace dismissed the suit for want of jurisdiction, and the plaintiff appeals. Reversed and remanded.

Appellant, who was plaintiff in the court below, filed suit in the justice court against appellee on open account for \$195.25 for merchandise furnished appellee's minor sons. On the trial de novo in the circuit court, the case was heard by the judge, a jury being waived, and the suit ordered dismissed for want of jurisdiction in the court of the justice of the peace. The record shows that the account as originally presented by appellant to appellee was for \$202.65, and included certain items for "cleaning and pressing" amounting to \$7.40, which items appellee denied liability for, claiming that she had not authorized this expenditure. Before the suit was filed, the items aggregating \$7.40 were deducted from the account and suit brought for the balance.

Kimbrough & Kimbrough, of Greenwood, for appellant. S. R. Coleman, of Greenwood, for appellee.

HOLDEN, J. The facts as testified in the lower court show that the court of the justice of the peace had jurisdiction of this lawsuit; consequently, on appeal to the circuit court, that court had jurisdiction, and should not have dismissed the case.

This case comes within the rule announced in *Vicksburg Waterworks Co. v. Ford*, 97 Miss. 198, 52 South. 208.

Reversed and remanded.

MAYES v. COLEMAN et al. (No. 17980.)
(Supreme Court of Mississippi, Division A.
March 13, 1916.)

1. VENDOR AND PURCHASER — 73 — CONTRACTS—CONSTRUCTION.

Complainant, through her agent and attorney, entered into a written contract for the sale of lands, agreeing in consideration of \$200, to be paid in Jackson free of any exchange, and the further consideration of \$1,000, to be paid in cash at Jackson free of any exchange, to convey to defendant a specified tract of land. The contract provided that it should be sent to a bank and delivered to defendant when the first cash payment was sent to complainant at Jackson free of exchange, the deed to be made upon the same condition. New York exchange for the first payment was sent to complainant and collected by her in the usual course of business, and the contract delivered to the bank. Thereafter defendant borrowed from another a sum of money to make the last payment, which money was deposited in a bank at the place where the deed was to be delivered, and that bank drew a draft on New York, which was delivered to complainant's agent, who sent it to complainant's Jackson agent. The deed which was in the custody of the agent who received the draft delivered the deed, but the draft was not paid because of the insolvency of the drawing bank. *Held*, that under the contract, payment in cash at Jackson had to be made before defendant was entitled to a deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 112; Dec. Dig. 73.]

2. VENDOR AND PURCHASER — 187 — TERMS OF PAYMENT—WAIVER.

In such case, the fact that complainant had previously accepted and collected New York exchange for the initial payment, and that her agent received a New York draft, did not show a waiver of her right to demand payment in cash at the place agreed upon; there being no particular sanctity to a draft, and it falling under the same rule as a check, which is *prima facie* taken as conditional and not as absolute payment.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121, 374, 375; Dec. Dig. 187.]

3. MORTGAGES — 151(6) — VENDOR'S LIEN — PRIORITY.

In such case, defendant purchaser having notified the one from whom he borrowed of plaintiff's rights, the lender's rights under a deed of trust given by the purchaser are inferior to those of complainant.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 318, 332-336; Dec. Dig. 151(6).]

Appeal from Chancery Court, Lincoln County; P. Z. Jones, Chancellor.

Bill by Mrs. Lella B. Mayes against C. C. Coleman and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Geo. Butler and R. B. Mayes, both of Jackson, for appellant. H. V. Wall, of Brookhaven, for appellees.

SYKES, J. The appellant filed her original bill in the chancery court of Lincoln county, praying that she be adjudged to have a lien on certain lands described in said bill, for the balance of the purchase money of \$1,000 due her, and that said lands be sold to satisfy said indebtedness. The appellee C. C. Coleman denied that there was any balance due appellant. The appellee Bartlett Calcote, in his answer to said bill, states that he loaned C. C. Coleman the \$1,000 with which to pay off the balance due the appellant, and that he took a deed of trust on the lands to secure the same. A decree was rendered in the court below, dismissing the appellant's bill, from which decree this appeal is prosecuted.

The material facts in the case are as follows: On August 25, 1913, Robert B. Mayes, the agent and attorney for the appellant, and C. C. Coleman, one of the appellees, entered into a written contract for the sale of the lands involved in this controversy. The said contract provided, among other things, that:

"In consideration of \$200 to be paid in Jackson, Miss., free of any exchange, and the further consideration of \$1,000.00, to be paid in cash at Jackson, Miss., free of any exchange, said last amount to be paid on the first day of January, 1914, I agree, as the agent and attorney for Mrs. R. B. Mayes, to convey to C. C. Coleman a certain tract of land containing about two hundred and eighty acres, and lying and being in Lincoln county, Miss.," etc.

The other paragraph in said contract material to this controversy reads as follows:

"This contract is to be sent to the Brookhaven Bank and delivered to C. C. Coleman when the first cash payment is sent to me at Jackson, Miss., free of exchange. The deed is to be made on the first of January, upon the same condition."

New York exchange for \$200 was sent to the appellant, and collected by her in the usual course of business. Some time in December, 1913, the appellee Mr. Coleman became quite anxious to obtain possession of the land, and took the matter up with the husband of appellee, who wrote him that he would write to an attorney in Brookhaven to prepare the deed to the land and send to him for the signature of Mrs. Mayes. In this letter he further stated that the appellee could not get possession of the land before the 1st of January. On December 27th, the husband of appellant wrote the following letter to Mr. Luther L. Tyler, Brookhaven, Miss.:

"I send you the deed to Mr. Coleman. It is understood this deed is not to be delivered to him until he pays the balance due of \$1,000, free of exchange at Jackson. In other words, if you will turn to my contract you will see that it calls for payment of this money at this place without cost to me. Please be kind enough to see that this is done, and send your bill for preparation of the deed. He has paid me \$200.00, leaving a balance due of \$1,000. Kindly acknowledge receipt and oblige," etc.

The appellee C. C. Coleman, after the contract between himself and the appellant for

the purchase of the lands had been executed, borrowed from the appellee Calcote, the amount of \$1,000, with the agreement and understanding that Coleman was to pay this \$1,000 to the appellant as the balance of the purchase money due on said land. Coleman then gave Calcote a deed of trust on said land to secure the payment of this money. Calcote was fully informed as to the contract between the appellant and the appellee Coleman, and was also aware of the fact that this balance of \$1,000 was due the appellant; in fact, it was fully understood between Calcote and Coleman that this money was to be used for that purpose. The \$1,000 was then deposited in the Commercial Bank & Trust Company of Brookhaven to the credit of Mr. Coleman, with the understanding between Coleman, Calcote, and Mr. L. H. Baggett, assistant cashier of said bank, that the money was to be paid to the appellant as the balance due her for the purchase price of said land.

The testimony further shows that the appellee Coleman instructed Mr. Baggett to get the deed from Mr. Tyler and pay the balance of the purchase money on said land. It is also undisputed that Mr. Baggett was shown a copy of the contract for the purchase of these lands, executed by Mrs. Mayes and Mr. Coleman. Mr. Tyler took the deed to the bank and showed Mr. Baggett the letter from Judge Mayes accompanying the said deed. Mr. Baggett then rang up the appellee Coleman and read to him the deed, and asked him if the deed was satisfactory, to which Coleman replied that it was. Baggett then gave Tyler a New York exchange for the sum of \$1,000, payable to R. B. Mayes, who was the agent of appellant. This exchange was taken by the attorney, Mr. Tyler, and was immediately mailed to Judge Mayes at Jackson. It reached Jackson the last day of December, and was in due course deposited in one of the Jackson banks for collection on January 2d, January 1st being a legal holiday. When the exchange reached New York it was not paid, for the reason that the Commercial Bank & Trust Company of Brookhaven had failed. Judge Mayes immediately notified Mr. Coleman that the exchange had not been paid, and requested him to pay the said \$1,000, as the balance due for the purchase price of the land. Mr. Coleman declined to do so, claiming that he had paid the same through Mr. Baggett, as above set out.

The only two questions for decision here are: First, where were the payments to be made under the said contract, whether in Jackson or Brookhaven? and, second, if the payments were to be made in Jackson, under the contract, then was this provision of the contract waived by the appellant, or her agent, Judge Mayes?

[1] The contract states that both payments were to be made in cash, at Jackson, Miss.,

free of any exchange. We think a mere quotation of this part of the contract shows beyond all question that it contemplates that the money was actually to be paid to the appellant or her agent in Jackson. The fact that New York exchange was sent to the appellant in payment of the \$200, and was duly collected by the appellant, does not show in any way any waiver on the part of the appellant of the place at which these payments were to be made. The contract simply means that there is no payment until the money is actually in the hands of the appellant in Jackson; and the depositing of the New York exchange in each instance was in no wise an acceptance of the same as payment. It is contended by the counsel for the appellee that the phrase, "free of exchange" simply means that the face value of the exchange in Jackson should be the amount of the indebtedness. To this proposition we do not agree. The meaning of the contract is simply that the money must be actually paid in Jackson, and that the mere depositing of New York exchange, or of a check, is not an acceptance in lieu of the actual money, and does not become a payment until the money has actually been paid as called for by the said check or exchange.

[2] Counsel then contend that this part of the contract was waived by the appellant's authorizing her attorney, Mr. Tyler, to turn over the deed and get the money. A complete answer to this contention, however, is that Mr. Tyler did not get the money, but got a New York exchange; another answer is that Tyler did not have authority to accept New York exchange in place of the money. The authority under which Tyler acted was known to Mr. Baggett, who was the agent of the appellee Coleman in the payment of this money. When Mr. Tyler was sent the deed by Judge Mayes, he was fully instructed about the contract and that payment should be made in Jackson; and a copy of the contract was sent him, which copy was shown by him to Mr. Baggett, the assistant cashier of the bank, who was representing the appellee Coleman in this transaction. The record in this case fails to disclose any testimony whatever upon which the contention of a waiver of this clause of the contract can be based. In the case of the Bank of Greenville v. Kretschmar et al., 91 Miss. 608, 44 South. 930, the question of what effect the delivery of a check to a creditor has as to payment of a debt was discussed by the court as follows:

"In 22 Am. & Eng. Ency. of Law (2d Ed.) page 569, it is said: 'It is a well-settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the prima facie presumption arises that the check was taken merely as conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check.'"

In the same opinion it is further stated:

"A check is not payment, unless the check is paid, unless it is specially agreed by the parties that the check, whether good or not, shall have that effect; and the burden of proof always rests on the party asserting it to show that the check was to have that effect. The presumption is against its being so received, and this presumption can only be overcome by clear proof to the contrary."

[3] New York exchange has no more sanctity than a check. We therefore hold that there was no payment of the \$1,000 to the appellant. At the time the appellee Calcote took his deed of trust on this land, he was aware of the claim of the appellant. Consequently his claim is subject to the superior claim of the appellant.

Reversed and remanded.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. LUNDY. (No. 17293.)

(Supreme Court of Mississippi, Division A. March 13, 1916.)

CORPORATIONS §507(11)—NOTICE TO CORPORATION—SUFFICIENCY OF COMPLIANCE.

Code 1906, § 920, provides that process may be served on the agent of a corporation within the county where suit is brought regardless of the character of the agency, but requires that the clerk, when return of the service is made, shall mail a copy of the process to the home office of the corporation by registered letter and file a certificate of such mailing, in the absence of which no judgment shall be valid. Summons was issued under the statute, but the clerk failed to mail the notice as required. *Held*, that default judgment thereafter granted in favor of the plaintiff was erroneous; there being no valid notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1991, 1993, 1994, 1995; Dec. Dig. §507(11).]

Appeal from Circuit Court, Neshoba County; C. L. Dobbs, Judge.

Action by Slocum Lundy against the Eminent Household of Columbian Woodmen. Default judgment for plaintiff, and defendant brought certiorari to the circuit court, wherein judgment was rendered for plaintiff, and defendant appeals. Reversed and remanded.

On April 20, 1912, appellee brought suit in the court of a justice of the peace of Neshoba county against appellant for the sum of \$100. A summons was issued directed to appellee, and on April 24th the constable made the following return:

"I have this day executed the within writ be delivered to J. F. Guthrie, consul commander, and to Melton Lundy, agents and representatives of defendant, whose place of business is in Neshoba county, Miss., district No. 1 thereof, a true copy of this writ."

On May 1st, the return day of the court, a judgment by default was rendered against appellant. No notice was given appellant by the justice of the peace, and no copy of the summons mailed to him as directed by section 920 of the Code of 1906.

After the time for an appeal to the circuit court had elapsed appellant learned of this judgment, and filed its petition in the circuit court asking for a writ of certiorari. The record was brought up, and on the hearing before the court, a jury being waived, a judgment was rendered against the appellant, from which an appeal is taken.

Section 920 of the Code is as follows:

"920. *Process may be Served upon Agent.*—Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing.

Huddleston & McKisson, of Decatur, H. L. Austin, of Philadelphia, and J. C. Ward, of Sumner, for appellant.

HOLDEN, J. The judgment of the justice's court was erroneous on account of no legal service on the defendant.

Reversed and remanded.

MOLPUS v. BOSTIC LUMBER & MFG. CO. (No. 17304.)

(Supreme Court of Mississippi, Division A. March 13, 1916.)

1. JUSTICES OF THE PEACE §39½ — JURISDICTION—RESIDENCE OF DEFENDANT—VALIDITY OF JUDGMENT.

A justice of the peace has no jurisdiction of a cause against a resident of another district where the debt was contracted and the liability incurred, and which had a justice qualified to act, and default judgment in such cause is void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 235; Dec. Dig. §39½.]

2. JUSTICES OF THE PEACE §135(6)—JURISDICTION — JUDGMENT — RESTRAINING ENFORCEMENT.

Where a default judgment of a justice of the peace is void because he had no jurisdiction of the cause, the purchaser of land from the debtor after the judgment who sought to have enjoined the sale of the lands under execution on the judgment need not show a good defense to the action in order to restrain the sale.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 442; Dec. Dig. §135(6).]

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Chancellor.

Action by Mrs. M. J. Molpus against the Bostic Lumber & Manufacturing Company. From an order sustaining demurrer to the bill, plaintiff appeals. Reversed and remanded.

W. L. Scott, of Meridian, for appellant. Sams & McCall and Baskin & Wilbourn, all of Meridian, for appellee.

SYKES, J. Appellant here (complainant below) filed an original bill in the chancery court of Lauderdale county against the appellee (defendant), seeking to enjoin the sale of certain lands therein described under an execution issued upon a judgment obtained in a justice of the peace court in Meridian against the son of complainant. The bill alleges, in substance, that the appellant purchased the lands for a valuable consideration from her son after the above judgment was enrolled against him, but before the execution thereon was issued. She alleges that the judgment was void because the suit was filed in district No. 1 of Lauderdale county, when the defendant (her son) was a resident citizen of district No. 5, and was a freeholder and householder of said district, and that the debt was contracted and all the liability incurred in said district No. 5; also that at the time her son was sued in district No. 1 there was a justice of the peace acting and duly qualified to try the suit in said district No. 5. The bill of complainant followed section 2724 of the Code of 1906 as to these allegations, and shows that the justice of the peace of district No. 1 had no jurisdiction to try said cause. A judgment was taken by default in said suit. A demurrer was sustained to the bill upon two grounds. The first is that the justice of the peace had jurisdiction, and that the judgment sought to be enjoined is therefore valid; second, that complainant, while seeking relief in equity, has failed to offer to do equity; that before she can maintain her bill in this case it was necessary for her to show that there is a valid defense to the claim on which the judgment in the justice of the peace court was founded.

[1] As to the first proposition, this court has held under practically a similar statement of facts that a judgment obtained as this was is a void judgment and may be perpetually enjoined. The court in part says:

"As the justice of the peace of district No. 4 did not acquire jurisdiction of the cause of action between the parties, the judgment against Chew was void, and the decree giving him a perpetual injunction against it is approved." Hilliard v. Chew, 76 Miss. 765, 25 South. 459.

[2] Defendant relies upon the cases of Stewart v. Brooks, 62 Miss. 493, and Walker-Durr Co. v. Mitchell, 97 Miss. 231, 52 South. 583, to maintain the proposition that it de-

volved upon complainant to state facts in her bill showing a valid defense to the claim on which the judgment was obtained. The case of Stewart v. Brooks, in 62 Miss., was where Brooks filed the bill for an injunction against the execution of a judgment recovered against him. He failed to allege that the notes upon which he was sued had been paid, or that he had a good defense to them. In the case of Walker-Durr & Co. v. Mitchell, in 52 South., a bill to enjoin the issuing of an execution on a judgment was filed by the Walker-Durr Company against Mrs. Mitchell and others. The material facts in that case were that Mrs. Mitchell had rented some land to one Hugh Bass, and the two bales of cotton raised on this land, upon which Mrs. Mitchell had a landlord's lien, were sold to the Walker-Durr Company. An attachment was sued out by Mrs. Mitchell, and these two bales of cotton were levied upon. Thereupon the Walker-Durr Company signed the replevin bond of the tenant sued. Judgment was duly rendered in favor of the landlord and against the defendant and Walker-Durr Company as surety for the amount of \$100. In its opinion the court in part said:

"It was incumbent on Walker-Durr Company to allege in their bill and prove that they had a valid defense to the demand on which the judgment was founded."

In the present case, however, the complainant was not a party to the suit in the justice of the peace court against her son. At that time she was simply a creditor of her son just as was the defendant in this case. Her son had a perfect right to sell his property to her for a valuable consideration. By purchasing same she in no way became responsible to this defendant or to any other creditor for any debts due them by her son. Since the judgment in this case is absolutely void, there was no lien whatever on the property bought by complainant from her son. In the two cases relied upon by the defendant there was a claim of a debt against each of the parties who filed his bill for an injunction; consequently it was necessary for them to allege in said bill facts showing that the debt was not a valid one against them before they could have any standing in a court of equity. In this case, however, the complainant was neither directly nor indirectly responsible for any debt due by her son to the defendant in this case.

Reversed and remanded.

ADAMS COUNTY v. CATHOLIC DIOCESE OF NATCHEZ. (No. 18914.)

(Supreme Court of Mississippi, Division A. March 13, 1916.)

1. TAXATION §241(2)—EXEMPTIONS—CHARITABLE SOCIETIES.

Code 1906, § 4251, cl. "d," provides: "All property, real or personal, belonging to any re-

ligious or charitable society, and used exclusively for the purpose of such society and not for profit," shall be exempt from taxation. Section 4252 provides that all the property, real and personal, and the revenues derived therefrom, belonging to any religious or charitable society or benevolent order on the lodge system, where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes. *Held*, that lands of an incorporated Catholic diocese, the rents of which were used to maintain orphans' homes, were exempt; the two sections being harmonious, the latter merely extending the exemption of the former.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 390; Dec. Dig. ¶ 241(2).]

2. TAXATION ¶ 204(2) — EXEMPTIONS — CONSTRUCTION OF STATUTES.

Statutes creating exemptions from taxation must be strictly construed; but the rule is relaxed as to exemptions to religious and educational institutions, as to which legislative intention governs.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 322; Dec. Dig. ¶ 204(2).]

3. STATUTES ¶ 197 — CONSTRUCTION — EXEMPTIONS — "AND."

The conjunction "and" will be construed as "or" in Code 1906, § 4252, providing for exemption of "all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes," so as to exempt property of religious institutions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 275; Dec. Dig. ¶ 197.

For other definitions, see Words and Phrases, First and Second Series, And.]

Appeal from Circuit Court, Adams County; R. E. Jackson, Judge.

Proceeding by the Catholic Diocese of Natchez against Adams County. Judgment for plaintiff, and defendant appeals. Affirmed.

Richard F. Reed, of Jackson, for appellant. Gerard Brandon, of Natchez, for appellee.

HOLDEN, J. This is an appeal from the judgment of the circuit court of Adams county abating and striking from the tax rolls certain real estate in the city of Natchez, rented and bearing revenue, assessed to the Catholic Diocese of Natchez, and declaring that the property, the legal title to which is in the diocese, is exempt from assessment and taxation. A jury was waived, and the case was heard by the judge upon the record of appeal from the board of supervisors of Adams county and an agreed statement of facts. From a judgment adverse to the appellant, it appeals here. The agreed statement of facts is as follows:

"That the allegations and statements in the petition of complainant addressed to the board of supervisors, setting forth the assessments complained of and the proceedings had in said board, leading up to the rendition of the final order appealed from, are true and correct as stated.

"That the legal title to the properties assessed is correctly stated in said petition to the board of supervisors (praying to have the assessment thereof abated and stricken from the rolls), to be in the Catholic Diocese of Natchez, Incorporated; but said title is held in trust for the Catholic congregation of St. Mary's Cathedral in the City of Natchez, Adams county, Mississippi.

"That the Right Reverend John E. Gunn is the Bishop of Natchez, embracing in his diocese and jurisdiction all the Catholic parishes and missions in the state of Mississippi, with his episcopal residence in the city of Natchez, and that the Very Reverend P. C. Hayden is Vicar General of Natchez, with his residence in said city.

"That the plaintiff 'Catholic Diocese of Natchez' is a religious corporation duly incorporated under the laws of the state of Mississippi, its charter of incorporation having been approved by the Governor on September 7, 1905, and being now recorded in Book No. 13, page 546, of the Books of Incorporation in the office of the secretary of state, and also in Book 4-A, page 817, of the Records of Deeds of Adams county, Mississippi.

"That a certified copy of said charter will be herewith filed, and is here referred to as Exhibit A to this agreed statement of facts.

"That said Right Reverend John E. Gunn, as Bishop aforesaid, is ex officio the chief officer of said religious corporation, and said Very Reverend P. C. Hayden, as Vicar General of Natchez aforesaid, is ex officio the secretary thereof.

"That prior to the incorporation of the said Catholic Diocese of Natchez the legal title of the several properties, the assessment of which is complained of and appealed from (as well as other properties hereinafter mentioned), was vested in the Right Reverend Thos. Heslin (since deceased), the then Bishop of Natchez, who held the title thereto in trust for the aforesaid Catholic congregation of St. Mary's Cathedral, a religious society of Catholics in said city of Natchez, to whom the equitable and beneficial interest and title belonged.

"That after the incorporation of said 'Catholic Diocese of Natchez' and pursuant to the object and purpose thereof, and of the authority given to it by said charter 'to receive and hold the titles to all the property, real and personal, belonging to the several Catholic congregations, parishes, and missions in the state of Mississippi, in trust for said congregations, parishes, and missions, respectively,' the said Right Reverend Thos. Heslin, Bishop of Natchez aforesaid, on September 1, 1906, conveyed to said corporation 'Catholic Diocese of Natchez,' in trust for said Catholic congregation aforesaid, by deeds of record, all the properties theretofore held in trust by him as aforesaid, in the county of Adams, state of Mississippi, being the two pieces of property assessed (which assessment is appealed from), and also the land at the southeast corner of Union and Main streets, in Natchez, on which is located the St. Mary's Cathedral and the Bishop's residence; the land at the southwest corner of Main and Union streets, in Natchez, on which is the Cathedral School and the dormitory occupied by the Brothers in charge of said school; the old Catholic Cemetery; the new Catholic Cemetery; certain cemetery lots formerly part of 'potter's field'; two lots of land adjoining Devereux Hall Orphan Asylum and used by said asylum. Afterwards R. Lee Parker conveyed to said corporation 3¼ acres of land in the county (outside the city), upon the same trusts, on which is located a Catholic mission church.

"That the above-mentioned property is all the property in Adams county, Mississippi, the title to which is vested in trust, as aforesaid, for said Catholic congregation, in said corporation.

"That, as already set forth, the Catholic Diocese of Natchez, Incorporated, holds under its charter title to properties in trust only for the several Catholic congregations, parishes, and missions in Mississippi, to which the equitable title and beneficial interest may belong. That said corporation is not for profit. That there is no stock issued and no dividends declared. That the two properties assessed are leased to tenants. That all the revenues therefrom are used for benevolent purposes and no other, and not for profit, to wit: Every cent of the revenues derived from said properties are used and expended in the benevolent work of maintaining, supporting, and providing for poor and dependent orphans in the St. Mary's Orphan Asylum for Girls and the Devereux Hall Orphan Asylum for Boys, in Natchez, Miss., which institutions are supported and maintained by the Catholic congregation of Natchez, with the assistance of other Catholic congregations in Mississippi."

Briefly stated, the facts in the case are the Catholic Diocese of Natchez is a religious society, incorporated, and owns, amongst other church property, two houses in Natchez which it leased to tenants and received rent therefor; that it used this property, not for profit to the society, but used the revenue in rent therefrom for charitable and benevolent purposes in the city of Natchez.

[1] The question presented here is whether or not these two pieces of property, not being used exclusively for the purposes of such religious society, but were leased, and bore a revenue in rent, are subject to taxation under the laws of Mississippi. Section 4251 of the Code of 1906, providing what property shall be exempt from taxation, in the first sentence of clause "d" of the section reads:

"All property, real or personal belonging to any religious or charitable society, and used exclusively for the purpose of such society and not for profit."

While this provision was then in section 3744, Code of 1892, the case of *Ridgeley v. Redus*, 78 Miss. 352, 29 South. 163, was decided, holding that a benevolent order on the lodge system was not entitled to exemption from taxation of property owned by the lodge, not being used exclusively for the purpose of such charitable society. And while this case was pending on appeal to the Supreme Court the Legislature enacted section 4252, Code of 1906, which reads as follows:

"All public libraries and buildings in which the free public schools are taught, and the lots on which the same are situated, not exceeding four acres in dimensions, without cost to the state or any county or municipality thereof for rent or lease, and also the real and personal property of library associations, used for library purposes where no dividends are declared, and to which the children attending the public schools have free access; and all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes."

The appellant urges that there can be no exemption here under section 4251 of the Code of 1906, as this statute was construed in the case of *Ridgeley Lodge v. Redus*, supra,

in which the court said in substance that under the facts in that case the exemption could not be maintained as the property was used for profit and not for charity, and that even though the income from the property be used for charity, yet under the statute, section 4251, Code of 1906, the exemption could not be sustained. We agree with counsel for appellant that under section 4251, Code of 1906, the appellee could not maintain exemption from taxation of the property here in question, but we think that the appellee may safely rely upon section 4252, Code 1906, to sustain its contention that the property in this case is exempt from taxation in this state. Counsel for appellant urges that there is a conflict between sections 4251 and 4252, and that this conflict cannot be reconciled and that the two sections cannot be read harmoniously together, and that section 4252 repeals section 4251.

In this we disagree with the learned counsel for the appellant, as it is clear that section 4252, Code of 1906, does not conflict with nor curtail the exemption given in 4251, but simply extends the exemption so as to apply to property owned by religious societies when not used exclusively for the purposes of the society but producing revenue, provided the revenue is used for benevolent purposes and not for profit. We concede that statutes exempting persons and property from taxation must be strictly construed, but it is also true that there is a relaxation of the rule in the case of statutes of exemption applicable to religious and educational institutions, and that the supreme test is in the intent of the Legislature. In *State v. Fisk University*, 87 Tenn. 241, 10 S. W. 286, the court holds:

"The intention of the Legislature must govern in ascertaining the extent of tax exemptions, and when the exemption is to religious, scientific, literary, and educational institutions, the same strict construction will not be indulged in that would be applied to corporations created for private gain or profit."

In *Holly Springs v. Marshall County*, 104 Miss. 761, 61 South. 703, Justice Reed said:

"In construing statutes, we must look to the intention of the Legislature, the spirit of the law, and the policy and purpose of the same."

It is well-settled law in construing statutes that the letter must yield to the spirit and intent of the act, and where there is a conflict the intent will control the construction. The latter part of section 4252, Code of 1906, which reads as follows:

"And all the property, real and personal, and the revenue derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes"

—when properly construed so as to obtain the intent of the Legislature, clearly means that the revenue derived by any religious society used for benevolent purposes shall be declared exempt from taxation.

[2, 3] It is argued with considerable force by counsel for appellant that the conjunction "and" used between "fraternal" and "benevolent purposes" in the latter part of this act should be strictly construed, and means that, unless the revenue derived by the religious society here is used for both fraternal and benevolent purposes, the appellee cannot claim the exemption, and that the religious society here is not a fraternal or benevolent order on the lodge system. But we disagree with counsel in this construction, and we hold that, in order to obtain the policy and intent of the statute, the disjunctive "or" should be used and read into the act in the place of the conjunctive "and," conjoining "fraternal and benevolent purposes" referred to in the last part of this provision of section 4252. If this was not the intent of the Legislature that the revenues derived by religious societies and used for benevolent purposes should be exempt, why the absurdity of mentioning "any religious or charitable society" in the act at all? And to hold that the contention of the appellant is correct would be to read entirely out of section 4252 any benefit whatever "to any religious or charitable society," and would limit the benefit to a benevolent and fraternal order on the lodge system alone. We think that such a construction of this statute is not justified by its terms. It is held that:

"Whenever necessary to effectuate the obvious meaning of the Legislature, conjunctive words may be construed as disjunctive, and vice versa." 38 Cyc. 1123, and cases cited.

This seems to be the settled rule. People v. Rice, 138 N. Y. 151, 33 N. E. 846; Elsfeld v. Kenworth, 50 Iowa, 389; Collins Granite Co. v. Devereux, 72 Me. 422; Williams v. Poor, 65 Iowa, 410, 21 N. W. 753; Price v. Forrest, 54 N. J. Eq. 669, 35 Atl. 1075; Bates' Ann. St. Ohio 1904, §§ 4947, 6794; Rev. St. Wyo. 1899, § 2724.

The judgment of the lower court is affirmed.

Affirmed.

Ex parte CAMPBELL (No. 17439.)
(Supreme Court of Mississippi. March 15, 1916.)

Appeal from Circuit Court, Hinds County; P. Z. Jones, Chancellor Presiding.
Application of A. G. Campbell for a writ of habeas corpus. Appeal dismissed.

PER CURIAM. Appeal dismissed.

CHERRY v. MOBILE & O. R. CO.
(No. 17384.)

(Supreme Court of Mississippi. March 15, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between Lelia May Cherry and the Mobile & Ohio Railroad Company. From the judgment Lelia May Cherry appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

J. J. NEWMAN LUMBER CO. v. LUCAS.
(No. 18002.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Forrest County; J. M. Arnold, Judge.

Action between the J. J. Newman Lumber Company and Joseph Lucas. From the judgment, the lumber company appeals. Affirmed. See, also, 67 South. 216, 451.

S. E. Travis, of Hattiesburg, for appellant. Sullivan, Conner & Sullivan, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

SUTTLE v. WILLIAMS. (No. 17278.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between Ben F. Suttle and J. P. Williams. From the judgment, Suttle appeals. Affirmed.

Stingily & McIntyre, of Brandon, for appellant. Powell & Thompson, of Jackson, for appellee.

PER CURIAM. Affirmed.

PERKINS v. CITY OF CORINTH et al.
(No. 17313.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action between S. E. Perkins and the City of Corinth and others. From the judgment, Perkins appeals. Affirmed.

W. C. Sweat, of Corinth, for appellant. Lamb & Warriner, of Corinth, for appellees.

PER CURIAM. Affirmed.

ADAMS COUNTY v. ST. JOSEPH'S SOCIETY FOR COLORED MISSIONS.

(No. 18913.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Adams County; R. E. Jackson, Judge.

Action between Adams County and the St. Joseph's Society for Colored Missions. From the judgment, the County appeals. Affirmed.

Richard F. Reed, of Jackson, for appellant. Gerard Brandon, of Natchez, for appellee.

PER CURIAM. Affirmed.

H. WESTON LUMBER CO. v. LOTT.
(No. 17963.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Chancery Court, Hancock County; J. Morgan Stevens, Chancellor.

Action between H. Weston Lumber Company and W. J. Lott. From the judgment, the Lumber Company appeals. Affirmed.

Gex & Waller, of Bay St. Louis, for appellant. J. E. Stockstill, of Picayune, and W. W. Stockstill, of Bay St. Louis, for appellee.

PER CURIAM. Affirmed.

GATES v. MODERN ORDER OF PRAETORIANS. (No. 18019.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Chancery Court, Forrest County; J. Morgan Stevens, Chancellor.

Action between Mrs. Birdie Gates and the Modern Order of Praetorians. From the judgment, Mrs. Gates appeals. Affirmed.

Tally & Mayson and Sullivan, Conner & Sullivan, all of Hattiesburg, for appellant. Mayes & Mayes, of Jackson, for appellee.

PER CURIAM. Affirmed.

KITCHENS et al. v. BANK OF NEW ALBANY. (No. 17224.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Union County; H. K. Mahon, Judge.

Action between J. M. Kitchens and others against the Bank of New Albany. From the judgment, the parties first mentioned appeal. Affirmed.

R. H. & J. H. Thompson, of Jackson, and H. D. Stephens, of New Albany, for appellants. Stephens & Kenneday, of New Albany, for appellee.

PER CURIAM. Affirmed.

STANDARD OIL CO. v. GOLDSTEIN.* (No. 18039.)

(Supreme Court of Mississippi. March 13, 1916.)

Appeal from Circuit Court, Jones County; J. M. Arnold, Judge.

Action by the Standard Oil Company against S. Goldstein. From the judgment, the Oil Company appeals. Affirmed.

Street & Street, of Laurel, for appellant. S. Freeman and W. J. Pack, both of Laurel, for appellee.

PER CURIAM. Affirmed.

LORD et al. v. CURRY.(Supreme Court of Florida. Jan. 26, 1916.
Rehearing Denied March 2, 1916.)

(Syllabus by the Court.)

1. PUBLIC LANDS §25 — TITLE DERIVED FROM GOVERNMENT—OFFICIAL SURVEY.

In an action of ejectment whereby it is sought to recover the possession of a tract of land and the basis of the title of the plaintiffs is a patent to the state of Florida from the United States of America, conveying a certain fractional section, which embraces government lot 1, which patent refers to the official survey so as to make it a part thereof, the plaintiffs deriving their title to such government lot by mesne conveyances, and it is claimed that the tract of land the recovery of the possession of which is sought forms a part of such government lot, such official survey, including the government plat and field notes, must control in determining such claim.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 33, 34; Dec. Dig. §25.]

§25 For other cases see same topic and KEY-NUMBER in al. Key-Numbered Digests and Indexes

*For opinion on motion to retax costs, see 71 South. 570.

2. BOUNDARIES §54 — GOVERNMENT SURVEY—GOVERNMENT LOT.

Where the official government plat shows that government lot 1 of a fractional section of land contains 21.73 acres and it also appears from such official plat and field notes that the government surveyor stopped his survey at what he called a "lagoon," and it further appears from such plat and field notes that the surveyor did not intend to define the sinuosities of the beach or to make the banks of the lagoon the boundary of the lot, but his intention is rather indicated to define by boundary lines the land embraced in such lot 1, and not to include a tract of land, whether marsh land, tide land, or otherwise, containing about 15 acres, which lies off the point at which the official survey stopped, such tract of land must be held not to be included within the confines of such government lot 1. It makes no difference whether the southwest point of the survey of such lot stopped at water that may have been between that point and the land beyond, or whether there was a narrow strip of land from the point at which the survey of lot 1 stopped, connecting the land beyond, it must be held that the land beyond such point was left as unsurveyed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. §54.]

3. PUBLIC LANDS §61(1)—PATENTS—PROPERTY CONVEYED—SWAMP LAND.

Swamp, boggy, and marsh land is properly treated as land, and land does not pass under a patent or deed as an appurtenance to land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192, 194, 207, 210, 212; Dec. Dig. §61(1).]

4. BOUNDARIES §54 — NAVIGABLE WATERS §37—GOVERNMENT SURVEY—CONVEYANCE OF RIPARIAN RIGHTS—PATENTS.

Where the facts and circumstances connected with a government survey affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries; and a patent to a fractional section of land does not necessarily confer riparian rights because of the presence of meanders.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. §54; Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. §37.]

Error to Circuit Court, Manatee County; F. A. Whitney, Judge.

Ejectment by Franc W. Lord and others against Frank A. Curry. Judgment for defendant, and plaintiffs bring error. Affirmed.

Singeltary & Reaves, of Bradentown, for plaintiffs in error. C. C. Whitaker, of Tampa, for defendant in error.

SHACKLEFORD, J. Franc W. Lord and others instituted an action of ejectment against Frank A. Curry for the recovery of the possession of the following described parcel of land:

"A tract of land in lot No. one (1), section one (1), township thirty-nine (39) south, range eighteen (18) east, beginning at a point south 80 degrees 11 minutes west, and distant nineteen hundred and forty-one (1,941) feet from the meander corner on the east boundary of said section on the north side of Roberts Bay, running thence south 8 degrees 30 minutes west 110 feet; thence south 68 degrees 45 minutes west 67.5 feet; thence north 58 degrees 30 minutes west 67 feet; thence north 3 degrees 00 minutes west 85.5 feet; thence north 84 degrees

45 minutes east 141 feet to the point of beginning."

The amended declaration is in the usual statutory form, to which the defendant filed two pleas, not guilty, and a denial of possession. Issue was joined upon these pleas, and a trial was had before a jury, which resulted in a verdict and judgment in favor of the defendant, and which judgment the plaintiffs have brought here for review. Thirty-four errors are assigned, all of which, with the exception of the first three and the last, are based upon instructions given at the request of the defendant and the refusal of certain instructions requested by the plaintiffs. The first three assignments are based upon the overruling of objections interposed by the plaintiffs to certain questions propounded by the defendant to two witnesses introduced in his behalf while the last assignment is based upon the overruling of the motion for a new trial, which motion consists of 26 grounds, those urged before us questioning the sufficiency of the evidence to support the verdict. It will not be necessary to discuss these assignments in detail, though we have carefully read the transcript of the record, as well as the full and able briefs which have been presented by the counsel for the respective parties, and have considered all the assignments which have been argued. We think that the application of a few well-settled principles of law to the facts established by the evidence adduced will prove decisive of the case.

[1] It is admitted by the respective counsel for the parties litigant that the real party in interest as plaintiff is the Sarasota-Venice Company, a Florida corporation, the nominal plaintiffs being the heirs of prior owners who were seised of government lot 1 of fractional section 1, township 39 south, of range 18 east, at the time the defendant entered into the possession of the land in controversy, but such prior owners having subsequently conveyed their interest the entire beneficial interest of such government lot 1 of fractional section 1 is now vested in the Sarasota-Venice Company. It is further admitted that the evidence establishes that such government lot 1, together with other lands, was patented to the state of Florida by the United States of America on the 25th day of August, 1856, under an act of Congress of September 28, 1850 (9 Stat. 519, c. 84) and that by mesne conveyances the plaintiffs acquired the title thereto and were the owners thereof at the time of the institution of this action, and that the defendant was at such time in the actual possession of the land in controversy. The following statement in the brief filed by the plaintiffs is not questioned by the defendant, but is practically admitted by him to represent correctly the points in dispute which are presented for determination:

"At the outset the court's attention is called to the fact that the plaintiffs (that is, the real plaintiff, the nominal plaintiffs being the heirs of

prior owners of the land who owned title at the time defendant took possession) are the undisputed owners of lot 1, section 1, township 39 south, range 18 east. That this lot as surveyed and platted by the United States government in 1847 is a triangular body of land with a given acreage of 21.73. This lot is in the shape of a right-angled triangle with its base and hypotenuse washed by the waters of the bay, and the point projecting out into the bay (see defendant's Exhibit 1) beyond the extreme point as shown by the government plat is a marked projection of land variously described in the evidence as an island and point, between which and the main shore of lot 1 there is a break of tide water, the extent and duration of which is variously described by the different witnesses. This extreme point or projection is not shown by the government survey, and it is upon this extreme point or projection that the defendant has settled, and the plaintiffs seek to eject him upon the theory that the extreme point or projection, although not shown by the original government plat, is under the law and facts a part and parcel of lot 1, and therefore owned by the plaintiffs. The defendant, on the other hand, claims that this extreme point or projection is so separated from lot 1 as to be an island, and that the same is unsurveyed government land, and while he claims no title in himself, he claims the right to settle the land as government land, and denies the plaintiffs' ownership or interest."

The following statement in the brief of the plaintiffs would also seem to be a fair presentation of the facts set forth therein established by the evidence, together with the points of difference between the plaintiffs and the defendant:

"No substantial body of water separates the extreme point held by the defendant from the main land. In fact there is no navigable water intervening, and the nature of the intervening flats is such as to give them the character of land susceptible of private ownership. The flats between the extreme point and the mainland are land, not water. The testimony of all the witnesses as well as the numerous photographs introduced in evidence show this to be true. All the witnesses agree that this intervening space is flat land over which the tide occasionally flows; that the same is covered with a growth of mangroves, buttonwood, rush-grass, and other grasses; and that stumps to buttonwood and black mangroves, and some pine stumps, show a substantial growth in previous years.

"The witnesses disagree as to the extent and frequency of the overflow of this intervening flat by the tide, some of them claiming that the flat is overflowed by every ordinary tide, and others that it takes an extraordinary high tide."

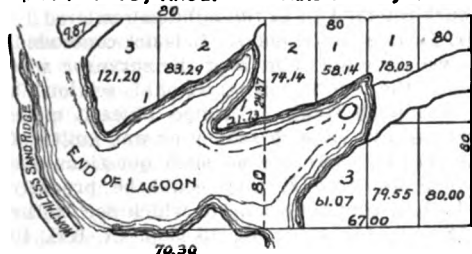
In other words, if the land described in the amended declaration constituted a part of government lot 1 at the time the same was surveyed and platted, then the plaintiffs were entitled to recover; if it did not form part of such lot at that time, then the plaintiffs had no right to recover. This is the problem which we are called upon to solve.

Many witnesses were examined upon behalf of each of the parties litigant, and much documentary evidence was also introduced, so that the transcript of the record is quite bulky. We shall not undertake to set out and analyze the evidence, but shall content ourselves with briefly stating such facts as are pertinent to the issue which, we think, the evidence establishes, referring to such

portions of the evidence as will render this opinion the more readily intelligible. As we understand it, while the evidence is conflicting upon some points, the controversy between the plaintiffs and the defendant is not so much over the facts which are established as over the principles of law which are applicable thereto and which must control. It seems advisable to copy the government plat or map of fractional section 1, township 39 south, of range 18 east, a certified copy of which was filed by the defendant. Such plat also shows fractional section 6, township 39 south, of range 19 east, and is as follows:

FRAC. TP. 39 S., R. 18 E.

FRAC. TP. 39 S., R. 19 E.



The defendant also filed as an exhibit a certified copy of the official field notes of such survey, which copy is as follows:

Certified Copy of Field Notes
of the Survey of Fractional Section One, Township
Thirty-nine South, Range Eighteen East.

Surveyed by A. H. Jones in 1847. Var. not given.
(Office map shows a Var. 4° 40' East.)

(The following corner established by Sam Reid in
1843. No Var. given.)

In running 6th Mile West on South Bdy. of Tp.
38 S., R. 19 E., at 80.00 Chs. planted 6th Mile Post.
Pine N. 40° W. 54 Pine N. 22° E. 40
Pine S. 55° E. 27 Pine S. 12° W. 60

West on North Bdy. of sec. From N. E. Cor.

Extension of S. Reid's line.

2.00 X lagoon or bay.
40.00 1/4 M. P. Pine.
Pine North 60 Pine south 40
55.00 Mouth of Creek
68.00 X do
80.00 M. P.
Pine N. 60° E. 90 Pine N. 30° W. 73
Pine S. 20° E. 60 Pine S. 10° W. 100
3rd rate pine.

South on East Bdy., From N. E. Cor.

(Tp. 39 S. R. 19 E.) Began at N. W. Cor.
ran south.

15.00 X lagoon or bay, enter pine.
39.37 Lagoon or bay.
40.00 1/4 M. P., in water.
80.00 M. P. in water.
Palmetto N. 80° W. 300 Palmetto S. 60° W. 270
No other trees.
24 Chs., pine woods,
the rest water.

South Bdy., sec. 1, run west from S. E. Cor.

18.00 To point of land, line skirts along the coast
in water.
23.00 X point of land, enter water.
40.00 1/4 M. P. in water.
65.00 X water onto gulf beach.
70.30 Post on Gulf beach.
No trees.
Line skirts along shore, mostly in the water.

West Bdy., of sec. 1, run south from N. W. Cor.

9.87 Post on lagoon.
Oak N. 60° E. 100 Oak N. 48° W. 30
Mostly small scrub.

Traverse of sec. 1. Begin at Post on N. E.
Cor. of Tp.

Course	Dist.	N.	S.	W.
S. 29° W.	12.00		10.50	5.52
S. 50° W.	20.00		12.86	15.32
S. 60° W.	35.00		17.50	30.31
West	10.40			10.40
N. 17° W.	25.00	23.91		7.31
N. 57° W.	13.00	7.08		10.90
				Mouth of creek
				Post on West
				Bdy. Sec.

115.40	30.99	40.86	80.06
		30.99	80.00

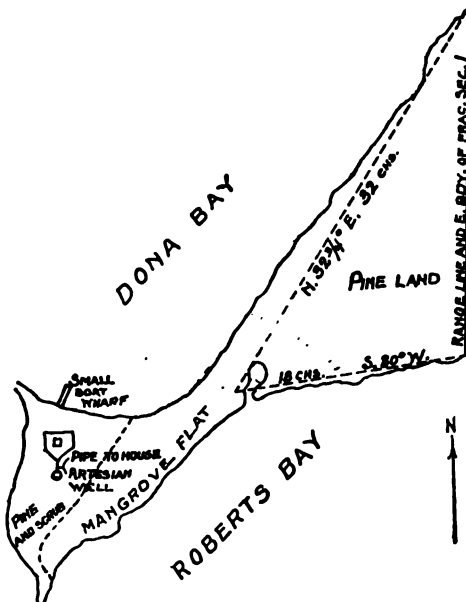
9.87	.06
10.00	
.13	.06 Error.

Traverse of sec. 1. Began at Post on lagoon 39.37
Chs. from Tp. Cor.

Course	Dist.	N.	S.	E.	W.
S. 80° W.	18.00		3.13		17.73
N. 32 1/2° E.	32.00	27.75		17.85	
	50.00	24.62		.12	
Measured Dist.	24.37				

.25 .12 Error.

The plaintiff presented the following map
as showing lot 1 as they claim it to be:



MAP SHOWING LOT NO. 1 OF FRAC. SEC. 1 IN TP. 39 S.,
R. 18 E., FLA., AS SURVEYED BY ME JAN. 20, 1911, AND
MARCH 10, 1914.

E. B. CAMP, C. E.

The latest decision by the United States Supreme Court involving "construction of patents conveying public lands by reference to official surveys and plats indicating streams or other waters," which we have been able to find is Producers' Oil Company v. Hanzen, decided June 14, 1915, and reported on page 325 of 238 U. S., on page 755

of 35 Sup. Ct. (59 L. Ed. 1330), wherein it was held as follows:

"The effect of riparian rights, attached to land conveyed by patent of the United States, depends upon the local law.

"As a general rule, meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official survey which shows the same bordering on a navigable river, the purchaser takes title up to the water line.

"Where the facts and circumstances, however, affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries; and a patent to a fractional section does not necessarily confer riparian rights because of the presence of meanders.

"Where, as in this case, the survey of improved lands was made at the express request of the occupant to whom they were subsequently patented, and the grant specified the number of acres, and other circumstances also indicated that only the lands conveyed were those within the traverse lines, the patent of the United States conferred no riparian rights but simply conveyed the specified number of acres.

"In a controversy between individuals as to the extent of the land conveyed by a patent of the United States, and to which the United States is not a party, nothing in the opinion or judgment should be taken to prejudice or impair any of the rights of the United States in the lands affected."

As was said in the body of the opinion, which was rendered by Mr. Justice McReynolds, 238 U. S., text 338, 35 Sup. Ct. 759 (59 L. Ed. 1330):

"Many causes decided by this court involved construction of patents conveying public lands by reference to official surveys and plats indicating streams or other waters. *Railroad Co. v. Schurmeier*, 7 Wall. 272, 286 [19 L. Ed. 74]; *Cragin v. Powell*, 128 U. S. 691, 696, 9 Sup. Ct. 203 [32 L. Ed. 566]; *Hardin v. Jordan*, 140 U. S. 371, 380, 11 Sup. Ct. 808, 838 [35 L. Ed. 428]; *Mitchell v. Smale*, 140 U. S. 406, 412, 11 Sup. Ct. 819, 840 [35 L. Ed. 442]; *Horne v. Smith*, 159 U. S. 40, 42, 15 Sup. Ct. 988 [40 L. Ed. 68]; *Grand Rapids, etc., R. R. v. Butler*, 159 U. S. 87, 92, 15 Sup. Ct. 991 [40 L. Ed. 85]; *Ainsa v. United States*, 161 U. S. 208, 229, 16 Sup. Ct. 544 [40 L. Ed. 673]; *Niles v. Cedar Point Club*, 175 U. S. 300, 306, 20 Sup. Ct. 124 [44 L. Ed. 171]; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 51, 22 Sup. Ct. 563 [46 L. Ed. 800]; *Kirwan v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599 [47 L. Ed. 698]; *Hardin v. Shedd*, 190 U. S. 508, 519, 23 Sup. Ct. 685 [47 L. Ed. 1156]; *Security Land, etc., Co. v. Burns*, 193 U. S. 167, 24 Sup. Ct. 425 [48 L. Ed. 662]; *Whitaker v. McBride*, 197 U. S. 510, 512, 25 Sup. Ct. 530 [49 L. Ed. 857]; *Graham v. Gill*, 223 U. S. 643, 645, 32 Sup. Ct. 396 [56 L. Ed. 586]; *Scott v. Lattig*, 227 U. S. 229, 244, 33 Sup. Ct. 242 [57 L. Ed. 490, 44 L. R. A. (N. S.) 107]; *Chapman v. St. Francis*, 232 U. S. 186, 196, 34 Sup. Ct. 297 [58 L. Ed. 564]; *Gauthier v. Morrison*, 232 U. S. 452, 459, 34 Sup. Ct. 384 [58 L. Ed. 680]; *Forsyth v. Smale*, 7 Biss. 201 (9 Fed. Cas. No. 4,950, p. 471). A review and analysis of these cases would be tedious and unprofitable; thorough acquaintance with the varying and controlling facts is essential to a fair understanding of them. They unquestionably support the familiar rule relied on by counsel for the oil company that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle

that facts and circumstances may be examined, and if they affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights."

We would call attention to the fact that this case went to the United States Supreme Court by writ of error to a judgment rendered by the Supreme Court of Louisiana, which judgment was affirmed. We would also refer to the opinion rendered by such court. *Producers' Oil Co. v. Hanszen*, 132 La. 691, 61 South. 754, which contains an interesting discussion of a number of the prior decisions of the United States Supreme Court referred to in the opinion rendered by Mr. Justice McReynolds. It is not contended, as we understand it, that the surveyor who made the survey of fractional section 1, township 39 south, of range 13 east, made any mistake in such survey or was guilty of any fraud, therefore no such questions are before us, even if they could be properly raised in this action, as to which see *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68. We would also refer to *Mitchell v. Smale*, 140 U. S. 406, 413, 11 Sup. Ct. 819, 822, 35 L. Ed. 444, 445; *French-Glenn Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102, which was affirmed in 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; *Graham v. Gill*, 56 Fla. 316, 47 South. 917, which was affirmed in 223 U. S. 643, 32 Sup. Ct. 396, 56 L. Ed. 586. Also see our prior decision in the same case, reported as *Gill v. Graham*, 54 Fla. 259, 45 South. 845.

We take the following statement from the reply brief filed by the plaintiffs in error, who were the plaintiffs in the court below:

"It is of course conceded by all parties that if the land described in the declaration is a part of lot 1, plaintiffs should recover; if it is not a part of lot 1, plaintiffs have no right to recover. But what is the criterion by which this question is to be determined? We contend that it is a question of intent purely and entirely. If the United States government intended to include it in its patent conveying lot 1, it is a part thereof; otherwise it is not. An answer to this question is a solution of the entire controversy.

"The intent which should govern is that shown first by the patent in the light of the law and the surrounding circumstances. Looking at the patent we find that it so refers to the official survey as to make it a part thereof, and in fact it is the official survey which constitutes and is the description afforded by the patent of the land conveyed thereby."

In support of their contention that "the intent of the government expressed in the patent is the cardinal principal of construction" the plaintiffs cite *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, which case went up from this state by writ of error to review a judgment rendered in the United States Circuit Court for the Northern District of Florida, which judgment was affirmed. Conceding that the cited case supports the contention of the plaintiff that the in-

tent as expressed in the patent must govern, if not directly then by necessary implication, we are of the opinion that the principles of law enunciated in the cited case, as applied to the facts established by the evidence adduced, decidedly militate against the contention of the plaintiffs that the judgment rendered in the instant case was erroneous, and should be reversed for the reasons advanced by the plaintiffs.

[2-4] Turning to the official plat of fractional section 1 which we have copied above, we find that it does not show thereon any tract of land separated from or extending beyond the extreme southwest point of government lot 1, but does show what is termed thereon a "lagoon."

The land described in the declaration contains about one-third of an acre situated upon a tract containing about 15 acres, according to the evidence, which tract of 15 acres the plaintiffs contend is embraced in lot 1. The field notes and the government plat both show that the tract of 15 acres was not embraced in the survey of lot 1, the lines of which indicate no intention of the surveyor to define the sinuosities of the beach or make the banks of the lagoon the boundary of the lot, but indicate rather an intention to define by boundary lines the land embraced in lot No. 1, and no intention to include the tract of about 15 acres which lies off the point at which the official survey of lot 1 stopped. Whether the southwest point of the survey of lot 1 stops at water that may have been between that point and the land beyond, or whether there was a narrow strip of land from the point at which the survey of lot 1 stops connecting the land beyond, the lines as surveyed show an intention to leave as unsurveyed and not included in the survey of lot 1 the land beyond the point at which the survey stopped. In their brief the plaintiffs, in referring to the space intervening between the point of government lot 1 and the land in controversy, admitted to be in the possession of the defendant, state that:

The trial court "in every instance refers to this intervening space as 'tide land,' not water, because the evidence all shows that it is not water and never has been. It is land, and the court properly so called it."

We think that the evidence shows this to be correct. This is squarely in line with previous statements by the plaintiffs in their brief which we have copied above in this opinion. The plaintiffs further state in their brief, and we think correctly in accordance with the evidence, that:

"When the flat [the intervening space] is reached the bay has not been reached, but in order to reach the bay the flat must be crossed and the point of land on which Curry [the defendant] lives must be crossed until the real bay has been reached."

According to the government plat, government lot 1 of fractional section 1, township 39 south, of range 19 east, contains 21.73 acres, while the evidence shows that the tract

of land which the plaintiffs claim to form part of government lot 1 embraces about 15 acres. If, as the plaintiffs contend, and, as we think, the evidence establishes, there is no navigable water between the main land and the tract of land of which the defendant is admitted to be in possession, we do not see where or how the question of navigability enters into the case. We fully approve of our decision in *Olement v. Watson*, 63 Fla. 109, 58 South. 25, Ann. Cas. 1914A, 72, which is cited and relied upon by the plaintiffs, wherein we held as follows:

"While the navigable waters in the state and the lands under such waters including the shore or space between high and low water marks, are held by the state for the purpose of navigation and other public uses, subject to lawful governmental regulation, yet this rule is applicable only to such waters as by reason of their size, depth and other conditions are in fact capable of navigation for useful public purposes.

"Waters are not under our law regarded as navigable merely because they are affected by the tides.

"The shore of navigable waters which the sovereign holds for public uses is the land that borders on navigable waters and lies between ordinary high and ordinary low water marks. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and low lands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation.

"Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters, are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.

"Where an individual owns the land covered by a small nonnavigable cove that is affected by the tide, the owner may make a portion of the cove navigable for his own private purposes without losing his fishing rights in the waters over his land in the cove."

But we do not think that our holding in the cited case helps the contentions of the plaintiffs. Also see our discussion in *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337; *Ferry Pass Inspectors' & Shippers' Association v. Whites River Inspectors' & Shippers' Association*, 57 Fla. 399, 48 South. 643, 22 L. R. A. (N. S.) 345; *Broward v. Mabry*, 58 Fla. 398, 50 South. 826; *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 South. 428. It is undoubtedly true, as we held in *Rivas v. Solary*, 18 Fla. 122, that "land does not pass under a deed as an appurtenance to land," citing in support thereof *Harris v. Elliott*, 10 Pet. 25, text 54, 9 L. Ed. 333.

We do not see that it makes any material difference whether the land of which the defendant is in possession was an island at the time it was surveyed, and platted, but the evidence adduced would seem to show that it was not. Although the waters have encroached on the land during the years which have intervened, it may well be doubted if, strictly speaking, such tract of land consti-

tutes an island now. According to the testimony of J. W. Moore, a surveyor connected with the United States Engineering Department, who was introduced on behalf of the defendant, he made a survey for the government of Roberts Bay and Dona Bay from Cases Pass, a blue print of which survey was filed in evidence, and the witness pointed out thereon the location of government lot 1, which lies between the two bays. The witness further testified that he made such survey "partly in 1908-13," and that in September, 1913, he made soundings of the water on the flat between the main land and the land in dispute and that, in his judgment, it was "from 1/10 to a foot deep at normal high tide," for a width of "two hundred and fifty or three hundred feet." This is practically borne out by the testimony of other witnesses, and its correctness is not disputed by the plaintiffs.

It seems to us that the case of *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, is well in point. Especially see 175 U. S. 308, 20 Sup. Ct. 127, 44 L. Ed. 171, from which we take the following excerpt:

"Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line into the territory north.

"But, it is urged, that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or nonnavigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

Also see the same case reported in 54 U. S. App. 668, 29 C. C. A. 5, which was affirmed in 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, Mr. Justice Brewer rendering the opinion therein, who began the opinion on page 305, of 175 U. S., on page 126, of 20 Sup. Ct. (44 L. Ed. 171), with this statement:

"But little can be added to the opinion of the Court of Appeals, whose conclusions we approve. The meander line run by surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary. *Railroad Company v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]; *Hardin v. Jordan*, 140 U. S. 371, 380 [11 Sup. Ct. 808, 838, 35 L. Ed. 428]; *Horne v. Smith*, 159 U. S. 40 [15 Sup. Ct. 988, 40 L. Ed. 68]. But it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements

the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey. Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh' as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh. 'The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.' *Hardin v. Jordan*, supra. In *James v. Howell*, 41 Ohio St. 696, 707, the Supreme Court of Ohio, speaking of these very patents and this marsh, said: "The 'meander' line along the southerly border of the marsh was, in fact, intended to be the boundary line of the fractional sections."

"It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale."

Also see *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, which is cited therein and to which we have referred supra. The case of *Producers' Oil Co. v. Hanszen*, 132 La. 691, 61 South. 754, is also in point. The opinion rendered by Mr. Justice Somerville and the vigorous dissenting opinion rendered by Mr. Justice Provosty cite and discuss the various authorities bearing upon the points decided. As we have previously said, the decision in this case was affirmed in 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330.

We think that the principles laid down in these cited cases are decisive of the points involved in the instant case.

The plaintiffs expressly abandon their three assignments based upon rulings on the evidence, stating that they think that "the assignments based upon the charges given and refused present the entire matter for the court's consideration." We have examined all of these charges and instructions, and no reversible error has been made to appear to us. Possibly some of the instructions given may not be strictly correct from a technical point of view, but we think that they are substantially correct.

It follows from what we have said that the judgment must be affirmed.

TAYLOR, C. J., and WHITFIELD and ELLIS, JJ., concur.

COCKRELL, J., absent by reason of sickness.

RUSSELL v. STATE.

(Supreme Court of Florida. Feb. 15, 1916.)

*(Syllabus by the Court.)*1. RAPE \Leftrightarrow 9—ELEMENTS OF OFFENSE—FORCE AND CONSENT.

Section 3221 of the General Statutes defines two phases of the crime of rape, one where the crime is committed upon a female child of the age of 10 years or more, and the other where the crime is committed upon a female child under the age of 10 years. In the former case the elements of force and consent are material, while in the latter they are not material.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 8; Dec. Dig. \Leftrightarrow 9.]

2. HABEAS CORPUS \Leftrightarrow 92(1)—ADMISSION TO BAIL—INDICTMENT—RAPE.

Upon an application for a writ of habeas corpus to admit a defendant to bail who is under indictment for rape, the court may look to the indictment to determine whether that phase of the crime of rape is charged in which the elements of force and consent are material.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 96; Dec. Dig. \Leftrightarrow 92(1).]

3. BAIL \Leftrightarrow 49—ADMISSION TO BAIL—BURDEN OF PROOF—INDICTMENT.

In an application for bail under an indictment for rape, the indictment is not conclusive of the defendant's guilt, but the burden is upon him to show that the proof is not evident and the presumption is not great; the indictment is merely a strong prima facie showing that the accused is rightfully held in custody and not entitled to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. \Leftrightarrow 49.]

4. BAIL \Leftrightarrow 49—ADMISSION TO BAIL—PROOF—REQUISITES.

In an application for bail under an indictment for a capital crime, the question for the court to whom the application is made is not whether the evidence adduced is sufficient to establish guilt beyond a reasonable doubt, but whether the evidence, including that of the state, which the applicant must produce, is sufficient to establish that degree of proof, showing evident guilt or great presumption of guilt, which is of a higher degree of proof than that which would sustain the verdict of a jury.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. \Leftrightarrow 49.]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"EVIDENT"—"MANIFEST."

The word "evident" has been defined as clear to the understanding and satisfactory to the judgment. Its synonyms are manifest, clear, plain, obvious, conclusive. The word "manifest" means to put beyond question of doubt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Evident; Manifest.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Habeas corpus by George W. Russell to be admitted to bail. Writ was denied, and Russell brings error. Reversed.

A. G. Hartridge and J. Turner Butler, both of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

ELLIS, J. George W. Russell was indicted by the grand jury of Duval county for rape. The indictment, omitting venue, title and signature of state attorney, is as follows:

"In the Name and by the Authority of the State of Florida:

"The grand jurors of the state of Florida, impaneled and sworn to inquire and true presentment make in and for the body of the county of Duval, upon their oath do present that George W. Russell, late of the county of Duval and state of Florida, on the 1st day of November, in the year of our Lord one thousand nine hundred and fifteen in the county and state aforesaid, in and upon one Pauline Stearn an assault did make, and her, the said Pauline Stearn, did then and there ravish and carnally know, by force and against the will of her the said Pauline Stearn, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida."

A capias issued upon the filing of the indictment, and Russell was taken into custody and incarcerated in the county jail to await trial. Upon a writ of habeas corpus applied for by him to admit him to bail, the court denied the bail and remanded Russell to the custody of the sheriff of Duval county, to be safely kept until otherwise directed by some court of competent jurisdiction. To this order Russell took writ of error.

[1] Rape is a capital offense in this state. Section 3221, Gen. Stats. of Florida.

Section 9 of the Declaration of Rights of the Constitution of Florida provides that:

"All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great."

Section 3221 of the General Statutes of Florida is as follows:

"Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death or by imprisonment in the state prison for life. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only."

The offense of rape is one defined by the statute, and the charge in the indictment must be in the language of the statute or language of equivalent import. The circumstances which constitute the definition of the offense denounced by the statute must be stated in the indictment. Nothing will be taken by intendment. The defendant should be brought within all the material words of the statute. See *Humphreys v. State*, 17 Fla. 381; *Barber v. State*, 13 Fla. 675; *Cook v. State*, 25 Fla. 696, 6 South. 451.

Section 3221 defines two phases of the crime of rape; one where the crime is committed upon a female child of the age of 10 years or more by force and against her will, the other where the offense is committed upon a female child under the age of 10 years. In the one case the offense cannot be proved except by a showing upon the part of the

state that the offense was committed by force and against the will of the female, while in the other case the offense is established by showing that the defendant had carnal knowledge of the child, and that she was under 10 years of age. In the latter case the element of force or consent of the child is immaterial. See *Schang v. State*, 43 Fla. 561, 31 South. 346; *Wilson v. State*, 50 Fla. 164, 39 South. 471. The indictment in this case, it will be seen, charges the offense of rape under that phase of the crime where the act is committed upon a child 10 years of age or more, and where the elements of force and consent are material. There is nothing in the record to show that the person upon whom the offense was alleged to have been committed was not in possession of her mental and physical faculties, nor that she was of an unenlightened mind, but, being 10 years of age or more, she was presumed to be enlightened.

In the case of *Barker v. State*, 40 Fla. 178, 24 South. 69, this court held that the law presumes a female under the age of 10 years cannot consent to carnal intercourse, but above that age she may, but that in determining whether or not she does consent when over 10, her age may be considered and her knowledge as to such matters. See, also, *Holls v. State*, 27 Fla. 387, 9 South. 67.

The court below did not consider the girl to be of such tender years as to allow the state attorney to propound to her grossly leading questions in her examination as a witness, and her own testimony is not of such character as to show that the proof was evident and the presumption great that the act was accomplished by force and against her consent. The manner of the commission of this alleged offense, the circumstances, time, and place were all material in this investigation as bearing upon the question of resistance and consent.

[2, 3] In a proceeding of this character the indictment is not conclusive of the defendant's guilt, but the burden of proof is upon the accused to show that the proof is not evident and the presumption is not great. See *Finch v. State*, 15 Fla. 633; *Holley v. State*, 15 Fla. 688; *Benjamin v. State*, 25 Fla. 675, 6 South. 433; *Rigdon v. State*, 41 Fla. 308, 26 South. 711.

[4] The question is not whether the evidence adduced on an application for bail is sufficient to establish guilt beyond a reasonable doubt, but whether the evidence is sufficient to establish that degree of proof where the judge to whom the application is made may say that guilt is evident or the presumption is great, which is a greater degree of proof than that establishing guilt merely to the exclusion of a reasonable doubt.

[5] The word "evident" is defined by Webster as "clear to the understanding and satisfactory to the judgment." Synonyms: "Manifest, plain, clear, obvious, conclusive." The word "manifest" is defined as follows:

"To put beyond question of doubt." In a trial this degree of proof is not required, for it not infrequently happens that upon a conviction the court will refuse to grant a new trial because there is evidence to support the verdict, although to his mind guilt may not have been established to the point of being manifest, obvious, beyond a question of doubt, yet it is to the court to whom application for bail is made, and his judgment is invoked as to the degree of proof established by the evidence, and not what a petit jury not yet impaneled may possibly decide as to the probative force of the evidence.

If, therefore, when an application is made to the court for bail in a capital case after indictment, the question for him is whether, considering the indictment, and all the evidence for the state, and that adduced in behalf of the defendant, the proof of guilt is evident or the presumption raised thereby is great.

Under the common-law practice bail was generally refused after indictment, because the court could not know on what evidence the grand jury acted, and by a legal fiction the proof thus offered was treated pro forma as "evident," and the presumption thereby arising "great." 3 R. C. L. p. 14. But under our Constitution and the decisions of this court the indictment is not regarded as conclusive. *Rigdon v. State*, supra; *Gainey v. State*, 42 Fla. 607, 29 South. 405. In which latter case the court held that:

"Where the proofs in such a case go no further than to establish a probability of guilt, they are not sufficient either to sustain a verdict of conviction or to call for a denial of bail."

In that case application was made for bail after indictment for a capital crime.

The English rule and that applied by Chief Justice Marshall in "Burr's Trial," denying bail after indictment by a grand jury, does not obtain, as has been shown, in this state.

The indictment is merely a strong prima facie showing that the accused is rightly held in custody and not entitled to bail. *Rigdon v. State*, supra. But the grand jury does not determine, nor is it clothed with the power to decide, the question of bail in any case. The proceedings of a grand jury are secret and wholly ex parte; evidence for the state being alone received. The accused is not present, he cannot be represented by counsel, he is not heard upon the legality or probative force of the evidence adduced. The proceedings are largely directed by the state attorney, who exercises some influence in the selection of witnesses, and, to some extent, perhaps, directs the findings. It would seem that, in view of these conditions, and the recognized policy of the law to afford every one accused of crime the full opportunity to prepare his defense, it is quite sufficient to treat the indictment as merely prima facie evidence of the truthfulness of the charge, upon an application for bail.

It was said in the case of *Thrasher v. State*,

26 Fla. 526, 7 South. 847, that it was a safe rule—

"to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as is exhibited on the hearing for bail; and where the evidence is of less efficacy to admit to bail."

As to the latter part of the court's language there can be no question as to its correctness, because if there is no evidence whatever of the defendant's guilt, of course he should be admitted to bail; but it does not follow that because a court admits the applicant to bail, it thereby decides that upon the evidence presented a jury should not convict the defendant of a capital offense, and, if convicted, the verdict would not be permitted to stand. As pointed out, the evidence may be sufficient to satisfy a jury beyond a reasonable doubt; there may be sufficient evidence to support such a verdict so that the trial judge would refuse to set it aside, although to his mind the evidence did not establish such degree of proof as that he could say guilt was evident, clear, conclusive beyond question of doubt. It was not intended to substitute the judgment of the court for that of the jury, and to use an order admitting the defendant to bail as an adjudication of his innocence.

The language used in the Thrasher Case was used in the case of *Commonwealth v. Keeper of Prison, 2 Ashm. (Pa.) 227*, in which the court admitted the applicant to bail, applying the latter clause. The court could find in no part of the testimony any ground for a fair and reasonable presumption that the defendant ever intended to take the life of the deceased.

The case of *Street v. State, 43 Miss. 1*, was cited in the Thrasher Case in support of the rule. That case followed a rule announced in *Commonwealth v. Keeper of Prison*, but in a prior case decided by the Supreme Court of Mississippi (*Ex parte Wray, 30 Miss. 673*), the court announced the rule that:

"If a well-founded doubt [of guilt] can ever be entertained, then the proof cannot be said to be evident nor the presumption great"

—and in such case bail must be granted. And in the case *Ex parte Bridewell, 57 Miss. 39*, the court declined to follow the rule announced in the case of *Street v. State, 43 Miss. 1*, and criticized the rule announced in *2 Ashm. (Pa.) 227*, in the following language:

"This rule, we think, is as plainly violative of the organic law, on the other extreme, as the remark of the High Court of Errors and Appeals in the cases above cited. A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great."

The Pennsylvania rule, which seems to have been followed in the Thrasher Case, fails to give due effect to a verdict of conviction. "It overlooks the vast change it effects in the attitude of the party."

The only witness for the state whose name appears upon the back of the indictment in this case was that of the prosecutrix, Pearl Stearns, and her testimony carries with it its own contradictions and discrepancies; and, while this court does not undertake to say in this proceeding that the evidence would not sustain a conviction of guilt, we think that the plaintiff in error met the burden of showing that the proof was not evident and the presumption was not great of the capital offense charged.

The order of the court, remanding the accused to the custody of the sheriff, is reversed, and the court is directed to admit him to bail in such sum as it deems necessary to secure his presence at the trial.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

WHITFIELD, J. (concurring). The Constitution ordains that:

"No person shall be * * * deprived of * * * liberty * * * without due process of law." Section 12, Declaration of Rights.

This section is designed to secure the right to personal liberty at all times when that right has not been forfeited and such forfeiture authoritatively determined by due course of law.

The Constitution also provides that:

"All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great." Section 9, Declaration of Rights.

This section is designed to secure the right to bail in all cases, except where from the evidence by which an alleged crime may be legally proven it appears with reasonable and evident or manifest certainty that the accused is guilty of a capital offense as charged.

The organic law contains provisions that:

"All courts in this state shall be open, so that every person for any injury done him in his * * * person or reputation * * * shall have remedy, by due course of law, and right and justice shall be administered without * * * delay," and that "the writ of habeas corpus shall be granted speedily and of right." Sections 4 and 7, Declaration of Rights.

These sections are intended to secure the right to a prompt and speedy determination by competent tribunals of the right to personal liberty when that right is duly alleged to have been violated. If a person who is duly charged with a crime is denied the right to bail when the offense charged is not a capital offense, or when the charge is of a capital offense and the proof is not evident, or the presumption is not great of the guilt of the accused of the capital offense charged, such denial of the right to bail is a deprivation of liberty without due process of law, in viola-

tion of the Constitution, as well as a denial of the organic right to bail in all cases except for capital offenses where the proof is evident or the presumption great; and upon complaint duly made it is the duty of the courts, by due procedure and without needless delay, to determine whether the right to personal liberty is denied without due process of law, or whether the organic right to bail is unlawfully denied, and to afford appropriate relief in due course of law. The use of the writ of habeas corpus to speedily determine whether a person charged with a capital offense is entitled to bail before trial and conviction is authorized by law so as to render effective the rights to bail and to liberty as provided by the Constitution.

In a trial on a charge of a capital offense, the issue to be determined is whether the defendant is guilty or innocent of the capital offense charged; and the burden is upon the state to show by competent evidence beyond a reasonable doubt that the defendant is guilty of the offense charged. The requirement that the evidence shall show guilt beyond a reasonable doubt is a rule of judicial procedure, designed to secure the organic right to personal life and liberty where that right has not been by due process of law clearly and indubitably shown to have been forfeited by the commission of the crime charged.

In an application for bail under a charge of a capital offense the accused is not on trial to determine the ultimate question of guilt or innocence, but the issue to be determined is whether or not, on the entire evidence produced at the hearing, the proof is evident or the presumption great of the guilt of the accused of the capital offense charged, so as to adjudicate whether or not the accused is, before conviction, entitled to bail under the Constitution; and the burden is upon the accused to produce the entire evidence, including that on the part of the state as well as that on the part of the accused, and to show from such entire evidence that the proof is not evident and the presumption is not great that the accused is guilty of the capital offense charged. The requirement that the proof shall be evident or the presumption great of guilt of a capital offense, before a person may lawfully be denied a right to bail, is a mandate of the Constitution designed to secure the organic right to personal liberty before conviction of a capital offense when the proof is not evident or the presumption is not great of the guilt of the accused of the capital offense charged. The hearing on application for bail and the trial to ultimately determine the truth of the charge are essentially different in the issues to be determined, in the procedure to be observed, and in the object to be attained. The quantum of proof required by rules of judicial procedure in a trial to ultimately determine the question of guilt or innocence with reference to punish-

ment or acquittal, i. e., that guilt must be shown beyond a reasonable doubt, is not necessarily the same as the quantum of proof required to show a right to bail under the constitutional provision that all persons shall be bailable even when charged with a capital offense, where the proof is not evident and the presumption is not great of the guilt of the accused of the capital offense charged.

The question whether the evidence is legally sufficient to sustain a verdict of guilty of the capital offense charged is not to be determined on an application for bail upon the evidence then adduced. That question is to be determined at or after the trial by the trial court and on writ of error by the appellate court, and such determination is to be made upon the evidence adduced at the trial. This is so, even though the evidence be the same at both hearings; but the law does not require, and the actualities of life do not make practicable, the production at a trial, more or less remote in time from the application for bail, exactly the same evidence that was adduced at the hearing on the application for bail. Thus it is made manifest that on an application for bail the only question to be determined and the only consideration is whether the accused has, from the whole evidence, shown that the proof is not evident and the presumption is not great of his guilt of the capital offense charged. This is accomplished when it appears from a consideration of the entire evidence that the proof of the guilt of the accused of the capital offense, not of a lesser offense that may be included in the charge, is so clear as to be evident or plainly manifest from the evidence that a doubt having a substantial basis in the evidence is not apparent from the whole evidence, and that from the entire evidence the presumption of guilt of the capital offense as charged is not great, that is, not so strong as to make guilt of the capital offense so plainly evident that a doubt is not clearly well founded in the evidence adduced. If any essential element of an offense is not shown the offense is not shown.

The capital offense here charged is that the accused did ravish and carnally know "a female of the age of 10 years or more, by force and against her will." On this application for bail the burden is on the accused to show from all the evidence that the proof is not evident, and that the presumption is not great, that he is guilty of the capital offense charged. This burden is met when it appears from all the evidence adduced that the proof is not evident and the presumption is not great of either essential element of the offense charged; i. e., that he either did not, as alleged, ravish and carnally know the named female by force, or that he did not do so against her will.

As from the testimony of the prosecutrix and the other evidence adduced at the hearing, the proof is not evident, and the pre-

sumption is not great, that the carnal intercourse, if had, was "against her will," the accused is entitled to bail.

Whether the evidence adduced on this application for bail would, or would not, be legally sufficient to sustain a capital conviction is not a subject of consideration here, since there has been no conviction. As at a trial on this indictment when other and different issues are to be determined, the evidence then adduced may not be exactly the same, and no more and no less in its extent or probative force than that taken in this proceeding, there is no just basis or legal authority for considerations of, or expressions as to the effect of, evidence that may hereafter be adduced at a trial, and no such questions are considered and no such expressions are indulged in here.

Evidence may be legally sufficient to sustain a conviction of a capital offense where nothing prejudicial to the accused occurred at the trial, when, even if it could have been exactly the same on an application for bail, such evidence may have been insufficient to make the proof evident, or the presumption great, of the guilt of the accused of the capital offense charged, so as to warrant a denial to him of his organic right to bail.

The conclusion here reached should have no influence on the determination of the guilt or innocence of the accused at the trial that may be had for that purpose.

MIZELL LIVE STOCK CO. v. POLLARD.
(Supreme Court of Florida. Feb. 15, 1916.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR \S 856(5) — **GRANTING NEW TRIAL—AFFIRMANCE.**

Where the trial court grants a new trial on a motion containing several grounds, without stating any ground on which the ruling was based, the order will be affirmed when authorized by any ground of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3423, 3424, 3427; Dec. Dig. \S 856(5).]

Error to Circuit Court, Leon County; J. W. Malone, Judge.

Action between the Mizell Live Stock Company, a corporation, and Garrison A. Pollard. From an order granting new trial, the corporation brings error. Affirmed.

W. J. Oven, of Tallahassee, for plaintiff in error. Fred. T. Myers, of Tallahassee, for defendant in error.

PER CURIAM. This is a writ of error directed to the granting of a new trial.

The motion for a new trial contained several grounds which questioned the sufficiency of the evidence to support the verdict and also claimed newly discovered evidence. The trial judge simply granted the motion without specifying the ground upon which his order was based. We have examined the

transcript of the record, and are of the opinion that the order must be affirmed upon the authority of *Ruff v. Georgia Southern & Florida Ry. Co.*, 67 Fla. 224, 64 South. 782, and *Chancey v. Williams*, 56 Fla. 215, 47 South. 811.

Order affirmed.

BANK OF JENNINGS v. JENNINGS et al.
(Supreme Court of Florida. Feb. 15, 1916.)

(Syllabus by the Court.)

1. HOMESTEAD \S 118(3), 119—**MORTGAGE LIEN—CREATION—ACKNOWLEDGMENT BY WIFE.**

A "mortgage duly executed * * * by husband and wife," sufficient to create a lien upon homestead real estate of the husband, as between the mortgagors and mortgagee must be duly executed by the husband and wife and the execution by the wife duly acknowledged by her, since under the statute due acknowledgment by the wife of the execution of the deed or mortgage by her is essential to the validity of any conveyance or relinquishment of an interest in real estate by the wife even as between the parties to the instrument.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 204, 210-214; Dec. Dig. \S 118(3), 119.]

2. ACKNOWLEDGMENT \S 25 — **SEPARATE ACKNOWLEDGMENT BY WIFE—PURPOSE.**

The law which authorizes designated officers to take the private examination of the wife was designed as a substitution for the proceedings at common law by fine and recovery, whereby the right of the wife on the one hand might be guarded, and a sure indefeasible and unquestionable transfer of her right secured on the other.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133-148; Dec. Dig. \S 25.]

3. ACKNOWLEDGMENT \S 55(1)—**CERTIFICATE—EFFECT AS EVIDENCE—FRAUD—PROOF.**

The certificate of the officer as to the acknowledgment of the execution of a deed of conveyance or mortgage made before him, is a quasi judicial act, and where the person executing the instrument and the instrument are in fact before the officer, and he undertakes to act officially, the certificate of the officer as to the transaction, when made as the law requires, is, in the absence of fraud or duress, conclusive as to the facts stated in the official certificate. When fraud is alleged, proof of it must be of the clearest, strongest, and most convincing character.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 290-300; Dec. Dig. \S 55(1).]

4. ACKNOWLEDGMENT \S 55(2)—**SEPARATE ACKNOWLEDGMENT BY WIFE—PROOF—CERTIFICATE OF OFFICER.**

Where a married woman signed a mortgage of land in the presence of witnesses, and the only contention in avoidance of the mortgage is that she did not acknowledge to or before the officer separate and apart from her husband the execution of the mortgage, the certificate of the officer of due acknowledgment of the execution of the mortgage by her separate and apart from her husband will prevail, where there is evidence to sustain the certificate, and it is not overcome by clear, strong, and convincing testimony.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 303-314; Dec. Dig. \S 55(2).]

Appeal from Circuit Court, Hamilton County; M. F. Horne, Judge.

Suit by the Bank of Jennings against W. P. Jennings and another. From decree for defendants, complainant appeals. Reversed and remanded, with directions.

Blount, Blount & Carter, of Pensacola, and Stafford Caldwell, of Live Oak, for appellant. I. J. McCall and B. B. Johnson, both of Jasper, for appellees.

WHITFIELD, J. Suit was brought by the mortgagee bank to correct an error in the date of a certificate of the acknowledgment of the execution of a mortgage and to foreclose the mortgage upon real estate alleged to have been given by the appellees husband and wife. The defendants filed the following plea:

That the property was "at the time of the purported execution of the alleged deed of mortgage, and some time prior thereto, and is now, the homestead of these defendants, and upon which these defendants did then reside, and upon which these defendants do now reside, that these defendants have never conveyed the same to the complainant as is claimed in its bill of complaint herein, that neither of these defendants ever acknowledged the execution of the mortgage herein attempted to be foreclosed, and that the certificate of K. K. Powell thereto attached is false."

This plea was sworn to by each of the defendants. The bill of complaint was amended so as to allege matters of estoppel. The answer filed had reference to the amendment to the bill of complaint. Replications to the plea and answer were filed and testimony taken. The bill of complaint was dismissed on final hearing, but a rehearing was granted, and in a subsequent decree a foreclosure was decreed "except as regards to the inchoate dower rights of the wife." An appeal was taken by the complainant from both decrees.

The certificate of the officer as to the acknowledgment before him of the execution of the mortgage is as follows:

"State of Florida, Hamilton County.

"Before me personally came W. P. Jennings, signer of the foregoing deed of mortgage and acknowledged that he executed the same for the purpose therein contained.

"And F. M. B. Jennings, wife of the said W. P. Jennings, being separate and apart from her said husband, further acknowledged that she joined her husband in the foregoing conveyance for the purpose of relinquishing all her dower or right of dower to the lands therein conveyed, and that she did so freely and voluntarily, without compulsion, constraint, apprehension or fear of or from her said husband.

"Witness my hand and official seal, this 8th day of March, A. D. 1912.

"[Seal.] K. K. Powell, Notary Public for the State of Florida at Large.

"My commission expires June 24, 1915."

Sections 1 and 4 of article 10, the "Homestead and Exemptions," article of the state Constitution, provide that:

"A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the

real estate shall not be alienable without the joint consent of husband and wife, when that relation exists."

"Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists."

The Constitution requires the mortgage to be "duly executed * * * by husband and wife." A due acknowledgment by the wife of the execution of the mortgage by her is essential to the validity of the mortgage. Acknowledgment of execution is under the statute an essential part of the execution of a deed or mortgage by a married woman conveying or relinquishing an interest in real estate.

Section 2462 of the General Statutes provides that:

"To render such sale, conveyance, mortgage or relinquishment, whether of separate estate or of dower, effectual to pass a married woman's estate or right, she must acknowledge, before some officer authorized to take acknowledgment of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband and the officer's certificate shall set forth all the foregoing requirements." Florida Compiled Laws 1914, § 2462.

[1] A "mortgage duly executed * * * by husband and wife," sufficient to create a lien upon homestead real estate of the husband, as between the mortgagors and mortgagee, must be duly executed by the husband and wife and the execution by the wife duly acknowledged by her, since under the statute due acknowledgment by the wife of the execution of the deed or mortgage by her is essential to the validity of any conveyance or relinquishment of an interest in real estate by the wife even as between the parties to the instrument. See *Adams v. Malloy*, 70 Fla. —, 70 South. 463. As to the husband, acknowledgment of the execution of the instrument is essential only for purposes of recording and its effects.

If the mortgage in this case was duly executed by the husband and duly executed by the wife and the execution of it duly acknowledged by her, it is sufficient in this respect and as between the mortgagors and mortgagee as a mortgage upon homestead real estate.

[2] The law which authorizes designated officers to take the private examination of the wife was designed as a substitution for the proceedings at common law by fine and recovery, whereby the right of the wife on the one hand might be guarded, and a sure indefeasible and unquestionable transfer of her right secured on the other. *Hart v. Sanderson*, 18 Fla. 103, text 109.

[3] The certificate of the officer as to the acknowledgment of the execution of a deed of conveyance or mortgage made before him is a quasi judicial act, and where the person executing the instrument and the instru-

ment are in fact before the officer, and he undertakes to act officially, the certificate of the officer as to the transaction, when made as the law requires, is, in the absence of fraud or duress, conclusive as to the facts stated in the official certificate. When fraud is alleged, proof of it must be of the clearest, strongest, and most convincing character. See *Hart v. Sanderson*, supra; *McClure v. American Nat. Bank of Pensacola*, 67 Fla. 32, 64 South. 427; 1 R. C. L. § 102; *Wilkins v. Baker*, 77 S. C. 244, 57 S. E. 851; *Young v. Duvall*, 109 U. S. 573, 3 Sup. Ct. 414, 27 L. Ed. 1036; 1 C. J. p. 898; *Holland v. Webster*, 43 Fla. 85, 29 South. 625; *American Freehold Land Mortgage Co. v. Thornton*, 108 Ala. 258, 19 South. 529, 54 Am. St. Rep. 148; notes 41 L. R. A. (N. S.) 1176; 1 Jones on Mort. (7th Ed.) § 500; notes 7 Ann. Cas. 249.

The officer acts officially and is entitled to a statutory fee for taking an acknowledgment.

[4] When a married woman has appeared before a magistrate, having signed a deed and acknowledged it, and he certifies a full compliance with the statute, his certificate, except fraud be shown, must be held conclusive of the facts it asserts. *Shear v. Robinson*, 18 Fla. 379.

It is admitted that the husband and wife signed the mortgage, and the important controversy is whether the married woman acknowledged, "separately and apart from her husband, that she executed the" mortgage as required by the statute and as stated in the certificate. The insistence is that the notary omitted to take the wife's acknowledgment separate and apart from her husband as the law requires.

The certificate of the notary public in this case is in substantial compliance with the statute in setting forth the requirements of the statute in taking the acknowledgments of married women. The notary public, Mr. Powell, testified as a witness for the complainant that he was requested to take, and did take, the mortgage up to the house of Mr. W. P. Jennings and get his and his wife's acknowledgment; that Mr. W. P. Jennings and Mr. C. W. Connell, the other witness to the mortgage, went with him to the house of Mr. W. P. Jennings; that Mr. W. P. Jennings and his wife, F. M. B. Jennings, signed the mortgage in the presence of the witness; that witness and Mr. Connell signed the instrument as witnesses to the mortgage. In response to the question, "Did Mr. W. P. Jennings and his wife, F. M. B. Jennings, acknowledge to you the execution of this mortgage?" the witness answered: "Mrs. F. M. B. Jennings did. I took her acknowledgment. Mr. Jennings, he just signed it." The witness further testified that W. P. Jennings and his wife, F. M. B. Jennings, appeared before him for the purpose of acknowledging this mortgage; that the taking

of the acknowledgment was for the purpose for which he went to Mr. Jennings' home; that Mr. Jennings knew this; that the witness did not know whether Mrs. Jennings knew of his purpose in going to the home; that she acknowledged the execution of the mortgage to the witness and notary public who made the certificate of the acknowledgment; that Mr. Jennings requested Mr. Connell to go to the house to witness the mortgage; that the appearance of Mr. W. P. Jennings and his wife, F. M. B. Jennings, at their home at the time the paper was signed and witnessed, is what he based his certificate on; that witness executed the certificate of acknowledgment as a notary public on the appearance of Mr. W. P. Jennings and his wife, F. M. B. Jennings, in their home, and on what took place at that time. On cross-examination:

"Q. And the fact that Mr. Jennings and Mrs. Jennings appeared and signed this mortgage in the presence of you and Mr. Connell is the sole reason upon which you base this certificate, is it not? A. Yes, sir; together with Mrs. Jennings' acknowledgment, it was. Q. What did Mrs. Jennings say? A. She says, 'I did.' Q. Did Mr. W. P. Jennings and Mr. Connell hear her make that statement? A. I don't think they did. Q. Did you talk to Mrs. Jennings about this mortgage? A. No more than taking acknowledgment."

Mr. Connell, for the defendants, testified that when the paper was signed by Mrs. Jennings her husband was present; that Mr. Jennings was present all the time that witness and the notary were there.

"Q. Did Mr. Powell take any acknowledgment from Mrs. Jennings to the execution of that paper, separate and apart from her husband? A. That is too hard for me, I don't know, I can't say."

On cross-examination he testified that:

"There was no separate acknowledgment taken. If there was one taken in there, I don't remember anything about it; but I do remember he was not taken out of the room, all right. Mr. Jennings was present, if I ain't mistaken."

For the defendants, Mr. W. P. Jennings testified:

"Q. Was there any acknowledgment taken at that time by Mr. Powell of Mrs. Jennings, as to whether or not she executed that paper? A. There was not, sir. Q. Mr. Jennings, where were you at the time Mrs. Jennings signed the paper? A. I was standing right by the table where she was sitting when she signed the paper. I went in the room and told her that we had this mortgage for her to sign, and, when we went in, I signed the paper first and got up, and then she sat down in the chair, and I stood right there by her until she signed it. Q. Did you hand it to her and request her to sign it? A. Yes, sir. Q. Did you stay present in the room until Kossie Powell left the house? A. I did; I left there with them."

On cross-examination:

"Q. Mr. Jennings, you and your wife signed that paper, didn't you? A. Yes, sir."

George S. Jennings, for the defendants, testified:

"Q. Were you present all the time Mr. Powell was there? A. Yes, sir. Q. Did Mr. Powell

take any acknowledgment of Mrs. Jennings whatsoever? A. No acknowledgment whatsoever."

The defense was that the notary omitted to take an acknowledgment by the wife separate and apart from her husband. By plea it is averred:

"That neither of these defendants ever acknowledged the execution of the mortgage * * * and that the certificate of K. K. Powell thereto attached is false."

Assuming this to be a sufficient plea to require the defendant to show that the notary public had the parties and the instrument before him for the purpose of taking their acknowledgment of the execution by them of the mortgage, and that he executed the certificate pursuant to his duty under the law as an officer, this proof was made. Even if the plea may be regarded as averring fraud on the part of the officer in making the certificate so as to avoid the legal effect of the official certificate as made after the foregoing proofs of jurisdiction and action taken were adduced, and to permit the defendants to offer, over objections by the complainants, testimony in contradiction of the terms of the official certificate of the notary public, the testimony adduced is not clear, strong, and convincing. The testimony for the defendants tends to show an omission, not a fraud, and the omission to take the wife's acknowledgment separate and apart from her husband is not clearly shown. The notary testified that he took the acknowledgment of Mrs. Jennings, and that he does not think Mr. W. P. Jennings, the husband, and Mr. Connell, heard Mrs. Jennings say, "I did," when he took her acknowledgment. This indicates that the acknowledgment was taken separate and apart from the husband, who did not hear the wife's reply to the notary. The husband testified that he told his wife "that we had this mortgage for her to sign." Mr. Connell, the defendant's witness, and a witness, to the mortgage, testified, "I don't know, I can't say," when asked if the notary took an acknowledgment from Mrs. Jennings separate and apart from her husband; that Mr. Jennings was not taken out of the room. Mr. W. P. Jennings, the husband, and Mr. George S. Jennings, the son, testified that no acknowledgment was made to the notary by Mrs. Jennings. But this latter is negative testimony. Mrs. Jennings was not a witness, and the circumstances are very different from those in *Lowell v. Wren*, 80 Ill. 238. The notary's affirmative testimony as to what transpired between him and Mrs. Jennings with reference to a duty the law imposed upon him, taken in connection with the certificate and the circumstances showing an execution of the mortgage by both Mr. and Mrs. Jennings at the family home, and the further circumstance that the wife signed the mortgage knowing what it was, and that the practicability of an acknowledgment separate and apart from the husband in the

same room is not negated, the presumption that the officer did his duty and the legal effect of the certificate are not overcome by clear, strong, and convincing testimony. This being so, the court erred in dismissing the bill of complaint. The subsequent proceedings need not be considered.

The decrees appealed from are reversed, and the cause is remanded, with directions to enter a decree of foreclosure against both the defendants.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

COCKRELL, J., takes no part.

SPARKMAN, Tax Assessor, v. STATE ex rel. BANK OF YBOR CITY.
(Supreme Court of Florida. Feb. 15, 1916.)

(Syllabus by the Court.)

1. TAXATION §49—"JUST VALUATION."

"A just valuation of all property" is not secured as is mandatorily required by the Constitution when the assessment valuation of some property is higher proportionately than the valuation put upon other property assessed for the same purpose.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 115-124; Dec. Dig. §49.

For other definitions, see *Words and Phrases*, *Just Valuation*.]

2. STATUTES §225—CONSTRUCTION.

In the absence of express repeals or irreconcilable repugnancy, the effect of a later statute upon a former one affecting the same subject depends upon the intent of the lawmaking power; and this is true whether the two statutes are passed at the same session or at different sessions of the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 302, 303; Dec. Dig. §225.]

3. STATUTES §181—CONSTRUCTION—LEGISLATIVE INTENT—DETERMINATION.

The intent of a statute is to be determined by a consideration of the language used, the subject-matter, the purpose designed to be accomplished, and all other relevant and proper matters that may assist in ascertaining the legislative intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. §181.]

4. STATUTES §162—SUBSEQUENT ENACTMENT—EFFECT TO SUPERSEDE PRIOR STATUTE.

A general statute covering an entire subject-matter, and manifestly designed to embrace all the regulations of the subject, may supersede a former statute covering a portion only of the subject, when such is the manifest intent, even though the two are not wholly repugnant.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 235-237; Dec. Dig. §162.]

5. STATUTES §159—SUBSEQUENT ENACTMENT—EFFECT TO SUPERSEDE PRIOR STATUTE.

Where there is material repugnance in statutory regulations, or where there is anything from which an intent that a later act shall supersede a prior act may be fairly inferred, it will be given that effect, particularly when the later act covers a broader general subject and contains a portion of the particular provisions of the former act, and adds to some portions and

omits other portions of such particular provisions so as to make such particular regulations contained in the prior act conform to the purpose and policy of the later act covering a broader subject, including the lesser.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. ¶159.]

6. TAXATION ¶449—ASSESSMENT—STATUTES.

In enacting chapter 5596, approved June 18, 1907, the lawmaking power clearly indicated an intent that such chapter shall supersede the previously enacted chapter 5605, approved May 22, 1907, which covers only a portion of the subject-matter that is fully covered by the complete regulations contained in the subsequently enacted chapter 5596, approved June 18, 1907.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 787, 788; Dec. Dig. ¶448.]

7. TAXATION ¶817(1), 449(1) — ASSESSMENTS—EQUALIZATION—POWER OF COUNTY COMMISSIONERS.

The county commissioners have no general power in making tax assessments, but only such special and limited power as is specifically conferred by statutes to secure equalization of tax values. When that power as specially conferred is exercised, and final adjournment is taken, their special power as a board of equalization ceases, particularly when as in this case the power is limited and particular, and in no sense general, as are other powers conferred upon the commissioners with reference to general county matters.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 525, 526, 790-792, 795, 797; Dec. Dig. ¶317(1), 449(1).]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Mandamus by the State, on the relation of the Bank of Ybor City against S. E. Sparkman, as Tax Assessor. Judgment for relator, and defendant brings error. Affirmed.

W. T. Martin, H. C. Gordon, and Guy A. Andrews, all of Tampa, and T. F. West, Atty. Gen., for plaintiff in error. Geo. P. Raney, J. W. Morris, Jr., and Wm. Hunter, all of Tampa, for defendant in error.

WHITFIELD, J. An alternative writ of mandamus was issued by the circuit judge wherein it is alleged that respondent, the tax assessor of Hillsborough county, in making up the assessment roll of said Hillsborough county for the year A. D. 1915, placed therein prior to July 1st of said year an alleged assessment against the relator upon its personal property in and at a valuation of said personal property of \$109,000; that said alleged assessment in the valuation imposed as aforesaid was excessive, unjust, and inequitable; that in said alleged assessment the valuation imposed upon the said personal property of the relator was higher proportionately than the valuation imposed by the respondent in assessing the same on said roll upon any and all other real and personal property assessed in said roll, except in the other assessments on said roll of the personal property of the other banks located in Hillsborough county, and that the

valuations imposed by the respondent in the assessment by him in said roll of the personal property of all banks in said Hillsborough county, including the relator, were by far greater and higher proportionately than the valuations imposed by the respondent aforesaid upon all other real and personal property assessed in said roll; that the assessment aforesaid by the respondent in said roll of the personal property of the relator violated the provisions of section 1 of article 9 of the Constitution of the state of Florida that "the Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal"; that the relator, desiring to present its complaint against the assessment hereinbefore mentioned to a body authorized to hear the same and grant relief in the premises, appeared before the board of county commissioners at the regular meeting held on the first Monday in July, A. D. 1915, to wit, on July 5th, when the said board had convened and was sitting as a board of equalization, and petitioned the said board to equalize the assessment against the relator and for a reduction of the same, and the said board took the said complaint and petition under consideration; that on July 6, 7, and 8, A. D. 1915, the said board continued its sittings as a board of equalization, and on July 8, 1915, by reason of the finding of the said board that the assessment roll of said Hillsborough county for the year 1915 was incomplete, by its resolution then duly adopted, allowed an extension of time for the completion of said roll, which had been presented by the respondent to the said board for review and equalization, until, to wit, August 4, 1915, when the said board on the date last mentioned reconvened as a board of equalization in pursuance of an adjournment to said last-mentioned date, and at its said meeting on August 4, 1915, the respondent, having completed the said assessment roll, again presented the same to the said board for equalization and review. Whereupon the said board by resolution adopted to that effect determined to sit for one week, or as long as should be necessary for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the said county assessor of taxes and of reviewing, perfecting, and equalizing the said assessment on August 5, 6, and 7, 1915, and at its said meeting on August 7, A. D. 1915, while sitting as a board of equalization aforesaid, having heard arguments and testimony with reference to the complaint of the relator hereinbefore mentioned, and having continued to have the same under advisement, did then and there grant the said complaint of the relator, and did reduce the valuation imposed by the assessor in the as-

assessment against the personal property of the relator to the sum of \$17,900, all of which more fully appear by reference to a certified copy of the resolution of the said board adopted at its said meeting and spread upon its minutes of said meeting on August 7, 1915, which is as follows:

Whereas, the various national and state banks and trust companies in Hillsborough county, Fla., have appeared before this board, protesting against the personal property assessment of said national and state banks and trust companies, and requested that said assessment be equalized, and that said banks and trust companies be assessed upon the same basis as other property owners in Hillsborough county, Fla.; and

Whereas, it appears from the facts and figures as submitted by said banks and trust companies that the personal property assessments against said banks and trust companies is unjust to said banks and trust companies, disproportionate to other assessments as against private individuals and corporations, and wholly without any basis or foundation whatsoever:

Now, therefore, be it resolved by the board of county commissioners of Hillsborough county, Fla., that the protest as made by said banks and trust companies be granted, and that said personal property assessment against said banks and trust companies be equalized, and that said banks and trust companies be assessed upon the same basis as other property assessments in Hillsborough county, Fla.; and

Be it further resolved that the assessment against the personal property of the various banks and trust companies in Hillsborough county be reduced to the following figures, to wit:

First National Bank of Tampa	\$70,800 00
Citizens' Bank & Trust Company	25,000 00
Exchange National Bank of Tampa	47,900 00
American National Bank of Tampa	34,400 00
First Savings & Trust Company of Tampa	44,400 00
Bank of Commerce of Tampa	9,200 00
Bank of Ybor City, Ybor City	17,900 00
Latin American Bank, Ybor City	5,300 00
Bank of West Tampa, West Tampa	3,500 00
Hillsborough State Bank of Plant City	5,460 00
Bank of Plant City, Plant City	5,400 00
First National Bank of Plant City	4,400 00

Passed by the board of county commissioners of Hillsborough county, Fla., on this 7th day of August, A. D. 1915

—that in pursuance of the said determination and resolution of the board the respondent did upon said assessment roll change the valuations as fixed by him in the several assessments referred to in the said resolution, including the assessment against the relator upon its personal property, from the valuations originally imposed by said assessor to the several amounts to which the same were reduced by the said board as set forth in said resolution; that said board continued its sittings as a board of equalization aforesaid on August 9th, 10th, and 11th in pursuance of its adjournments to that effect, and, having on August 11, 1915, concluded the review and equalization of said tax assessment roll as presented by the respondent, it thereupon finally adjourned as

a board of equalization and review, as will more fully appear by the following entry in the minutes of said board at its meeting on August 11, 1915, to wit: "The board, having concluded review and equalization of the tax roll as presented by the assessor, adjourned on motion as a board of equalization and review;" that the resolution and determination of the board of county commissioners hereinbefore mentioned granting the said complaint and petition of the relator and reducing the valuation in the assessment of its personal property as hereinbefore alleged and the said resolution continued to remain and was in full force and effect when the said board of county commissioners adjourned as a board of equalization and review as above stated, and had not then been reconsidered, altered, or in any wise disturbed; that the respondent at no time required or requested the relator or any person in its behalf to give in the amount or list of its personal property for the assessment thereof upon the tax roll of the year 1915, nor required or requested the relator or any person in its behalf to make oath before the respondent or any other person to the amount or list of its personal property, nor did the relator or any person on its behalf at any time refuse to give in the amount or list of its personal property to the respondent, nor to take oath to any amount or list of its personal property.

III. That the board did not at any of the meetings referred to in the preceding paragraph, nor at any other time, increase or order increased the value of any real estate or personal property as fixed by the county assessor of taxes of said Hillsborough county upon the tax assessment roll for the year 1915; that after the adjournment by the board of county commissioners of Hillsborough county, Fla., as a board of equalization on August 11, 1915, as stated, no complaints were made or submitted in person or otherwise to the said board from the owners or agents of any real estate or personal property assessed upon the assessment roll of said county for the year 1915 with reference to any assessment appearing upon the said roll; that by reason of the facts stated in this paragraph the board, after their said adjournment on August 11, 1915, as a board of equalization, as stated in preceding paragraph No. 2, were without any authority, jurisdiction, or power to either change or alter any assessments or valuations of property appearing upon said assessment roll of said county, nor to reconsider, alter, or disturb their said action taken while sitting as a board of equalization in granting the complaint and petition of the relator hereinbefore mentioned and fully set forth.

IV. That the board met in regular session on the first Monday in September, 1915, to wit, September 6th; that the purpose of the said meeting as stated in the minutes of the

said board was as follows, to wit: "This meeting held for the purpose of hearing complaints of property owners, both real and personal, the valuations of which have been changed;" that no owners or agents of any property assessed on said assessment roll in person or otherwise made or submitted to the said board any complaints of any property assessed upon said roll. Without the same there was no action to be taken by the board with reference to the said assessment roll, and no action was taken, and thereupon the said board adjourned sine die, and the said board did not undertake to adjourn to any future date its sitting as a board of equalization and review or to hear complaints touching the said assessment roll.

V. That the board illegally and without authority of law at a meeting of said board did on September 7, 1915, undertake to rescind and annul its previous action while sitting as a board of equalization and review granting the complaint and petition of the relator hereinabove mentioned and set forth, and in pursuance whereof the respondent had reduced upon the assessment roll of said county for the year 1915 the value of the personal property of the relator to the sum of \$17,900, to which the same had been reduced by the said board, and to annul the action of the said board with reference to the assessments equalized and reduced in any by the resolution hereinbefore mentioned by adopting at its said meeting of September 17, 1915, a resolution in the words and figures following, to wit: "Commissioner J. M. Jackson moved that a former resolution passed by this board lowering the personal tax assessment against the banks and trust companies be rescinded. Motion was seconded by Commissioner Moody and carried. Commissioner West refrained from voting"—and that the said attempted action of the said board last mentioned was utterly void, and was insufficient to authorize the respondent to reraise upon the assessment roll of said county the assessment of the personal property of the relator first herein mentioned to the original value imposed by said assessor of \$109,000. Nevertheless, in pursuance of the said resolution mentioned in this paragraph, the respondent has again changed the valuation imposed in the assessment upon said roll of the personal property of the relator, and replaced the same at the sum of \$109,000, as originally fixed by him, and, although relator has requested the respondent to make the said assessment to conform to the reduction granted by the board of county commissioners as a board of equalization in and by resolution, the respondent has utterly refused and continues to refuse so to do, and has undertaken to levy a tax upon said personal property for state, county, and school subdistrict purposes at the rate fixed therefor upon a valuation on said personal property in the sum of

\$109,000, and the said assessment roll of said Hillsborough county for the year 1915 is now in the possession, custody, and control of respondent.

The respondent, S. E. Sparkman, as tax assessor of Hillsborough county, Fla., was commanded forthwith to enter in the assessment roll of Hillsborough county, Fla., for the year 1915 in the assessment therein of the personal property of the said Bank of Ybor City on said roll for the year 1915 a valuation of \$17,900, and to levy upon said roll against said property taxes for state and county and subschool district purposes at the rate fixed therefor upon the valuation last mentioned, or to show cause for not doing so.

The respondent demurred to the alternative writ on the following grounds:

"First. That mandamus is not the appropriate remedy.

"Second. That mandamus does not lie to meet the case alleged by the relator.

"Third. The facts recited and alleged in the alternative writ do not entitle the relator to the relief asked for or to any relief.

"Fourth. The facts alleged and recited in the alternative writ fail to show that the relator made a return of his personal property to the respondent and that the same was specified under oath.

"Fifth. The said alternative writ fails to show that the relator made a return to the respondent of his personal property under oath, and, so failing, he had no legal right to complain of the valuation made by the assessor of the said personal property.

"Sixth. From the facts alleged and recited in the alternative writ it appears that it was unlawful for the county commissioners, acting as a board of equalization or otherwise, to lower the assessment of the personal property of the relator as assessed by the respondent.

"Seventh. From the facts and recitals set forth in the alternative writ the board of county commissioners was without authority to hear complaints and receive testimony in regard to the personal assessment of said relator and to lower the same from the sum of \$109,000 to the sum of \$17,900, or to any other sum.

"Eighth. The facts and recitals in the alternative writ show that the said board of county commissioners of Hillsborough county on or about the 17th day of September, A. D. 1915, rescinded its former action or resolution whereby the said board undertook to reduce the personal assessment of the relator from the amount assessed by the respondent.

"Ninth. The alternative writ contains no positive allegations or recitals showing that the respondent, in assessing the personal property of the relator, in any way discriminated against said relator or was in any way guilty of an abuse of his discretion and judgment in the fixing of valuations.

"Tenth. Under the law the respondent is without power at this time to either lower or increase the valuation of the assessment of the relator's personal property.

"Eleventh. The allegations and recitals in the said alternative writ are vague, indefinite, and uncertain."

The court overruled the demurrer to the alternative writ, and, the respondent having declined to file any further pleadings, a peremptory writ was awarded and obeyed, and the respondent took writ of error.

A performance of the requirements of a

peremptory writ of mandamus is not a bar to an appeal from the judgment awarding the writ. County Commissioners of Polk County v. Johnson, 21 Fla. 577.

The applicable provisions of law are as follows:

"The Legislature shall provide for a uniform rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes."

Section 1, art. 9, Const.

"Sec. 16. It is hereby made the duty of every person owning or having the control, management, custody, direction, supervision or agency of property of whatsoever character that is subject to taxation under the laws of this state, to return the same for taxation to the county assessor of taxes in the proper county, or to other proper officer, on or before the first day of April of each and every year, giving the character and the true cash value of the same, as required by law, and upon failure to do so the assessment and valuation made by the assessing officer or officers shall be deemed and held to be binding upon such owner or other person or corporation interested in such property, unless complaint is made of such assessment and valuation on the day set for hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes.

"Sec. 17. Every county assessor of taxes shall require any person giving in the amount or list of his personal property to make oath before him that the same is full and correct, and any person refusing to take such oath shall not be permitted afterwards to reduce the valuation made by such county assessor of taxes of his personal property for that year. The valuation of any item of property, real or personal, by the taxpayer, shall in no case prevent the county assessor of taxes from determining its true value, and if he shall ascertain or have reason to believe that the valuation of any item of property is too small, he shall increase the same to its true value. If any taxpayer feels aggrieved at the valuation placed upon any item of property by the county assessor of taxes, he shall complain to the county commissioners at their meeting in August, that the valuation may be properly adjusted.

"Sec. 18. All personal estate liable to taxation, the value of which shall not have been specified under oath as aforesaid, shall be estimated by the county assessor of taxes at its true cash value, according to his best judgment and information, and his failure by neglect or refusal to make such estimate shall be a cause of suspension by the Governor."

"Sec. 23. The county assessors of taxes shall complete the assessment rolls of their respective counties on or before the first Monday in July in every year, on which day such assessors shall meet with the board of county commissioners at the clerk's office of their respective counties for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessment, and may continue in session for that purpose from day to day for one week, or as long as shall be necessary. Due notice of such meeting shall be given by publication in a newspaper published in such county, or by posting a notice at the court house door, if there be no newspaper published in the county, at least fifteen days before the board will be in session for the purpose of hearing complaints and receiving testimony as to the value of any property as fixed and assessed by the county assessor of taxes: Provided, that the

county commissioners of any county may, if they deem it necessary, extend the time for the completion of such assessment roll and for the purpose of revising and equalizing the assessment, a similar extension, not exceeding thirty days, giving due notice and an opportunity to be heard as to the assessment and values as hereinbefore provided. Should the board increase the value fixed by the county assessor of taxes of any real estate or personal property, due notice thereof shall be given to the owner or agent of such property by publication in a newspaper published in such county, or by posting a notice at the courthouse door, if there be no newspaper published in the county, at least fifteen days before the board will be in session, to hear any reason that such persons may desire to give why the valuation fixed by the board shall be changed. The board of county commissioners shall meet on the first Monday in August or September of each year for the purpose of hearing complaints from owners or agents of any real estate or personal property the value of which shall have been fixed by the assessor, or changed by them, and for that purpose the board shall sit as long as it may be necessary.

"Sec. 24. The board of county commissioners shall have full power to equalize the assessment of the real estate or personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property."

"Sec. 66. The county assessor of taxes and the board of county commissioners of each and every county in this state shall comply with the requirements of section 23 of this act."

Sections 16, 17, 18, 23, 24, and 66, c. 5596, Acts of 1907, approved June 18, 1907.

[1] If the county commissioners were authorized to make the reduction in the relator's personal property assessment, and were not authorized to rescind the action taken, the relator had a right to require the tax assessor to make the assessment on the valuation as reduced; therefore the important inquiry is whether the reduction was duly ordered and the order not legally revoked so as to affect the respondent's legal duty when the alternative writ was issued. The alternative writ alleges that the valuation fixed by the tax assessor "was excessive, unjust, and inequitable" and in violation of the requirements of the Constitution as to "a uniform and equal rate of taxation" and "a just valuation of all property, both real and personal," and the findings of the commissioners when they ordered the reduction in valuation expressly state that it appears from the facts and figures as submitted that the personal property assessment of the relator bank * * * is unjust to said bank * * *

disproportionate to other assessments as against private individuals and corporations, and wholly without any basis or foundation whatsoever." "A just valuation of all property" is not secured, as is mandatorily required by the Constitution, when the assessment valuation of some property is higher proportionately than the valuation put upon other property assessed for the same purpose.

In view of the above-stated allegations of the alternative writ and of the findings of the county commissioners, it may be assumed that the county commissioners adopted the

subsequent resolution of September 17th purporting to rescind the resolution "lowering the personal tax assessment against the bank," on the theory that the commissioners had no power to reduce the valuation in the first instance.

In apparent conformity with this assumption it is argued by counsel for the plaintiff in error that the county commissioners had no power to make the reduction, since section 2 of chapter 5605, approved May 22, 1907, amending section 526, General Statutes of 1906, should be applied in connection with the provisions of the general revenue law of 1907, hereinbefore quoted, and that, being applicable, such section 2 of chapter 5605 provides that "it shall be unlawful for the county commissioners to lower the assessment of any personal property given in by the owner or assessed by the assessor, which shall not have been specified under oath," thereby making the reduction illegal, since it is alleged by the relator taxpayer that it did not specify its property under oath.

Chapter 5605, claimed by the respondent to be in force, is as follows:

"An act to amend sections 525 and 526 of the General Statutes of the State of Florida, relating to taxation and finance.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. That section 525 of the General Statutes of Florida, relating to taxation and finance, be, and the same is hereby amended so as to read as follows:

"525. *Review by County Commissioners.*—The assessors shall complete the assessment rolls of their respective counties on or before the first Monday of July in every year, on which day such assessors shall meet with the board of county commissioners at the clerk's office of their respective counties for the purpose of reviewing and equalizing the assessment, and may continue in session for that purpose from day to day for one week, or as long as shall be necessary: Provided, that the county commissioners of any county may, if they deem it necessary, extend the time for the completion of such assessment roll. Should the board increase the value fixed by the assessor of any real estate or personal property, due notice thereof shall be given to the owner or agent of such property by publication in a newspaper published in such county, or by posting a notice at the courthouse door if there be no newspaper published in the county, at least fifteen days before the board will be in session, to hear any reasons that such persons may desire to give why the valuation fixed by the board shall be changed. The board of county commissioners shall meet on the first Monday in August of each year for the purpose of hearing complaints from the owner or agent of any real estate or personal property, the value of which shall have been fixed by the assessor, or changed by them, and for that purpose the board shall sit as long as may be necessary."

"Sec. 2. That section 526 of the General Statutes of Florida, relative to taxation and finance, be, and the same is hereby amended so as to read as follows:

"526. *Equalization of Assessments.*—The board of county commissioners shall have full power to equalize the assessment of the real estate and personal property in their respective counties and for that purpose only may raise or lower the value fixed by the assessor on any particular piece of real estate or personal prop-

erty. It shall be unlawful for the county commissioners to lower the assessment of any personal property given in by the owner or assessed by the assessor which shall not have been specified under oath. The county commissioners failing to obey this provision shall be subject to a fine of fifty dollars each, and suspension."

"Sec. 3. That all laws and parts of laws in conflict with this act be and the same are hereby repealed.

"Sec. 4. That this act shall take effect from and after its passage and approval by the Governor.

"Approved May 22, 1907."

The statutes of the state enacted at a session of the Legislature are not numbered or printed with reference to the date of their passage or approval. Chapter 5605 was approved and took effect upon its approval, May 22, 1907. Chapter 5596, according to the printed copies thereof, was approved and became effective June 18, 1907. The latter is a general revenue law "relating to tax assessments and collection of revenue." The former amended two sections of the prior general revenue law (chapter 4322, Acts of 1895); the same being re-enacted as sections 525 and 526 of the General Statutes of 1906.

[2-5] In the absence of express repeals or irreconcilable repugnancy, the effect of the latter statute upon a former one affecting the same subject depends upon the intent of the lawmaking power; and this is true whether the two statutes are passed at the same session or at different sessions of the Legislature. The intent of a statute is to be determined by a consideration of the language used, the subject-matter, the purpose designed to be accomplished, and all other relevant and proper matters that may assist in ascertaining the legislative intent. A general statute covering an entire subject-matter, and manifestly designed to embrace all the regulations of the subject, may supersede a former statute covering a portion only of the subject, when such is the manifest intent, even though the two are not wholly repugnant. Where there is material repugnance in statutory regulations, or where there is anything from which an intent that a later act shall supersede a prior act may be fairly inferred, it will be given that effect, particularly when the later act covers a broader general subject and contains a portion of the particular provisions of the former act, and adds to some portions and omits other portions of such particular provisions so as to make such particular regulations contained in the prior act conform to the purpose and policy of the later act, covering a broader subject, including the lesser.

[6, 7] In enacting chapter 5596, approved June 18, 1907, covering the broad general subject of the assessment of property and the collection of taxes, including matters properly connected with such general subject, the inclusion in such chapter of the new matter contained in section 18 and other sections of the act, and the re-enactment of section 525 as amended with further amendment, and the

re-enactment of a portion of section 526 of the General Statutes of 1906 as amended by chapter 5605, and the omission of another portion of amended section 526, considered in connection with the policy and purpose shown by the other sections of chapter 5596 set out herein, the Legislature clearly indicated an intent that the later act shall supersede the former statute, covering only a portion of the subject-matter that is fully covered by the complete regulations of the later act. This is obviously the intent when it appears that the amendment made by section 1 of chapter 5605 to section 526 merely gave the county commissioners authority to equalize the assessment values of personal property as well as real estate, and when it further appears that, in considering the entire subject upon the enactment of the later general statute covering the whole matter, the amendment made to section 526 of the General Statutes of 1906 by chapter 5605 as to power to equalize assessments of personal property was retained, and the latter portion of the section, making it "unlawful for the county commissioners to lower the assessment of any personal property given in by owner or assessed by the assessor which shall not have been specified under oath," was omitted from the later act, covering the entire subject and providing complete and in some respects new and different regulations indicating the then purpose and policy of the lawmakers. See *Dees v. Smith*, 55 Fla. 652, 46 South. 173; *Jernigan v. Holden*, 34 Fla. 530, 16 South. 413.

This case is essentially different from *Luke, a Slave, v. State*, 5 Fla. 185, *Doggett v. Walter*, 15 Fla. 355, *Curry v. Lehman*, 55 Fla. 847, 47 South. 18, *State v. Southern Land & Timber Co.*, 45 Fla. 374, 33 South. 999, *State v. Commissioners of Volusia County*, 28 Fla. 793, 10 South. 14, and other somewhat similar cases, where two acts were held to operate concurrently, and one not being designed to supersede the other.

The two sections of chapter 5605 approved May 22, 1907, having been in substance re-enacted with additions to one and omission from the other as sections 23 and 24 of chapter 5596, approved June 18, 1907, along with complete regulations of the whole general subject of the assessment and collection of state and county taxes, chapter 5605 is thereby superseded and rendered inoperative. See section 526, *Compiled Laws of 1914*, and notes. As a result of this the provision of section 526 of the General Statutes of 1906, as amended by section 2 of chapter 5605, approved May 22, 1907, that "it shall be unlawful for the county commissioners to lower the assessment of any personal property given in by the owner or assessed by the assessor, which shall not have been specified under oath," is not in force since chapter 5596, approved June 18, 1907, took effect. This being so, the county commissioners were authorized by section 24 of Chapter 5596 to "raise or low-

er the value fixed by the county assessor of taxes on any particular * * * item or items of personal property," including that belonging to the relator, whether the relator had returned its property under oath or not, as they did by the resolution of August 7, 1915, herein quoted. The merits of the reduction in valuation are not here for consideration.

Sections 16, 23, and 24 provide specifically for stated meetings of the county commissioners as a board of equalization and for hearings, and also give power to equalize assessments of both real and personal property. The provisions and limitations of these sections have reference to the rights of taxpayers and due process of law in levying tax burdens; and, if they are not substantially complied with, the taxpayer is not bound by the action taken. See *Clark-Ray-Johnson Co. v. Williford*, 62 Fla. 453, 56 South. 938; *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513.

Section 27, c. 5596, provides that the county commissioners shall in October examine and compare the original tax roll with the two copies required to be made, and make indorsements thereon that they are correct, the assessor being present "to correct all mistakes and inaccuracies," and that warrants annexed to one of the tax books giving to the tax collector authority to collect the taxes assessed "shall be recorded in the minutes of the board of county commissioners, and the county commissioners shall not have power to change any assessment after the copies [of the tax roll] have been delivered," etc. This latter provision manifestly relates to "mistakes and inaccuracies," and does not give to the county commissioners authority to raise an assessment duly lowered and fixed in equalizing all tax assessments after the time for equalizing has passed and the county commissioners have adjourned sine die at a meeting held under statutory requirement for that purpose. Such a construction, in the absence of other authority, would make the provision lacking in due process of law.

The county commissioners, as appears from the allegations of the writ demurred to, adjourned sine die as a board of equalization on August 11, 1915, without increasing the valuations of any real estate or personal property as fixed by the tax assessor, and no complaints were made with reference to any other assessments than those that were reduced as shown by this alternative writ, and the county commissioners having no complaints to consider at their meeting in September, adjourned sine die as a board of equalization and review to hear complaints as to assessments. As the relator's assessment was reduced at the August meeting, as the commissioners had authority to do under the statute, and as the board adjourned sine die August 11 and again on September 8, 1915, when the meetings required by the

statute were held, and presumably equalization was completed, the board of county commissioners were without authority subsequent to such completion of equalization and adjournment sine die to in effect raise the relator's assessed valuations from the amounts to which they were previously reduced, since the power to equalize valuations for taxation is special and limited, and the lawmakers had made no provision for such subsequent action and provided no notice to the person whose assessment is thus raised after having been reduced and fixed on its merits as stated in the resolution; there being no question of making the assessment speak the truth in accordance with action duly taken within the limited authority to equalize valuations subject to the statutory requirements as to time and notice with opportunity to be heard. The rights required by the relator with reference to the assessment against him by virtue of the previous action duly taken and not set aside by competent authority cannot be taken away by subsequent action of the board that is not provided for by law, since that would be a denial of due process. See *French v. Harney County*, 33 Or. 418, 54 Pac. 211; 37 Cyc. 1098.

Even if the relator had actual notice and was heard before the rescinding action was taken, this does not afford due process or render legal the action that was taken without authority of law. See *Coe v. Armour Fertilizer Works*, 287 U. S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027.

No question of fraud or imposition or clerical misprision is presented here.

Section 23, c. 5596, provides for a meeting of the county commissioners on the first Monday in August or September for the purpose of hearing complaints of valuations fixed by the tax assessor or changed by the commissioners, "and for that purpose the board may sit as long as it may be necessary." But in this case the board had sat as long as it deemed necessary, and, there being no complaints, the board adjourned sine die as a board of equalization. The county commissioners have no general power in making tax assessments but only such special and limited power as is specifically conferred by statutes to secure equalization of tax values. When that power, as specially conferred, is exercised, and final adjournment is taken, their special power as a board of equalization ceases, particularly when, as in this case, the power is limited and particular, and in no sense general, as are other powers conferred upon the commissioners with reference to general county matters. Such cases as *Parker v. Evening News Publishing Co.*, 54 Fla. 544, 45 South. 309, and *Bowden v. Ricker*, 69 South. 694, are not controlling here. In this case it is alleged and admitted by demurrer that there were no com-

plaints for the equalizing board to consider at its statutory meeting in September, and that the board adjourned sine die, and did not undertake to adjourn its sittings to any further day as a board of equalization and review or to hear complaints touching the said assessment roll. The special and limited power to equalize assessments having been exercised, and the duty completed, the statute does not either expressly or impliedly give authority to have a subsequent meeting to change assessments fixed in due course of law.

Affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

JACKSON v. STATE.

(Supreme Court of Florida. Feb. 15, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 382 — EVIDENCE — MATERIALITY.

In a prosecution for murder, proffered testimony by the defendant that the justice of the peace who conducted the preliminary examination of the defendant permitted him to give bond, awaiting the action of the grand jury, is properly excluded as being immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 847-864; Dec. Dig. — 382.]

2. CRIMINAL LAW — 1160 — VERDICT — EVIDENCE.

When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, an appellate court should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084; Dec. Dig. — 1160.]

Error to Circuit Court, Walton County; Cephas L. Wilson, Judge.

John Jackson was convicted of murder in the second degree, and brings error. Affirmed.

S. K. Gillis, of De Funiak Springs, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, J. John Jackson was indicted and tried for the crime of murder in the first degree, and convicted of murder in the second degree.

The first and second assignments of error are as follows:

"(1) The court erred in refusing to allow the plaintiff in error to introduce evidence that the justice of the peace who conducted the preliminary examination allowed him to give bond to await the action of the grand jury.

"(2) The court erred in striking from the testimony the evidence that the plaintiff in error had been allowed by the justice of the peace who conducted his preliminary examination to give bond awaiting the action of the grand jury."

[1] We find that the defendant was sworn as a witness in his own behalf, and the following proceedings then took place:

"I know Mr. Hilson. Q. When he sent you down here to jail, state whether or not he said you could give bond. A. Yes, sir.

"Mr. D. Stuart Gillis: I object. I don't think that is material.

"The Court: Who said so?

"Mr. S. K. Gillis: The justice of the peace.

"The Court: I don't think that is material. I don't see how that testimony could affect the trial as to what some justice of the peace did in his court. (To which ruling the attorney for the defendant did then and there except.)"

It will be observed that the witness answered the question before any objection was interposed thereto, and it does not appear that any motion was made to strike the answer. We think that the trial judge was correct in stating that such testimony was not material. It is sufficient to say that these two assignments have not been sustained.

[2] The third and only remaining assignment is based upon the overruling of the motion for a new trial, the grounds of which question the sufficiency of the evidence to support the verdict. We have carefully read the transcript of the record, and are of the opinion that the evidence is amply sufficient. As we held in *Maples v. State*, 68 Fla. 87, 66 South. 423, following numerous prior decisions of this court:

"When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, an appellate court should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside the evidence."

Judgment affirmed.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

STEWART v. DE LAND-LAKE HELEN
SPECIAL ROAD AND BRIDGE DIST. IN
VOLUSIA COUNTY et al.

(Supreme Court of Florida. Feb. 15, 1916.
Rehearing Denied March 2, 1916.)

(Syllabus by the Court.)

1. STATUTES \S 162—REPEAL BY IMPLICATION—SPECIAL AND GENERAL ACTS.

The maxim of "*Leges posteriores priores contrarias abrogant*" is not applicable to cases where the precedent act is special or particular and the subsequent act is general; the rule being that a later general act does not work any repeal of a former particular statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 235-237; Dec. Dig. \S 162.]

2. STATUTES \S 162—REPEAL—MODIFICATION—GENERAL AND SPECIAL ACTS.

In the construction of general and special acts the maxim "*Generalia specialibus non derogant*" applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant and irreconcilable as to in-

dicate a legislative intent that the one should repeal or modify the other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 235-237; Dec. Dig. \S 162.]

3. STATUTES \S 162—REPEAL—MODIFICATION—GENERAL AND SPECIAL ACTS.

One statute will not be held to repeal a former one, unless there is a positive repugnancy between the two, or the latter was clearly intended to prescribe the only rule which should govern the case provided for, or it revises the subject-matter of the former, or expressly repeals it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 235-237; Dec. Dig. \S 162.]

4. STATUTES \S 159 — REPEAL BY IMPLICATION—REPUGNANCY.

The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 229; Dec. Dig. \S 159.]

5. STATUTES \S 225 — CONSTRUCTION—LAWS IN PARI MATERIA.

Laws should be construed with reference to the Constitution and the purpose designed to be accomplished, and in connection with other laws in *pari materia*, though they contain no reference to each other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 302, 303; Dec. Dig. \S 225.]

6. STATUTES \S 225 — CONSTRUCTION—STATUTES IN PARTIAL CONFLICT.

Where one statute in comprehensive terms covers a subject, and another later statute embraces only a particular part of the same subject, the two should be construed together, unless a different legislative intent appears; and the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 302, 303; Dec. Dig. \S 225.]

7. STATUTES \S 158 — REPEAL BY IMPLICATION—LEGISLATIVE INTENT.

While statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes, unless such is clearly the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 223; Dec. Dig. \S 158.]

8. STATUTES \S 159, 161(1)—REPEAL BY IMPLICATION—REPUGNANCY—LEGISLATIVE INTENT.

An intent to repeal prior statutes or portions thereof may be made apparent, when there is a positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes. But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 229, 230, 233, 234; Dec. Dig. \S 159, 161(1).]

9. STATUTES \S 161(1)—CONSTRUCTION—ACTS COVERING SAME SUBJECT.

If two statutes may operate upon the same subject without positive inconsistency or repugnancy in the practical effect and consequences, they should each be given the effect designed for them, unless a contrary intent clearly appears.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 230, 233, 234; Dec. Dig. \S 161(1).]

10. HIGHWAYS \hookrightarrow 122—STATUTE—REPEAL BY IMPLICATION.

Chapter 5762 of the Laws of 1907 has not been repealed by chapter 6208 of the Laws of 1911 (Comp. Laws 1914, §§ 884a-884q), and there are no such conflicts in the provisions of the two chapters that they cannot stand together and each be operative.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. \hookrightarrow 122.]

11. CONSTITUTIONAL LAW \hookrightarrow 48—CONSTRUCTION IN FAVOR OF VALIDITY OF STATUTE.

Our state Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. \hookrightarrow 48; Statutes, Cent. Dig. § 56.]

12. CONSTITUTIONAL LAW \hookrightarrow 48, 70(3)—JUDICIAL POWER—POLICY OF STATUTE—DETERMINATION BY COURTS.

The reasonableness or justice of a deliberate act of the Legislature, the wisdom or folly thereof, the policy or motives prompting it, so long as the act does not contravene some portion of the organic law, are all matters for legislative consideration, and are not subject to judicial control. The courts are bound to uphold a statute, unless it is clearly made to appear beyond a reasonable doubt that it is unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 46, 131; Dec. Dig. \hookrightarrow 48, 70(3); Statutes, Cent. Dig. § 56.]

13. CONSTITUTIONAL LAW \hookrightarrow 70(3) — JUDICIAL POWER — POLICY OF STATUTE — PROVINCE OF COURTS.

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to review by the courts, whose province is not to regulate, but to effectuate, the policy of the law as expressed in valid statutes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. \hookrightarrow 70(3).]

14. CONSTITUTIONAL LAW \hookrightarrow 50—LEGISLATIVE POWER—SCOPE.

Great latitude should be accorded to the Legislature in the exercise of its proper powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. \hookrightarrow 50.]

15. TAXATION \hookrightarrow 25 — ASSESSMENT—COUNTY PURPOSE — LEGISLATIVE DETERMINATION—REVIEW BY COURTS.

The Constitution does not define or amplify the term "county purposes" for which counties may be authorized "to assess and impose taxes," and the Legislature, in exercising its appropriate lawmaking functions, may determine what is a "county purpose," and the courts are not authorized to render such determination ineffectual, unless some provision of the Constitution is violated, or unless the particular enactment can have no legal or practical relations whatever to any "county purpose."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. \hookrightarrow 25.]

16. HIGHWAYS \hookrightarrow 90, 122—STATUTES \hookrightarrow 123 (4)—TITLE AND SUBJECT-MATTER—ROADS AND BRIDGES.

Chapter 6208 of the Laws of 1911 (Comp. Laws 1914, §§ 884a-884q) is not violative of sections 1 and 2 of article 8, or of sections 3 and

5 of article 9, of the state Constitution, or of section 16 of article 3 of such Constitution.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302, 380, 393; Dec. Dig. \hookrightarrow 90, 122; Statutes, Cent. Dig. §§ 178, 179, 181; Dec. Dig. \hookrightarrow 123(4).]

17. HIGHWAYS \hookrightarrow 122—CONFLICTING ACTS—ROADS AND BRIDGES.

There are no such conflicts in the provisions of chapter 6673 of the Special Laws of 1913, as amended by chapter 7145 of the Special Laws of 1915, and chapter 6208 of the Laws of 1911 (Comp. Laws 1914, §§ 884a-884q), as amended by chapter 6879 of the Laws of 1915, that such chapters cannot stand together and each be operative.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. \hookrightarrow 122.]

18. HIGHWAYS \hookrightarrow 166 — MUNICIPAL CORPORATIONS \hookrightarrow 661(1) — STREETS—LEGISLATIVE CONTROL.

The Legislature exercises plenary control over public highways, whether they be public county roads or streets in cities and towns.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 457; Dec. Dig. \hookrightarrow 166; Municipal Corporations, Cent. Dig. §§ 1432, 1434; Dec. Dig. \hookrightarrow 661(1).]

19. CONSTITUTIONAL LAW \hookrightarrow 50 — LEGISLATIVE POWER—PUBLIC WELFARE.

Bounds of wide discretion should be accorded to the Legislature, in the interest of the public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. \hookrightarrow 50.]

20. TAXATION \hookrightarrow 29—FORMATION OF TAXING DISTRICTS—SPECIAL ASSESSMENTS—CONSTITUTIONAL LAW.

There is no express provision in the state Constitution as to special assessments for local improvements, nor is there any express provision in such Constitution as to the formation of taxing districts for particular purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60; Dec. Dig. \hookrightarrow 29.]

21. TAXATION \hookrightarrow 29 — TAXING DISTRICTS—LEGISLATIVE POWER.

When the nature of the case does not conclusively fit it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and is not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60; Dec. Dig. \hookrightarrow 29.]

22. APPEAL AND ERROR \hookrightarrow 900 — PRESENTATION FOR REVIEW—PRESUMPTION.

Every presumption is in favor of the correctness of an order or decree rendered by a circuit judge, and the burden rests upon one appealing from such order or decree to overcome this presumption of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669; Dec. Dig. \hookrightarrow 900.]

Appeal from Circuit Court, Volusia County; Jas. W. Perkins, Judge.

Proceeding by the De Land-Lake Helen Special Road and Bridge District in Volusia County, by M. Bond and others, County Commissioners, to validate a bond issue, wherein a petition for intervention, answer, objection, and demurrer were filed by Isaac A. Stewart. From an adverse order, Stewart appeals. Affirmed.

On the 11th day of September, 1915, the De Land-Lake Helen road and bridge district in Volusia county, Florida, by M. M. Bond and the other county commissioners of such county, filed a petition under the provisions of chapter 6868 of the Laws of Florida (Acts 1915, page 141), for the purpose of having validated a bond issue for the sum of \$350,000, which had been voted upon and authorized at a special election held on the 13th day of July, 1915, under the provisions of chapter 6208 of the Laws of Florida (Acts 1911, page 187), as amended by chapter 6879 of the Laws of Florida (Acts 1915, page 182). The petition is quite lengthy, having a number of exhibits attached thereto and covering 66 typewritten pages. We do not copy the petition or exhibits, but shall refer to such portions thereof and make such excerpts therefrom as may seem necessary or desirable for a proper understanding of this opinion. Suffice it now to say that the petition sets forth in detail all the different steps taken, both preceding and subsequent to such special election, and alleges a strict compliance with all the statutory requirements. The transcript shows that such petition was presented to the circuit judge on the date that the same was filed, who on the same day made an order to the effect that the state of Florida, through the state attorney for the Seventh judicial circuit, show cause before such circuit judge on the 9th day of October, 1915, "why said bonds should not be validated and confirmed"; that a copy of such petition and such order of court be served upon such state attorney at least 18 days prior to the date fixed for such hearing, and also—

"that prior to the hearing of said cause the clerk of this court shall publish in a newspaper published in the said De Land-Lake Helen special road and bridge district, once each week for at least three weeks before said hearing, the first publication to be at least eighteen (18) days before said hearing, a notice addressed to the taxpayers and citizens of said De Land-Lake Helen special road and bridge district, requiring them, at the time and place specified in this order for the hearing of said cause, to show cause, if any they have, why said bonds should not be validated and confirmed."

The transcript further shows that the state attorney was served, and also that publication was made in compliance with such order.

On the 9th day of October, 1915, Joseph H. Jones, Esq., the state attorney for the Seventh judicial circuit of Florida, filed his answer to such petition, which, omitting the caption and introductory paragraphs, is as follows:

"This respondent, now and at all times reserving to himself the right of exception to the petition heretofore filed, for answer thereunto as provided by law, answering says:

"As state attorney of the Seventh judicial circuit of the state of Florida, the district in which De Land-Lake Helen special road and bridge district in Volusia county, Florida, is situated, he admits that a petition was filed in this honorable court on the 11th day of September, 1915, in and by M. M. Bond, J. Le Roy Harden, T. J. Murray, J. G. Cade, and J. D. Maley, as county commissioners of Volusia county, Florida, against the state of Florida,

in the matter of the validation of bonds of the above-named special district.

"That on the said 11th day of September, 1915, this honorable court issued its order to respondent, Joseph H. Jones, as state attorney in and for the Seventh judicial circuit of the state of Florida, to show cause on the 9th day of October, 1915, why the bonds petitioned to be validated should not be validated and confirmed.

"That at the same time a copy of the said order and petition was served upon this respondent.

"Respondent further shows that notice of this hearing has been published in the De Land Weekly News, as required by law, and proof of same filed in these proceedings.

"Respondent, further answering, says that he has carefully examined the said petition for the validation of the said bonds for the De Land-Lake Helen special road and bridge district in Volusia county, same being for the aggregate sum of \$350,000; that the object of the said bonds is for the construction of roads and bridges in the said district, to be paid for from the proceeds of the sale of the said bonds.

"Respondent, further answering, says that, as shown by these proceedings, the petition required by law was filed before the county commissioners of the said county of Volusia, state of Florida, on the 3d day of May, 1915, as shown by verified copy annexed to the said petition, that same was signed by the requisite number of duly registered voters who were freeholders residing in the said territory proposed to be constituted as special road and bridge district in Volusia county, and praying for the issuance of bonds; also setting forth in general terms the directions and proposed roads and bridges, and the location of the improvements contemplated in and by the said petition, and the amount estimated necessary for the construction of the same, and further that the payment for the same was to be made from the proceeds of the sale of the bonds to be issued upon the said territory for these purposes.

"The election was ordered by the said county commissioners of Volusia county at the next meeting after the filing of the said petition, as shown by the petition and verified exhibit served upon this respondent. Notice of the election to be held in the said district was also given by publication, as provided by law, and same was duly published, designating the roads to be built and the bridges to be constructed, and the estimated cost of same, appointing inspectors and clerks for the conduct of the election, notice of which was published in the Volusia County Record, a weekly newspaper printed and published in De Land, in the said proposed district, in Volusia county, Florida, for five consecutive weeks, issues between June 11 and July 9, 1915. Subsequent to the publication of the call for the said election, the returns were canvassed, and it was found that the majority was in favor of constituting the said territory into a special road and bridge district and constructing and paying for the proposed roads and bridges as specified in the said petition, by the sale of bonds which were voted in the sum of \$350,000, said canvass being upon the 3d day of August, 1915.

"The territory was set apart by the county commissioners in and for Volusia county, and designated and declared as the De Land-Lake Helen special road and bridge district in Volusia county, Florida, and the boundaries of the said district were duly declared and published in the Volusia County Record, a newspaper published in the said district, as provided by law.

"That on the 7th day of September, 1915, a resolution providing for the issuance of road and bridge bonds for the said special road and bridge district in the amount of \$350,000, an prescribing the form and details of the said bonds, with place of payment of the interest

and principal thereof, was passed by the board of county commissioners in and for Volusia county, Florida.

"Respondent, further answering, says that the said county commissioners, in providing for the payment of the interest and principal of the said bonds so to be issued upon the said special road and bridge district, have followed the statute of 1911, to wit, chapter 6208, Laws of Florida.

"Respondent, further answering, says that the object of the issuance of the said bonds is for a legal purpose, to wit, the construction and building of roads and bridges in the said district.

"That the issuance of the said bonds was duly approved by a majority of the qualified voters at the said election duly called.

"That he has ascertained that the assessed value of the taxable property in said district for 1914 is \$1,929,000.

"That the bonded indebtedness is none.

"The present issue is for \$350,000, which makes the total of the district \$350,000, drawing interest at 6 per cent. per annum.

"That the population of the said De Land-Lake Helen special road and bridge district is estimated at 7,500.

"Respondent, further answering, says that the conditions required to be performed for the issuance of these bonds have been duly performed, and that he sees no reason why the said bonds should not be validated by the order and decree of this court.

"And now, having fully answered, he prays to be hence dismissed in these proceedings."

To such answer was attached the following exhibit:

"State of Florida, County of Volusia.

"I, Samuel D. Jordan, clerk of the circuit court in and for the state and county aforesaid, hereby certify that the assessed valuation of the real estate, personal property, railroad, telegraph, and telephone lines included in the boundaries of the De Land-Lake Helen special road and bridge district for the year 1914, as calculated by the tax assessor is \$1,929,000. I further certify that there is no other bonded indebtedness upon the said district than the issue of \$350,000, which is now in process of validation.

"The estimated population of the said district is 7,500.

"Witness my hand and official seal this 8th day of October, A. D. 1915.

"[Seal] Samuel D. Jordan,
"Clerk Circuit Court."

On the 9th day of October, 1915, Isaac A. Stewart filed the following paper, which he designates "Petition for Intervention, Answer, and Demurrer":

"Now comes Isaac A. Stewart, by his attorney, Tom B. Stewart, not waiving the many imperfections and defects of the petition filed herein, for answer, objection, and demurrer thereto, does represent unto the court as follows:

"That he is a citizen of the county of Volusia and state of Florida, residing in the city of De Land; that he is the owner of much taxable property in the county of Volusia and state of Florida, and that he owns several pieces of property in the city of De Land, upon which he pays taxes and which is within the De Land-Lake Helen special road and bridge district of Volusia county, Florida, according to metes and bounds mentioned in petition herein, some of which land is upon the roads proposed to be paved under this bonding issue; and for special objection to the granting of the prayer of petitioner, De Land-Lake Helen special road and bridge district the said Isaac A. Stewart does most respectfully submit unto the court

the following objections to the validation of said bonds:

"First. That chapter 6208, Laws of Florida, Acts of 1911, under the provisions of which the bonds are alleged to have been voted, is unconstitutional and void.

"Second. That chapter 6208, Laws of Florida, Acts of 1911, under the provision of which act the bonds are alleged in the petition to have been voted, is inapplicable to Volusia county, as the construction and repairing of all roads and bridges in Volusia county, as well as the levying of special taxes and the limitation as to the amount Volusia county can tax for road the bridge purposes, is governed by special act of the Legislature of Florida, to wit, chapter 5762, Laws of Florida, Acts of 1907, which is now in force and has not been repealed, and chapter 6208, Laws of Florida 1911, has no effect in Volusia county.

"Third. That chapter 5762, Laws of Florida, Acts of 1907, regulates the manner in which roads and bridges shall be constructed in Volusia county, Florida, as well as the manner in which the revenue shall be derived for constructing and repairing the same, as well as imposing a limitation as to the amount that can be assessed against the property in Volusia county.

"Fourth. That the petition shows on its face that the proceedings on which the bonds are issued are illegal and void.

"Fifth. That said petition shows on its face that the petition for the special bond election did not set out in general terms a description of the roads and bridges to be constructed.

"Sixth. That the petition shows on its face that the petition for the calling of the special bond election did not set out in general terms a description and a proposed location of the roads and bridges to be constructed, together with amount estimated as being necessary with which to pay for the construction of same.

"Seventh. That said petition shows on its face that petition for the special bond election did not state the kind of bonds to be issued, the number of years which they were to run, or the amounts of interest the proposed bonds were to bear, for failure of which said bond issue is illegal and void.

"Eighth. That said petition shows on its face that the notice of the special bond election did not set out or give a general description of the roads and bridges proposed to be constructed, but did give a description of some five different materials which might be used.

"Ninth. That said petition shows on its face that the notice for the bond election did not set out or give a general description of the roads and bridges proposed to be constructed, together with the estimated cost of same, and the manner in which payment for the construction of same was to be made.

"Tenth. That said petition shows on its face that the notice of the bond election did not give any definite or general description of the roads and bridges to be constructed, and did in several instances have an alternative description as to what material would be used in the construction of certain roads.

"Eleventh. That said petition shows on its face that the notice of bond election did not state the kind of bonds that were to be issued, the number of years which they were to run, or the interest they should bear.

"Twelfth. That this court is without jurisdiction to grant the relief sought in the petition.

"Thirteenth. That the petition does not make or state such facts as entitled the bonds sought to be validated to be validated.

"Fourteenth. That said petition shows on its face that said bond issue is illegal and void, because they are to be issued to build roads and streets within the corporate limits of the city of De Land, a municipal corporation existing

under the laws of Florida, which by its charter is given exclusive control over the streets within its limits, which charter is now in full force and effect, and has not been abolished, or the charter thereof changed or modified.

"Fifteenth. That because of many irregularities in the petition for bond election, the calling and notice of bond election, etc., the prayer of petition should not be granted.

"It is prayed that Isaac A. Stewart be given advantage of the above and foregoing objections numbered 1 to 15, inclusive, as fully as if made by demurrer or otherwise.

"Wherefore Isaac A. Stewart prays that he be allowed to intervene in this suit, and that he be made a party respondent (or defendant) to the petition filed herein, and that the petition be dismissed, and the relief sought denied."

This paper has appended thereto the affidavit of the intervener to the effect that:

"All the facts set up by him as to his ownership of property in Volusia county, Florida, and to his citizenship therein, in the above and foregoing petition for intervention and answer are true, and that so much of the above and foregoing answer and objections as is in effect a demurrer is interposed in good faith, and not for the purpose of delay."

On the 9th day of October, 1915, the circuit judge made an order from which we copy the following:

"It is thereupon ordered, adjudged, and decreed that said Isaac A. Stewart be made a party respondent to said petition, and his petition for intervention, answer, objection, and demurrer be made a part of the record in this matter."

Also on the 9th day of October, 1915, the circuit judge rendered the following order:

"This day this cause coming on to be heard upon the original petition filed herein and the answer of the state of Florida, by the state attorney, thereto, and the petition for intervention, answer, objection, and demurrer of Isaac A. Stewart, and the same having been submitted to the court for final hearing by the respective parties hereto, and the court having determined all the questions of law and of fact in said cause, upon consideration thereof the court doth find that the equities in said cause are with the petitioner, and that the prayer of the said petition should be granted, and that all proceedings had or taken in connection with the issuance of the bonds of De Land-Lake Helen special road and bridge district in Volusia county, Florida, are regular and legal.

"It is therefore ordered, adjudged, and decreed that the bonds referred to and described in said petition and the other papers herein are hereby validated and confirmed, and when said bonds are duly issued, sold, and delivered the same shall be valid and legal obligations against the said De Land-Lake Helen special road and bridge district in Volusia county, Florida, and this decree shall be forever conclusive as to the validity of the said bonds against the said district, and against the taxpayers and citizens thereof, in the event no appeal is taken from this decree within 20 days from the date of the signing of the same, or in the event that, if such appeal be taken, this decree shall be confirmed by the Supreme Court, and in case no appeal shall be taken as aforesaid, or if taken and this decree is confirmed by the Supreme Court, then and in that event the validity of said bonds shall never be called in question in any court in this state.

"It is further ordered, adjudged, and decreed that all proceedings heretofore had and taken in connection with the issuing of said bonds are regular, legal, and proper."

From this order Isaac A. Stewart has entered his appeal and assigned the following errors:

"(1) The court erred in finding that the equities in said cause are with the petitioner, and that the prayer of the said petition should be granted, and that all proceedings had or taken in connection with the issuance of the bonds of the De Land-Lake Helen special road and bridge district in Volusia county, Florida, are regular and legal.

"(2) The court erred in decreeing that the bonds referred to and described in said petition and the other papers herein are hereby validated and confirmed, and when said bonds are duly issued, sold, and delivered the same shall be valid and legal obligations against the said De Land-Lake Helen special road and bridge district in Volusia county, Florida, and this decree shall be forever conclusive as to the validity of the said bonds against the said district and against the taxpayers and citizens thereof, in the event no appeal is taken from this decree within 20 days from the signing of the same, or in the event that such appeal be taken this decree shall be confirmed by the Supreme Court, and in case no appeal shall be taken as aforesaid, and if taken and this decree be confirmed by the Supreme Court, then, in that event, the validity of said bonds shall never be called in question by any court of this state.

"(3) The court erred in decreeing that all proceedings heretofore had and taken in connection with the issuing of said bonds are regular, legal, and proper.

"(4) The court erred in validating the bonds sought to be validated in the petition."

Tom B. Stewart, of De Land, for appellant. Landis, Fish & Hull, of De Land, for appellees.

SHACKLEFORD, J. (after stating the facts as above). Voluminous briefs have been filed by the respective counsel in this cause, in which numerous authorities are cited, and we have also been favored with oral arguments. We shall treat such points as seem to be necessary for a proper disposition of the case.

Instead of arguing the assignments as made in detail, the appellant has announced that he relies for a reversal of the order from which the appeal was entered upon four propositions of law, the first of which he states in his brief as follows:

"The first proposition is that chapter 5762, Acts of the Year 1907, entitled 'An act for the improvement of public roads and bridges in Volusia county, providing for the employment of convicts under certain conditions and for the levy * * * of a road and bridge tax, and the means of its expenditure,' is now in force and effect in Volusia county, Florida, and that chapter 6208, Laws of Florida, Acts of 1911 (Comp. Laws 1914, §§ 884a-884q), under the provision of which act the bonds are alleged in the petition to have been voted, is inapplicable to Volusia county, as the construction and repair of all roads and bridges in Volusia county, as well as the levying of special taxes and the limitation as to the amount Volusia county can tax for road and bridge purposes is governed by special act of the Legislature of Florida, to wit, chapter 5762, Laws of Florida, Acts of 1907, which is now in force and has not been repealed, and that chapter 6208, Laws of Florida 1911, has no effect in Volusia county, and that chapter 5762, Laws of Florida, Acts 1907, regulates the manner in which all roads and

bridges shall be constructed in Volusia county, Florida, as well as the manner in which the revenue shall be derived for constructing and repairing the same, as well as imposing a limitation as to the amount that can be taxed against the property in Volusia county."

Chapter 5762 of the Laws of Florida (Acts of 1907, page 291), which the appellant contends has never been repealed, either directly or by necessary implication, and therefore remains in full force and effect, bears the following title:

"An act for the improvement of the public roads and bridges in Volusia county, providing for the employment of convicts under certain conditions and for the levy and collection of a road and bridge tax, and the means of its expenditure."

As is apparent at a glance, this is a local law, relating to Volusia county in the particulars and for the purposes therein specified, and does not undertake to provide for or authorize the issuance of any bonds for road and bridge purposes, but relates only to the levy and collection of a road and bridge tax, and the means of its expenditure. Chapter 6208 of the Laws of Florida (Acts of 1911, page 167), is a general law, applicable throughout the state, being entitled:

"An act to authorize the counties of the state of Florida to create and constitute special road and bridge districts, within said counties; and to issue bonds and levy and collect a special road and bridge tax with which to pay for the construction, repair and maintenance of the roads and bridges within said special road and bridge districts."

Section 1 thereof expressly provides that:

"Whenever residents of any territory embraced wholly or in part in one or more road districts, as at that time constituted in any county of the state of Florida, desire to have such territory constituted into a 'special road and bridge district' and to have constructed within said special district permanent roads and bridges, they shall present to the board of county commissioners a petition," etc.

We would also call attention to sections 15 and 16 of such chapter 6208, which are as follows:

"Sec. 15. That after the construction of the roads and bridges authorized by the special election, the board of county commissioners shall estimate from year to year the amount necessary to keep in repair and maintain the roads and bridges within said special road and bridge district, and shall assess annually all taxable property within the said special district, a tax not exceeding ten mills on the dollar, which said tax shall be collected and paid into the special road and bridge fund of that special district, and used solely by the county commissioners for the repair and maintenance of the roads and bridges within said special road and bridge district.

"Sec. 16. That any special road and bridge district created under authority of this act shall be entitled to receive for the repair and maintenance of the roads and bridges in said district its due proportion of the county tax levied and collected upon the taxable property of the county for general road purposes; and the special tax provided for in section 15 of this act shall be levied and collected on the taxable property in said special district only for such repair and maintenance of the roads and bridges in said special district that cannot be paid for from its proportion of the general county road tax."

Section 18 of such chapter expressly repeals all laws and parts of laws in conflict therewith.

[1-4] As early as the case of *Luke v. State*, 5 Fla. 185, this court held:

"The maxim of '*leges posteriores priores contrarias abrogant*' is not applicable to cases where the precedent act is special or particular, and the subsequent act is general; the rule being that a later general act does not work any repeal of a former particular statute."

In the body of the opinion on page 194 it is said:

"As a general rule, it is true that every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; '*Leges posteriores priores contrarias abrogant*.' But to apply this maxim of the law it is necessary that the two acts be in conflict, * * * which is not the case here."

The opinion then proceeds to state:

"Applying another rule in the interpretation or construction of statutes, the later general act does not work any repeal of a former particular act."

Likewise in *State v. Southern Land & Timber Co.*, 45 Fla. 374, 33 South. 999, we held:

"In the construction of general and special acts the maxim '*Generalia specialibus non derogant*' applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other."

[5] In *State ex rel. Gonzalez v. Palmes*, 23 Fla. 620, 3 South. 171, we held:

"One statute will not be held to repeal a former one unless there is a positive repugnancy between the two, or the latter was clearly intended to prescribe the only rule which should govern the case provided for, or it revises the subject-matter of the former, or expressly repeals it."

See, also, the discussion in *City of Tampa v. Prince*, 63 Fla. 387, 58 South. 542.

As we said in *Smith v. Milton*, 61 Fla. 745, text 764, 54 South. 719, 720:

"The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other."

[6] In *State ex rel. Loftin v. McMillan*, 55 Fla. 246, 45 South. 382, we held as follows:

"Laws should be construed with reference to the Constitution and the purpose designed to be accomplished, and in connection with other laws in *pari materia*, though they contain no reference to each other.

"Where one statute in comprehensive terms covers a subject, and another later statute embraces only a particular part of the same subject, the two should be construed together, unless a different legislative intent appears; and the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any."

Also see *Peninsular Industrial Insurance Co. v. State*, 61 Fla. 376, 55 South. 398.

[7-9] In *State v. County of Gadsden*, 63 Fla. 620, 58 South. 232, we held:

"While statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes, unless such is clearly the legislative intent.

"An intent to repeal prior statutes or portions thereof may be made apparent when there is a positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes. But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute.

"If two statutes may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them, unless a contrary intent clearly appears."

The discussion in the opinion rendered in this case is instructive and helpful in dealing with the proposition which we are now considering.

[10] We have carefully examined the different contentions of the appellant in support of this first proposition upon which he relies for a reversal of the order from which he has appealed, in the light of the decisions of this court which we have cited, and are of the opinion that such proposition in its entirety cannot be sustained. We think that the appellant is right in claiming that chapter 5762 of the Laws of Florida has not been repealed by chapter 6208 of the Laws of Florida, and upon this point we find that the appellee concurs with appellant. We do not find any such conflicts in the provisions of the two chapters that they cannot stand together and each be operative. If as a matter of fact such conflicts exist that the provisions of each chapter cannot be enforced, the appellant has not succeeded in pointing out and demonstrating the same.

[12] The second proposition upon which the appellant relies is stated in his brief in the following language:

"The second proposition is that chapter 6208, Laws of Florida, Acts of 1911, is unconstitutional and void, in that it violates that provision of the Constitution of the state of Florida providing for a uniform system of taxation throughout the state, county and city, as required by sections 1 and 2 of article 8 of the Constitution, sections 3 and 5 of article 9 of the Constitution, which provides that counties shall be political divisions of the state, and that the Legislature shall provide for a uniform and equal rate of taxation, and that the Legislature shall authorize the several counties and incorporated cities and towns in the state to assess and impose taxes for county and municipal purposes and for no other purposes, and all property shall be taxed on the principles established for state taxation—that is, a rate uniform and equal throughout the state, throughout the county or throughout the municipality."

Sections 1 and 2 of article 8 of the state Constitution, which it is claimed are violated by chapter 6208, are as follows:

"Section 1. The state shall be divided into political divisions to be called counties.

"Sec. 2. The several counties as they now exist are hereby recognized as the legal divisions of the state."

Sections 3 and 5 of article 9 of the state Constitution, which it is contended are also

violated by such chapter 6208, read as follows:

"Sec. 3. No tax shall be levied except in pursuance of law.

"Sec. 5. The Legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for state taxation. But the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits. The Legislature may also provide for levying a special capitation tax, and a tax on licenses. But the capitation tax shall not exceed one dollar a year and shall be applied exclusively to common school purposes."

[11-13] We fail to see wherein chapter 6208 violates in any way the provisions of sections 1 and 2 of article 8 of the state Constitution, and we are not enlightened upon this point by the appellant either in his brief or oral argument; therefore we content ourselves with simply announcing that no violation of such sections has been made to appear to us. Neither has the appellant succeeded in demonstrating wherein the provisions of either section 3 or section 5 of article 9 of the state Constitution have been violated by such chapter. As we held in *State ex rel. Moodle v. Bryan*, 50 Fla. 293, 39 South. 929, following prior decisions of this court therein cited:

"Our state Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid."

We likewise held in this case:

"The reasonableness or justice of a deliberate act of the Legislature, the wisdom or folly thereof, the policy or motives prompting it, so long as the act does not contravene some portion of the organic law, are all matters for legislative consideration and are not subject to judicial control. The courts are bound to uphold a statute, unless it is clearly made to appear beyond a reasonable doubt that it is unconstitutional."

[14] In *Davis v. Florida Power Co.*, 64 Fla. 246, 60 South. 759, Ann. Cas. 1914B, 965, we held:

"Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to review by the courts, whose province is not to regulate, but to effectuate, the policy of the law as expressed in valid statutes."

Also see *McNeill v. Webeking*, 66 Fla. 407, 63 South. 728; *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 South. 769, Ann. Cas. 1915D, 99; *Anderson v. City of Ocala*, 67 Fla. 204, 64 South. 775, 52 L. R. A. (N. S.) 287; *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 South. 282; *Noble v. State*, 68 Fla. 1, 66 South. 153; *Jordan v. Duval County*, 68 Fla. 48, 66 South. 298; *Peninsular Casualty Co. v. State*, 68 Fla. 411, 67 South. 185; *Pinellas Park Drainage Co. v. Kessler*, 69 Fla. 558, 68 South. 668; *State v. Phillips*, 70 Fla. —, 70 South. 367; *Ex parte Powell*, 70 Fla. —, 70 South. 392; *Ex parte Pricha*, 70 Fla. —, 70 South. 406.

As we said in *Seaboard Air Line Ry. v. Simon*, 56 Fla. 545, text 551, 47 South. 1001, 20 L. R. A. (N. S.) 126, 16 Ann. Cas. 1234:

"Great latitude should be accorded to the Legislature in the exercise of its proper powers."

[15] In *Jordan v. Duval County*, 68 Fla. 48, 66 South. 298, we held:

"The Constitution does not define or amplify the term 'county purposes' for which counties may be authorized 'to assess and impose taxes,' and the Legislature, in exercising its appropriate lawmaking functions, may determine what is a 'county purpose,' and the courts are not authorized to render such determination ineffectual, unless some provision of the Constitution is violated, or unless the particular enactment can have no legal or practical relations whatever to any 'county purpose.'"

See, also, *Cotton v. County Commissioners of Leon County*, 6 Fla. 610; *Stockton v. Powell*, 29 Fla. 1, 10 South. 688, 15 L. R. A. 42; *County Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416.

We fail to see wherein any of the sections of the two articles of the state Constitution which we have copied above, and upon which the appellant relies to support his contention, have been violated by chapter 6208 of the Laws of Florida. As we have previously said, the appellant, upon whom the burden rests, has not succeeded in convincing us that any of the provisions of such chapter which he has attacked are in conflict with the state Constitution. We think that the reasoning in the cases which we have just cited effectually disposes of this contention of the appellant adversely to him. Especially is this true of *Pinellas Park Drainage District v. Kessler*, supra, and *Jordan v. Duval County*, supra.

It is also suggested by the appellant in his brief, though not strenuously insisted upon, that chapter 6208 of the Laws of Florida is also violative of section 16 of article 3 of the state Constitution, which reads as follows:

"Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such a case the act, as revised, or section, as amended, shall be re-enacted and published at length."

We have often had occasion to construe this section, and what we have said repeatedly in the different opinions which we have rendered makes further discussion unnecessary. We content ourselves with referring to *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 South. 929, wherein numerous prior decisions of this court are cited, and the recent cases of *Ex parte Pricha*, 70 Fla. —, 70 South. 406, *Ex parte Powell*, 70 Fla. —, 70 South. 392, and *Ex parte Gillett*, 70 Fla. —, 70 South. 446, and stating that under the principles announced in these cases this contention of the appellant cannot be upheld.

The third proposition of law upon which the appellant relies, as set forth in his brief,

is somewhat lengthy, and we do not consider it necessary to copy it in full. In effect, it is contended that the bond issue in question is illegal, for the reason that it is proposed to construct roads and streets from the proceeds arising from the sale thereof within the corporate limits of the city of De Land; whereas chapter 6678 of the Laws of Florida, volume 2 of the Acts of 1913, page 298, being entitled "An act to abolish the present municipal government of De Land, Volusia county, Florida, and to organize a new city government for the same and to provide for its jurisdiction and powers," gives such city of De Land exclusive control over the streets within its limits; whereas, if such bond issue is permitted to stand, certain streets within the city will be paved from the proceeds derived from the levy of a tax on property outside of the limits of the city together with property situated within such limits. It is contended that the bond issue which is here questioned violates sections 20, 51, and 52 of such charter act, chapter 6678. Section 20 is quite lengthy, setting forth the powers conferred upon the city council of the city of De Land. The portion thereof upon which the appellant relies and which he has copied in his brief is as follows:

"The city council shall * * * within the limitations of this act, have power by ordinance to levy and collect taxes upon all property, privileges and professions taxable by laws for state purposes; * * * to regulate and provide for the construction of streets and paving the same, and for the construction and repairs of sidewalks and foot pavements, and if the owner or owners, agent or agents of any lot, or parcel of land abutting thereon or thereto, shall fail to comply with the provisions of any ordinance or resolution of the city council ordering any such improvements within such time as may be prescribed thereby, the city council or any person or persons duly authorized by them, may contract for such construction, improvements or repairs, and the city shall pay for the same, and the amount so paid shall be a lien upon said lot or parcel of land, which may be enforced by suit at law or equity, and the amount be recovered against the said owner or owners by suit before the circuit court of the county. * * * The city council may by ordinance or resolution provide for the payment of any part of the cost of such work or improvement out of the general tax. *The reasonable cost of such construction, improvement or repair shall be assessed against said property, and shall be a lien thereon;* * * * to take and appropriate private grounds and private property in manner and form provided by law for the condemnation, for widening streets or parts thereof, or for extending the same, or for laying out any streets, avenues, alleys, or squares, parks or promenades, where the public convenience may require it, *and to assess the cost and expenses pro rata for such improvement upon the property specially benefited thereby;* to require parties or their agents owning property within the city to bring the same to a * * * topographical level, by filling or excavations, as shall be necessary, the city having and exercising the same right of lien and its enforcement as provided in case of sidewalks and pavements when said work or excavations or filling in shall be done by the city."

Sections 51 and 52 of such chapter are as follows:

"Sec. 51. All property, real and personal, in the city of De Land, not expressly exempted by the laws of the state, shall be subject to taxation by the city of De Land.

"Sec. 52. The city shall have the power to make its own assessment of taxes."

[17] As is also stated by the appellant in his brief, this chapter 6678 has not been repealed or modified, except by chapter 7145 of the Laws of Florida (volume 2 of Acts of 1915, page 448), in certain particulars which do not affect the point now under consideration. In effect, this charter act of the city of De Land simply confers the powers usually conferred by the Legislature upon municipalities in this state, setting forth such powers somewhat in detail. It will be borne in mind, as we have previously said, that chapter 6208 of the Laws of Florida was enacted by the Legislature at its session in 1911, and was amended in certain important particulars by chapter 6879 of the Laws of Florida, enacted by the Legislature at its session in 1915, while chapter 6678, forming the charter act of the city of De Land was enacted in 1913, and was amended in certain respects by chapter 7145, enacted in 1915.

It seems to us that what we have said in discussing the first proposition of law advanced by the appellant practically disposes of the third proposition adversely to his contention. We see no conflict in chapter 6208, as amended by chapter 6879, and chapter 6678, in any of the particulars pointed out by the appellant. We are all the more strengthened in this conclusion by the provisions contained in section 7 of chapter 6208, which section is as follows:

"That the construction, repair and maintenance of the roads and bridges in said special road and bridge district or districts shall at all times be subject to the supervision and control of the board of county commissioners. And the said board of county commissioners is hereby granted and empowered with the right of eminent domain, whenever it may become necessary to exercise the same, for the purpose of opening up, widening or straightening roads or, constructing bridges or, for the purpose of obtaining earth, rock, stone, shell, marl, clay, timber or, other material to be used in the construction repair or, maintenance of the roads and bridges as provided for in this act. And whenever any of the roads or bridges proposed to be constructed under the provisions of this act, are located within the territorial boundaries of one or more incorporated cities or towns, the county commissioners shall have the right of eminent domain and control over such streets or territory within such municipality as may be necessary for constructing and maintaining the public highways and bridges and the approaches thereto as provided for in the special election held under the authority of this act."

[18, 19] We held in *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 South. 590:

"The dominant control of highways and streets is vested in the legislative power of the state."

And in *County Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 418, we held:

"The Legislature exercises plenary control over public highways, whether they be public county roads or streets in cities and towns."

The last-cited case is quite instructive upon several points involved in the instant case. We would also refer to our discussion in *Hayes v. Walker*, 54 Fla. 163, 44 South. 747, as to "the bounds of wide discretion that should be accorded to the Legislature in the interest of the public welfare." Also see *Skinner v. Henderson*, 26 Fla. 121, 7 South. 464, 8 L. R. A. 55, and *State v. Commissioners of Putnam County*, 23 Fla. 632, 3 South. 164.

[20, 21] As we said in *Edwards v. City of Ocala*, 58 Fla. 217, text 219, 50 South. 421, 422: "There is no express provision in the Constitution as to special assessments for local improvements," which we quoted with approval in *Anderson v. City of Ocala*, 67 Fla. 204, text 212, 64 South. 775, 52 L. R. A. (N. S.) 287. It is further true that there is no express provision in the Constitution as to the formation of taxing districts for particular purposes. As is well said by Judge Coolley on page 234 of his valuable work on Taxation (3d Ed.):

"When the nature of the case does not conclusively fit it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and is not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions."

This principle is well supported by the authorities cited in the notes. It is further true, as is said by the distinguished author on page 238 of the work cited:

"It is not essential that the political districts of the state shall be the same as the taxing districts, but special districts may be established for special purposes, wholly ignoring the political divisions."

We would also refer to the several pages following this statement, and the authorities cited in the respective notes. Also see 27 *Amer. & Eng. Ency. of Law* (2d Ed.) pages 911 to 915, and the authorities there cited.

The fourth and last proposition upon which the appellant relies is stated in his brief as follows:

"The fourth proposition is that the said bond issue is illegal and void, because the petition calling for the special bond election did not set out in general terms a description and a proposed location of the roads and bridges to be constructed, together with the amount estimated as being necessary with which to pay for the construction of same because said petition calling for a special election did set out and give a general description of some five or more different materials of which said roads might be constructed, and because no general description of the width of the bridges was given or the consistency of the materials to be used in their construction, and further because said petition for special bond election did not state the kind of bonds to be issued, the number of years they were to run, or the amount of interest the proposed bonds were to bear, for failure of which said bond issue is illegal and void, which same objections as have been above stated may be addressed to the order of the county commissioners calling for a bond election and a notice of election for bonding."

We have already extended this opinion to a greater length than is desirable, so shall

not discuss in detail the various and sundry respects in which it is contended by the appellant that the bond issue is illegal and void for failure to comply with the statutory requirements. Suffice it to say that we have carefully read the transcript of the record, bearing in mind these contentions of the appellant, and after so doing are of the opinion that there has been a substantial compliance with such statutory requirements. The state attorney in his answer to the petition, which we have copied above recites that he has carefully examined all of the proceedings, and finds that all of the requisites have been performed and complied with, and that he sees no reason why such bonds should not be validated, while the circuit judge in his decree found that "all proceedings heretofore had and taken in connection with the issuing of said bonds are regular, legal, and proper."

[22] As we have held time and again, every presumption is in favor of the correctness of an order or decree rendered by a circuit judge, and that the burden rests upon one appealing from such order or decree to overcome this presumption of law. We think that the appellant has failed to meet this burden.

Order affirmed.

TAYLOR, C. J., and WHITFIELD and ELLIS, JJ., concur.

COCKRELL, J., takes no part.

WILLIAMS v. TYLER. (6 Div. 919.)

(Court of Appeals of Alabama. Jan. 11, 1916.
On Rehearing, Feb. 1, 1916.)

JUDGMENT \Leftarrow 143—DEFAULT JUDGMENT—SETTING ASIDE—EXCUSES FOR DEFAULT.

Code 1907, § 5372, provides that when a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, he may apply for a rehearing at any time within four months from the rendition of the judgment. In Jefferson county the custom had universally prevailed for a long time for the clerks of each of the courts to issue a printed docket, containing the names of cases set for trial in such court, with the names of the attorneys, and during all of such time it had been the custom of the bar to rely upon such printed docket for notice of the setting of such causes, and not to examine the dockets in the clerk's office. The name of a defendant and her attorneys were properly entered upon the appearance docket of the city court of Birmingham, but the clerk, in making a transcribed docket of the cases set for trial, by accident or mistake omitted defendant's first name, merely giving her initials, and omitted the names of defendant's attorneys, and the same omissions appeared in the printed docket, made up and distributed among attorneys. As a result, defendant's attorneys did not discover that defendant's case was set for trial, and judgment *nil dicit* was rendered. *Held*, that defendant's attorneys were entitled to rely, and warranted in relying, on the printed docket furnished by the clerk, and the judgment was rendered against

defendant by mistake and without fault on her part, within the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. \Leftarrow 143.]

Thomas, J., dissenting.

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Petition by Myrtle S. Williams for new trial in the case of W. G. Tyler v. Myrtle S. Williams, in which judgment was rendered *nil dicit*, for plaintiff and against petitioner. From an order sustaining demurrer to petition, petitioner appeals. Reversed and remanded on rehearing.

The following is the amended petition:

Comes the petitioner, Myrtle S. Williams, who is the defendant in the above-styled cause, No. 32544, and respectfully represents unto the court that she was prevented from making her defense in the above-styled cause No. 32544 by surprise, accident, or mistake, without fault on her part, and that a judgment was rendered against her in the above-styled cause No. 32544 in the said city court of Birmingham, for the sum of \$920.50, within four months from this date, to wit, on the 7th day of January, 1915. Petitioner further represents unto this court and states that within 30 days after the service of the summons and complaint upon her in the above-styled cause No. 32544 she employed the law firm of Harsh & Fitts to represent her in the above-styled cause, and to represent her defense in this court in said cause; that within said 30 days the said attorneys representing defendant therein, who is this petitioner, filed in said cause on behalf of said defendant, now petitioner, demurrers to said complaint, and upon the same paper in which said demurrer was filed demanded a jury in writing for the trial of said cause; that in the summons and complaint filed against her in said cause No. 32544 this petitioner, defendant therein, was designated as "Myrtle S. Williams," and she was so designated in said proceeding filed in said cause by her said attorneys; that at all times from the service of said summons and complaint to the present time this petitioner has lived in Jefferson county, Alabama, and her said attorneys during the whole of said time have had an office in Birmingham, Alabama, and the said attorneys had or knew petitioner's post office address and her whereabouts. And petitioner avers that neither she nor her said attorneys ever knew or had any notice whatsoever that the said cause was set for trial until the day that the said original petition was filed, to wit, the 8th day of March, 1915; that she learned that said cause had been set for trial accidentally, and by learning that a judgment had been rendered against her while she was engaged in or about selling or trading a piece of her real estate; and that her said attorneys did not know and had no notice of the said judgment, or that the said cause No. 32544 was set for trial, until their attention was called to the same by this petitioner on said 8th day of March, 1915. Petitioner further avers that Jefferson county is a very large and populous county, containing, as petitioner is informed and believes, upward of 250,000 population, and that the city of Birmingham, in said county, in which this court is held, is a large city, containing upwards of 175,000 population; that the said city court of Birmingham has four judges, each of whom hold court separately one from the other, and are in session from the first Monday in October to the last day in June, less some short legal vacations; that the dockets of said city court of Birmingham contain a vast number of cases, as petitioner is informed

and believes, and therefore states, more than 2,000 cases; that there is held contemporaneously with said city court of Birmingham other courts in the said city of Birmingham, viz., the circuit court of Jefferson county, which has two judges, each of whom holds court separately from the other; the chancery court, which has one chancellor, the criminal court of Jefferson county, which has two judges, each of which holds court separately from the other, and the United States District Court, which has one judge; that the said circuit court has a great number of cases on its docket, much in excess of 1,000; that the said criminal court has several thousand cases on its docket, to wit, 3,000 cases, and that the said chancery court has a large number of cases on its docket, and that the said United States court has a considerable number of cases on its docket; that petitioner's said attorneys are attorneys engaged in the general practice of law in the said city of Birmingham, and practice in each of said courts in common with most of the bar in Birmingham; that long before the filing of the above-styled cause against this petitioner it had been recognized by the bar of said city of Birmingham and by the officers of each of said courts that it was practically necessary that the clerks of each of said courts should issue a printed docket for distribution amongst attorneys having causes set in said courts in advance of the day on which said causes were set, for the purpose of thereby receiving notice of the day on which said causes were set for trial; that for a long time prior to the filing of said cause, and at the time thereof, and ever since, the custom has universally prevailed in Jefferson county, Alabama, for the clerks of each of said courts to issue such a printed docket containing the names of each of the cases set in said court, together with the names of the attorneys for the plaintiff and also the names of the attorneys for defendant printed therein in connection with such causes, and to issue said docket a long enough time ahead of the day on which said causes were set for trial that the attorneys might have notice therefrom in ample time of the setting of the causes to notify their clients and to prepare same for trial on the day for which said causes were respectively set for trial, and during all of said time it has been the custom of the bar in said Birmingham to rely upon said printed dockets for notice of the setting of said causes, and it has been the custom of petitioner's said attorneys to so rely upon said printed docket; that if attorneys were required to go to the clerk's office and there examine the original trial dockets, or original appearance dockets, or to procure the clerk to do so, in order to ascertain when their causes were set for trial, it would result in great expense and loss of time to said attorneys and to the clerks of said courts, and would require extra help to be furnished by said clerk, in order to furnish the opportunity for said attorneys to so examine said dockets, and would require extra help by and on behalf of attorneys who had in said courts any considerable practice; that an examination would have to be made frequently of the dockets of said courts, and that attorneys in making said examination would have to have lists of the causes in which they represented either plaintiff or defendant in said courts; that for several years last past the clerks of each of said courts have always furnished said printed docket to the attorneys, and it has not been the custom during said time for attorneys to examine the dockets in the clerk's office to ascertain when causes were set for trial, but, on the contrary, it has been the custom during the whole of said time to rely on said printed docket to so ascertain.

Plaintiff avers that the system of requiring attorneys to examine the original dockets in the office of the clerks would be wasteful of time and money, very vexatious and annoying, and wasteful to the clerks, and would be wholly

impracticable; that Birmingham is a metropolitan city and that a metropolitan practice does not practically admit of any such method; that the above-styled cause No. 32544 was docketed on one of the large dockets of the city court of Birmingham, to wit, the appearance docket, and on said original docket the defendant's name was given correctly and in full, and her said demurrers signed by her said attorneys were shown on said docket to have been filed, and the names of her said attorneys were there entered on said appearance docket, to wit, in the month of June, 1914, at or about the time petitioner's said demurrers were filed in said cause; that the clerk of said court, through himself or one of his deputies, undertook to transcribe from said original or appearance docket the causes thereon to be set for trial during the term of said court beginning on the first Monday in October, 1914, including the above-styled cause No. 32544, and that said transcribed docket was the docket to be used and which was used in setting said causes so transcribed, including the above-styled cause, for trial during said term; that in transcribing the above-styled cause the said clerk or his deputy by accident or mistake omitted the first name of defendant, and merely gave initials, and omitted the names of defendant's attorneys and all reference thereto; that the said cause was marked on said transcribed docket as set for trial January 5, 1915, and a printed docket as above described was made up and printed at the instance of said clerk for distribution amongst attorneys having causes set on said docket, that they might learn in due time the dates on which their said causes were set for trial; that by accident or mistake there was not only omitted from said transcribed docket the first name of defendant, only her initials being given, and also the names of her attorneys and all reference thereto, but there was also omitted from both of said dockets, to wit, said transcribed docket and said printed docket, the names of defendant's attorneys and all reference thereto; that in the due course of business, and in the diligent prosecution of their practice, said attorneys procured one of said printed dockets in due season, in order that they might learn from same, in accordance with the practically universal custom at said Birmingham, the date on which each of the causes was set for trial on said docket in which they represented plaintiff or defendant, and they procured one of said dockets long before the said 5th day of January, 1915, to wit, in the month of December, 1914; neither the names of defendant's attorneys nor her first name were on the only docket in the clerk's office on which said cause was set for trial, and said names did not appear on any docket in the clerk's office, except the original or appearance docket, and the time set for trial was not indicated on that docket; that said printed docket contained the names of more than 1,000 cases, and covered a period of from the first Monday in January, to and including the 1st day of April, 1915; that of the total number of cases on said printed docket petitioner's said attorneys represented for 150; that it was the universal custom of the clerk, in causing said printed docket to be printed wherever the defense had been filed by an attorney, to print the attorney's name as the attorney for defendant, and whenever the cause had been filed by attorney the printed docket showed said attorney's name as attorney for plaintiff; that where no defense had been filed to print a blank line, instead of the name of any attorney; that the said attorneys were aware that they had filed defenses in all their causes which could be printed on said printed docket, and had signed their names to the papers in which said defenses were filed, and that they had done so; that there were a considerable number of cases printed on said docket in which no names were printed as attorneys for defendants in said

cause, there being no defenses filed in said causes at said time, except in said cause against petitioner No. 32544, in which cause defense had been filed, and which defense was signed by defendant's said attorneys.

Petitioner further avers that there are a great number of persons named "Williams" in Jefferson county, Alabama, and in the city directory of the city of Birmingham in use at said time alone there are shown the names of a great number of persons named "Williams," to wit, 957, and it contains the names of 68 persons named "Williams" whose first name begins with an "M," as does petitioner's; that the said attorneys in person or by competent agent examined said printed docket carefully, and by reason of the names of said attorneys being omitted from said docket, and all reference to said attorneys being omitted therefrom, and by reason of defendant's first name being omitted therefrom, said attorneys, without fault on their part or on the part of their said agent, failed to ascertain from said docket, or otherwise, that said cause was set for trial until more than 30 days after the said judgment was rendered against this petitioner, and only ascertained same as above set out, to wit, on the 8th day of March, 1915, and then by accident. Petitioner further avers that it was solely by reason of and as a proximate consequence of the said accident or mistake of the clerk or his deputy, without fault on her part, and without fault on the part of her said attorneys, that she was prevented from making her defense in the above-styled cause No. 32544, and that said judgment was rendered against her. She further avers that the whole of the claim of plaintiff in the above-styled cause No. 32544 against defendant was based upon the claim of plaintiff that he as a real estate agent had sold for and on account of this petitioner a certain lot in the city of Birmingham, Alabama; and this petitioner states that the said plaintiff, W. G. Tyler, did not sell said lot, but, on the contrary, said lot was sold by another real estate agent or concern, to wit, Tarrant Realty Company, who have been fully paid and satisfied for their services in so making said sale; and petitioner further avers that she did not, at the time of the bringing of the suit in the above-styled cause No. 32544, or at any time thereafter, owe plaintiff anything for or on account of said sale, or for or on account of any cause whatsoever, and that she has a full and complete defense to the said cause of action, and that she was prevented from making her said defense by surprise, accident, or mistake, as above set out.

Premises considered, this petitioner prays that the said judgment rendered against her in the above cause be set aside, and that she have a rehearing in said cause, and for other, further, and general relief.

Harsh & Fitts, of Birmingham, for appellant. John T. Glover, of Birmingham, for appellee.

THOMAS, J. This is an appeal from the final judgment of the lower court refusing to grant a statutory rehearing applied for under section 5372 of the Code, known as the "four months statute," and is the proper remedy for reviewing such action of the lower court. *End. Dep. Dis. G. L., etc., v. Harvey*, 6 Ala. App. 245, 60 South. 602, and cases cited. The reporter will set out the petition, as amended, for rehearing, that was so denied. The court sustained a demurrer to it, which presents as the only point for review the question as to whether or not the facts alleged in the amended petition are sufficient,

if true, to show either "surprise, accident, mistake, or fraud, *without fault*" on the part of petitioner or her counsel, within the meaning of those terms as employed in said section 5372 of the Code. *Traub v. Fabian*, 160 Ala. 210, 49 South. 240; *Wheeler v. Morgan*, 51 Ala. 573; *Walker's Case*, 54 Ala. 577; *North's Case*, 49 Ala. 385; *Brock's Case*, 65 Ala. 79; *Blood's Case*, 65 Ala. 103.

We cannot, it seems to us, with due regard for the decisions of our Supreme Court, which are binding on us, hold otherwise than that the trial court did not err in sustaining the demurrers to the petition, as amended, and in denying the rehearing. It is no doubt true, as is contended, that the averments of the petition clearly show that the failure to make defense against the judgment prayed to be set aside was due to the mistake or oversight of the clerk of the court in stating, in the printed dockets of the cases pending in the court that were distributed as pamphlets among the bar for their information, the case of W. G. Tyler against the petitioner, Myrtle S. Williams, in a different style or way from that in which it was stated on the regular dockets of the court; and it is no doubt further true that this difference in the statement of the case led petitioner's attorneys, as it naturally would under the circumstances as disclosed in the petition, to overlook the fact that the case stated and styled on the printed docket or pamphlet as "W. G. Tyler v. M. S. Williams," and which failed to show the appearance of any counsel for defendant, was the same case as was stated and styled on the regular court dockets as "W. G. Tyler v. Myrtle S. Williams," and which showed that counsel had entered an appearance for defendant; but it is further true that, notwithstanding this, the defendant's counsel, with whose negligence defendant is chargeable, cannot escape—if we adhere, as we must, to the rulings of our Supreme Court—the charge of a lack of due diligence, which diligence, though it may not have required that the petitioner's counsel discover from the printed docket itself that the two cases were one and the same, did require that, when they failed to discover on the printed docket the case against their client, which they knew was pending in that court to be tried, they make some inquiry of the clerk to ascertain the status of that case and why it had been omitted from the printed docket, which inquiry would have led to the information that it had not been omitted, but was on such docket, and was set for trial on the day there named.

It may be that where the clerk, as in this case, for his own convenience and that of the bar, prepares and furnishes printed lists of the cases pending for trial, together with a statement of the day they are, respectively, set for trial, counsel interested would have a right to rely on the information there imparted as to the date set for trial, the same

as he would have a right to rely on information imparted in a letter from the clerk written by him in answer to a request from counsel for information as to when a particular case was set for trial, and that, if a case appearing on such list was taken up and tried on any day previous to the day it was there stated as set for trial, and this without a change of notice to counsel, who, relying in good faith on the first notice, was not present at the trial, then this would probably furnish good ground for rehearing (*Renfro v. Merryman*, 71 Ala. 195; *Womack v. Bookman*, 34 Ala. 38), although the clerk may have made a mistake in the first instance by having given the wrong, instead of the correct, date that the case was set for trial, and although the case may have been tried on the correct date that had, at the time of the giving of the wrong date, been actually set for the trial. A party, we think, should not in this character of proceeding be charged with fault for having relied in good faith on information as to the date a case is set for trial, although such information is incorrect, if it is imparted by the clerk, since he is the officer known to be the maker and custodian of the records which contain that information, and since, therefore, it is naturally to be supposed that he would give only correct information. But where the clerk imparts no information at all, the case is different; since, though a party may rely on information from the clerk, he is not allowed to rely on a *lack of information* from him with respect to a matter concerning which it is the party's duty to inquire.

The recent case of *Henley v. Chabert*, 65 South, 993, decided by our Supreme Court, settles this proposition. In that case the bill alleged, as one of the grounds upon which the rehearing was prayed:

"That the said case of *Henley* against these orators [which as previously averred was pending in the circuit court of Walker county, and in which complainants had, as here, seasonably filed a demurrer to the complaint] was never set down for trial * * * until some time in the month of October, 1912," etc.; "that on the 22d day of October, 1912, without notice to orators, or either of them, or their attorneys, a judgment by default was rendered by the circuit court of Walker county, of which neither of these orators or their attorneys had any notice; that on, to wit, the 21st day of November, 1912, a writ of inquiry was issued in the case, without any notice to either of these orators or their attorneys, and judgment rendered against orators in the sum of \$2,000; and that prior to that time a list of the cases in the circuit court of Walker county, which were set for different days between November 11, 1912, and January 23, 1913, was published and furnished the several attorneys living in Jasper [where complainants' counsel lived], and practicing in said court, and that nowhere in said published list or pamphlet in said cause did it state or show that said case of *Henley* against these orators was set for trial," etc.

This ground of the bill for rehearing our Supreme Court disposed of very briefly by saying:

"Nor is it sufficient ground for relief that the cause was not set down for trial until in the month of October, and the list of cases made out by the clerk and published did not disclose the case of respondent against complainants. No diligence or effort on the part of complainants to ascertain the status of the cause is shown." *Henley v. Chabert*, 65 South, 993.

The court cited in support of this holding the case of *Renfro v. Merryman*, 71 Ala. 195, where it was held that the claimant in a case of the trial of the right of property was not without fault, and hence was not entitled to a rehearing where it appeared that he attended court on Wednesday and Thursday of the first week of the term at which the case was triable, ready with his testimony and attorney to try the case, but, finding that the case had not been docketed, he and his attorney left court, when afterwards, to wit, on Saturday of that week, the case was for the first time docketed, and was tried immediately after being so docketed and without notice to claimant or his counsel. In disposing of the question, Judge Brickell, speaking for the court, said:

"Waiving all other considerations, it is manifest the appellants were wanting in reasonable diligence. * * * Reasonable diligence required them to be active in the prosecution of the claim. The inadvertence of the clerk in omitting to enter the suit on the docket it was their duty to cure by directing his attention to the omission. That omission did not work a discontinuance of the suit; and it was the duty of the clerk, when he discovered it, to rectify it by docketing the cause. When docketed, it was within the discretion of the court to call the cause for trial at any time during the term, a particular day not having been set for the trial." *Renfro v. Merryman*, *supra*.

The case as made by the instant petition, where from the allegations of the petition it appears that, on the printed docket or pamphlet furnished by the clerk to petitioner's counsel, the cause pending for trial against her as defendant was not stated or described with that fullness and particularity that it was stated or described on the regular dockets of the court, and that as a result of this difference in the statement or description of the cause petitioner's counsel were misled, and overlooked the fact that it was one and the same cause, is certainly no stronger than the case of *Henley v. Chabert*, *supra*, where, as seen, it appeared that on the printed docket or pamphlet furnished counsel the cause pending in the court against petitioner as defendant was not stated or described at all, but was omitted entirely therefrom. The fact that the cause that was pending for trial against petitioner here as defendant was so meagerly described in the printed list of pending causes that was furnished petitioner's counsel as not to call such counsel's attention to the fact that it was the same cause as that in which they had been previously employed to represent petitioner and wherein they had already filed a demurrer, surely puts petitioner in no better position or standing for a rehearing than

if a statement or description of said cause had been left off or omitted entirely from said list.

On account of the difference in description between the case against petitioner as stated or styled on the printed docket and the same case as stated or styled on the regular court docket, it may be that counsel should be excused, as urged by them, from not discovering the identity of the cases from an inspection of the printed list itself; but when we so excuse them upon this theory, upon which they insist, it amounts to a holding that the case was so meagerly and differently described in the printed list from what it was on the regular docket as to be equivalent, so far as the printed list conveyed any information to counsel with respect to the matter, to having been left off entirely from the printed list. Therefore, in the final analysis of the case at bar, we are presented exactly with the same proposition as confronted our Supreme Court in the case of *Henley v. Chabert*, supra; consequently, for us to hold here that the appellant was entitled to a rehearing would be to overrule the decision of our Supreme Court in the latter case, unless that case can be differentiated from this, as counsel insist it can, by reason of the fact of the large difference between the number of causes and the volume of business pending in the court where that case originated (the Walker county circuit court) and the number of causes and volume of business pending in the court where this case originated (the city court of Birmingham).

But we cannot see that these facts should make any difference in the application of the principle here involved. Attorneys, whether rural or urban, whether enjoying a large or small practice, whether employed in many or only a few cases, and whether those cases are pending in a court with heavy or light dockets, are supposed to know and keep in mind, by memory if they be few, and by memorandum if they be many, the cases in which they have been employed; and when a clerk furnishes an attorney with a printed list of the cases pending in a particular court in which that attorney practices, then, although it is customary for the clerk to furnish such list, and although ordinarily it is reliable, it is the duty of the attorney to look over the list and see if the cases in which he is employed are listed, and, if not listed, to make inquiry of the clerk as to their status, because the attorney, upon not finding on such list a case in which he has been employed and which he knows is pending for trial, must naturally infer that there has been an oversight in some way on the part of the clerk in omitting it.

The fact that an attorney has so many cases that he cannot keep them actually in mind does not relieve the duty of meeting this requirement; for under such circumstances he can keep a written memorandum

or private list of his cases, from which list he can as conveniently check the list furnished him by the clerk as he could from memory where his cases are few, which checking, if properly done, will in all cases lead to a discovery of the omission of any of his cases from the list furnished by the clerk. If omitted, then it is a case where the clerk has furnished no information at all, and it is therefore incumbent on the attorney to inquire. This, it seems to us, is the rationale of the decision of our Supreme Court in the two cases to which we have last adverted. *Henley v. Chabert* and *Renfro v. Merryman*. No inquiry as to the status of the cause having been made in the present case, so far as appears from the allegations of the petition, a case of due diligence is not shown, and the lower court, consequently, did not err in sustaining the demurrers to the petition and in denying the application for rehearing. Authorities supra; *National Co. v. Hinson*, 103 Ala. 532, 15 South. 844; 4 Mayf. Dig. 715, 312.

The principles governing the granting of rehearings under the statute (Code, § 5372) here invoked are the same as those obtaining had relief been sought by bill in equity, since the object of the statute was merely to provide a less expensive and more speedy remedy than the latter and as cumulative of it. *Renfro v. Merryman*, supra; *Evans v. Wilhite*, 167 Ala. 587, 52 South. 845; *Todd v. Leslie*, 171 Ala. 625, 55 South. 174. As a statement of these principles, and in fortification of our application of them to the case at bar, it is not inappropriate to here quote briefly from the decisions of our Supreme Court, which we do as follows:

"A proper and due regard for the peace and interests of society requires strictness and caution in exercising the power to disturb the decrees and judgments of other courts of competent or concurrent jurisdiction, and reopening controversies, which it is the policy of the law to quiet. * * * To successfully invoke the interposition, it is not sufficient that wrong has been done, but it must be manifest that the wrong occurred because of accident, surprise, or fraud, or the act of the opposite party, and without fault or neglect on the part of the party complaining. A concurrence of injustice committed and freedom from fault and negligence is an indispensable condition to the exercise of this jurisdiction." *Waldrom v. Waldrom*, 76 Ala. 289. * * * "The rules of equity are strict in requiring a party seeking relief from a judgment at law to acquit himself of fault or neglect in respect of defenses which might have been interposed to prevent the judgment." * * * *Foshee v. McCreary*, 123 Ala. 493 [26 South. 309]. * * * "The highest degree of diligence [though other authorities use the term "due diligence"] is exacted from him, and, if it is not exhibited, the court will not intervene. *Norman v. Burns*, 67 Ala. 248." *Henley v. Chabert*, supra.

Affirmed.

On Rehearing.

THOMAS, J. On application for rehearing, it is said in appellant's brief:

"This court, bowing to what it conceives to be the authority of the Supreme Court in the

case of *Henley v. Chabert*, concludes that this case presents no stronger appeal for relief than that case, and holds that if a lawyer, upon the perusal of a printed docket setting out a number of cases, fails to find a particular case of his upon that particular printed docket, he must conclude that something wrong had happened, because the case necessarily should have been on that docket. * * * This court surely knows that all the cases pending upon the dockets of the city court of Birmingham are not set at one setting—that all are not put upon any printed docket issued for the information of litigants and attorneys. A docket * * * covers only about three months of actual court work, and it would be preposterous to think of setting all of the causes pending in the court within that period of time. Therefore, in the city court of Birmingham, it could not follow from an omission of a particular case from a printed docket that the cause was wrongfully omitted."

We acquiesce in the correctness of the conclusion expressed, but not in one of the premises upon which it is rested. This court cannot, as that conclusion assumes, take judicial knowledge that the clerk of the city court of Birmingham does not, at the commencement of the term of said court, or other time, and at one setting, set for trial all cases at issue then pending on the docket of said court, and that, consequently, the printed list furnished by him to attorneys does not, and is not intended to, cover all cases at issue pending on said docket, but that said clerk, at the commencement of said term and at one setting, sets for trial only such part of the cases at issue on said docket as he decides should be tried within the next three months, and that at the expiration of said three months he makes another setting, and so on until the end of the term, and furnishes to the attorneys during the term, not one printed list covering all the pending cases, but several lists—one at the commencement of the term, and others from time to time thereafter as he sets the cases, each covering only the cases set for a particular three months. If this be true, and if the particular printed list furnished counsel during the term mentioned was not the last to be furnished for that term, then we concede that counsel, when failing to find his case on that list, would have no occasion to believe that there was an accidental omission of his case from that list; nor would there, we think, arise in such case any necessity for inquiry on his part of the clerk, since, under such circumstances, counsel, it seems to us, should have a right to presume that the clerk had not set the cause at the time of furnishing that list, that he had, consequently, intentionally omitted it therefrom, and that he would subsequently set it, and let it appear on some subsequent list to be furnished during the term. While, in such a case, the particular printed list so served furnishes no information at all as to the status of the particular case, yet such case may be differentiated from that stated in the opinion, where only one list was supposed to be served during the term, and this by reason

of the fact that the clerk has, by the establishment in the past of a practice and custom to furnish further lists during the term, impliedly promised in the present to do so, upon which promise counsel would, on account of such past practice and custom, have a right to rely in dealing with a particular list before them, at least to the extent of presuming that, although their cause did not appear on that list, it would appear on a subsequent list to be furnished during the term.

This presumption, however, cannot be indulged as to the last list of the series of lists to be furnished for the term; for when counsel, who know that the particular cause has not appeared on any previous list served during the term, and who know, as the petition here shows, that that cause *is at issue, undisposed of, and pending for trial at that term* on the dockets of said city court, fails to find it listed on the last of the series of printed lists to be furnished for the term—it not having appeared on any previous list—he is under as much duty to make inquiry of the clerk as to the status of that cause as he would have been, had it been the custom and practice of the clerk to furnish only one list covering all cases at issue on the docket, as was supposed in the opinion, instead of, as is now contended for, several lists, covering together all the cases at issue on said docket. It is as much a case of no information at all when all of such several lists, including the last, taken together, furnish no information, as when one list covering all the cases at issue furnishes none. The two cannot be distinguished in principle. Each falls under the authority of *Henley v. Chabert*, *supra*, and under the reasoning which we, in our opinion, have given as what we conceived to be the basis of that authority. If that authority is severe as to the degree of diligence exacted of counsel, this is a matter to be addressed to our higher court on certiorari, and not to us.

Furthermore, if in fact it was the practice and custom of the clerk to furnish during the term, not one printed list purporting to cover all the cases on the docket at issue for that term, as we inferred in the opinion, but to furnish, as is now claimed, several lists—one at the commencement of the term and others from time to time thereafter as he sets the cases for trial, each covering only those cases at issue on the docket as are set for a particular three months—and if the list referred to in the petition as furnished counsel was not the last of the series to be furnished for the term, these facts, which would, as seen, distinguish this case from the *Henley-Chabert* Case, should have appeared from the allegations of the petition. We cannot take judicial knowledge of them, even though they be facts, since they are

not matters of common knowledge, as is insisted. 17 Am. & Eng. Ency. Law, 892.

Appellant next urges that the allegations of the petition are sufficient to show that these are the facts. In his brief on this point it is said:

"The sworn petition necessarily shows it. On page 2 it avers that the dockets of the city court of Birmingham contain a vast number of cases, 'more than 2,000.' The same petition shows that the printed docket contained 'more than 1,000 cases.'"

But counsel overlook the fact that, while it is true that the petition does show that the dockets of said city court "contained more than 2,000 cases"—including, we must infer, those at issue and those not at issue—it fails to show how many of them were at issue, or how many were not, thereby leaving us entirely in the dark on this subject. Only those at issue would, we infer, appear on any printed list of the cases set for trial, because only those at issue could be legally set for trial; and, for all we know, therefore, the "more than 1,000 cases" which, the petition alleges, appeared on the printed list served on counsel, constituted and compromised the whole of the cases at issue on the dockets of said city court. Consequently there is nothing in the allegations mentioned to show but what the list served on counsel covered, and was intended by the clerk to cover, all the cases at issue, as the case here was, on said docket. But even if there was anything in the petition to show that such list was only a partial list of such cases, and that it was the practice and custom of the clerk to furnish several, instead of one, during the term, there is nothing to show but what the list here was the last of the series to be furnished for the term. If it was, then the case cannot be distinguished, for reasons before pointed out, from the Henley-Chabert Case. Pleadings are, on demurrer, to be construed most strongly against the pleader, and must negative every reasonable adverse intendment. "If we allow the averment to be true, but at the same time a case may be supposed consistent with it which would render the averment inoperative, * * * such a case will be presumed or intended, unless excluded by particular averments." *Scharfenburg v. Decatur*, 155 Ala. 654, 47 South. 95. Another statement of the rule is that, if pleadings admit of two reasonable constructions, that least favorable to the pleader must be adopted. 4 Mayf. Dig. 447, par. 4.

We are unable, in the light of these principles, to find that the petition makes a case that can be differentiated from the Henley-Chabert Case, where, we repeat, it was said by our Supreme Court:

"Nor is it sufficient ground for relief that * * * the list of cases made out by the clerk and published did not disclose the case of respondent versus complainants. No diligence or effort on the part of complainants to ascertain the status of the cause is shown."

In that case the printed list published by the clerk furnished, as pointed out in our opinion, no information at all as to the status of the particular cause, but, by accident or mistake of the clerk, such cause was omitted entirely from said list. In the instant case, while the printed list so furnished by the clerk does contain information, and that correct, with respect to the status of the particular cause, yet, on account of the accident or mistake on the part of the clerk in describing on the printed list that cause so differently from the way in which it was described on the regular court dockets, we are asked to say that counsel for petitioner should be excused for their failure to discover the identity of the cause as stated on the printed list with the cause as stated on the regular court dockets, and hence should be excused for their failure to act on the correct information imparted by said list as to the day said cause was set for trial. If we excuse them, it can only be, as stated in the original opinion, on the theory that the statement or description of the cause on the printed list was so different or variant from the statement or description of it on the regular dockets of the court as to amount to no statement or description of that cause at all on the printed list.

Hence we have the identical situation as presented in the Henley-Chabert Case—not a case where the clerk furnished incorrect information as to when a particular cause was set for trial, but a case where he furnished no information at all as to when such cause was set for trial; consequently a case where, as in the Henley-Chabert Case, counsel were under duty, if they would be "without fault," which the statute (Code 1907, § 5372) requires as a condition to relief, to make inquiry of the clerk as to the status of said cause, which would have resulted in information as to the day said cause was set for trial. The fact that in the Henley-Chabert Case the relief was sought by bill in equity, rather than, as here, by petition at law under the four months statute (Code 1907, § 5372), does not alter the result; since, as pointed out in the authorities cited in the original opinion, it is indispensable to relief in either case that the judgment prayed to be set aside should have been obtained, not only as the result of "surprise, accident, mistake, or fraud," but "without fault" on the part of the party seeking relief, or of his or her counsel. What is, and what is not, "without fault" in such a case, are matters on which equity and the law cannot and do not differ. Consequently, if in equity a complainant is not "without fault," but is lacking in "due diligence," who fails to make inquiry as to the status of his or her cause, which is omitted from a printed list furnished by the clerk, but which complainant or his or her counsel knows to be at issue and pending for trial at that term of the court, then

equally at law a petition for rehearing under the four months statute is not "without fault," but is lacking in "due diligence," who fails, under the same circumstances, to make such inquiry. The latter remedy is merely, as we pointed out in the opinion, a statutory substitute for the former, and is governed, as to the questions here involved, by the same principles.

Nor can the case at bar be differentiated from the Henley-Chabert Case by the fact that in the instant case it appears that it was the custom of the clerk to furnish printed lists, while it does not so appear in the Henley-Chabert Case. Such a custom vel non on the part of the clerk is, it seems to us, entirely immaterial to the question of "due diligence" on the part of counsel, since we are unable to see why an attorney would not have as much right to rely on a printed list furnished by the clerk for the first time and purporting to contain a statement of all the cases on the docket that have been set for trial, together with the several days on which they have been respectively so set, as he would have to rely on such a list after the clerk had established a custom of furnishing it, because, as we see it, the thing which warrants an attorney in relying on the correctness of information imparted by such a printed list so furnished by the clerk is not the fact that the clerk has established a custom of furnishing such a list, but the fact that the list emanates from the clerk—the officer of the court and the maker and custodian of its records, wherein that information so communicated by him reposes—who, as such officer, has access to that information, and is supposed, therefore, to furnish it correctly when he undertakes to do so, whether verbally, by letter, by printed lists, or otherwise. For this reason—that is, because the clerk is the officer of the court—it is our view, as expressed in the original opinion, that attorneys and litigants have a right to accept as correct, and to act upon it in appearing at court, all information actually imparted by the clerk as to when a particular cause is set for trial, however that information be imparted, whether by printed lists or otherwise, and although it be incorrect, but that whenever the clerk fails to impart any information on that subject, as was true in the Henley-Chabert Case, and as is true in the instant case—as so appears from the analysis we have heretofore given of this case—then it is the duty of counsel, if they would avoid being lacking in "due diligence" under the four months statute, to make inquiry and ascertain when the cause, with reference to which the clerk has furnished them no information, and which they know to be pending and at issue for trial at that term of the court, is set for trial. *Henley v. Chabert*, supra.

The foregoing, which is in line with what

was said in the original opinion, expresses the views of the writer, which, if they had been approved by the court, would have resulted in overruling appellant's application for rehearing. However, the other members of the court, my Associates, Judges PELHAM and BROWN, who constitute a majority, have, since the original opinion was written, changed their views, and think, for reasons as severally expressed by them in the following opinions, that the application for rehearing should be granted. What I have said is sufficient to indicate why I am of opinion that each of them is in error in supposing that this case can be distinguished from the Henley-Chabert Case on either of the grounds set forth in their respective opinions. Judge PELHAM is at fault, I think, in holding, as the basis for the distinction drawn by him, that not as much diligence is required to be shown on the part of counsel when relief against a judgment is sought under the four months statute, like in the present case, as when sought by bill in chancery, like in the Henley-Chabert Case. On the other hand, the holding of Judge BROWN, that the two cases may be distinguished, is based upon a misconception, I think, of the very basis of fact upon which relief is sought in the present case, which misconception is clearly disclosed by the following statement in his opinion, to wit:

"Would a reasonably careful attorney, under these circumstances, have relied on the information furnished by the printed docket furnished by the clerk? We cannot escape the conclusion that he would be warranted in so doing, and that petitioner's attorney had a right to rely on the information it furnished."

As we have hereinbefore pointed out, the petition, when properly analyzed, predicates the right to the relief sought, not upon the ground that the printed list furnished any information as to the status of petitioner's cause, and that such information was incorrect, but upon the ground that said printed list furnished, in effect, no information whatever as to the status of petitioner's cause, since it described said cause in such a way as that its identity was not, even in the exercise of reasonable diligence, discoverable by petitioner's counsel. Consequently, we repeat, this is a case, like the Henley-Chabert Case, where the clerk imparted no information at all by the printed list as to the status of petitioner's cause, and not a case where the clerk imparted incorrect information. In the latter case, we agree, as before said, that counsel would have a right to rely on the information imparted, though it turned out to be incorrect. My Brother BROWN goes further, and in his effort to distinguish this case from the Henley-Chabert Case says in effect that, in view of the well-known doctrine that "negligence is a relative term," it might well be that an attorney in Walker county would not be "without fault," as was held in the Henley-Chabert Case, if he neg-

lected to make inquiry as to the status of his client's cause when failing to find it on a printed list furnished by the clerk, yet that an attorney in Jefferson county would be "without fault" in neglecting to make such inquiry under those circumstances, provided it appears that it was customary for attorneys in the latter county to so neglect, and was not so customary in the former county. We are unable to appreciate the force of this application of the doctrines of custom and relative negligence. It seems to us that, if due diligence requires of an attorney in Walker county the duty of making inquiry under the circumstances mentioned, it should, and does, require it of an attorney in Jefferson county, and that a custom not to exercise it in the latter county cannot be allowed to supplant the requirements of the law in this kind of a matter.

In pursuance of the holding of the majority of the court, the application for rehearing is granted, judgment of affirmance set aside, and a reversal ordered.

BROWN, J. Petition for rehearing under section 5372 of the Code, providing:

"When a party has been prevented from making his defense by surprise, accident, *mistake* or fraud, without fault on his part, he may, in like manner, apply for a rehearing at any time within four months from the rendition of the judgment."

The judgment against which relief is sought was rendered on the 7th day of January, 1915, and the original petition for rehearing was filed on the 13th day of March, 1915. A demurrer was sustained to the original petition and the petition as amended, and, the petitioner declining to plead further, judgment dismissing the petition was entered, and from that judgment this appeal is prosecuted.

It is well settled that the proceeding under consideration here is not a continuation of the original suit, but is an independent suit, analogous to a bill in equity for relief against judgments at law, and is governed by the same principles (*Evans v. Wilhite*, 167 Ala. 587, 52 South. 845), with probably more liberal application in proceedings for rehearing under the statute, where, when rehearing is granted, the entire case is opened and the cause proceeds as if no judgment had been rendered. In such case "the petitioner will not be put to full proof of the facts upon which his defense in the original action depends," and the petition is sufficient if it appears that he will be able to make full defense when the action is again tried. *Ex parte Wallace*, 60 Ala. 268. The gravamen of the petition in this case is that, through accident or mistake of the clerk of the court, the name of the defendant was not correctly transcribed on the trial docket on which the case was set for trial, and the names of her attorneys, who had appeared for her and filed a demurrer to the complaint, were not

entered thereon, and on account of this mistake her attorneys did not recognize the case on the docket as that of the petitioner, or take notice of the date on which it was set for trial. The petition, after showing that petitioner has a good defense to the action, avers that when the case was regularly reached for trial, on motion of the plaintiff, the demurrer filed by her attorneys was stricken and judgment rendered against her, and that it was so rendered on account of the mistake of the clerk above stated, and that she had no notice or knowledge of the rendition of the judgment until long after the time allowed for the ordinary motion for new trial. The petition further avers:

"That the clerk of said court, through himself or one of his deputies, undertook to transcribe from said original appearance docket [where the petition shows the names of the parties and the defendant's attorneys were properly entered] the causes thereon to be set for trial during the term of said court beginning on the first Monday in October, 1914, including the above-styled cause, numbered 32544, and that said transcribed docket was the docket to be used and which was used in setting said causes so transcribed, including the above-styled cause, for trial during said term; that in transcribing the above-styled cause said clerk or his deputy, by accident or mistake, *omitted the first name of defendant*, and merely gave initials, and *omitted the names of defendant's attorneys and all reference thereto*; that the said cause was marked on said transcribed docket and set for trial January 5, 1915, and a printed docket as above described was made up and printed at the instance of said clerk for distribution among attorneys having cases set on said docket, that they might learn in due time the dates on which said cases were set for trial; that by accident or mistake there was not only omitted from said transcribed docket the first name of defendant, only her initials being given, and also the names of her attorneys and all reference thereto, but there was also omitted from both of said dockets, to wit, said transcribed docket and said printed docket, the names of defendant's attorneys and all reference thereto; that in the due course of business, and in the diligent prosecution of their practice, said attorneys procured one of said printed dockets in due season, in order that they might learn from same, in accordance with the practically universal custom at said Birmingham, the date on which each of the cases was set for trial on said docket in which they represented plaintiff or defendant; and they procured one of said dockets long before the said 5th day of January, 1915, to wit, in the month of December, 1914. Neither the names of defendant's attorneys nor her first name were on *the only docket in the clerk's office* on which said cause was set for trial, and said names did not appear on any except the original or appearance docket, and *the time set for trial* was not indicated on that docket."

The city court of Birmingham is presided over by four judges, and the act of the Legislature approved February 28, 1907, regulating the setting of cases for trial provides:

"The cases in said court shall, under the direction of said judges, be arranged on four separate dockets. Each of said judges may be separately engaged at the same time, or at different times, in the trial of different cases. One of said dockets shall be made up of chancery cases; one, of cases in which juries have not been demanded; one of appeal and certiorari cases, and cases in assumpsit, ejectment, trover and detinue, in which juries have been demanded;

and one of all other cases in which juries have been demanded; but in the discretion of the judges, more than one of the judges may be engaged at the same time in the separate trial of different cases on the same docket. The judges may, in their discretion, alternate in the trial of the different dockets, either monthly or at such times as may to them seem proper. *They shall have the control and direction of the setting of all cases, and cases shall be set for trial as nearly as practicable in the order in which they are brought.*" Local Acts 1907, p. 256.

It is the statutory duty of the clerk of the court, not only to keep a correct appearance docket of all civil cases, on which must be entered all the civil actions brought, the names of the parties, the character of the action, the name of the attorney by whom the same is brought, and the sheriff's return, but it is likewise his duty to enter the appearance of the attorney for the defendant, and to make up and keep a trial docket of all civil cases, on which must be entered the names of the parties, the character of the action, and the names of the attorneys employed and appearing in the cause. Code 1907, § 3272; Local Acts 1907, p. 259. And it is this trial docket, necessarily, that is used by the judges in setting cases for trial, and this is the docket that litigants would naturally examine, under ordinary circumstances, for information as to the date set for trial of causes thereon. In the absence of notice or knowledge that the clerk had failed to perform his duty of correctly transcribing the names of the parties and their attorneys on the trial docket, attorneys practicing in the court have a right to assume that the clerk has performed this duty. *Jones on Evidence*, § 45; *Roman, Trustee, v. Lentz et al.*, 177 Ala. 70, 58 South. 438.

But it is not enough that the judgment was rendered and petitioner's right to make her defense cut off by the accident or mistake of the clerk in failing to correctly transcribe the names of the party and her attorneys on the trial docket; she must go further, and show that she was not guilty of negligence in respect to making her defense to the action. Otherwise stated, she must show that the judgment was rendered because of accident or mistake on the part of the clerk, un-mixed with negligence on her part or the part of her attorneys, whose negligence, if found, must be charged to her. *Evans v. Wilhite*, supra; *Broda v. Greenwald*, 66 Ala. 538. This is the crucial point in the case, on which its result must turn. She undertakes to acquit herself of such negligence by showing that she employed a firm of reputable lawyers in the city of Birmingham to represent her in making her defense; that within the time allowed for pleading they appeared for her and filed appropriate pleadings in the case, and their names were duly entered by the clerk on the appearance docket; that there is an enormous amount of litigation in the courts at Birmingham, and a vast number of pending causes on their dockets, aver-

ring that on the dockets of the city court alone there were "more than 2,000 cases"; that because of these conditions it was impracticable for attorneys practicing in said courts to examine all the dockets to ascertain when the causes wherein they were interested were set for trial, and by a universal custom, long prevailing, the clerks of said courts had periodically issued printed dockets for information of the bar and litigants, containing the names of such cases as were set for trial and the date so set; that it was the universal custom of the bar to rely on this docket for such information. The petition in this respect avers:

"That long before the filing of the above-styled cause against this petitioner it had been recognized by the bar of the said city of Birmingham and by the officers of each of said courts that it was practically necessary that the clerk of each of said courts should issue periodical dockets for distribution among attorneys having causes set in said courts in advance of the day on which said causes were set, for the purpose of thereby receiving notice of the day on which said causes were set for trial; that for a long time prior to the filing of said cause, and at the time thereof and ever since, the custom has *universally* prevailed in Jefferson county, Alabama, for the clerks of each of said courts to issue said printed dockets containing the name of each of the cases set in said court, together with the name of the attorney for the plaintiff and also the name of the attorney for the defendant printed therein in connection with such case, and to issue said docket a long enough time ahead of the day on which said cases were set for trial that the attorneys might have notice therefrom in ample time of the setting of said causes to notify their clients and prepare the same for trial on the days for which said causes were respectively set for trial, and during all of said time it has been the custom of the bar of said Birmingham to rely upon said printed docket for notice of the setting of said causes, and it has been the custom of the petitioner's said attorneys to so rely upon said printed docket; * * * and it has not been the custom during said time for attorneys to examine the dockets in the clerk's office to ascertain when causes were set for trial, but, on the contrary, to rely on said printed docket to so ascertain."

The petition then avers that the clerk issued such printed docket, and petitioner's cause was improperly entered thereon, and the names of her attorneys wholly omitted therefrom; that said docket contained "more than 1,000 cases" set for trial, and after diligently examining this printed docket they did not discover that petitioner's cause was entered thereon, by reason of the said mistake of the clerk in entering the cause, and were misled thereby, and by reason thereof the judgment was entered. The question here is: Do these averments acquit the defendant and her attorneys of negligence as a matter of law? In other words, under the circumstances here disclosed, were the defendant's attorneys justified in assuming, in absence of notice to the contrary, that this printed docket was correct, and were they justified in relying upon it?

The statute confers upon the judges of the city court of Birmingham the power to make

rules of practice regulating the trial and disposition of causes in the court, and the writer entertains the opinion that the sanction by the officers of the courts of the long-established custom shown by the petition as to the manner of setting cases for trial and giving notice thereof is tantamount to establishing a rule of court to that effect, and that litigants and their attorneys were justified in looking to this printed docket for information as to the date cases were set for trial. This conclusion is induced by the fact that a great body of our law is the growth of custom and usage governing the conduct of men and fixing their rights. 12 Cyc. 1030. However this may be, the presumption as to the regularity of official acts has been gradually extended to acts unofficial, and the courts universally hold:

"That it is reasonable to assume that the usual and customary modes of business have been adopted in a given case, until some departure from the regular mode has been shown." Jones on Evidence, § 48. That "negligence is a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances at some time or place may not be negligence under other circumstances at another time and place. All the surrounding attendant circumstances must be taken into account, if the question involved is one of negligence, such as the opportunity for deliberation, degree of danger, and many other considerations of like nature, affecting the standard of care which may be reasonably required in the particular case." 29 Cyc. 417, 418. That negligence is "the failure to do what an ordinarily prudent person would have done under the circumstances." Alabama City, Gadsden & Attalla R. R. Co. v. Bullard, 157 Ala. 618, 47 South. 578. That "what is negligence and what is due care may depend upon the custom and habit of people in the same place and under similar circumstances. So the drivers of horses and carriages on the highway, and the masters or pilots of ships and steamboats on the water, must follow the customary mode of passing each other, and a failure to comply with such custom will amount to negligence. And the presentation of a check may be shown by usage to be in time, which without such proof would be deemed to be negligently delayed. Again, where the question was whether a guest at a hotel had been guilty of negligence in leaving the key in the door of his room, in which was a large sum of money, evidence of usage of guests at the hotel leaving keys in the doors of their rooms was held to be relevant." 12 Cyc. 1079; Jones v. Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

In view of these well-established principles of law, and the custom shown by the petition and admitted to exist by the demurrer, the question is: Would a reasonably careful attorney, under these circumstances, have relied on the information furnished by the printed docket furnished by the clerk? We cannot escape the conclusion that he would be warranted in so doing, and that petitioner's attorney had the right to rely on the information it furnished. Furthermore, the printed docket was an exact copy of the trial docket on which the case was set, the error occurring in transcribing the case onto the trial docket; so, if the petitioner's attorneys had examined the trial docket, they would

have gained no more information than appeared in the printed docket which they did examine.

The case of Henley v. Chabert, 65 South. 993, is easily distinguished from the case here presented. The gravamen of the bill in that case was alleged fraud, practiced by the plaintiff in the action, in misleading the defendant by oral statements as to what disposition he intended to make of the case; yet it was shown that he refused to put the agreement in writing, thus putting the defendant on notice that he would not be absolutely bound by his statements. In that case there was no averment of a long-prevailing custom as to the issuance of a bar docket for the information of litigants and their attorneys, and their custom to rely upon such docket. The only averment in that record touching this matter was:

"And that prior to that time [the rendition of the judgment] a list of the cases in the circuit court of Walker county which were set for trial on different days between November 11, 1912, and January 23, 1913, was published and furnished the several attorneys living in Jasper practicing in said circuit court, and that nowhere on said published list or pamphlet of said causes did it state or show that the said case of J. M. Henley against these orators was set for trial."

And, besides, there is a vast difference in the facts and circumstances surrounding the parties in this case to those existing in that, and, as we have shown, in treating the question of negligence, this must be taken into account.

The case of Renfro v. Merryman, 71 Ala. 195, is also easily distinguished. In that case the complainant and his attorney knew that the case was triable at the term of the court at which the judgment was rendered, and attended the court for the purpose of trial, and after examining the trial docket and finding the case had not been entered thereon, without calling the matter to the attention of the court, absented themselves from the court. In that case the parties had knowledge that the case stood for trial, that the clerk had failed in his duty, and, relying upon his negligence and the unwarranted assumption that he would continue his negligence, they left the court. This was a positive act of negligence, based upon an unwarranted assumption that the officer would not discharge his official duty.

The case at bar is more nearly analogous to the case of Evans v. Wilhite, supra, where the clerk entered upon the minutes an order continuing the case; and there it was held that the defendant was justified in relying on this entry, and that no further proceedings were warranted without notice to him.

"A mistake of fact, provided it be honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment be against conscience, in enjoining its enforcement." 23 Cyc. 1012 (X, B, 9, d); Brown v. Jones, 44 Ga. 71; 1 Black on Judgments (2d Ed.) §§ 335, 345, 381.

"As a general rule, any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself there, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agent, will authorize a court of equity to enjoin the adverse party from enforcing such judgment." 23 Cyc. 991 (X, B, 1); Foshee v. McCreary, 123 Ala. 493, 26 South. 309; Watts v. Gayle, 20 Ala. 817; Stinnett v. Mobile Branch State Bank, 9 Ala. 120; 23 Cyc. 1010 (X, B, 9).

The existence of a meritorious defense to the action, which the complaining party was prevented from making by fraud, accident, or mistake, unmixed with negligence on his part, is sufficient to render the enforcement of the judgment unconscionable. Waddill v. Weaver, 53 Ala. 58; Ex parte North, 49 Ala. 385.

The petition was not subject to the demurrers interposed thereto, and they should have been overruled.

PELHAM, P. J. I concur in the conclusion reached by Judge BROWN. There is no question in my mind but that, philosophically considered, that determination of the question presented by the record in this case is sound; but I had entertained the opinion that the case of Henley v. Chabert, 65 South. 995, was in the way of such a holding on our part, as we are required by statute to conform our holdings to those of the Supreme Court. (See opinion of the Court, per Thomas, J., on the original consideration of this case, based on the holding in Henley v. Chabert, supra.)

I have, on this application, again carefully examined the case of Henley v. Chabert. That case is distinguishable from the case in hand, in the first place, because the Supreme Court, in that case, was applying a stricter and more inflexible rule than is applicable here. In the Henley-Chabert Case the Supreme Court was considering whether the bill in equity, as framed in that case, was sufficient, or without equity, in its allegations seeking to enjoin a judgment recovered against the complainants in a court of law. In passing upon that question, due regard and consideration were given to the rule of "great strictness and inflexibility" against a judgment recovered in a court of law being supplanted by a proceeding in chancery. I think it fairly inferable, from the opinion read as a whole, that a different rule might have been made to apply to the subject-matter under consideration if the case presented there, as here, had been under the "four months statute" (Code, § 5372), where the parties are shown to have exercised due diligence in making application to the law court for relief, rather than, after long delay, seeking the aid of a court of chancery, as were the facts disclosed by the record in the Henley-Chabert Case and pointedly referred to in the opinion in that case,

and which entered into the consideration of the conclusion reached in that case.

The case in hand is also distinguishable from the case referred to, as above cited, in that the facts set up in the petition (which are to be taken as admitted on demurrer) aver that the petitioner relied upon a universal custom of long standing, and well known and acquiesced in by all parties concerned, for attorneys practicing in the courts of Birmingham to depend for information of the setting of cases upon the printed list, or docket, furnished the attorneys for that purpose by the clerk, because of the impracticability of the attorneys examining the various original dockets where such a very large number of cases were pending in the courts of that jurisdiction. If it was the "universal custom," as alleged by petitioner, for attorneys to rely upon these printed dockets periodically issued by the clerk for this purpose, and this custom was of long standing, recognized, known, and acquiesced in for the good and sufficient reasons set out in the petition by the officers of the court, attorneys, parties, and, in fact, all persons concerned, it does not seem to me that the petitioner's attorneys should be charged with negligence for having recognized the universally prevailing custom and relied upon the printed docket to furnish the information as to the setting of cases, impracticable to be otherwise ascertained. The consideration of an established custom and the attorneys' reliance upon such a custom in no way entered into the consideration of the case of Henley v. Chabert, supra.

STEDHAM v. ROBERTSON. (7 Div. 295.)
(Court of Appeals of Alabama. Dec. 14, 1915.)
APPEAL AND ERROR \Leftrightarrow 1011—REVIEW—QUESTIONS OF FACT.

In a case tried before the judge without the intervention of a jury, the Court of Appeals will not review the action of the court in passing on conflicting evidence, consisting of the oral testimony of witnesses, where there is sufficient evidence to support the judgment rendered, as the credibility of the evidence was a matter for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. \Leftrightarrow 1011.]

Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge.

Detinue by J. T. Stedham against G. W. Robertson. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff sued for one light bay horse mule and one 2½ wagon. Defendant admitted possession of the property sued for, but denied that plaintiff had any right, title, or interest in it, and avers that on March 5, 1913, J. H. and E. L. Shaw executed a mortgage to defendant on said property, and, default having been made in the payment of said mortgage, defendant foreclosed same, and

bought the property, by virtue of the power of sale under said mortgage, and that said property is the property of defendant, and that plaintiff came to title under and by virtue of a mortgage executed by J. H. Shaw to Barfield-Green Mercantile Company, which mortgage purports to be transferred to E. L. Shaw, and by E. L. Shaw transferred to plaintiff. The defendant alleges that the mortgage was paid about March 1, 1913, and the attempted transfer did not carry with it any title to the property involved in the suit. As a reply thereto, plaintiff set up that a mortgage of March 5, 1913, given by the Shaws to defendant, was on condition that the said mortgage should be void if a certain bond of the same date should not be used in the circuit court, and it is averred that the bond was not used, and that therefore the mortgage is void. The evidence was in serious conflict on these various propositions, was given ore tenus, and judgment rendered thereon for the defendant.

Rutherford Lapsley, of Anniston, for appellant. Merrill & Walker, of Anniston, for appellee.

PELHAM, P. J. The conclusions of the court on the facts, and the judgment rendered thereon, when the case is tried before the judge without the intervention of a jury, should not be disturbed on review, if the judgment rendered can be supported by the evidence. *Montgomery Lodge v. Massie*, 159 Ala. 437, 49 South. 231; *Minchener et al. v. Robinson*, 169 Ala. 472, 53 South. 749; *Kelly v. City of Anniston*, 164 Ala. 631, 51 South. 415; *McIntyre Lumber & Export Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 66; *Millner v. State*, 150 Ala. 95, 43 South. 194.

An examination of the evidence set out in the record shows a conflict that the court, having the witnesses before it, decided in favor of the defendant. We cannot undertake to review the action of the court in passing on conflicting evidence, consisting of the oral testimony of witnesses the court had the advantage of personally observing on the witness stand. Beyond a doubt there was sufficient evidence to support the judgment rendered, and the credibility of the evidence was a matter for the trial court. Authorities *supra*. The only error assigned on the appeal is the action of the circuit court in rendering judgment in favor of the defendant on the evidence.

Affirmed.

STOVALL v. HAMILTON. (6 Div. 705.)
(Court of Appeals of Alabama. Dec. 16, 1915.)

1. FRAUDULENT CONVEYANCES — 229 — GARNISHMENT AS REMEDY.

Where a judgment debtor, in accepting payment of a claim, caused his debtor to execute a note to a third person to pay a portion of the indebtedness as a subterfuge to escape payment

of the judgment against him, he was the beneficial owner of the indebtedness, and could have maintained an action thereon in his own name, so that the debt was subject to garnishment for a judgment against him.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 668-670; Dec. Dig. — 229.]

2. FRAUDULENT CONVEYANCES — 52(1) — RIGHT TO SELL HOMESTEAD.

A judgment debtor may sell his homestead, regardless of his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 118, 122-124; Dec. Dig. — 52(1).]

3. GARNISHMENT — 205 — DEBTS SUBJECT.

Where a judgment debtor, selling his land, after receiving a cash payment, required the payment of the balance of the price by note and mortgage to his son, simultaneously with the transfer of title by him to the purchaser, the purchaser was not indebted to the judgment debtor, nor subject to garnishment, and need not plead in the garnishment proceedings asking that the judgment debtor be brought in for a determination of the person to whom he owed the money.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 397; Dec. Dig. — 205.]

4. PAYMENT — 9 — HOW MADE — CONSENT.

Payment by the consent of the party interested may be made other than in money.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 38, 40, 41, 49, 53; Dec. Dig. — 9.]

Thomas, J., dissenting in part.

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by S. Hamilton against J. P. Myers, in which, after judgment, the plaintiff garnished J. M. Stovall. From the judgment against the garnishee, he appeals. Affirmed.

Ray & Cooner and Gunn & Powell, all of Jasper, for appellant. Finch & Pennington, of Jasper, for appellee.

THOMAS, J. As a general rule, the plaintiff cannot, by process of garnishment, reach and subject to the payment of his debt against the defendant any demand which the defendant could not, at the time of the service of the writ of garnishment, have recovered of the garnishee in an action *ex contractu*. But this rule is subject to the exception that, if the demand has been fraudulently transferred or assigned by defendant, then, notwithstanding the defendant could not himself, on account of such transfer or assignment, recover of the garnishee, yet the plaintiff could do so, because the transfer or assignment, being fraudulent, is void as to him, and, so far as his rights are concerned, the case stands the same as if there had been no transfer or assignment at all. *American Trust & Savings Bank v. O'Barr*, 12 Ala. App. 546, 67 South. 795, and cases cited.

In all cases, however, where there has been a transfer or assignment by the defendant of the debt once due him by the garnishee,

whether that transfer or assignment is valid or fraudulent as against the plaintiff, it behooves the garnishee, if he would protect himself from the possibility of a double liability for the same debt—a liability to the transferee or assignee and a liability to the plaintiff—to set up in his answer to the writ of garnishment the fact of such transfer or assignment, or that another claims the debt, and suggest that that other be brought in and made a party to the proceedings, to contest with plaintiff the right to such debt. Code, § 4328; *Fowler v. Williamson*, 52 Ala. 16; *Blackman & Co. v. Collier*, 12 Ala. App. 568, 68 South. 519. In such case, an issue as to the fact and validity of the transfer is then made up between the plaintiff and the claimant, and, if found for the plaintiff, judgment is rendered in his favor against the garnishee, which relieves the latter of liability to the claimant; but, if the issue be found for the claimant, the garnishee is discharged, thereby relieving him of liability to the plaintiff, and leaving him liable only to the claimant. Code, § 4329. But if the garnishee admits an indebtedness to the defendant, and fails to set up that it has been transferred or assigned, that fact can avail him nothing, and the plaintiff will be entitled to a judgment against him on such admission, notwithstanding the transfer or assignment, and notwithstanding it may be valid as against the plaintiff, and notwithstanding that by reason of it the garnishee may also be liable to the transferee or assignee for the debt. *Blackman & Co. v. Collier*, supra. And, although the garnishee should deny in his answer any indebtedness at all to the defendant, yet if, upon contest of such answer, the plaintiff should prove that, at the time the writ of garnishment was served, a debt had been previously contracted by the garnishee with defendant, which remained unpaid at the time of the service of the writ of garnishment, the plaintiff would be entitled to a judgment against the garnishee, notwithstanding that, before the service of the writ, the defendant had transferred or assigned that indebtedness to a third person, and notwithstanding the garnishee would, on account of such transfer or assignment, be also liable to such third person. *Fowler v. Williamson*, supra. The reason is that, the garnishee having failed in his answer to plead or set up such transfer or assignment, it is not within the issues made by the pleadings, and proof of it cannot, therefore, profit him anything. *Fowler v. Williamson*, supra; *Blackman & Co. v. Collier*, supra. As said by Chief Justice Brickell in the case of *Fowler v. Williamson*, supra:

"If a garnishee does not in his answer disclose that an indebtedness owing to the defendant in the attachment or in the judgment has been transferred, but relies on a general denial of indebtedness, and an issue is formed contesting his answer, on the trial of such issue there is no contingency in which the garnishee can be permitted to offer evidence of such transfer.

The fact of transfer is not within the issue formed, or which can be legally formed. The only fact in issue is whether, when the garnishment was served, or at the time of answer, there was an indebtedness contracted by the garnishee to the defendant, of which the defendant was, *when it was contracted*, the real beneficial owner. If such indebtedness existed, judgment must be rendered against the garnishee, though it may have been transferred."

See, also, 9 Ency. Pl. & Pr. 836, and citations in note 2.

In the case at bar, it appears that the appellee, Hamilton, had recovered of the defendant, Myers, a judgment, and that thereafter he sued out a writ of garnishment on this judgment, which was executed by service upon the appellant, Stovall, as garnishee, who duly filed answer denying in general terms under oath any indebtedness to the defendant, Myers. The plaintiff, appellee (said Hamilton), contested said answer of the garnishee, alleging that it was untrue, and further alleging that said garnishee was indebted to the defendant in the sum of \$1,000 as part purchase price for land sold and conveyed by defendant to the garnishee. The evidence was without dispute to the effect that the defendant, Myers, did, after the rendition of plaintiff's judgment against him, sell and convey to the garnishee, Stovall, his exempt homestead (Code, § 4160), at and for the sum of \$2,000, of which \$1,000 was paid in cash, and a note for the remaining \$1,000 was, at the time, executed by the garnishee to the son of said defendant, Myers, with the latter's consent, and that said note had never been paid. The court, without the intervention of a jury, rendered judgment for the plaintiff against the garnishee, who insists that the court erred, because it does not appear, he contends, that he, the garnishee, was ever indebted to the defendant at all—it appearing that he paid in cash half the purchase price of the land, and that he, contemporaneously therewith, executed a note to the defendant's son, with the defendant's consent, for the other half, the execution of which note, payable to a third person, as it was, it is contended amounted to the same, in law, as the payment in cash to defendant. In other words, the contention is that the giving of the \$1,000 note to defendant's son contemporaneously with the purchase from defendant of the land operates the same in law as if payment had been then made in cash to defendant of that sum, and consequently that there was never any debt from garnishee to defendant for the \$1,000 now sought to be reached; hence that the garnishee pursued the correct course when, in his answer, he denied any indebtedness whatever to defendant, instead of admitting, as appellee contends he should have done, under the authority of *Fowler v. Williamson*, supra, an indebtedness at one time, and alleging that it, still unpaid, had been transferred to another before the writ of garnishment was served.

We cannot conceive how it can be properly said that there was never any indebtedness from garnishee to defendant for the \$1,000 for which garnishee made the note to defendant's son, since the very consideration of that note was the balance of the purchase money which garnishee owed defendant for his land. However short a time he may have owed it to defendant before executing the note to the son is immaterial. Suppose a note therefor had never been executed by garnishee to defendant's son; could not the defendant have recovered of the garnishee on an account, or account stated, or could the garnishee have escaped liability entirely by failing or refusing to give a note to defendant's son as was promised? A proper answer to these questions shows conclusively that for some moment of time before the note was executed to defendant's son, however brief that time, the garnishee was indebted to the defendant. The execution by him to defendant's son of a note for this indebtedness did not thereby discharge his liability therefor, but merely changed the form of his obligation and the person to whom he was liable. In other words, the transaction did not amount to a payment of the debt, but merely to a novation—the substitution of defendant's son for defendant as obligee—and amounted to the same in legal effect, so far as the questions here involved are concerned, as if the garnishee had given defendant a note for the debt and defendant had transferred that note to his son. It has been held that, in such latter case, as before seen, that the garnishee, in order to make proof of the transfer under the pleadings, must in his answer admit at one time having been indebted to defendant and allege that the indebtedness, still unpaid, had been transferred by defendant to another before the garnishment was served. *Fowler v. Williamson*, *supra*. This was not done here, and we hold, in line with the authority cited, that the court did not err in ignoring the proof of the transfer of the debt; that is, proof of the execution to defendant's son of a note for the debt due garnishee, and consequently that the court did not err in rendering judgment for plaintiff. *Fowler v. Williamson*, *supra*.

The fact, if it be a fact, that the \$1,000 for which the garnishee executed to defendant's son the said note was exempt to defendant, because a part of the proceeds of his exempt homestead, and consequently that there was no fraud on plaintiff in making said transfer, is immaterial, since, as seen, these matters were not within the issues made by the pleadings, as they would have been if the garnishee had in his answers admitted having contracted an indebtedness to defendant before the garnishment summons was served, and had alleged that such indebtedness had, before such summons was served, been transferred to another. *Fowler v. Williamson*,

supra. This would have presented the question as to whether or not there had in fact been a transfer, and, if so, whether it was valid or void as against plaintiff; otherwise, even if valid, it cannot protect the garnishee, who failed to plead the transfer. *Fowler v. Williamson*, *supra*; *Blackman v. Collier*, *supra*. However, we are not prepared to say it was valid, or that it was not valid. Appellant insists we should say that it was valid, on account of the fact that it appears that the indebtedness transferred was a sum owed defendant as a balance on the purchase price of his exempt homestead. In answer to this insistence, appellee points out the holding of our Supreme Court to the effect that the proceeds of the sale of an exempt homestead are not exempt as a homestead; that is, that the right of a homestead exemption does not follow and exist in the property into which a homestead may have been voluntarily converted. While such seems to be the holding of our Supreme Court (*Giddens v. Williamson*, 65 Ala. 439; 15 Am. & Eng. Ency. Law [2d Ed.] 594), the correctness of which we have no reason to doubt, yet it may be, as appellant contends, that that holding has no application in a case where, as here, the title to the property or chose in action into which the homestead was converted was, contemporaneously with such conversion, put into another person. The decision of this question is, as seen, unnecessary to the disposition of this case, in view of our holding that it was not raised by reason of the failure of the garnishee to set up in his answer the transfer.

If our holding as to the necessity on the part of the garnishee to plead the transfer be not correct, then there is no logical and orderly way of raising the question of a transfer and its validity *vel non*. Certainly it cannot be fairly contended that the proper way to have raised the question was for the plaintiff, after the garnishee filed answer denying indebtedness to defendant, to have filed a contest alleging that, notwithstanding the garnishee was not indebted to defendant at the time of the service of the writ or of filing answer, yet that prior thereto he was indebted to defendant, and that, although that debt had, before the service of the garnishment writ, been transferred by defendant to another, so that as a matter of fact garnishee did not owe defendant anything, yet that that transfer was fraudulent and void as against plaintiff, and that therefore, the debt not having been paid, plaintiff was entitled to recover it of the garnishee. The plaintiff is not supposed to know of secret transfers made by defendant of debts due—in fact, it is to the interest of both the defendant and the transferee to keep these matters from the knowledge of plaintiff, and they studiously endeavor to do so if there is any fraud in the transaction. On the other hand, the debtor garnishee must

in all cases be notified of the transfer in order to make it binding on him, unless the transfer is of commercial paper. The law, therefore, in an effort to protect the plaintiff against fraudulent and secret transfers, of which he may know nothing, requires the garnishee to make a disclosure in his answer of the fact of any transfer of the debt that has come to his knowledge; and this with the view of apprising plaintiff of it, and thereby affording plaintiff opportunity to investigate, and to show at the trial, if he can, the invalidity of the transfer, of which, unless disclosed in the garnishee's answer, he may never know anything. Plaintiff certainly would not be prepared with proof to attack the validity of the transfer, if his first knowledge of such transfer was gained, as might be the case here, only during the course of the trial. The law, consequently, requires of the garnishee a full and free disclosure in his answer of all transfers, whether the transfer be direct or indirect, as here. 9 Ency. Pl. & Pr. 836; Fowler v. Williamson, supra; Woodlawn v. Purvis, 108 Ala. 511, 18 South. 530; Johns v. Field, 5 Ala. 484; Crayton v. Clark, 11 Ala. 787; Foster v. White, 9 Port. 221.

The judgment appealed from is affirmed. Affirmed.

The foregoing expresses the views of the writer. The other members of the court concur in the judgment of affirmance reached, but are of opinion that the reasons for it should be placed on other grounds, as expressed by Judge BROWN in the opinion following.

BROWN, J. [1] The trial was by the court without the intervention of a jury, and the evidence shows that the note and mortgage, payable on their face to D. J. Myers, were executed and delivered to the judgment debtor, I. P. Myers; that the judgment debtor had them in his possession a short time before the trial, and tried to induce the garnishee to pay the indebtedness represented thereby to him; and, aside from the fact that the papers were made payable to D. J. Myers, there is no evidence that he had or claimed any right or interest in the debt due from the garnishee. This evidence affords an inference that the execution of the note and mortgage to D. J. Myers was a mere subterfuge; that D. J. Myers had never had any claim or title thereto, and the debt was, in fact, due to the judgment debtor, I. P. Myers. If this is true, he was not only the beneficial owner of the debt, but was the holder of the legal title to the securities, and could maintain an action in his own name thereon (Code 1907, § 2489); and the debt could be subjected to garnishment. Curtis v. Parker & Co., 136 Ala. 217, 33 South. 935; Archer v. People's Savings Bank, 88 Ala. 249, 7 South. 53; Jefferson County Savings Bank v. Nathan et al., 138 Ala. 342, 35 South. 355; Alex-

ander v. Pollock & Co., 72 Ala. 137. This evidence supports the finding of the trial court, and an affirmance must follow. Stedham v. Robertson, 71 South. 62; Montgomery Lodge v. Massie, 159 Ala. 437, 49 South. 231; Minchener et al. v. Robinson, 169 Ala. 472, 53 South. 749.

[2, 3] The undisputed proof shows that the property conveyed to Stovall was the homestead of I. P. Myers, and he had a perfect right to dispose of it as he pleased, regardless of his creditors. Cox et al. v. Birmingham Dry Goods Co., 125 Ala. 320, 28 South. 456, 82 Am. St. Rep. 238; Kennedy v. First National Bank of Tuscaloosa, 107 Ala. 170, 18 South. 396, 36 L. R. A. 308; Hodges v. Winston, 95 Ala. 514, 11 South. 200, 36 Am. St. Rep. 241; Fuller v. Whitlock, 99 Ala. 411, 13 South. 80. Therefore, if, as appellant contends, the note and mortgage were executed and delivered to D. J. Myers in payment of the purchase money, in settlement of a claim due to him from I. P. Myers, or, in this case, even as a gift, contemporaneously with the payment of the \$1,000 to I. P. Myers by Stovall and the delivery of the deed, and were accepted as payment in full of the purchase money and concurring with the passing of the title, no indebtedness, in fact, was ever due from Stovall to I. P. Myers. Pollak v. Winter, 173 Ala. 550, 55 South. 828; Cook v. Malone, 128 Ala. 662, 29 South. 653; 1 Benj. on Sales, § 335 et seq.; Shines v. Steiner, 76 Ala. 458; Blackshear v. Burke, 74 Ala. 239.

[4] The fault in the opinion of my Brother THOMAS ignores the fact that payment may thus be made without creating a debt, and the rule announced there presupposes the existence of a debt to the defendant and a transfer thereof to the garnishee. It is well settled, by consent of the party interested, payment may be made other than in money. 30 Cyc. 1187; Lewis and Wife v. Dillard & Jones, 66 Ala. 1. If payment in full of the purchase money was made by paying to I. P. Myers \$1,000 and the execution and delivery to D. J. Myers of the note and mortgage, then no indebtedness ever existed to I. P. Myers, and the rule of pleading and practice announced in Fowler v. Williamson, 52 Ala. 16, has no application, as is evident from the expression of the court:

"If a garnishee does not in his answer disclose that an indebtedness owing to the defendant in the attachment or in the judgment has been transferred, but relies on a general denial of indebtedness, and an issue is formed contesting his answer, on the trial of such issue there is no contingency in which the garnishee can be permitted to offer evidence of such transfer. The fact of transfer is not within the issue formed, or which can be legally formed. The only fact in issue is whether, when the garnishment was served, or at the time of answer, there was an indebtedness contracted by the garnishee to the defendant, of which the defendant was, when it was contracted, the * * * beneficial owner."

There is nothing here which precludes the garnishee from showing payment contemporaneously with the passing of the title to the

property and concurring therewith, in any way that such payment could be made. The result of the holding in the opinion of my Brother, when applied to such a case, would require the garnishee to commit perjury in his answer in order to protect his legal rights and prevent double liability. For these reasons, I cannot concur in what is said as to the applicability of the rule of practice announced in *Fowler v. Williamson*, supra.

The question of the right of the judgment debtor to claim the proceeds of the sale of his homestead is not here presented, as no such claim is made.

KNIGHTS OF MODERN MACCABEES v. GILLESPIE. (8 Div. 322.)

(Court of Appeals of Alabama. Dec. 14, 1915.)

1. INSURANCE ⇐815(1) — MUTUAL BENEFIT INSURANCE—ACTIONS—PLEADING.

The form for a complaint on a life insurance policy issued for a definite term of years provided by Code 1907, § 5382, form 12, requiring the plaintiff to allege the term for which the policy was issued, does not apply to an action on a certificate in a mutual benefit organization which is in force only for so long a time as the member remains in good standing, and not for a definite term of years so that an allegation that the injury occurred while the policy was in full force and effect is sufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1996; Dec. Dig. ⇐815(1).]

2. APPEAL AND ERROR ⇐1078(3)—MATTERS REVIEWABLE—WAIVER.

Where a ground of demurrer to a complaint is not insisted on in the brief on appeal, no question in regard thereto is presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258; Dec. Dig. ⇐1078(3).]

3. INSURANCE ⇐723(2) — APPLICATION — FRAUD—ACTUAL DECEIT.

Under Code 1907, § 4572, providing that no misrepresentation in securing a policy of life insurance shall void the policy unless made with intent to deceive, or unless the matter misrepresented increased the risk, although a question in an application was not answered and this was done with intent to deceive, if it did not in fact deceive there was no ground for avoiding the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1859; Dec. Dig. ⇐723(2).]

4. INSURANCE ⇐724(2)—MUTUAL BENEFIT—APPLICATION — MISREPRESENTATION—WAIVER.

Where it appears on the face of an application that a question is not answered or is imperfectly answered, the issuance of a policy without further inquiry by the insurer is waiver of the imperfection.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. ⇐724(2).]

5. INSURANCE ⇐815(1) — MUTUAL BENEFIT CERTIFICATE—PLEADING—SUFFICIENCY.

A pleading in an action on a certificate alleging that the insurer with full knowledge by and through its officer, servant, or agent issued and delivered the policy with the true condition of the insured well and thoroughly understood, is sufficient to allege the authority of such

officers or agents to make the waiver of a condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1996; Dec. Dig. ⇐815(1).]

6. APPEAL AND ERROR ⇐1040(15) — HARMLESS ERROR.

Error, if any, in overruling demurrers to a replication which was made in a number of counts, is harmless where some portion of the replication was valid, and plaintiff could have recovered under it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4103, 4105; Dec. Dig. ⇐1040(15).]

7. PLEADING ⇐412—WAIVER OF OBJECTIONS —FAILURE TO DEMUR — AFFIRMATIVE CHARGE.

Where the sufficiency of replications was not tested by demurrer or the allegations avoided by any but a general rejoinder, and the plaintiff proved their truth without dispute, he was entitled to the affirmative charge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. ⇐412.]

8. INSURANCE ⇐755(3) — MUTUAL BENEFIT INSURANCE — CERTIFICATE—ACTIONS—EVIDENCE.

Where the evidence showed without dispute that after knowledge of an injury to the insured the grand lodge officers of the insurer accepted premiums for a policy of accident insurance, it was unnecessary to determine to what extent the local officers could bind the insurer by waiver or estoppel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1909-1913, 1915, 1916; Dec. Dig. ⇐755(3).]

9. APPEAL AND ERROR ⇐1068(5)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Where the plaintiff was entitled to an affirmative charge, it was unnecessary on appeal to consider refused special charges requested by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. ⇐1068(5); Trial, Cent. Dig. § 475.]

10. APPEAL AND ERROR ⇐1032(1)—REVERSAL—GROUNDS.

Under rule 45 (175 Ala. xxi, 61 South. ix), in order to require reversal it is not only necessary to show error, but prejudice or injury must also appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4061; Dec. Dig. ⇐1032(1).]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by William T. Gillespie against the Knights of the Modern Maccabees. Judgment for plaintiff, and defendant appeals. Affirmed.

John A. Lusk & Son, of Guntersville, and A. E. Hawkins, of Albertville, for appellant. McCord & Orr, of Albertville, for appellee.

THOMAS, J. The complaint was upon a policy or certificate of insurance, alleged in the complaint to be styled or known as "an accident, disability, and funeral benefit certificate," and alleged in the complaint to have been issued to plaintiff by defendant on August 27, 1912, wherein, as was alleged, it was agreed, among other things, that:

"If by accident the plaintiff should suffer the loss of one leg by severance at or above the an-

kle joint he should receive the sum of \$500" (the amount claimed in the complaint).

The complaint further averred that:

"While said policy was in force and effect, to wit, on or about the 28th day of April, 1913, the plaintiff by accident suffered the loss of a leg at or above the ankle joint, of which the defendant has had notice," etc.

[1] The only ground of the demurrer to the complaint that is insisted upon in brief alleges that the complaint is defective in that it fails to state for what period of time the policy was issued.

We are of opinion that this ground of the demurrer was not well taken, because the absent averment mentioned, though found in the Code form (Code, § 5382, form 12) for a complaint on a life insurance policy, issued for a definite term of years, we cannot say, as a matter of law, is applicable to all policies, especially policies or certificates of insurance covering accidents issued by benevolent orders, as defendant purports to be. *National Life Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45. Commonly, such a policy or certificate as the latter continues in force, not for a definite period of years, but only so long and as long as the insured remains in good standing as a member of the order by the payment of dues, etc.

The object of the mentioned averment in the Code form cited, which is to the effect that the policy sued on and issued on a date alleged, insured the life of the deceased for a stated number of years, was that it might be made to appear from the complaint whether the time of the death as subsequently alleged was within the alleged term covered by the policy; that is, whether the death was during or within the life of the policy. But where such an averment—such an averment as, that the policy insured the insured for a stated number of years or other period—is not true with respect to the contract of insurance actually sued on, then such an averment would be entirely inappropriate, and, if made, would create a variance between allegation and proof when the policy itself was offered in evidence. *U. S. Health, etc., Co. v. Savage*, 185 Ala. 232, 64 South. 340.

When, therefore, such an averment is not applicable or appropriate to the contract sued on, then any other averment of fact showing that the death, or accident, as the case may be, happened or occurred within the life of the policy sued on will meet the requirements of good pleading. *U. S. Health, etc., Co. v. Veitch*, 161 Ala. 630, 50 South. 95; *Patterson v. K. of P.*, 162 Ala. 430, 50 South. 377.

As will be observed from reading the excerpts from the complaint as hereinbefore quoted, it alleged to this end that the accident, relied on as the basis for recovery under the policy, happened "while said policy was in force and effect."

[2] It might be, which we do not decide, that these last words (those quoted), though otherwise sufficient, were objectionable as

alleging a conclusion of the pleader (*Penna. Cas. Co. v. Perdue*, 164 Ala. 508, 51 South. 352), but no ground of the demurrer seems to properly raise this question, and if it did, it is not insisted upon in brief, and is therefore waived (*L. & N. R. R. Co. v. Holland*, 173 Ala. 675, 55 South. 1001)—the first ground of demurrer, which we have already considered, being the only one urged in brief, or even there mentioned. The whole of the brief on the point of the demurrer reads:

"The first ground of the demurrer * * * should have been sustained. The complaint did not show for what period of time it [the policy] was issued. It should have shown this"

—citing in support *U. S. Health, etc., Co. v. Veitch*, supra, and *U. S. Health, etc., Co. v. Savage*, supra, each of which cases we have hereinbefore cited and neither of which, so far as we can see, conflicts with the views we have expressed.

[3] The defendant also complains of the sustaining of demurrers to certain of its pleas. Plea numbered 2, to which a demurrer was sustained, alleged that:

"The policy sued on was issued upon the faith of representations made in a written application and medical examination furnished and signed by defendant; that the application and policy formed one contract, and that in them it was provided: That all the statements and representations made in the application for the policy were material and were true and were warranted by plaintiff to be true. That in and as a part of said application plaintiff was asked this question: 'Are you in any way crippled or deformed?' That plaintiff's answer thereto was a material basis for the issuance of the policy. That plaintiff purposely left said question unanswered, and thereby fraudulently intended to deceive the defendant into the belief that plaintiff was not in any way crippled, when in fact he was, being at the time badly crippled, which fact he fraudulently withheld from this defendant."

The demurrer took the point, among others, which need not be considered, that the plea failed to show that the defendant was in fact deceived, by plaintiff's failure to answer the question, into believing that plaintiff was not crippled or deformed.

Whatever may have been plaintiff's intention to deceive by his failure to answer the question mentioned, if such failure did not in fact deceive the defendant, then such failure furnishes no basis for avoiding the policy. It requires both an intention to deceive and an actual deception to constitute fraud. 14 Am. & Eng. Ency. Law (2d Ed.) 106-108, and Alabama authorities there cited.

As we interpret it, there is nothing in section 4572 of the Code (cited by appellant) that alters or that was intended to alter this rule; nor is there anything that was said in construing said section, in the case of *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 451, 65 South. 449, nor in the cases there cited (some of which are cited by appellant), which was intended to do so. *National Union v. Sherry*, 180 Ala. 627, 61 South. 944; *Prov. Society v. Pruett*, 141 Ala.

688, 37 South. 700; Insurance Co. v. Gee, 171 Ala. 435, 55 South. 166; 16 Am. & Eng. Ency. Law (2d Ed.) 921, note 2.

[4] The court consequently did not err in sustaining the demurrer, containing the ground mentioned, to defendant's said plea 2; nor to pleas 3 and 4, which had like defects. Furthermore, we may say with respect to the question in the application, alleged in plea 2 to have been left unanswered, that the law is that where it appears upon the face of the application for insurance that a question is not answered at all, or imperfectly answered, the issuance of a policy without further inquiry will constitute a waiver of the imperfection in the application and will render immaterial the omission to give a full answer. 16 Am. & Eng. Ency. Law (2d Ed.) 937, and authorities there cited; 19 Am. & Eng. Ency. Law (2d Ed.) 71, and cases cited.

[5] Demurrers to pleas 5, 6, A2, A3, and A4 were overruled, but in order to understand the replications to them and points raised with reference thereto it is essential to state their substance. Pleas 5 and 6 set up, separately and severally, that the questions asked plaintiff in the application, to which he is alleged in each instance to have given a false answer, were, "Are you in good health?" to which plaintiff replied, as was alleged, "Yes;" and, "Have you ever applied for membership in any society, or in any life insurance company or association, and been rejected or action postponed?" to which plaintiff replied, as was alleged, "No." Each of the pleas, 5 and 6, further alleged that these answers were false, and plea 5 alleged that they were intended to deceive and did deceive defendant, while plea 6 alleged that the misrepresentations increased the risk of loss under the policy, concluding with an averment that the defendant then and there paid into court the sum of \$25 as the full amount of all premiums and dues paid by plaintiff to defendant on account of said membership and policy.

Pleas A3 and A4 alleged, respectively, that the false answers mentioned both deceived the defendant, and also increased the risk of loss under the policy; while plea A2 contained these allegations with respect to plaintiff's failure to answer the question set out in plea 2 hereinbefore quoted from.

Demurrers to these pleas having been, as said, overruled, the plaintiff filed to each, separately and severally, seven replications, setting up in varying form and phraseology waiver and estoppel, to all of which replications demurrers were overruled, except to the replication numbered 1, to which a demurrer was sustained. It is insisted by defendant that the court erred in not also sustaining the demurrers to the other replications—those numbered 2, 3, 4, 5, 6, and 7—in that each failed to show or allege that the officers of defendant referred to in the replications had authority to waive the matters

and things set up in the pleas which the replications purported to answer.

We think this ground of the demurrer, which is the only ground insisted upon or even mentioned in the brief, is without merit, certainly as to some of these replications. For instance, replication 2 alleged:

"That the defendant with full knowledge, by and through its officer, servant, or agent, issued and delivered the said policy with the true condition of plaintiff well and thoroughly understood, and thereby waived the matters and things set out in said plea and," etc.

The averment that "defendant with full knowledge by and through its officer, servant, or agent" is the equivalent of an allegation that defendant knew the facts mentioned by and through its officer, servant, or agent, which implies an allegation that such officer, agent, or servant was one whose knowledge as to the matters was knowledge of the defendant, because it would be impossible in law and in fact for defendant to know a thing by and through its officer, agent, or servant, unless knowledge of the latter was knowledge of the former. Knowledge of the agent could not in law be knowledge of the principal, except when the former was acting as the authorized agent of the latter in acquiring or receiving that knowledge. Replication 2, consequently, impliedly avers the authority of defendant's said officers or agents, and was therefore not subject to the ground mentioned of the demurrer. *Brown v. Com. Fire Ins. Co.*, 86 Ala. 189, 5 South. 500.

Whether subject to other grounds, we need not consider, as they were waived by not being insisted on in brief.

[6] Under that replication (replication 2), as well as under replications 5, 6, and 7 (which were, in their implied averments as to the authority of defendant's agent, similar to replication 2), plaintiff was at liberty to prove knowledge of the facts alleged on the part of any officer or agent of defendant whose authority was such that in law knowledge on his part would be knowledge of the defendant; and, if the evidence was such that plaintiff was entitled to the affirmative charge on either of these replications (either 2, 5, 6, or 7), then even though the court did err, which we need not decide, in overruling the said mentioned ground of the demurrer to plaintiff's replications numbered 3 and 4, it would be error without injury to defendant, since defendant's pleas, to which these latter replications were an attempted answer, were completely emasculated by the establishment without dispute of either of the other replications mentioned. *Liverpool Co. v. Tillis*, 110 Ala. 201, 17 South. 672; *Britt v. Pitts*, 111 Ala. 406, 20 South. 484.

Without pausing to consider the evidence as to the replication numbered 2, we may say that the evidence tends without dispute to establish replications 5, 6, and 7, which alleged in substance in some of them that the de-

fendant, through its officer, agent, or servant, waived, and in others that it estopped itself from setting up, the matters and things relied on in its pleas to defeat recovery, by the fact that with full knowledge of the falsity of plaintiff's answers to two questions in the application for insurance and his failure to answer another, as mentioned in the pleas, the defendant continued to accept the dues and premiums on the policy after the injury or accident to plaintiff by which he lost his said leg, and retained the same up to the time of the filing of said pleas in this suit, and cannot now be heard to set up the defenses interposed in said pleas, etc.

[7] Assuming, without considering or deciding, that these replications set up immaterial matters, yet—their sufficiency not being tested by demurrer, or, if tested, the overruling of the demurrer not being insisted upon on appeal, except as to the one ground, which is without merit, as hereinbefore pointed out, and the allegations of the replications not being avoided by any rejoinder, except a general rejoinder denying their truth—if plaintiff proved without dispute in the evidence the facts alleged in the replications, he was, under our system, entitled to the affirmative charge. 4 Mayf. Dig. 486, § 23; 5 Mayf. Dig. 758, §§ 124½, 125; Liverpool Co. v. Tillis, 110 Ala. 201, 17 South. 672; Britt v. Pitts, 111 Ala. 406, 20 South. 484.

This the plaintiff did. The evidence was without conflict to the effect that Grand Lodge officers of the defendant order, after the accident to plaintiff and while his claim therefor was pending, and after knowledge acquired by them, in the investigation of such claim, of the fact of the falsity of plaintiff's statements in the application for insurance, etc., as set up in defendant's pleas, continued to receive and accept the dues and premiums from plaintiff on the policy and retained all he paid in, until defendant filed the pleas in the present case, when such premium and dues were paid into court.

[8] The plaintiff being entitled to the affirmative charge on this basis, it becomes unnecessary to consider or determine as to what extent the organizer and officers of defendant's local lodge, who had knowledge of the facts, had authority to bind defendant by waiver or estoppel. As bearing on these matters, however, the following authorities are of interest, to wit: United Order, etc., v. Hooser, 160 Ala. 334, 49 South. 354; National Union v. Sherry, 180 Ala. 627, 61 South. 944; Aetna Ins. Co. v. Kennedy, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160; Con. Fire Ins. Co. v. Brooks, 131 Ala. 614, 30 South. 876; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 South. 46; Prine v. American Central Ins. Co., 171 Ala. 343, 54 South. 547.

[9] The plaintiff, as shown, being entitled to the affirmative charge, it likewise becomes unnecessary to consider the refused special

charges assigned by defendant as error. Western Union Telegraph Co. v. Whitson, 145 Ala. 426, 41 South. 405; Griffin v. Bass Foundry & M. Co., 135 Ala. 490, 33 South. 177; Bowling v. M. & M. Ry. Co., 128 Ala. 556, 29 South. 584.

[10] Numerous exceptions were taken by the defendant to the rulings of the court on the admission and rejection of evidence, but only eight of these are insisted upon in brief. Most of them are clearly without merit, while in some there is probably merit; but it is not made to appear how, even if the court erred, it was prejudicial or injurious to the defendant as regards the replications upon which we have held plaintiff was entitled to the affirmative charge. Not only error, but injury, must be shown. Sup. Ct. rule 45 (175 Ala. xxi, 61 South. ix). In fact, it clearly appears that most, if not all, of the rulings complained of as to rulings on evidence relate to the matters and things set up in replications 2, 3, and 4, which, for reasons before pointed out, we have been at liberty to ignore and have ignored entirely in the disposition of the case. We find no erroneous rulings on the evidence that were injurious to defendant as regards replications 5, 6, and 7, which confessed defendant's pleas, and set up new matter in avoidance that was proved without dispute.

Affirmed.

DUNAWAY v. RODEN. (8 Div. 290.)

(Court of Appeals of Alabama. Feb. 1, 1916.)

1. CONTRACTS ¶176(9) — MODIFICATION — TERMS OF NEW AGREEMENT—QUESTION FOR JURY.

In an action for compensation for boring a well, question whether it was the implied intention of the parties, after modifying the original contract, that defendant should still pay for the well casing and for the removal of plaintiff's well-boring machinery, as originally agreed, though nothing as to such matters was said at the time of the modification, *held* for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 917; Dec. Dig. ¶176(9); Trial, Cent. Dig. § 326.]

2. CONTRACTS ¶353(10)—ACTION FOR COMPENSATION—INSTRUCTION.

In an action for compensation for boring a well, under an agreement that defendant should give a mule and pay for well casing and the removal of plaintiff's machinery, which was subsequently modified to provide that plaintiff should receive a cash payment in accordance with the number of feet bored, the charge that if the jury believed that plaintiff and defendant first made a contract for plaintiff to bore a well for a mule, and that afterwards a new contract was made whereby the old one was abandoned, plaintiff could not recover for moving his machinery or for casing the well, "provided you find that plaintiff did not comply with the new contract," was properly refused, not only as calculated to mislead as to whether the terms of the original contract adverted to were abrogated by the new agreement, but also as positively confusing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1841; Dec. Dig. ¶353(10).]

3. TRIAL ¶261—INSTRUCTIONS.

The trial court is not in error for refusing a charge incorrectly stating the law, or which is confusing, though its only fault lies in the fact that it is too favorable to the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ¶261.]

4. CONTRACTS ¶236—MODIFICATION.

Parties to an executory contract may alter it at their pleasure and in any particular they see fit upon no other consideration than mutual consent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1118; Dec. Dig. ¶236.]

5. CONTRACTS ¶333(6)—ACTION FOR COMPENSATION—RECOVERY.

In an action for compensation for boring a well, where, under the contract for the work, as modified, the stipulation as to the quantity of water plaintiff was to get was changed, and he was obligated only to bore the well to such a depth as to reach water, which he did, plaintiff could recover on the special count pleading the modified contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1650, 1654; Dec. Dig. ¶333(6).]

6. CONTRACTS ¶176(9)—TERMS—INTENTION OF PARTIES—QUESTION FOR JURY.

In an action for compensation for boring a well, question whether the contract obligated plaintiff merely to "get water," or to get enough water to supply defendant's family and live stock, *held* for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 917; Dec. Dig. ¶176(9); Trial, Cent. Dig. § 326.]

7. CONTRACTS ¶323(1)—PERFORMANCE—QUESTION FOR JURY.

In an action for compensation for boring a well under a contract obligating plaintiff merely to "get water," question, whether the 12 or 14 two-gallon buckets every 12 hours actually produced met the requirement of the contract, *held* for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1543, 1827; Dec. Dig. ¶323(1).]

8. CONTRACTS ¶176(1)—CONSTRUCTION—QUESTION FOR COURT.

The construction of a contract is for the court only when it is in writing or its terms are not in dispute.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 767; Dec. Dig. ¶176(1); Trial, Cent. Dig. § 826.]

9. WORK AND LABOR ¶14(1)—RIGHT OF ACTION ON COMMON COUNT.

Where plaintiff contracted to bore a well for defendant, the well to produce enough water to supply defendant's family and live stock, which it failed to do, but after plaintiff reached water defendant told him to work one more day and quit, plaintiff could recover on a common count for work and labor done at defendant's request.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 81; Dec. Dig. ¶14(1).]

10. WORK AND LABOR ¶9—PLEADING—RECOVERY.

Although, where there is an express contract, plaintiff cannot sue on an implied one, but must recover, if at all, on the express contract, yet the rule is subject to the exception that where the express contract has been fully performed, and nothing remains to be done but payment in money, plaintiff can recover either under the common counts, or under a special count based on the express contract, or under both.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 23-24; Dec. Dig. ¶9.]

11. CONTRACTS ¶241—RIGHT OF PARTY TO STOP WORK.

Where the party who had contracted for boring a well, agreeing to pay therefor so much a foot, before the well was bored to such a depth as to procure the amount of water called for by the contract, desired to stop the contractor for the work, he had the right to do so, provided the contractor consented, thus effecting a modification of the contract by mutual consent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1126; Dec. Dig. ¶241.]

12. CONTRACTS ¶248—MODIFICATION OF AGREEMENT—QUESTION FOR JURY.

In an action for compensation for boring a well, whether the contractor for the work was told by the other party, after water was reached, to work one more day and quit, was a question for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. ¶248.]

13. WORK AND LABOR ¶12—MODIFICATION OF CONTRACT—RECOVERY.

A contractor for a well, whom the other party directed, upon reaching water, to bore one more day and quit, could recover, under a common count for work and labor done at request, on the modification of the contract by mutual consent before full performance, irrespective of an acceptance of the work.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 27; Dec. Dig. ¶12.]

14. APPEAL AND ERROR ¶1050(1)—REVERSAL FOR HARMLESS ERROR—RULE OF COURT.

In an action for compensation for boring a well, where the original contract was modified, and its terms, as modified, were in dispute, the erroneous admission of testimony to show the value of the mule which defendant originally agreed to pay for the work did not justify the Court of Appeals in reversing, under Rule 45 of the Supreme Court (175 Ala. xxi), providing that no judgment may be reversed for error in the admission of evidence, unless, after examination of the entire case, it appears that the error complained of has probably injuriously affected substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4163, 4167, 4166; Dec. Dig. ¶1050(1).]

15. CONTRACTS ¶247—ACTION—EVIDENCE.

In an action for compensation for boring a well, where the original contract calling for the giving of a mule in payment was modified to call for a cash payment of so much per foot, its exact terms otherwise being in dispute, plaintiff's evidence as to the value of the mule was properly admitted as a circumstance to aid the jury in determining what the modified contract actually was, and its proper interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1139, 1787; Dec. Dig. ¶247.]

16. APPEAL AND ERROR ¶231(7)—RESERVATION OF GROUNDS OF REVIEW—MOTION TO EXCLUDE EVIDENCE.

Where a motion to exclude testimony, otherwise competent, failed to raise the point that it was not responsive to the question which called it forth, the motion being merely general and not specifying any grounds, the point that the answer was unresponsive could not avail the moving party on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶231(7); Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. §§ 194-210, 223-227, 689, 690, 694, 696.]

Brown, J., dissenting on rehearing.

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by J. H. Roden against A. M. Dunaway. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts sufficiently appear from the opinion.

The following charges were refused to defendant:

(6) If you find from the evidence that there was an entire contract to bore the well, and that plaintiff did not perform the contract in full, but only in part, then your verdict should be for defendant.

(7) If you believe plaintiff and defendant first made a contract for plaintiff to bore the well for a mule, and that afterwards a new contract was made for the boring of the well, in lieu of the old contract, and if thereby the old contract was abandoned, then I charge you that plaintiff cannot recover anything in this case, either for moving the machinery or for furnishing casing for the well, provided you find plaintiff did not comply with the new contract as made.

(8) If you are reasonably satisfied from the evidence that, under the contract made to bore the well, it was stipulated and agreed that plaintiff was to furnish enough water in said well to supply defendant's family and enough for his stock, and that plaintiff did not do this, then, if this is true, plaintiff is not entitled to recover anything in this case for boring said well.

O. Kyle, of Decatur, for appellant. Tidwell & Sample, of New Decatur, for appellee.

THOMAS, J. Action by appellee, as plaintiff below, against appellant, as defendant below, for compensation for boring a well.

The complaint, to which no demurrer was filed, contained four counts, but the second was eliminated by the giving of the affirmative charge for defendant. The refusal of the court to give such charge for defendant as to each of the other counts is the principal error relied on for a reversal.

The first and third counts sought a recovery under a special contract for boring said well, the only difference between the two being that the latter more fully set out the contract; while the fourth count sought a recovery under the common count for work and labor done at plaintiff's request in boring said well, etc. Defendant pleaded the general issue with leave to give in evidence any matter that might be specially pleaded. The contract relied on by plaintiff for recovery was a parol one. He testified:

"In July, 1912, I made a contract with defendant to bore him a well, for which he was to give me a mule [which was shown to be worth \$125]. The contract was that I was to bore the well for the said mule and defendant was to pay the cost [\$3] of moving my well-boring machinery to his place where the well was to be bored, and was to furnish the casing for said well [shown to have been put in by defendant at a reasonable cost of \$2.50]. I was to bore the well such a depth as would furnish water sufficient for defendant's use at his house for his family and for his live stock that was kept on his premises. * * * After I moved my well-boring machinery to defendant's premises for the purpose of boring the well and had set up the machinery, I made a new contract with defendant for boring the well. Defendant informed me that, after having made the first agreement about boring the well, he had sold the mule he was to give me for said work, but that he presumed I would just as soon have the money

as the mule. To this I assented, and it was then agreed that I was to bore the well and was to receive as compensation 50 cents per foot for boring through dirt and \$1 per foot for boring through rock. Nothing was said in this last agreement about the quantity of water I was to furnish. It was simply agreed that I was to get water. I bored the well 72 feet in depth, and 6 of this was through dirt and sixty-six of this was through rock. I bored until I struck water. The day before I quit work on the well, I saw the defendant, * * * and he paid me \$10, and he told me that the well did not furnish sufficient water, and to work one more day on it and quit. When this new contract was made, my well-boring machinery had been set up on defendant's premises preparatory to begin boring under the original contract. Under the new contract, nothing was said about defendant's paying for the casing of the well, or for the removal of the machinery to his premises."

The defendant insists that under this evidence he was entitled to the affirmative charge as to count 3 of the complaint on account of an alleged variance between allegation and proof, because the count in describing the special contract sued on, which was the new or modified contract, alleged that under it defendant not only was to pay plaintiff 50 cents per foot for dirt and \$1 per foot for rock bored through in sinking the well, but was also to pay for the casing of the well and for the cost of removing plaintiff's machinery to the place of boring, while the testimony as set out, it is insisted, afforded no evidence whatever that defendant was to pay for the latter two items.

[1] We cannot so agree. The facts and circumstances are such that the jury might infer that it was the implied intention of the parties that under the new contract—the contract as modified—the defendant was still to pay for the casing of the well and for the removal of the machinery, though nothing was in fact said about either of these things at the time of the modification.

The testimony of the defendant as to the original contract between the parties and as to the facts and circumstances under which it was modified coincides with that of plaintiff. Both agree that under the new or modified contract plaintiff was to get for boring the well, not a mule, as first agreed, but 50 cents per foot for dirt and \$1 per foot for rock bored through in sinking the well; and both agree that at the time of this new agreement nothing was said about defendant's paying for the casing of the well and the removal of plaintiff's machinery, as had been formerly agreed to—that is, under the contract as originally made. What is to be inferred from their silence as to these matters? May it not be reasonably implied from their failure to make any change in these stipulations of the old contract, which they were merely modifying, that they intended them to remain as there agreed? In other words, was it not the implied understanding that the old contract was to stand except as to particulars where a change was expressly agreed on?

[2, 3] As to whether it was or not was a

question for the jury, and the court did not err in refusing the affirmative charge as to count 3 on any theory of a variance. Nor did the court err in refusing written charge numbered 7 requested by defendant, and which asserted that:

If the jury believed that "plaintiff and defendant first made a contract for plaintiff to bore the well for a mule, and that afterwards a new contract was made for boring the well in lieu of the old contract, and if thereby the old contract was abandoned, then plaintiff could not recover anything either for moving his machinery or for casing the well, *provided you find that plaintiff did not comply with the new contract.*"

The charge, we think, was not only calculated to mislead the jury for reasons just adverted to, but was positively confusing by reason of the concluding paragraph in it, as above italicized. On this account, the charge, as applied to the evidence, is susceptible of the construction that it meant to assert that, although the jury might believe that under the original contract the defendant was to pay for moving plaintiff's machinery and for casing the well, yet, if they further believed that that contract was abandoned and a new contract entered into in lieu of it, which did not require the defendant to pay for moving plaintiff's machinery and casing the well, the plaintiff could not recover anything for either of these things; "provided the jury believed that plaintiff did not comply with the new contract." Upon the hypothesis stated in the charge, the plaintiff was not entitled to recover anything for moving his machinery and casing the well, even though he had complied with the new contract; and yet the charge, by the concluding proviso mentioned, implies that he would, provided he complied with the new contract. The lower court cannot be put in error for refusing a charge which incorrectly states the law, or which is confusing, although its only fault in this particular lies in the fact that it is too favorable to the opposite party. 6 Mayf. Dig. 11, par. 17.

[4] Parties are at liberty to alter or change an executory contract at their pleasure and in any particular they see fit upon no other consideration than mutual assent. 2 Mayf. Dig. 797, § 48.

That the original contract—the terms of which were undisputed—was altered or changed, both parties agree. The extent of that modification only was in dispute, which was clearly a question for the jury to determine. *Swanner v. Swanner*, 50 Ala. 66.

The plaintiff also testified, as before seen, that, at the time the new contract was made, "it was simply agreed that he was to get water"; while the defendant testified that, at the time of the making of the new contract, the plaintiff then expressly again agreed to bore the well deep enough to furnish a sufficient supply of water for defendant's family and live stock, and that by actual test the well bored by plaintiff furnished

only 12 or 14 two-gallon buckets every 12 hours, which was totally insufficient for the purpose mentioned.

[5-8] If the jury believed the testimony of the plaintiff to the effect that under the new contract the stipulations of the old contract as to the quantity of water he was to get were expressly changed, and that under the new contract he was only to bore the well to such a depth as to reach water, then plaintiff was entitled to recover under the special count; provided the jury believed the water gotten was sufficient to meet the requirements of the new contract under plaintiff's version of it. We cannot say as a matter of law, as it is insisted by appellant we should say, that the amount of water procured by plaintiff in boring the well, to wit, 12 or 14 two-gallon buckets every 12 hours, was not sufficient to meet the requirements even of plaintiff's version of the new contract, to the effect that under it he was only "to get water." In other words, it is insisted that, in the light of the situation and surroundings of the parties at the time of employing those words in the contract—that is, that plaintiff was to get water—we should interpret those words to mean that plaintiff was to get water sufficient to supply the family and stock of the defendant; and that, since the evidence discloses that the amount actually gotten was inadequate to that end, we should hold that the defendant was entitled to the affirmative charge, upon the theory that the plaintiff had not performed the contract sued on by him; even if we accept as true his own evidence as to its terms. Under the facts and circumstances of this case, however, as pointed out, we think it was the province of the jury, and not the court, to determine not only the question as to whose version of the terms of the contract was correct (whether that of the plaintiff or that of the defendant) but, in the event they found the plaintiff's version to be correct, and that the contract bound him only to get water, to also determine whether the amount of water actually gotten (12 or 14 two-gallon buckets every 12 hours) was sufficient to meet that requirement. What the parties meant and understood by the employment of these terms, if they were employed in the contract, was for the jury, and not the court, to say, after considering all the facts and circumstances of the case. It is only when the contract is in writing, or when its terms are not in dispute, that its construction is for the court. *McFadden v. Henderson*, 128 Ala. 221, 29 South. 640.

[9] But even if the jury did not believe plaintiff's version of the new contract, but believed defendant's version, and also believed that the water gotten was not sufficient to supply defendant's family and stock, yet, if they believed plaintiff's testimony to the effect that after he reached water defendant told him to work one more day and quit,

then he would also be entitled to recover. *Mansfield v. Morgan*, 140 Ala. 587, 37 South. 393. Hence the court did not err in refusing the affirmative charge as to any of the counts, either the counts 1 and 3, which were special counts, as before said, based on an express contract, or the count 4, which was the common count for work and labor done.

[16] While it is true that where there is an express contract the plaintiff cannot resort to an implied one, but must recover, if at all, on the express agreement, yet this rule is subject to the exception that where the express contract has been fully performed, and nothing remains to be done but the payment of the price in money, then the plaintiff can recover either under the common counts or under a special count based on the express contract, or under both. 5 Mayf. Dig. 206, § 22, and cases cited.

[11-13] Charges 6 and 8 were properly refused, for even though the new contract was as defendant claimed, and even though plaintiff did not fully perform it, yet, if defendant told plaintiff, as plaintiff swears he did, to work one more day and quit, then defendant would be liable. *Mansfield v. Morgan*, supra. The character of the new or modified contract between the parties was such that, the deeper the plaintiff bored the well, the more expensive it would be to the defendant, who was to pay for the work, not a lump sum, but according to the number of feet bored; and if, before the plaintiff bored the well to such a depth as to procure the amount of water called for by the contract even under defendant's version of it, the defendant wanted to stop plaintiff in the work, he had a perfect right to do so, provided plaintiff consented. This would be again changing the contract by mutual consent. Plaintiff testified, as pointed out, that defendant told him, after water was reached in the well, to work one more day and quit. If this be true, which was a question for the jury, then the plaintiff was entitled to recover under the common count found in the complaint. Such a recovery would not, as appellant seems to think, have to be predicated upon an acceptance by defendant of the work, but upon a change or modification of the new contract by mutual consent before it was fully performed, which is entirely permissible, as shown in the authorities cited in the opinion.

[14, 15] The fact that the court permitted the plaintiff to prove the value of the mule that was, under the first contract between the parties, to be given plaintiff by defendant in return for boring the well, we cannot say, if error, that it was injurious; which we must be able to say before we would be authorized to reverse the case under the new rule of our Supreme Court. Rule 45 (175 Ala. xxi). However, we are not only of opinion that there was no injury in admitting such proof, but also that there was no error, as we think the jury had a right to know

what the first contract was—the consideration therefor, that is, not only that that consideration was a mule, but the value of it—as a circumstance to aid them (the jury), for whatever it was worth, in determining what the modified contract actually was and its proper interpretation. A knowledge by the jury of what the first contract was was certainly essential to their understanding of the situation of the parties and what they had in mind when they entered into an agreement to change or modify that contract. All the evidence as to it was admitted without objection from defendant, who also testified as a witness for himself to its terms. The only objection was that the court permitted plaintiff to prove the value of the mule that was to be given by defendant under the old contract for boring the well. We do not think that this should reverse the case for reasons stated, even if error.

[16] The court declined to exclude, on motion of defendant, an answer of a witness for plaintiff to the effect that defendant told him (witness) that he (defendant) thought that, with the well bored by plaintiff, and with another well he (defendant) had, he (defendant) could make out. It is insisted that this answer of the witness should have been excluded because it was not responsive to the question from plaintiff's counsel which called it forth. Granting that it was not responsive, no ground of the motion to exclude raised this point; but the motion was merely a general one not specifying any grounds. Consequently, the point now made can avail appellant nothing. *Eason v. Isbell*, 42 Ala. 456; *Riley v. State*, 88 Ala. 193, 7 South. 149.

We find no error in the record, and the judgment appealed from is affirmed.

Affirmed.

On Rehearing.

BROWN, J. On re-examination of this case on rehearing, I entertain the opinion, on the plaintiff's own evidence, which is without dispute on this point, that the evidence as to the first contract was wholly irrelevant to the issues in this case, and that contract should in no way influence the result. The plaintiff testified in his own behalf (Record, p. 9):

"Under the first contract that I made with the defendant, I was to receive a mule for boring the well, and defendant was to pay for moving my machinery outfit to his premises and was also to pay for the casing of the well. We abandoned this old contract and made a new one, defendant agreeing to pay me 50 cents per foot for dirt and \$1 per foot for rock. It was under this contract I bored the well. When the last contract was made, my well-boring machinery had been set up on defendant's premises preparatory to begin boring under the original contract. Under the new contract, nothing was said about defendant paying for the casing of the well or for the removal of the machinery to his premises."

This testimony of the plaintiff is unmistakably conclusive in establishing the fact that the first contract was abandoned and a

new contract entered into covering the same subject-matter between the same parties (L. & N. R. Co. v. Bontrager, 186 Ala. 186, 65 South. 28), and the acceptance of the new contract by the parties by operation of law extinguished the former contract (Otis v. McMillan & Son [headnote 3] 70 Ala. 46).

This evidence clearly does not show a mere modification of the first contract, but an abandonment of it by mutual agreement of the parties, and leaves no room for construing the new contract as a modification of the old. It is elementary that it is not the office of the law or the courts to make contracts for parties, but to enforce them as made by the parties. Therefore the evidence as to the value of the mule was wholly immaterial and should have been rejected on the appellant's objection.

If the facts hypothesized in charge 7 were found by the jury from the evidence, the plaintiff was not entitled to recover, and the refusal of this charge was erroneous. The only criticism to which it was subject is that it was too favorable to the plaintiff, in that it required the jury to find that the plaintiff had not complied with the last contract. No doubt, in fixing the price to be paid in the new contract, the fact that the machinery had already been moved and set down was taken into consideration by the parties.

For these errors, the judgment should be reversed.

LONG v. BALTIMORE BARGAIN HOUSE. (6 Div. 958.)

(Court of Appeals of Alabama. Dec. 14, 1915.)

APPEAL AND ERROR \S 627(3)—TIME FOR FILING CERTIFICATE—MOTION TO AFFIRM.

Where a case was tried and determined in the law and equity court May 1, 1915, appeal taken May 12, 1915, and notice of appeal served May 13, 1915, while the certificate was filed in the Court of Appeals November 25, 1915, appellee's motion to affirm the judgment must be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2747, 2749; Dec. Dig. \S 627(3).]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action between T. L. Long and the Baltimore Bargain House. From the judgment, Long appeals. Affirmed.

Dana Phillips, of Jasper, for appellee.

PELHAM, P. J. The judgment in this case is shown by the certificate filed here to have been tried and determined on the 1st day of May, 1915, and an appeal taken on the 12th day of May, 1915, and notice of appeal served on the 13th day of May, 1915. The certificate was filed here on November 25, 1915, and a motion made by the appellee to affirm the judgment appealed from.

From the above statement showing the date of rendition of judgment, etc., it will be seen that the motion is well taken, and is granted. Affirmed.

GLENN v. CITY OF PRATTVILLE. (3 Div. 205.)

(Court of Appeals of Alabama. Jan. 11, 1916.)

1. CRIMINAL LAW \S 1088(18)—RECORD ON APPEAL—SUFFICIENCY.

Although the judgment showed that a demurrer to the complaint was overruled, where the demurrer itself was not in the record but appeared only in the bill of exceptions, the questions sought to be raised by it were not presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2801; Dec. Dig. \S 1088(18).]

2. CRIMINAL LAW \S 304(12)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

While courts take judicial notice of public statutes conferring authority upon municipalities to pass ordinances, they do not take judicial notice of ordinances or proceedings of the municipal court in the exercise of such power.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 708, 2951½; Dec. Dig. \S 304(12).]

3. MUNICIPAL CORPORATIONS \S 639(1)—VIOLATION OF ORDINANCE—DEMURRER—EFFECT.

Where a complaint avers the existence and violation of an ordinance, a demurrer thereto confesses the averments and cannot set up matters de hors the record as to the irregularity of the proceedings in adopting the ordinance, the demurrer in such case being a speaking demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1406-1409; Dec. Dig. \S 639(1).]

4. MUNICIPAL CORPORATIONS \S 642(3)—PUBLIC ACTS—MUNICIPAL ORDINANCES—MANNER OF OBJECTION.

Under Code 1907, § 1259, providing that ordinances of city councils published in book form shall be received as evidence of the passage and legal publication of such ordinances in all courts without further proof, when the book of ordinances was offered, if irregularities were claimed in the adoption of the ordinances, it was incumbent upon the one so claiming to offer the proceedings in evidence and make them a part of the record by bill of exceptions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1414; Dec. Dig. \S 642(3).]

5. MUNICIPAL CORPORATIONS \S 105—PROCEEDINGS OF COUNCIL—VALIDITY OF ORDINANCES.

The omission of the words "Council of" in the caption of an ordinance does not render it void, the provisions of Code 1907, § 1259, requiring such words in the caption, being merely directory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 223, 224; Dec. Dig. \S 105.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

John Glenn was convicted of violating an ordinance of the city of Prattville, prohibiting the sale of liquors, and, on appeal to the circuit court, was again convicted, and he appeals. Affirmed.

See, also, 12 Ala. App. 609, 67 South. 622.

The complaint charged the violation of the ordinance of the city of Prattville by the said John Glenn in that within said city, and within 12 months before this prosecution was commenced, said John Glenn did sell, keep for sale, or otherwise unlawfully dispose of prohibited liquors or beverages, contrary to law, and in violation of an ordinance of the city of Prattville. The demurrers appear only in the bill of exceptions, and raise the issue that the city of Prattville had no valid law upon its statute books for the violation of which defendant is charged, and because the ordinance is illegal and void, because of certain irregularities in its passage, which the demurrers point out. The objections to the introduction of the ordinance were: That it was not the act of the city council of Prattville in that it shows on its face that it is an ordinance of the city of Prattville, and because it appears to have been adopted and introduced at the same meeting, and unanimous consent is not shown for its immediate consideration, and other objections of like character.

Guy Rice, of Prattville, for appellant.
Eugene Ballard, of Prattville, for appellee.

BROWN, J. [1] While the judgment of the court shows that a demurrer to the complaint was overruled, the demurrer itself is not set out in the record proper, and appears only in the bill of exceptions. Under repeated rulings, the questions sought to be raised by the demurrer are not presented for review. *Beck v. West & Co.*, 91 Ala. 314, 9 South. 199; *Brooks v. Rogers*, 101 Ala. 111, 13 South. 386; *Heard v. Hicks et al.*, 101 Ala. 102, 13 South. 256.

[2] Courts take judicial notice of public statutes conferring authority upon municipalities in this state power to adopt by-laws and ordinances, but do not take judicial notice of such ordinances or the proceedings of the municipal board in the exercise of such power. *North Birmingham Street Ry. Co. v. Calderwood*, 89 Ala. 247, 7 South. 360, 18 Am. St. Rep. 105; *Barnes v. Common Council of Alexander City*, 89 Ala. 602, 7 South. 487.

[3] Therefore, when, as in this case, the complaint avers the existence and violation of an ordinance, a demurrer thereto confesses the averments, and cannot set up matter dehors the record as to the irregularity of the proceedings of the municipal board to avoid the ordinance. In such case the demurrer is a speaking demurrer and should be overruled. *Sanders v. Wallace et al.*, 114 Ala. 263, 21 South. 947.

[4] The defendant's objection to the ordinance is likewise untenable. The statute provides that:

"Ordinances and resolutions purporting to be published by authority of the council, in book or pamphlet form, shall be received as evidence of the passage and legal publication of such ordi-

nances as of the dates mentioned or provided for therein, in all courts and places, without further proof." Code 1907, § 1259; *Lane v. City of Tuscaloosa*, 12 Ala. App. 599, 67 South. 778.

When the book of ordinances was offered, if the defendant desired to question the regularity of the proceedings of the municipal board in its passage, it was incumbent upon him to offer such proceedings in evidence, and, on appeal, make them a part of the record by bill of exceptions. *Barnes v. Common Council of Alexander City*, 89 Ala. 602, 7 South. 487.

[5] The omission of the words "Council of" in the caption of the ordinance did not render it void, the provisions of section 1252 in prescribing such caption being merely directory. *Lane v. City of Tuscaloosa*, supra; *Lane v. City of Tuscaloosa*, 12 Ala. App. 604, 67 South. 779; *Bell v. Town of Jonesboro*, 3 Ala. App. 652, 57 South. 138.

This disposes of all matters presented in the assignment of error and argument; and, as no error appears upon the record, the judgment of the circuit court is affirmed.

Affirmed.

SHERROD v. STATE. (6 Div. 973.)

(Court of Appeals of Alabama. March 4, 1916.)

1. CRIMINAL LAW §100(3)—JURISDICTION—CONCURRENT JURISDICTION.

Where two courts have concurrent jurisdiction, that which first takes cognizance of the case may retain it to the exclusion of the other and no other court can interfere.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 114; Dec. Dig. §100(3).]

2. CRIMINAL LAW §92—JURISDICTION—ELEMENTS.

Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment in a criminal prosecution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 137-166; Dec. Dig. §92.]

3. INDICTMENT AND INFORMATION §1—JURISDICTION—PREREQUISITE—FORMAL ACCUSATION.

Under Const. 1901, § 6, providing that one accused of a crime shall have the right to demand the nature and cause of the accusation and to have a copy thereof, a formal accusation sufficient to apprise the defendant of the nature and cause is a prerequisite to jurisdiction of the offense.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 1-3; Dec. Dig. §1.]

4. INDICTMENT AND INFORMATION §5—JURISDICTION—FORMAL ACCUSATION—OBJECTION—WAIVER.

While irregularities in obtaining jurisdiction of the person may be waived, a formal accusation is essential to complete jurisdiction and cannot be waived.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 28; Dec. Dig. §5.]

5. CRIMINAL LAW §99—JURISDICTION—ELEMENTS.

Where complaint was made against the accused and warrant of arrest issued, and the defendant was arrested and admitted to bail, and

return of the warrant made to the city court, its jurisdiction over the offense and the person was complete, under Code 1907, § 7350, providing that a prosecution may be commenced by finding an indictment, issuing a warrant or binding over the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 196, 197; Dec. Dig. ¶ 99.]

6. CRIMINAL LAW ¶100(3)—JURISDICTION—PRIORITY—BURDEN OF PROOF.

Where complete jurisdiction appears in the city court, the burden is then on the defendant, who seeks to oust its jurisdiction, to show the jurisdiction of the offense in another court prior to the attaching of the jurisdiction of the city court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 114; Dec. Dig. ¶ 100(3).]

7. CRIMINAL LAW ¶100(3)—JURISDICTION—PRIORITY—EVIDENCE.

Where the defendant's pleas in the city court show that no formal complaint or charge was made in the recorder's court, and that he was not called to appear, nor to plead until after he had been arrested and admitted to bond in the city court, the recorder's court had no jurisdiction, and his remedy was to plead therein the pendency of the prosecution in the city court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 114; Dec. Dig. ¶ 100(3).]

8. CRIMINAL LAW ¶100(1)—JURISDICTION—EXERCISE.

The fact that city police officers were authorized by statute or ordinance to arrest offenders without warrant and commit them to jail does not, in the absence of a formal accusation, constitute exercise of the jurisdiction of the recorder's court over the offense prior to his appearance and pleading, whether the offense be denounced by statute or ordinance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 196; Dec. Dig. ¶ 100(1).]

9. INDICTMENT AND INFORMATION ¶5—VIOLATIONS OF MUNICIPAL ORDINANCES—WAIVER OF DEFENSE.

Where the offense is one denounced by municipal ordinance, formal accusation cannot be said to be waived in the recorder's court until the accused pleads to the charge without demanding the nature and cause of the accusation.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 28; Dec. Dig. ¶ 5.]

10. ARREST ¶62 — ARREST WITHOUT WARRANT—AUTHORITY.

The charter provision of the city of Bessemer does not authorize arrest without warrant, but merely authorizes passage of an ordinance granting such authority.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 144; Dec. Dig. ¶ 62.]

11. CRIMINAL LAW ¶304(12)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

Courts will not take judicial notice of the existence of municipal ordinances in the absence of proper averments and proof thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 708, 2951½; Dec. Dig. ¶ 304(12).]

12. CRIMINAL LAW ¶100(3)—JURISDICTION—PRIORITY—ARREST.

That the accused was not arrested under process of the city court until after he had been arrested by city police and had given bond for his appearance before the recorder, does not, in the absence of proof of filing of formal accusation in the recorder's court, deprive the city court of jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 114; Dec. Dig. ¶ 100(3).]

13. CRIMINAL LAW ¶1167(3)—APPEAL AND ERROR—REVERSAL—HARMLESS ERROR.

Under rule 45 (175 Ala. xxi, 61 South. ix), the mere fact that a plea was erroneously disposed of on motion to strike rather than on demurrer, is insufficient to require reversal if no substantial right of the defendant was probably injuriously affected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8103; Dec. Dig. ¶ 1167(3).]

14. DISORDERLY CONDUCT ¶11—EVIDENCE—SUFFICIENCY.

Evidence in prosecution for disorderly conduct held to sustain the refusal of the court to give an affirmative charge for the defendant.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. § 18; Dec. Dig. ¶ 11.]

15. CRIMINAL LAW ¶1134(4)—APPEAL—MATTERS REVIEWABLE.

Where an appeal was taken and bill of exceptions signed before amendment of the Code to authorize appeals from rulings on motions for new trial in criminal cases, the appeal was governed by the pre-existing rule, and the court could not consider the ruling for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2587; Dec. Dig. ¶ 1134(4).]

Appeal from City Court of Bessemer; William Jackson, Special Judge.

Ed Sherrod, alias Ed Sherrel, was convicted of disorderly conduct, and he appeals. Affirmed.

McEniry & McEniry, of Bessemer, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. This prosecution was commenced in the city court of Bessemer by complaint made before a justice of the peace on the 27th day of February, 1915, the justice issuing a warrant of arrest returnable to the city court. The defendant, as appears from the return of the officer indorsed on the warrant, was arrested on the 2d day of March, and gave bail for his appearance before the city court to answer the charge. By his pleas autrefois acquit, the defendant undertook to set up the judgment of the recorder's court of the city of Bessemer, a court of concurrent jurisdiction of misdemeanors committed within the police jurisdiction of the city. Code 1907, § 1221. The defendant's first plea avers: "On the 5th day of March, 1915, in the recorder's court of the city of Bessemer he was charged and put upon trial under complaint charging disorderly conduct, in that the defendant made use of insulting, abusive, or obscene language in the presence of a woman"—and was acquitted. The second avers that, "before the affidavit and warrant in this case were served on the defendant, defendant had been arrested, placed in the city jail in the city of Bessemer on a charge of disorderly conduct, had been released on bond to answer the recorder's court of said city of Bessemer on said charge; that thereafter, on the 5th day of March, 1915, he was charged and put upon trial," etc., and acquitted; and in each of said pleas it is averred that the transaction

involved in the two prosecutions is the same.

[1] The principle is universally acknowledged that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it, to the exclusion of the other; and no other court can interfere and wrest from it the jurisdiction first obtained.

"These rules have their foundation, not merely in comity, but in necessity." *Gay, Hardie & Co. v. Brierfield Coal Co.*, 94 Ala. 308, 11 South. 355, 16 L. R. A. 564, 33 Am. St. Rep. 122; *Granite Co. v. Wadsworth*, 115 Ala. 570, 22 South. 157; *Gustin v. State*, 10 Ala. App. 171, 65 South. 302 (affirmed on review by the Supreme Court, 66 South. 1008).

[2] Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment in a criminal prosecution. 12 Cyc. 220 (VI, G); *Armstrong v. State*, 23 Ind. 95; *Ford v. State*, 18 Ind. 484; *Carrington v. Commonwealth*, 78 Ky. 83; *King v. People*, 5 Hun (N. Y.) 297.

[3] To this end, a formal accusation sufficient to apprise the defendant of the nature and cause of the accusation is a prerequisite to jurisdiction of the offense. Const. 1901, § 6; *Butler v. State*, 130 Ala. 127, 30 South. 338; *Miles v. State*, 94 Ala. 106, 11 South. 403; 12 Cyc. 221 (VI, H).

[4] Irregularities in obtaining jurisdiction of the person may be waived, but a formal accusation by indictment, or information, or complaint supported by oath is essential to complete jurisdiction, and cannot be waived. 12 Cyc. 221; *Butler v. State*, supra; *Johnson v. State*, 82 Ala. 29, 2 South. 466.

[5] This prosecution was commenced on the 27th of February, 1915, when the complaint was made and the warrant of arrest issued, and the jurisdiction of the offense attached, empowering the court, through its process, to take the defendant into its custody and draw to itself jurisdiction over his person. The defendant was arrested and admitted to bail on March 2, 1915, and return of the warrant made into the city court; and its jurisdiction over the offense and the person was then complete. Code 1907, § 7350; *Clayton v. State*, 122 Ala. 91, 26 South. 118; 12 Cyc. 220 (V, G).

[6] Complete jurisdiction of the city court thus appearing, the burden was on the defendant, who seeks to oust the city court of its jurisdiction, to show that the recorder's court acquired jurisdiction of the offense, as well as the person, authorizing it to proceed to final judgment, before the completed jurisdiction of the city court attached.

[7] Both of the defendant's pleas confessedly show that no formal complaint or charge was made in the recorder's court, and that the defendant was not brought before the court and called on to plead until the 5th of March, 1915, three days after the defendant had been arrested and admitted to bond on the process of the city court. Under these conditions, when he was called to the bar of

the recorder's court, his remedy was to set up by appropriate pleas the pendency of the prosecution in the city court, showing that this court had acquired complete jurisdiction of the offense and person before the formal accusation was made in the recorder's court. *Gustin v. State*, supra.

[8] The fact that the police officers of the city of Bessemer were authorized by statute or ordinance to arrest offenders without warrant and commit them to jail, if this authority be conceded, did not, in the absence of a formal accusation, quicken into exercise the jurisdiction of the recorder's court over the offense until the offender was brought to the bar of the court and called on to plead, and this is true whether the offense be one denounced by statute or ordinance.

[9] If the offense be one denounced by ordinance of the municipality, the formal accusation cannot be said to have been waived until the accused pleads to the charge without demanding the nature and cause of the accusation against him. *Aderhold v. Mayor*, etc., of Anniston, 99 Ala. 521, 12 South. 472.

[10, 11] We observe, however, that the charter provision relied on as conferring authority to arrest without warrant does not confer such authority, but, at most, empowers the municipal legislative board to grant such authority by ordinance (*Childers v. State*, 156 Ala. 96, 47 South. 70); and the court will not take notice of the existence of such ordinances in the absence of appropriate averments or proof (*Glenn v. City of Prattville* [Ala. App.] 71 South. 75; *North Birmingham Street Ry. Co. v. Calderwood*, 89 Ala. 247, 7 South. 360, 18 Am. St. Rep. 105).

[12] While it is true that a demurrer to the plea was the proper way to present the question, yet it clearly appears from the pleas and the evidence proposed that all that the defendant proposed to show was that, while the prosecution in the city court was commenced first, he was arrested by the police authorities of the city on a charge of disorderly conduct before his arrest under the process of the city court and after he had given bond for his appearance before the recorder. This, for reasons above stated, was not sufficient to deprive the city court of jurisdiction.

[13] It is therefore not made to appear, after an examination of the entire record, that any substantial right of the defendant was probably injuriously affected, and the judgment of the trial court will not be reversed for disposing of the pleas on motion to strike, rather than on demurrer. Rule 45, Supreme Court Practice (175 Ala. xxi, 61 South. 1x); *Rooks v. State*, 83 Ala. 79, 3 South. 720.

For like reasons, no error is shown in the ruling of the court on the solicitor's objections to the evidence offered by the defendant pertaining to the defense of former jeopardy.

[14] The evidence shows that while the state's witness, Miss Coleman, was using the-

telephone at her father's residence between 7 and 7:10 o'clock p. m. on February 26, 1915, some one interrupted her by breaking into the conversation and using the following obscene and abusive language: "Good God! Ain't you ever going to get through? G—d d—n it, you have been talking a half of an hour. Get off the line;" that she thereupon hung up her receiver and the phone immediately rang, and she took down her receiver to listen, when some one at the defendant's phone said, "This is Ed." The evidence further shows that the only two phones on this line are the Coleman phone and that of the defendant; that the residence of the defendant is in the same locality as Coleman's residence—both being on Eighth avenue in the city of Bessemer; that defendant was a fireman in the employ of a railroad and it was customary for the caller at the railroad shop to call over the phone for him when his services were wanted; that defendant's services were wanted on this particular night, and some time before eight o'clock a call was made for him. The defendant denied using the language and offered testimony tending to show that he was not at home at the time the obscene language was alleged to have been used. However, the evidence on the part of the state was sufficient to require an explanation from the defendant, and therefore afforded an inference to be drawn by the jury that he was the person using the language. The affirmative charge was therefore properly refused. *Pantaze v. West*, 7 Ala. App. 599, 61 South. 42.

[15] The appeal in this case was taken, and the bill of exceptions signed, before the approval of the act amending section 2846 of the Code so as to authorize appeals from the ruling on motion for new trial in criminal cases, and this appeal is governed by the rule existing prior to the amendment of said section of the Code, and the ruling on the motion for new trial is not subject to review. *Burrage v. State*, 113 Ala. 108, 21 South. 213.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

JOHNSON v. STATE (6 Div. 11.)

(Court of Appeals of Alabama. Jan. 20, 1916.)

INTOXICATING LIQUORS § 236(11)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Where the evidence showed that the prosecuting witness took whisky from defendant's buggy after the latter had denied having any, and tossed a dollar into the buggy, and that defendant threw the dollar back and said he could not afford to sell whisky, and defendant stated that the whisky was taken without his consent, the evidence did not show facts affording an inference of guilt, and did not justify a conviction for unlawfully selling.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 313-315; Dec. Dig. § 236(11).]

Appeal from Winston County Court; John S. Curtis, Judge.

John Johnson was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

The evidence for the state tended to show: That just before Christmas the witness Roden met defendant in the road and asked him if he did not have some whisky. The defendant replied, "No." That the witness saw the whisky in Johnson's buggy, took the package out, wrapped in thin wrapping paper as used in stores, and pitched \$1 in defendant's buggy. That Johnson pitched it back and said he could not afford to sell the whisky. The package contained two bottles of rye whisky, not quite a half gallon in all. Defendant's statement was practically the same as the witness above detailed, with the exception that the whisky was wrapped just as it was shipped to him from Tennessee, and that witness took the whisky without his consent.

Z. McVay, of Double Springs, and Travis Williams, of Russellville, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. A careful reading of the evidence set out in the bill of exceptions does not seem to the members of the court to show sufficient facts affording an inference of guilt of any crime charged against the defendant in the complaint, or affidavit, upon which he was tried, upon which to base, or justify, a finding and judgment of conviction.

It follows that the judgment of conviction, from which the appeal is prosecuted, must be reversed, and the cause remanded.

Reversed and remanded.

DANIEL v. STATE. (6 Div. 932.)

(Court of Appeals of Alabama. Feb. 10, 1916.
Rehearing Denied March 4, 1916.)

1. CRIMINAL LAW § 631(4)—LIST OF JURORS—SERVICE ON ACCUSED.

Acts 1909 (Sp. Sess.) p. 317, § 32, requires the court, on indictment for a capital felony, on the first day of the term, or as soon as practicable thereafter, to make an order for the summoning of a jury for the defendant's trial and requiring service of a list of the persons thus summoned on the defendant. A former statute required service one entire day before the day set for the trial. This defendant was served five days before the day of his trial. *Held*, a substantial compliance with the statute.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1379, 1439; Dec. Dig. § 631(4).]

2. JURY § 70(6)—SUMMONING SPECIAL VENIRE.

Under Acts 1909 (Sp. Sess.) p. 317, § 32, providing that the venire for the trial of a defendant charged with a capital felony shall consist of jurors drawn and summoned for the week of the term in which the case is to be tried and those specially drawn by the court, only those regular jurors who were drawn and summoned

could be used; the court having no authority under the law to include those appearing on the regular venire who were not summoned.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 322; Dec. Dig. ¶70(6).]

3. JURY ¶66(6)—SUMMONING OF VENIRE—PREMATURE RETURN OF SHERIFF.

Where the return of a sheriff on the regular venire was premature, the defendant had no ground of complaint where he was given his full quota of names required by the court under Acts 1909 (Sp. Sess.) p. 317, § 32, providing that in cases of persons indicted for capital offense the court shall order the sheriff to summon not less than 50 nor more than 100 persons.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 290; Dec. Dig. ¶66(6).]

4. JURY ¶68—SUMMONING OF JURORS—RETURN BY SHERIFF.

Where a writ of venire was on its face made returnable on a certain day, the return made on that day was not premature.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 303, 304; Dec. Dig. ¶68.]

5. CRIMINAL LAW ¶649(1)—TRIAL—DISCRETION OF COURT.

Where the order of the court in a prosecution for homicide fixed the date of the trial, if the business of the court required it, it was within its discretion to pass the case until a succeeding day of the term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512-1514; Dec. Dig. ¶649(1).]

6. CRIMINAL LAW ¶1134(6)—APPEAL AND ERROR—HARMLESS ERROR.

Where an objection to a question was properly sustained, the court would not be put in error because the ground urged was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2991; Dec. Dig. ¶1134(6).]

7. WITNESSES ¶236(4)—EXAMINATION—INDEFINITE QUESTION.

In a prosecution for homicide, the question asked a witness, "Do you know what Mr. D. was doing?" was properly ruled out as indefinite in fixing time.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 821; Dec. Dig. ¶236(4).]

8. CRIMINAL LAW ¶1170(4)—APPEAL AND ERROR—HARMLESS ERROR.

In a prosecution for homicide, where the question, "Do you know what Mr. D. was doing?" was improperly ruled out, but the witness later testified fully as to the conduct of the parties immediately before and during the affray, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3148; Dec. Dig. ¶1170(4).]

9. WITNESSES ¶240(4)—EXAMINATION—LEADING QUESTION.

In a prosecution for homicide, the question asked a witness, "Did D. strike the first lick?" was objectionable as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 839; Dec. Dig. ¶240(4).]

10. CRIMINAL LAW ¶1170(4)—APPEAL AND ERROR—HARMLESS ERROR.

In a prosecution for homicide, where the question, "Did D. strike the first lick?" was improperly ruled out, but the witness later testified that the deceased struck the first blow and that the defendant struck back, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3148; Dec. Dig. ¶1170(4).]

11. WITNESSES ¶338—IMPEACHMENT AS TO CHARACTER.

In a prosecution for homicide, the court did not err in allowing the state to show the bad character of the defendant's witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. ¶338.]

12. CRIMINAL LAW ¶789(4)—TRIAL—INSTRUCTION.

In a prosecution for homicide, an instruction, that the presumption of innocence surrounds the defendant throughout the trial and shields him against every inference of guilt until destroyed by evidence so strong that the jury is convinced to a moral certainty beyond all reasonable doubt that the defendant was not without guilt, was properly refused, as the words "not without guilt" were calculated to confuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847-1849, 1967; Dec. Dig. ¶789(4).]

13. CRIMINAL LAW ¶829(1)—INSTRUCTIONS—REQUESTS.

In a prosecution for homicide, it was not error to refuse an instruction fully covered by other instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829(1).]

14. CRIMINAL LAW ¶789(5)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, an instruction, that no proof of guilt will satisfy the demands of the law if it does not convince the jury beyond reasonable doubt that the defendant is necessarily guilty, was properly refused, as the use of the word "necessarily" in effect asserted that the evidence must exclude all doubt of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847-1849, 1960, 1967; Dec. Dig. ¶789(5).]

15. HOMICIDE ¶116(6)—SELF-DEFENSE.

Threats of violence accompanied by an overt act may justify one assaulted in acting more promptly on the appearance of things under the doctrine of "apparent eminent peril."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 163; Dec. Dig. ¶116(6).]

16. HOMICIDE ¶300(7)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, an instruction, that the law allows a defendant who is without fault, when attacked by a person of known violent dangerous character, to act more quickly in defense of his life or limb, was properly refused as abstract; the record containing no evidence that the deceased was a person of that character.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. ¶300(7).]

17. HOMICIDE ¶300(7)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, instructions, that a person has a right to remain in his place of business and be unmolested in the management of his business and need not retreat on the entry of a hostile person, and that the law does not require a defendant to retreat when attacked in his place of business, were properly refused, where there was a conflict in evidence as to where the affray actually took place.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. ¶300(7).]

18. HOMICIDE ¶300(3)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, instructions, that a person has the right to remain in his place of business and need not retreat therefrom

when attacked, were properly refused, as they ignored the doctrine of freedom from fault.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 617; Dec. Dig. § 300(3).]

Appeal from Criminal Court, Jefferson County; W. E. Fort, Judge.

W. E. Daniel was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The killing is alleged to have been done by stabbing or cutting with a knife, and the person killed was one William Gannaway. The tendency of the evidence sufficiently appears.

The following charges were refused to defendant:

(22) The presumption of innocence surrounds defendant and attends him at every step in the case, and is a shield to him against every inference of guilt until it is destroyed by evidence so strong that you are convinced to a moral certainty, and beyond all reasonable doubt, that defendant is not without guilt.

(18) No amount of proof of guilt, however made, will satisfy the demands of the law, if it fails to convince the minds of all the jury beyond a reasonable doubt that defendant is necessarily guilty.

(5) I charge you that the law allows a defendant who is without fault in bringing on the difficulty, when attacked by a person of known violent, dangerous, bloodthirsty, and turbulent character, to act more quickly in defense of his life or limb than when attacked by a person of good character.

(1) A person has a right to remain in his place of business and to be unmolested in the management of his business in his own store, and there is no duty on him to retreat from it on the entering of a hostile person.

(3) I charge you that the law does not require a defendant to retreat when attacked in his own storehouse or place of business.

Allen, Bell & Sadler, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, J. The order fixing the day for defendant's trial was made on January 30, 1915, and fixed the 8th day of February, the first day of the sixth week of the January term of the court, as the day for trial. On the same day, the court entered an order fixing the number of jurors constituting the venire for defendant's trial at 97, to be comprised of 37 jurors drawn and summoned for the sixth week of the term, and the 60 special jurors then drawn and ordered to be summoned. The return of the sheriff shows that a copy of the venire as thus constituted, together with a copy of the indictment, was served on the defendant in person on the 3d day of February, 1915, which was five days prior to the day set for the trial. Motion was made to quash the venire on the ground that it does not appear from the record of the court that the court "on the first day of the term, or as soon as practicable thereafter," made an order commanding the sheriff to summon not less than 50 nor more than 100 persons as jurors for the defendant's trial; that 100 persons' names have been drawn for the week, and only 97 of these

names appear on the list served on the defendant; that the return of the sheriff on the regular venire for the week was premature and shows on its face a lack of diligence on the part of the sheriff in serving the regular jurors; that the record shows that the venire was not served "forthwith," as required by the statute.

[1] The purpose of the statute in requiring the court, at the earliest "practicable" day, to make an order for the summoning of the jury for defendant's trial, and requiring service of a list thereof on the defendant, is to afford the defendant ample time to inspect the list and inquire into the qualifications of persons constituting the venire for his trial. Previous to the enactment of the present jury law, the statute required service one entire day before the day set for the trial. In this case, the defendant was served five days before the day of his trial, affording defendant and his counsel ample time to inquire as to the qualifications of the jurors, and was therefore a substantial compliance with the statute.

[2-4] The statute provides—and the order of the court was in accord therewith—that the venire for the trial of a defendant charged with a capital felony shall be constituted of the jurors drawn and summoned for the week of the term in which the case is to be tried and those specially drawn by the court. Acts Special Session 1909, p. 318, § 32; *Harris v. State*, 172 Ala. 413, 55 South. 609. Therefore the accused had no interest in those persons whose names appeared on the regular venire and who were not summoned; they in no way affected the defendant's venire, and the court had no authority under the law to make them a constituent element thereof. So far as the regular jurors for the week were concerned, the ipse dixit of the statute fixed their status in relation to the defendant's trial. It was only those drawn and summoned that could be used. If it be conceded that the return of the sheriff on the regular venire was premature, it affords the defendant no ground to complain, as he was given his full quota of names required by the order of the court. Moreover, the venire, on its face, was made returnable on the 30th day of January, 1915, and the return was made on that date, and was not, in fact, premature. The return day of the venire was so fixed, no doubt, to meet the difficulty in fixing the number of names as constituting the special venire pointed out in *Harris v. State*, supra. The motion to quash the venire was properly overruled. Acts 1909, supra, §§ 29-32.

[6] The order of the court fixed the 8th day of February, 1915, as the day for defendant's trial, and, if the business of the court required, it was within the discretion of the court to pass the case until a succeeding day of the term and proceed with the trial on that day.

[8-8] The state offered several witnesses whose testimony tended to show the details of the difficulty between defendant and deceased, which, according to some of the witnesses, occurred between 6 and 7 o'clock in the evening, and, according to others, between 7 and 8, on the sidewalk in front of the defendant's place of business, and which tended to show an angry, wordy altercation with reference to a bill due from deceased to defendant; that the defendant threw up his left hand as though to strike deceased, and, when deceased threw up his hand to ward off the blow, the defendant cut him in the abdomen with a knife, inflicting a wound causing the death of the deceased. The defendant offered one Hurst Franklin, who testified that he saw the difficulty between the defendant and the deceased; that he was in the defendant's place of business at the time of the difficulty; that it occurred between 6 and 7 o'clock in the evening. He was then asked, by the defendant, "Do you know what was the occasion of the cutting?" This question clearly called for a conclusion of the witness, and, while this objection was not urged against it, the objection that was made was sustained, and the court will not be put in error for sustaining it. The witness was also asked, "Do you know what Mr. Daniel was doing?" This question was indefinite in fixing the time, and may have referred to any time before or subsequent to the immediate difficulty, and the objection was properly sustained. *Fleming v. State*, 150 Ala. 19, 43 South. 219. Furthermore, after these objections were sustained, the witness testified fully as to the conduct of the parties immediately before and during the affray.

[9, 10] The witness Smith was the defendant's witness, and the question, "Did Daniel strike the first lick?" was leading, and the objection of the solicitor was properly sustained. After this objection was sustained, the witness testified that the deceased struck the first lick, and that defendant "hit back."

[11] No objection was made to the solicitor's question, "Would you believe him on oath?" to the witness Syx, offered in rebuttal by the state to impeach defendant's witness Smith. The question was not answered by the witness. The court did not err in allowing the state to show the general bad character of defendant's witness. *Byers v. State*, 105 Ala. 31, 16 South. 716; *Rector v. State*, 11 Ala. App. 333, 66 South. 857.

[12-18] Charge 22, refused to the defendant, by the use of the words "not without guilt," was calculated to confuse, and its refusal was proper. By a close scrutiny of the charge, the conclusion is irresistible that it merely asserts the proposition that the presumption of innocence attends the defendant until his guilt is established by the evidence beyond a reasonable doubt; and this proposition of law was given to the jury in charge

numbered 15, first appearing on page 17, and charge numbered 21, last appearing on page 18 of the record. Charge 18, by the use of the word "necessarily," in effect asserted that the evidence must exclude all doubt of guilt, and was well refused. Furthermore, the reasonable doubt doctrine sought to be embodied in this charge is fully covered by given charges 19, 21a, 23, 24, and 25. Charge 5 refused to the defendant was abstract. The record contains no evidence that the deceased was a person "of known violent, dangerous, bloodthirsty, and turbulent character." While it is true that threats of violence, accompanied by an overt act, may justify one assaulted in acting more promptly "on the appearance of things," that is not the doctrine asserted by this charge. Such conditions and circumstances are the foundation for the doctrine of "apparent imminent peril." The charge was well refused. Charges 1 and 3 assume that the fatal encounter took place in the defendant's store, while there was some evidence that it was on the sidewalk of the street in front of the store, where both parties had a right to be. *McGhee v. State*, 178 Ala. 4, 59 South. 573. These charges also ignore the doctrine of freedom from fault. *Andrews v. State*, 159 Ala. 29, 48 South. 858; *Sanford v. State*, 2 Ala. App. 81, 57 South. 134; *Medlock v. State*, 114 Ala. 6, 22 South. 112; *Thomas v. State*, 69 South. 315.

There is no error in the record, and the judgment is affirmed.

Affirmed.

CITIZENS' NAT. BANK v. BUCHEIT. (8 Div. 364.)

(Court of Appeals of Alabama. Jan. 11, 1916.
Rehearing Denied Feb. 1, 1916.)

1. CORPORATIONS — § 657(3) — FOREIGN CORPORATIONS — VALIDITY OF CONTRACTS.

Const. 1901, § 232, and Code 1907, §§ 3642-3644, 3645-3649, 3653, 6628, 6629, regulating foreign corporations doing business within the state, have no extraterritorial operation and do not render void in their inception contracts made outside the state by foreign corporations, although such contracts are to be performed within the state.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2537-2540; Dec. Dig. § 657(3).]

2. CORPORATIONS — § 657(3) — CONTRACTS OF FOREIGN CORPORATIONS — ENFORCEMENT.

Where the contract of a foreign corporation made outside the state is to be performed within the state, and to perform it the foreign corporation must engage in business within the state, the courts of the state will refuse their aid to such foreign corporation, if it has not complied with the statutory requirements, in enforcing the contract or recovering the benefits thereof.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2537-2540; Dec. Dig. § 657(3).]

3. COMMERCE — § 80 — FOREIGN CORPORATIONS — INTERSTATE COMMERCE.

Under Code 1907, § 3650, providing that the provisions relating to foreign corporations shall not apply to corporations doing only an

interstate commerce business within the state, those provisions cannot be construed to prevent such corporations from suing in the courts of the state without complying with the statutory requirement to enforce valid contracts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. ¶80.]

4. CORPORATIONS ¶657(3)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—CONTRACTS MADE WITHIN THE STATE.

Any contract entered into within the state by a foreign corporation not qualified to transact business therein is contrary to the public policy of the state, and gives the corporation no right that the state courts will recognize or enforce at its instance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2537-2540; Dec. Dig. ¶657(3).]

5. BILLS AND NOTES ¶375 — DEFENSES AGAINST INNOCENT PURCHASER — ILLEGALITY.

If a contract entered into in violation of a statute is declared void by the statute, it is void in the hands of an innocent purchaser in due course; but, if it is not declared void and is subject to the law merchant, it will be enforced in the hands of an innocent purchaser for value in due course and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. ¶375.]

6. CORPORATIONS ¶657(3)—FOREIGN CORPORATIONS—CONTRACTS—VALIDITY AGAINST CORPORATION.

A contract by a foreign corporation, not declared void by statute though entered into within the state in violation of the Constitution and the statute, will be enforced against the corporation in favor of the other party not involved in the guilt of the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2537-2540; Dec. Dig. ¶657(3).]

7. BILLS AND NOTES ¶375—FOREIGN CORPORATIONS—CONTRACTS—VALIDITY—BONA FIDE PURCHASERS.

A contract made by a foreign corporation which had not complied with Code 1907, §§ 3642-3646, requiring it to maintain an office and agent within the state, sections 3647-3649, requiring it to pay a tax on its capital employed within the state, or sections 3651-3653, requiring it to pay the privilege or license tax, if negotiable and in the hands of an innocent purchaser, will be enforced, and a replication alleging that plaintiff is a bona fide purchaser of notes is good against pleas alleging the failure of the payee, a foreign corporation, to comply with the statutes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. ¶375.]

8. BILLS AND NOTES ¶478—FOREIGN CORPORATIONS—SUIT—PLEA.

A plea, alleging that the notes sued on were executed and delivered to the agent of a foreign corporation within the state and that the transaction occurred in the state, where, under a contract between the maker of the notes and the agent of the foreign corporation, the latter assembled and installed a machine, when construed against the pleader, does not show that the foreign corporation had transacted business within the state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1522, 1523; Dec. Dig. ¶478.]

9. CORPORATIONS ¶642(3)—FOREIGN CORPORATIONS—"TRANSACTIONING BUSINESS"—SALE OF MACHINE.

Where a machine was ordered through the agent of a foreign corporation, the order sent to the home office, and the machine built there and

shipped into the state and delivered to the buyer, the transaction was interstate, and the execution and delivery to the agent within the state of notes for the purchase price did not constitute "transacting business" within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2523; Dec. Dig. ¶642(3).]

For other definitions, see Words and Phrases, First and Second Series, Transacting Business.]

10. BILLS AND NOTES ¶166—NEGOTIABILITY—RETAINING TITLE TO PROPERTY.

Under the Negotiable Instruments Act (Laws Sp. Sess. 1900, p. 126), an instrument payable to order and possessing the characteristics of negotiability is not deprived of negotiability because it retains title to the property described therein as security for its payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 421; Dec. Dig. ¶166.]

11. BILLS AND NOTES ¶473—PLEA—DENIAL OF NEGOTIABILITY.

A plea, alleging that the note sued on is not a commercial negotiable paper, but embodying a copy of the note which shows it to be negotiable, is demurrable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1503-1507, 1555; Dec. Dig. ¶473.]

12. CORPORATIONS ¶642(4)—FOREIGN CORPORATIONS—DOING BUSINESS—SALE OF MACHINE—"ASSEMBLE."

A plea, alleging that a bottling machine sold by a foreign corporation was to be assembled within the state, is not sustained by proof that some slats belonging to it and the door of a drum were packed in the drum and were unpacked and put in place by the agent of the corporation, since "assemble," when applied to a machine, means to collect or gather together the parts and place them in their proper relation to each other to constitute the machine.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2524; Dec. Dig. ¶642(4).]

For other definitions, see Words and Phrases, Assemble.]

13. COMMERCE ¶40(1)—FOREIGN CORPORATIONS—"DOING BUSINESS"—SALE OF MACHINE—INTERSTATE CONTRACT.

Where an order for a machine was given to the soliciting agent of a foreign corporation and sent to the corporation, and the machine was constructed out of the state and shipped to the buyer in the state and there unpacked and parts put together by the agent, who then gave instructions as to its operation and accepted notes for the purchase price, the transaction was interstate commerce and not "doing business" within the state by the foreign corporation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. ¶40(1).]

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

14. BILLS AND NOTES ¶375—FOREIGN CORPORATIONS—VALIDITY OF CONTRACTS—BONA FIDE PURCHASER—SUBSEQUENT ACTS.

Where notes given a foreign corporation in an interstate commerce transaction are sued on by a bona fide purchaser thereof, the fact that, subsequent to receiving the notes, the corporation transacted business within the state in relation to the machine sold, does not destroy the right of the holder of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. ¶375.]

15. TRIAL ¶136(1)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Where there was evidence for the plaintiff that defendant had signed a written order for a machine for which the notes sued on were giv-

en and that the order had been lost, and secondary evidence was admitted as to its contents, and defendant's evidence tended to show that he did not sign the order, though he did not positively deny doing so, a requested charge that, if the defendant entered into a written contract for the purchase of the machinery, the verdict should be for the plaintiff, was properly refused as invading the province of the jury to determine the contents of the order if it was signed.

[Ed. Note.—For other cases, see Trial, Dec. Dig. **⚡**136(1); Pleading, Cent. Dig. **⚡**75.]

16. BILLS AND NOTES ⚡356 — BONA FIDE PURCHASER—DEPOSIT OF FUNDS TO CREDIT —“PURCHASER FOR VALUE.”

A bank which discounted a note and deposited the proceeds to the account of the payee cannot claim protection as a “purchaser for value” unless the funds were absorbed by antecedent indebtedness or exhausted by withdrawal; it not being sufficient that a material portion thereof was checked out.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. **⚡**908; Dec. Dig. **⚡**356.]

For other definitions, see Words and Phrases, First and Second Series, Purchaser for Value.]

17. TRIAL ⚡248 — INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

Where the evidence for both plaintiff and defendant showed that the contract stipulated that the machine sold to defendant would do satisfactory work, a requested charge predicated a verdict for plaintiff, among other things, on a finding that the contract contained no agreement to make the machine work in a satisfactory manner, is abstract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. **⚡**582, 583; Dec. Dig. **⚡**248.]

18. TRIAL ⚡191(3)—ACTIONS—INSTRUCTIONS —ASSUMING ISSUES.

A requested charge that the burden is on defendant in a suit by the transferee of notes made by him to show that the plaintiff had knowledge of his defenses is erroneous as assuming that plaintiff was a purchaser for value.

[Ed. Note.—For other cases, see Trial, Cent. Dig. **⚡**423-425; Dec. Dig. **⚡**191(3).]

19. BILLS AND NOTES ⚡497(2)—BURDEN OF PROOF—BONA FIDE PURCHASER.

The transferee of notes need not aver in his complaint that he purchased for value without notice, but if he does so he assumes the burden of proving that issue.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. **⚡**1876, 1877, 1886, 1887; Dec. Dig. **⚡**497(2).]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Assumpsit by the Citizens' National Bank against G. F. Buchett. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint alleges that the four notes were made payable to the Lipps Bottle Washer Company, Chattanooga, Tenn., and that before maturity of each of said notes plaintiff became the owner of same for a valuable consideration, and is now the holder and owner of said notes. The complaint was afterwards amended by adding separate counts declaring on each of the four notes.

The pleas of defendant are as follows:

Plea 2. That at the time of giving said note, payee was a corporation domiciled and located in the state of Tennessee; that said notes were executed in the state of Alabama, and handed to one Downs, the agent and officer of

the payee corporation; that the said bottle washer, for which the notes sued on were given, and to which payee had title, was then in the state of Alabama; and that the transaction occurred in the state of Alabama, where, under the contract between the parties, the machine was assembled and installed in New Decatur, Ala., by payee's president Downs, and was to be a part of defendant's bottling plant.

Paragraph 2. And defendant avers that at the time of said transaction herein set forth the said payee did not have in the state of Alabama at least one known place of business, that it had not at that time filed with the Secretary of the State of Alabama a certified copy of its articles of incorporation.

Plea 3. After adopting all of paragraph 1 of plea 2, it avers that, at the time of the transaction referred to, said payee corporation had not filed in the state of Alabama in the office of the Secretary of State any instrument in writing, under the seal of the corporation, and signed officially by the president and secretary thereof, designating at least one known place of business in the state of Alabama, and an authorized agent or agents thereat. Plea 4, after adopting all of paragraph 1 of plea 2, avers that the payee corporation had not at that time procured a permit to do business in the state of Alabama.

Plea 5, after setting out paragraph 1 of plea 2, avers that the said transactions were conducted in the state of Alabama by the payee corporation, through one Downs, its agent, who prepared the notes, brought them to defendant's place of business, had defendant sign them, and delivered them back to said Downs, and set up and installed or overhauled said bottle washer, and at the time of the performance of these acts the payee corporation had not a designated or known place of business in this state, and an authorized agent.

Pleas 6 and 7 set up the guaranty and warranty, and the failure of the machine to come up thereto, that the machine was worthless, and not what it was represented to be, and not capable of effective and satisfactory operation, and that after testing the machine thoroughly and finding it would not work, and that it was worthless, offered to return same to the Lipps Bottle Washer Company, but that they refused to accept it, and it was now at defendant's plant ready to be returned.

Replication 2 is as follows:

That the notes sued upon were acquired by plaintiff as owner, for a valuable consideration and before maturity. That at the time the notes were complete and regular on their face, and plaintiff took them in good faith for value. That at the time said notes were negotiated to plaintiff, plaintiff had no notice of any infirmity in the notes or defects in the title, if any defect there was, of the Lipps Bottle Washer Company, the payee of said note, in whose hands they were at that time, and had no knowledge or notice of any defense that defendant has to said notes, if any he has. And plaintiff avers that it became a holder in due course of the notes sued on.

The following charges were refused to defendant:

1. Affirmative charge.
2. That in reaching your verdict for this case you are not to consider any evidence as to what the contract was between Lipps Bottle Washer Company, and defendant.
3. I charge you that plaintiff is an innocent purchaser of the note sued on, and your verdict should be for plaintiff.
5. I charge you that defendant has not proven his pleas Nos. 6, 7, and 8, as amended, filed in this case.
8. I charge you that defendant cannot defeat

a recovery in this case by plea 2 filed by defendant herein.

9. I charge you that defendant cannot defeat a recovery in this case by virtue of pleas 3, 4, and 5 filed by him in this case.

10. If you are reasonably convinced from the evidence that Bucheit entered into a written contract for the purchase of the bottling machinery, your verdict should be for plaintiff.

11. If you are reasonably satisfied from the evidence that defendant Bucheit, either for himself or by another for him, and with his consent, entered into a written contract to purchase the bottling machine from the Lipps Bottle Washer Company, and if you are not reasonably satisfied from the evidence that said written contract so made contained a stipulation that said Lipps Bottle Washer Company was to do something more than to deliver the machine to defendant at his plant in New Decatur, Ala., your verdict should be for plaintiff; provided you are reasonably satisfied from the evidence that plaintiff discounted the notes sued on before maturity, in good faith, and that plaintiff gave a reasonable consideration therefor by crediting the account of the Lipps Bottle Washer Company with the face value of said notes, less the discount, if they were discounted, provided you find that the Lipps Bottle Washer Company afterwards checked out of plaintiff's bank the entire amount of said credits, or a material portion thereof; and provided further you find plaintiff by its officers or agents had no notice or knowledge of any defect, if any, in the title of the Lipps Bottle Washer Company, in the notes sued on, and no knowledge or notice of any defense defendant had to said notes at or before the time plaintiff acquired them.

12. If you believe the evidence, plaintiff is an innocent purchaser of the notes sued on for value, before maturity, and without knowledge or notice of any defect in the title of the Lipps Bottle Washer Company thereto, if there was any defect in its title to them, and without knowledge or notice of any defect that defendant had, if any, to said note.

13. If you are reasonably satisfied from the evidence that defendant entered into a written agreement with said Lipps Bottle Washer Company for the purchase of the machine, and that said written agreement, if made, contained no provision for the erection of said machine, and agreement to make it work in a satisfactory manner, then your verdict must be for plaintiff.

14. Your verdict should be for plaintiff, provided you find that plaintiff purchased the notes sued on, for value, before maturity, and without notice of any defect of the Lipps Bottle Washer Company to the title to said notes, and any defense defendant had against the same.

15. The burden was on defendant Bucheit to show to your reasonable satisfaction that, before plaintiff paid a valuable consideration for the notes sued on (if you find that it did pay a valuable consideration for them), it had knowledge or notice, through some officer or agent of it, of the defenses existing against said note, or notice of such facts or circumstances as were sufficient to put plaintiff bank on inquiry which, if followed up, would have discovered the existence of such defenses.

16. If you believe the evidence in this case, I charge you that the contract by which the Lipps Bottle Washer Company was to sell and deliver the bottling machinery, which, if you believe the evidence, was the consideration of the note sued on, was not, and did not constitute, a doing of business in Alabama, and was not prohibited by the laws of the state, but was a valid transaction.

18. If you find that plaintiff was an innocent purchaser for value of the notes sued on, and that it became such purchaser before the maturity of said notes, then I charge you that your verdict should be for the plaintiff, if you believe the evidence in this case.

19. If, under the contract made by the defendant, with the Lipps Bottle Washer Company, said company was to ship a machine to defendant from Chattanooga, Tenn., stipulating only that it would do good work, and you find that said machine was shipped already put together, as a machine, except that the metal pieces which were to hold the bottles in place were placed in the bottom of the machine; and you further find that said metal pieces to hold said bottle in place fitted into grooves in said machine, and could be slipped into their appropriate places, on the machine by hand; and you further find that a small door to said machine was also placed in the bottom of said machine and needed to be taken therefrom and fastened in its proper place on the outside of the machine; and you find that this was all of the parts of the machine which were disconnected from their proper places on said machine—then I charge you the agreement of the Lipps Bottle Washer Company, if such an agreement was made, that it would assemble machine at defendant's plant in New Decatur, was complied with, and I further charge you that such agreement, if made, was not in violation of law, and defendant cannot defeat a recovery in this case by virtue of said agreement.

21. If you are reasonably satisfied, after considering all the evidence, that defendant made a written contract for the purchase of a machine, and that said contract (except as to date and amount) is as shown by Exhibit A to the deposition of the witness Crabtree, your verdict should be for plaintiff.

24. I charge you that plaintiff was a bona fide purchaser of the notes sued on if you believe the evidence.

26. The burden is on defendant of showing to your reasonable satisfaction that plaintiff had knowledge or notice of defendant's defense to the notes sued on.

The following is charge 3 given for defendant:

The bank cannot avoid or escape from any defense that Bucheit may have had, and that as substantially counted on in any one of the pleas in this case, unless it shows a purchase before maturity in due course without notice or knowledge of such defense or defenses; and if the bank shows nothing more than the discount of the notes and the deposit of the proceeds to the credit of the Lipps Bottle Washer Company, followed by the subsequent taking out of such proceeds, the bank has not made out its claim or its replication as a bona fide purchaser for value without notice.

Osceola Kyle, of Decatur, for appellant.
E. W. Godbey, of Decatur, for appellee.

BROWN, J. The Constitution of this state (section 232) declares:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. * * * The Legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporations, but such franchise tax shall be based on the actual amount of capital employed in this state."

To carry into effect this section of the Constitution, the Legislature prescribes a method of authenticating qualification papers, and declares that "it is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections" (Code 1907, §§

3642, 3643; Code, § 3644); and penalized such corporation for a violation of the statute (Code 1907, § 3645); and likewise penalized the act of any person who acts as agent or transacts any business, directly or indirectly, for or on behalf of such corporation (Code 1907, § 3646). It likewise declared that, before any such corporation shall be allowed to transact any business in this state, it shall pay into the treasury of the state a franchise tax based upon the actual amount of capital employed in such intrastate business, and provides the method of ascertaining the amount of such tax (Code 1907, §§ 3647, 3648); and that "all contracts made in this state by any foreign corporation, which has not first complied with the provisions of the two preceding sections (sections 3647, 3648), shall, at the option of the other party to the contract, be wholly void" (Code 1907, § 3649). The statute fixes, as another prerequisite to the right of such corporation to engage in intrastate business, that it shall procure from the Secretary of State a permit or license, countersigned by the State Auditor, authorizing it to do business in this state upon payment of a nominal sum as a fee for the issuance of such permit, which is paid into the state treasury and becomes a part of the general revenues of the state; and declares:

"No such corporation, its agents, officers, or servants, shall transact any business for or in the name of such corporation within the state of Alabama without having first procured said permit, and all contracts, engagements, or undertakings or agreements with, by, or to such corporation, made without obtaining such permit, shall be null and void." Code 1907, § 3653.

The statute also subjects the offending corporation and its agents to a criminal prosecution for transacting business without a license. Code 1907, §§ 6628, 6629; *Barr v. State*, 10 Ala. App. 111, 65 South. 197.

[1] It is manifest that these regulations have no extraterritorial operation, and contracts made outside of this state, although they are to be performed in the state, are not within their influence so as to render them absolutely void in the making. *Alexander v. Ala. Western R. Co.*, 179 Ala. 480, 60 South. 295.

[2] Where the contract is to be performed in this state, although not entered into here, and in the performance the nonresident corporation must engage in business in this state, although the contract is valid, the policy of the state, as evidenced by the Constitution and statutes, compels the courts of the state to refuse their aid to such offending corporation in the enforcement of such contract or recovering the benefits accruing thereunder. *Alexander v. Ala. Western R. Co.*, supra; *Ala. Western Ry. Co. v. Talley-Bates Co.*, 162 Ala. 396, 50 South. 341; *Geo. M. Moller Mfg. Co. v. First National Bank of Dothan*, 176 Ala. 229, 57 South. 762.

[3] It is manifest that it is not the pur-

pose of these statutes to interfere with transactions of strictly interstate commerce (Code 1907, § 3650), and they must be so enforced as not to unreasonably burden such commerce, or the right of foreign corporations to invoke the power and authority of the courts to recover the fruits thereof. The expression found in some of our cases, to the effect that such corporations cannot sue in the courts of this state without qualifying under the Constitution and statutes, is too broad in its scope. Such a rule, if strictly enforced, would result in imposing unreasonable restraint on acts of interstate commerce. *Sioux Remedy Co. v. F. M. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193.

[4] However, from well-recognized principles of law, it would seem that any contract entered into in this state by a foreign corporation which has not qualified to transact business in this state contravenes the public policy of the state, and confers on the offending corporation no right that the courts of the state will recognize or enforce at its instance. This seems to be the trend of the great weight of authority, and some of the leading cases are here collated. *Chattanooga National Building & Loan Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; *Bank v. Parker*, 146 Ala. 513, 40 South. 988; *General Electric Co. v. Town of Ft. Deposit*, 174 Ala. 185, 56 South. 802; *McGehee v. Lindsay*, 6 Ala. 16; *Moog v. Hannon*, 93 Ala. 504, 9 South. 596; *Jemison et al. v. Birmingham & Atlantic R. Co.*, 125 Ala. 383, 28 South. 51; *Western Union Tel. Co. v. Young*, 138 Ala. 243, 36 South. 375; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671. And in one case it was said:

"The rule above declared is not only founded in the soundest principles of morality and public policy, but its enforcement is necessary to maintain the supremacy of the laws and the dignity of the state." *Woods v. Armstrong*, supra.

And in another:

"It is sufficient if the law prohibits the doing of the act, and, when it does, the court, being organized under the law and required to administer it, cannot enforce any supposed rights predicated upon a prohibited act or the omission to perform an act that is prohibited." *Western Union Tel. Co. v. Young*, supra.

The following cases support this conclusion: *Hanover National Bank v. Johnson*, 90 Ala. 549, 8 South. 42; *Hawley v. Bibb*, 69 Ala. 56; *Bank v. Coughron* (Tenn. Ch. App.) 52 S. W. 1113; *Ehrhardt v. Robertson*, 78 Mo. App. 404; *Montjoy v. Bank*, 76 Miss. 402, 24 South. 870; *Perkins v. Savage*, 15 Wend. (N. Y.) 412; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 281; *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 417; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 28; *New v. Waller*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Thompson v. Bowle*, 4 Wall. 463, 18 L. Ed. 423; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918; *Jones*

v. Dannenberg Co., 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271.

[5] If a contract entered into in violation of a statute is expressly declared void by the statute, the contract is void, even in the hands of an innocent purchaser in due course. *Hanover National Bank v. Johnson*, supra; *Bank v. Parker*, supra; *Bluthenthal & Bickart v. City of Columbia*, 175 Ala. 398, 57 South. 814; *Kuhl v. Press Co.*, 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135.

On the other hand, if the contract is not declared void by the statute, and is subject to the law merchant, although it may not confer any right on the offending party, it will be protected in the hands of an innocent purchaser for value in due course and without notice. *Bozeman v. Allen*, 48 Ala. 512; *Greenhard on Public Policy*, pp. 8-13; *Scott v. Taul*, 115 Ala. 529, 22 South. 447; *Bank v. Nelson*, 106 Ala. 535, 18 South. 154; *Bluthenthal & Bickart v. City of Columbia*, supra.

[6] Another recognized exception is, if the contract is not denounced as void by statute, although it may have been entered into in this state by a nonresident corporation, in violation of the constitutional provision and the statutes, the offending corporation will not be allowed by the courts of the state to set up its unlawful conduct to avoid liability at the suit of the other party to the contract, who was not involved in the guilt of the transaction. *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

[7] The statutes enacted by the Legislature to carry into effect the provisions of the Constitution may be classified as follows: The objective of sections 3642-3646 is to compel foreign corporations to submit themselves to the jurisdiction of the courts of this state, as a prerequisite to the right to invoke the equal protection of the laws of the state in the enforcement of obligations arising out of intrastate business through the courts of the state. While such corporations and their agents are penalized for transacting business in violation of the statutes, contracts entered into by the offending corporation are not expressly declared void. Although such contracts are not enforceable in the hands of the offending corporation, if negotiable, and in the hands of an innocent purchaser without notice, they will be enforced. *Bozeman v. Allen*, supra. The reason underlying this application is that the penalty is directed against the offending corporation and its agents, and the statute should not be enforced so as to inflict punishment on those who are not involved in the guilt of the transaction. *Brooklyn Life Ins. Co. v. Bledsoe*, supra; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134.

The objective of sections 3647-3649 is to raise revenue by compelling corporations to pay a tax, fixing as a basis for the levy the actual amount of capital employed in this state, and contracts entered into in violation of these statutes are not void except at the

option of the other party (Code 1907, § 3649; *Sunflower Lumber Co. v. Turner Supply Co.*, 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20), and, not being absolutely void, if negotiable, and in the hands of innocent purchasers without notice, will be protected.

The objective of sections 3651-3653 is also to raise revenue in the form of a privilege or license tax, but the statute declares that:

"All contracts, engagements, or undertakings or agreements with, by or to such corporation, made without obtaining such permit, shall be null and void." Code 1907, § 3653.

And, if this question was one of first impression, we would, for reasons above stated, and on authorities above cited, be constrained to hold that any contract entered into in violation of these statutes is without any element of property right, and void, even in the hands of an innocent purchaser; but, as we read them, the following cases hold that such contracts are not void, and the fact that the statute was violated in their making is no defense. We accept these cases as our guide, as we are bound to do, under the provisions of the act creating this court. *Drew et al. v. Ft. Payne Co.*, 186 Ala. 285, 65 South. 71; *Alexander v. Ala. Western R. Co.*, 179 Ala. 480, 60 South. 295; *Sunflower Lumber Co. v. Turner Supply Co.*, 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20.

[8, 9] When the principles announced above are applied to the pleadings in this record, the plaintiff's replication No. 2 to defendant's pleas was a complete answer to pleas 2, 3, and 5, as well as to 6 and 7; and the court erred in sustaining the defendant's demurrers thereto; and, under the holdings of the Supreme Court cited above, the replication was likewise an answer to plea 4. It is manifest from the verbiage of paragraph 1 of plea 2, which is adopted as a part of pleas 3, 4, and 5, and, as for that matter, all the other pleas, that the pleader studiously avoided averring that the sale of the property representing the consideration of the note sued on was made in Alabama; and, when this paragraph is construed most strongly against the pleader, it merely avers that the notes were signed and delivered to Downs, the president of the corporation, in Alabama, and, when they were so signed and delivered, the property was then located in this state, and the transaction—the signing and delivery of the notes—occurred in this state, where, under a contract between defendant and Downs, the machine was assembled and installed by Downs. These averments fall far short of showing that the Lipps Bottle Washer Company had transacted business in Alabama in violation of the Constitution. All that is averred in the plea may be admitted and the sale of the property can be classed as interstate commerce. If, in fact, the machine was ordered through the agent of the corporation, and the order was taken in advance and sent in to the home office of the corporation in Chattanooga,

Tenn., and there accepted by the corporation, and the machine was built in Chattanooga and shipped to Alabama and delivered to the defendant in pursuance of a contract thus made, it was an interstate transaction; and the mere execution of the notes and their delivery to Downs in Alabama did not embody the exercise of a corporate function by the payee of the notes, and would not change the conclusion. *Beard v. Union & American Publishing Co.*, 71 Ala. 60. Neither would the fact that Downs, on his own account, agreed to assemble and install the machine. This point was taken by the demurrer, and it should have been sustained. *Scharfenburg v. Town of New Decatur*, 155 Ala. 651, 47 South. 95; *Kershaw v. McKown*, 68 South. 559; *Sioux Remedy Co. v. F. M. Cope*, *supra*.

[10, 11] The record is not clear as to what ruling the court made on the demurrer to plea 8 as last amended, but, as the case must be reversed, and from the entire record it appears that this plea was treated as presenting an issue in the case, we deem it proper to say that the conclusion stated in this plea, "that the note sued on is not a commercial negotiable paper," is not sustained by the averments following, embodying a complete copy of the note. The note, as thus set out, is payable "to order," and, under the uniform negotiable instrument law, possesses all the characteristics of a negotiable paper; and the fact that it retained the title to property described therein as a security for the debt does not destroy its negotiability. *Acts 1909, Sp. Sess. p. 126; Louisville Co. v. Gray*, 123 Ala. 251, 26 South. 206, 82 Am. St. Rep. 120; *Same v. Howard*, 123 Ala. 380, 26 South. 207, 82 Am. St. Rep. 126; *Bank v. Slaughter*, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88; *Montgomery v. Crowthwait*, 90 Ala. 553, 8 South. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832; *McGhee v. Importers' & Traders' National Bank*, 93 Ala. 192, 9 South. 743; *Crawford's American Negotiable Instruments*, p. 15, § 24. The demurrers to plea 8 as last amended should have been sustained.

[12, 13] The pleas, as framed, carry the burden to the defendant of showing that under the contract "between the parties" the machine was to be "assembled and installed" by payee's president, Downs. The word "assemble" is applied to both persons and things; and, when applied to a machine in the sense used in these pleas, carries the meaning that the parts of the machine were collected or gathered together and placed in their proper relation to each other so as to constitute the machine. See *Standard Dictionary*, vol. 1, p. 125; *Universal Dictionary*, vol. 1, p. 336; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 South. 961. The undisputed evidence shows that the defendant gave his order for the machine to Downs, the president of the payee corporation, who acted as an agent to solicit orders,

about two and one-half months before the machine was received by defendant; whether the order was in writing or verbal was a disputed question; but the evidence shows without dispute that the order was taken from defendant in New Decatur, Ala., and sent in by Downs to the office of the payee in Chattanooga, Tenn., receipt thereof by the payee of the note being acknowledged by letter written April 19, 1913. In this letter, payee stated that the machine was to be shipped by May 15th. The machine was constructed in Chattanooga, and there loaded on a car by the payee and shipped to New Decatur to the defendant, where it was taken from the car by defendant and set down by him in his place of business at its proper place. In packing the machine for shipment, some slats that belonged to the machine and a door to the drum were packed in the drum, and all that Downs did before the notes were executed was to place these slats in the groove provided for them and place the door on its hinges. After this, the power, which was furnished by the defendant, was applied, and the machine was started and operated by Downs for the purpose of showing the defendant's employes how to operate it; and, after 12 boxes of bottles had been washed, the notes were signed and delivered to Downs, and he left. The defendant testified that Downs guaranteed the machine to work, and about three weeks after the notes were given, the machine having proven unsatisfactory, Downs came back, and had considerable work done on the machine, but failed to make it work satisfactorily. The evidence further tends to show that the machine was defective and worthless.

We are of opinion that this evidence falls to meet the burden assumed by the pleas to show that the machine was assembled in this state by contract of the parties; and we are further of the opinion that the facts occurring prior to the time the notes were given stamp the transaction as interstate business, and in no way offensive to the statutes. *Beard v. Union & American Publishing Co.*, 71 Ala. 60; *Sioux Remedy Co. v. F. M. Cope*, *supra*; *Crenshaw v. State of Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565; *Dozier v. State of Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 23 L. R. A. (N. S.) 264; *Wright v. State*, 8 Ala. App. 437, 63 South. 14; *Padgett v. Gulfport Fert. Co.*, 11 Ala. App. 366, 66 South. 866.

[14] The facts occurring subsequent to the time the notes were given, conceding that they constituted a doing of business in Alabama in violation of the statutes, would not render the original contract void in the making so as to destroy the right of a holder in due course, for value, without notice. *Bozeman v. Allen*, *supra*; *Alexander v. Ala. Western R. Co.*, *supra*.

The conclusions above announced are not in conflict with the holding of the Supreme

Court in *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 South. 961, and followed in *Geo. M. Moller Mfg. Co. v. First National Bank of Dothan*, 176 Ala. 231, 57 South. 762. The defense held good in the first of these cases was that the plaintiff, a foreign corporation, under contract transported the material from another state and built it into a structure on the defendant's premises, without qualifying to do business in Alabama. In the other case, the contract, as stated in the opinion of the court, "covers the furnishing of material and the erection of same in a specified manner, as well as many other acts, such as the construction of a brick wall, wainscoting, tinting, and the doing of divers other things, in addition to the supplying of the material."

We are led to the conclusion that to hold, on the facts disclosed by the record in this case, that the payee corporation was doing business in Alabama in violation of the Constitution and statutes, would be applying them so as to constitute an unreasonable burden in restraint of interstate commerce. *Sioux Remedy Co. v. F. M. Cope*, supra. This conclusion is sustained by the utterance, found in both of the cases above referred to, that the application in those cases is "abhorrent to the judicial conscience," and going to show that the court had gone to the utmost limit in applying these statutes.

The affirmative charge requested by the plaintiff, as applied to the issues presented by pleas 2, 3, 4, and 5, should have been given. The other issues in the case were properly submitted to the jury, and the affirmative charge on the whole case, as well as charges 1, 2, 3, 5, 10, and 15, were properly refused. On the issues as formed, charges 8, 9, 12, 14, 18, 21, and 24 were properly refused.

[16] There was some evidence tending to show that the payee's agent, in taking the order for the machine, used a written form signed by the purchaser, embodying the terms of the sale, and that there was an acceptance of the order in this form. The original order was not offered, but proof of loss was made and secondary evidence of its contents offered. The secondary evidence tended to show that the contract thus entered into, if such was the fact, contained no stipulation that the payee was to do anything more than deliver the machine in Alabama, and contained a warranty that the machine was made of first-class material and capable of doing first-class work. While the defendant did not positively deny the signing of such order, his evidence tended to show that he did not sign it. On this state of the evidence, it was for the jury to determine, not only the question as to whether such order was given, but what it contained, and for this reason charge 10, as worded, was invasive of the province of the jury.

[10] Before a purchaser of a negotiable note under the facts hypothesized in charge 11 can be protected as a "purchaser for value," in due course, it must be shown that the funds entered to the credit of the depositor were absorbed on antecedent indebtedness, or exhausted by withdrawal. *Tatum v. Commercial Bank & Trust Co.*, 185 Ala. 249, 64 South. 561; *Alabama Grocery Co. v. First National Bank of Ensley*, 158 Ala. 143, 48 South. 840, 132 Am. St. Rep. 18; *German-American Bank v. Lewis*, 9 Ala. App. 353, 63 South. 741. And it is not enough that a material portion of the funds be checked out. Charge 11 was therefore properly refused.

[17, 18] The evidence on the part of the plaintiff, as well as that offered for defendant, shows that one stipulation of the contract was that the machine would do satisfactory work, and therefore charge 13 was abstract. Charge 16, under the evidence, asserts a correct proposition of law applicable to the case, and should have been given. Charge 19 was made faulty by using the expression "assemble the machine at defendant's plant in New Decatur, Ala." Charge 28 assumes that plaintiff was a purchaser for value in good faith, and was properly refused.

[10] While some of the charges given at the instance of the defendant could have been properly refused as leaving to the jury the duty of fishing out the issues, and others for being argumentative, we find no reversible error in giving them. While it was not necessary for the plaintiff, in his complaint, to aver that he purchased for value, without notice, having done so, he assumed the burden of proving the issue as laid. *Weinstein Bros. et al. v. Citizens' Bank*, 69 South. 972; *German-American National Bank v. Lewis*, 9 Ala. App. 352, 63 South. 741. Under the issues as formed, charge 3 does not misplace the burden of proof as to notice of the defenses.

For the errors pointed out, the judgment of the circuit court must be reversed.

Reversed and remanded.

POSTAL TELEGRAPH-CABLE CO. v. MINDERHOUT. (6 Div. 895.)

(Court of Appeals of Alabama. Jan. 11, 1916.)

1. PRINCIPAL AND AGENT ⇐22(2)—PROOF OF RELATION—DECLARATIONS OF AGENT.

The acts and declarations of an agent, or one purporting to be an agent, are not admissible to show his agency, in the absence of independent proof of agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. ⇐22(2).]

2. PRINCIPAL AND AGENT ⇐22(2)—PROOF OF RELATION—DECLARATIONS OF AGENT—INDEPENDENT EVIDENCE.

In an action against a telegraph-cable company for injury from being run into by its messenger boy on a bicycle, where it appeared that the boy came from the direction of defendant's

office, that defendant was engaged in delivering messages in the city and employed boys who used bicycles, that the boy who ran into plaintiff had on a cap inscribed "Postal Telegraph-Cable Company," and had in his hand an envelope closely resembling the particular kind of envelope used by defendant for messages handled by it, evidence that as soon as plaintiff had regained her feet, the boy on request refused to give her his name, and that he said he was delivering a message, was admissible on the issue of his agency for defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. ¶ 22(2).]

3. TRIAL ¶ 255(4) — REQUEST FOR INSTRUCTIONS—NECESSITY.

The party against whose interest evidence was properly admitted, entitled to have its consideration limited to the purpose for which it was competent, had the duty of asking a proper instruction from the court to that effect, and it did not rest upon the court to limit the consideration of such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. ¶ 255(4).]

4. EVIDENCE ¶ 121(2)—RES GESTÆ—STATEMENTS OF AGENT.

In an action against a telegraph company for personal injuries by being run into by its messenger boy on a bicycle, the answer of the boy to plaintiff's question right after the collision refusing to give his name and his statement that he was delivering a message were admissible as a part of the "res gestæ," where such answer and statement were the unpremeditated accompaniments of the main facts of the occurrence, explanatory of the conduct and purposes of the participants, and were produced by and instinctive upon the occurrence and virtually a part of it rather than a retrospective narration of any matter connected with it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 308; Dec. Dig. ¶ 121(2).]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Action by Mrs. Lella Minderhout against the Postal Telegraph-Cable Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Certiorari denied. 71 South. 91.

Cabaniss & Bowie, of Birmingham, for appellant. A. G. & E. D. Smith, of Birmingham, for appellee.

PELHAM, P. J. The appellee, as plaintiff in the trial court, brought an action for damages against the defendant (appellant) for personal injuries alleged to have been sustained on one of the streets in the city of Birmingham, as the result of the plaintiff's having been injured by being run into, or against, by a messenger boy on a bicycle, in the service or employment of the defendant (while acting within the line and scope of his duties as such employé), engaged in or about the delivery of a message. The case was tried on pleas of contributory negligence and the general issue, resulting in a judgment for the plaintiff.

The plaintiff's evidence on the trial, in part, tended to show that the boy, riding a bicycle and coming from the direction of the defendant's office in the city of Birmingham

about a block away, ran his bicycle over or against the plaintiff while she was waiting at a proper and customary place on a street crossing for the purpose of boarding a street car. It was also shown that the defendant, as part of its regular business, was engaged in receiving and delivering messages in the city of Birmingham for a reward; that it employed boys, who used bicycles in the transaction of this business; that the boy in question, at the time of running against the plaintiff with his bicycle, had on a cap bearing the inscription, "Postal Telegraph-Cable Company," and had in his hand an envelope closely resembling the particular kind of envelope used by the defendant for messages handled and delivered by it.

The plaintiff, while testifying as a witness in her own behalf with reference to the messenger boy running into her, was asked the following questions: (1) "I will ask you what he said when you asked him for his name?" (2) "Just at the time you were injured, Mrs. Minderhout [the plaintiff], and at the time you were all scrambling up from where you were hurt, did the boy say anything to you concerning the delivery of his message; whether he was delivering a message or not?" To the first question the witness answered: "He refused to give me his name." To the second question the following answer was made: "Yes; he said he was delivering a message." The defendant separately objected to each of these questions and separately moved to exclude each of the answers, and duly reserved exceptions to the adverse rulings of the court in overruling objections to the questions and in refusing to exclude the answers. The only errors insisted upon here relate to these rulings of the court on the evidence. The basis for the objection to this testimony as being inadmissible is: First, that declarations of the agent are not admissible for the purpose of proving agency; and, second, because, as contended by appellant's counsel, the declarations constituted no part of the res gestæ of the transaction.

[1] It is not to be doubted, nor is the principle questioned by appellee's counsel in brief, that agency cannot be established by the mere declaration of an agent; and that, in the absence of independent proof of the agency, the acts and declarations of an agent, or one purporting to be an agent, are not admissible for the purpose of showing agency. *Postal Telegraph-Cable Co. v. Lenoir*, 107 Ala. 643, 18 South. 266; *Union Naval Stores Co. v. Pugh et al.*, 156 Ala. 370, 47 South. 48.

[2] When, however, there is independent proof of other facts from which the inference of agency may be drawn, the acts and declarations of one whose agency is the subject of inquiry, though incompetent to establish agency when there is no other evidence of agency, is competent, in connection with oth-

er evidence of agency, for consideration in determining both the fact of agency and the scope of authority. The direct question here presented was considered and the rule stated as above by the Supreme Court in the case of *Birmingham Mineral R. R. Co. v. Tennessee Coal, Iron & R. R. Co. et al.*, 127 Ala. 137, 145, 28 South. 679, approvingly citing *McClung v. Spotswood*, 19 Ala. 165, *Lytle & Co. v. Bank of Dotham*, 121 Ala. 215, 26 South. 6, and *United States Life Ins. Co. v. Lesser*, 126 Ala. 568, 28 South. 646, declaratory of the same rule. In the instant case there is ample evidence of independent facts and circumstances showing agency, or affording a basis for such inference, aside from the declarations, to make them competent evidence in that connection for the purpose of determining the fact of agency.

[3] The duty did not rest upon the court, as insisted, to limit or qualify the consideration of the evidence. If properly admitted, and if the party against whose interest it was admitted was entitled to have its consideration limited to the purposes for which it was competent, the duty rested upon him to ask a proper instruction from the court to that effect. *Hanners v. State*, 147 Ala. 27, 41 South. 973.

[4] It is further contended that the declarations are inadmissible as they do not constitute a part of the *res gestæ* of the transaction. The question of the admissibility of this proof as part of the *res gestæ* was for the trial court, and it should not be put in error for admitting it, unless this court would be justified in affirming that it appears with reasonable certainty that the declarations and acts admitted were not the unpremeditated accompaniments of the main facts of the occurrence, explanatory of the conduct and purposes of the participants, and were, in fact, subsequent declarations, so separate in point of time that they should be attributed to subsequently formed motives or purposes. *Lundsford v. State*, 2 Ala. App. 38, 56 South. 89. We cannot affirm that the declarations admitted by the court did not constitute part of the substantive transaction—were not within the *res gestæ* of the occurrence. We think that they were produced by, and instinctive upon, the occurrence to which they relate and virtually a part of it, rather than a retrospective narration of any matter connected with it—not the mere statement of facts as held in memory of a past transaction. It is reasonably clear that they sprang out of the occurrence and stand in the relation thereto of an unpremeditated result, instinctive upon the happening, a product of it, fairly precluding the idea of deliberate after-formed design in making them. Declarations made on the scene of the transaction immediately afterwards in the presence of the parties may form part of the *res gestæ*, provided they are

so closely connected as to be virtually part of the entire transaction and are unpremeditated and instinctive upon the main occurrence to which they relate, and serve to elucidate or explain it, rather than, and as distinguished from, being the retrospective narration of past occurrences. *Nelson v. State*, 130 Ala. 83, 30 South. 728; *James v. State*, 12 Ala. App. 16, 67 South. 773; *Ala. Great Southern Railroad Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403. See, also, *Ex parte Western Union Telegraph Co. (Western Union Telegraph Co. v. Baker)*, 69 South. 246.

We think the court's rulings on the evidence complained of are free from error.

Affirmed.

POSTAL TELEGRAPH-CABLE CO. v. MINDERHOUT. (6 Div. 260.)

(Supreme Court of Alabama. Feb. 10, 1916.)

CERTIORARI \Leftrightarrow 68—REVIEW.

The Supreme Court will not issue certiorari to review decision of the Court of Appeals on the facts, or in the application of the law to the facts, but will only revise the holding of such court on a question of law.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 180-182; Dec. Dig. \Leftrightarrow 68.]

Certiorari to Court of Appeals.

Action by Mrs. Lella Minderhout against the Postal Telegraph-Cable Company. A judgment for plaintiff was affirmed by the Court of Appeals (71 South. 89), and defendant petitions for certiorari. Writ denied.

Cabanias & Bowie, of Birmingham, for appellant. A. G. & E. D. Smith, of Birmingham, for appellee.

ANDERSON, C. J. While there has heretofore been some division among the members of the court as to questions that would be reviewed by this court upon certiorari to the Court of Appeals, the rule has been laid down in repeated decisions and applied in many instances, where the writ was denied and no opinion was prepared, to the effect that we would not review the finding of the Court of Appeals upon the facts, or in the application of the law to the facts. *Kirkwood v. State*, 184 Ala. 9, 63 South. 990; *Ex parte State*, 181 Ala. 4, 61 South. 53; *Ex parte Savannah Williams*, 182 Ala. 34, 62 South. 63; *Ex parte Western Union Co.*, 183 Ala. 451, 63 South. 88; *Ex parte Stevenson*, 177 Ala. 384, 58 South. 992. In the *Kirkwood Case*, *supra*, it was said:

"This court has repeatedly laid down * * * the rule that it will revise the rulings of the Court of Appeals upon certiorari only as to questions of law, and not upon a finding of facts, or in the application of the facts to the law."

"We have repeatedly held that this court will not review or revise the holding of the Court of Appeals, except for error as to a question of law, and not upon a finding or conclusion as to

facts, or in the application of the facts to the law," *Western Union Case*, supra.

"But this court seems to have made up its mind not to review the rulings of the Court of Appeals on any point involving a construction of evidence, even though there is no conflict. *Ex parte Stevenson*, 177 Ala. 384, 58 South. 992. And in its latest case it has said that it will not review the facts 'for the purpose of revising the application of same to the law by said Court of Appeals.'" *Ex parte Savannah Williams Case*, supra.

"We have previously held that this court had the authority to review and revise the decisions of the Court of Appeals upon questions of jurisdiction and law. *Ex parte L. & N. R. R. Co.*, 176 Ala. 631, 58 South. 315. We held, however, in the case of *Ex parte Stevenson*, 177 Ala. 384, 58 South. 992, that this court would not review or revise the finding or conclusion of the Court of Appeals upon the facts, or that we would review the facts for the purpose of revising the application of same to the law by said Court of Appeals." *Ex parte State Case*, supra.

"In the observance of the duty of supervision laid upon the Supreme Court by section 140 of the Constitution, the Supreme Court will not, under any circumstances, review or revise the findings or conclusions of the Court of Appeals upon the matters or issues of fact only, nor review or revise the findings or conclusions of the Court of Appeals upon matters or issues of fact only, with the view to the ascertainment or determination whether legal principles applied by that court to the decision of the appeal should have been applied thereto." *Stevenson Case*, supra.

In the brief of the applicant for the writ, upon application for rehearing in the Court of Appeals, and which is also presented in support of the application for the writ of certiorari, we find the following statement:

"For the most part we do not question the statements set out in the opinion of this court affirming the verdict and judgment of the lower court with reference to the general rules of law governing the decision of the question as to what is and what is not a part of the *res gestæ*. We do most respectfully and earnestly insist, however, that the rules of law therein set out are not properly applied to the declaration under discussion."

This statement and contention presents a point not reviewable, and which is excluded from the revisory powers of this court under the rule above quoted, and the writ is denied.

Writ denied.

SAYRE, SOMERVILLE, and GARDNER, JJ., concur.

WARREN et al. v. CROW. (7 Div. 745.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. REFORMATION OF INSTRUMENTS §36(1)—MORTGAGE—SUFFICIENCY OF BILL.

A bill for the reformation and foreclosure of a mortgage, executed by the defendants and transferred to the plaintiff, making the mortgage an exhibit, and averring that a mistake was made in the description of the real estate intended to be conveyed by the mortgage, giving the description as contained therein, and averring that it failed to include about 37 acres, omitted therefrom by inadvertence or mistake on the part of the draftsman, describing the property as it should have been described according to plaintiff's contention, and averring

that such was the express intent of the parties, describing the realty which was intended to be conveyed, and averring that a correct description thereof was shown by a plat of the land submitted to the draftsman as a description of the realty intended to be conveyed when the mortgage was drawn, was sufficiently definite to show the land conveyed, the land omitted, and the intention of all the parties with respect to it when executing the mortgage, and good against a demurrer.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141, 143, 146; Dec. Dig. §36(1).]

2. PLEADING §34(4)—CONSTRUCTION AGAINST PLEADER.

A pleading is to be construed most strongly against the pleader, yet the language used should be given a reasonable construction.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. §34(4).]

Appeal from Chancery Court, De Kalb County; James E. Horton, Jr., Chancellor.

Bill by J. O. Crow against F. M. Warren and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

M. W. Howard, of Birmingham, and Isbell & Scott, of Ft. Payne, for appellants. Davis & Baker, of Ft. Payne, for appellee.

GARDNER, J. Bill by appellee for reformation and foreclosure of a certain mortgage executed by appellants to one Goodhue, which said mortgage was duly transferred to appellee. Demurrer to the bill was overruled; hence this appeal.

[1, 2] The only insistence of counsel for appellants is that the bill is insufficient in its averments to the effect that it was the intention of the parties at the time of the execution of the mortgage that the land in question be included therein. While it is a well-settled rule that the pleading is to be construed most strongly against the pleader, yet the language used should be given a reasonable construction. We are of the opinion that the demurrer was properly overruled. A copy of the mortgage is made an exhibit to the bill. The fourth paragraph avers that a mistake was made in the description of the real estate of Isaac C. J. Warren intended to be conveyed by said mortgage. The description of the same as appears in the mortgage is then given, and it is also averred that this description fails to include about 37 acres, which was omitted therefrom by inadvertence or mistake on the part of the draftsman of the mortgage. The fifth paragraph describes the property as it should have been described according to the contention of complainant, and concludes with the averment, in substance, that such was the express intention and understanding of all the parties. Paragraph 6 also purports to give a correct description of the real estate which—to use the language of said paragraph—"was agreed and intended to be conveyed in said mortgage deed."

It is also averred in the eighth paragraph that a correct description of said real estate is shown by a plat of the land made by a certain surveyor, which "said plat was submitted to Chas. M. T. Sawyer, the draftsman of said mortgage, by the respondents, as a description of the real estate intended to be conveyed in said mortgage, at the time and before said mortgage was drawn."

Other averments not here noted, in connection with those above stated, make the bill sufficiently definite to show the land conveyed and that omitted, and the intention of all the parties with respect to the same at the time of the execution of said mortgage. We conclude, therefore, that the decree overruling the demurrer is correct, and the same is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and SOMERVILLE, JJ., concur.

FRANKLIN v. SNOW et al. (6 Div. 997.)
(Supreme Court of Alabama. Feb. 10, 1916.)

1. ADVERSE POSSESSION §114(1) — **WILD LANDS—EVIDENCE.**

Although acts of ownership on wild land under color of title need not be frequent or extensive, mere removal of sawlogs and rails in the absence of a showing of frequency or time of removal, is insufficient to establish title by adverse possession, even when coupled with testimony of two witnesses that, so far as they knew, the claimant had sole possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. § 114(1).]

2. ADVERSE POSSESSION §63(7)—**TITLE BY PRESCRIPTION.**

Title to wild lands by adverse possession for 10 years under an agreement of the owner to convey to claimant cannot be aided by prescription, converting an equitable title into a legal title, since that presumption arises only in support of peaceable possession under claim of title for 20 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 354-357; Dec. Dig. § 63(7).]

3. PARTITION §62 — **PLEADING—DEFENSE—EQUITABLE TITLE OF DEFENDANT.**

Where a deed, void as a conveyance, if valid as an agreement to convey, passed to the defendant the exclusive equitable interest in the land, his failure to allege the equitable interest and to pray for equitable relief precludes consideration of his equitable title as a defense to a suit for sale of the land and distribution of the proceeds.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 178-181; Dec. Dig. § 62.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by Henry C. Snow and others against Jack Franklin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bankhead & Bankhead, of Jasper, for appellant. Davis & Fite, of Jasper, for appellees.

SOMERVILLE, J. The bill is filed by certain heirs of Jane Franklin against her son, Jack Franklin, for a sale for distribution of a certain tract of land owned by her in her lifetime. The answer denies that complainants own any interest in the land, and avers that respondent owns "the entire interest" therein. The evidence shows that Jane Franklin owned the land by virtue of a government patent, and that, in consideration of Jack Franklin's advancement of \$100, with which she procured the patent, she agreed to make him a deed to the land, which she did by a writing dated and delivered to him in December, 1886. This deed is signed by mark only, is without attestation, and the certificate of acknowledgment, though filled in by the notary, is not signed by him. It is conceded that this deed did not convey the legal title to the land. Respondent claims, however, that he has acquired the legal title by adverse possession, and also by prescription.

[1] It appears that the land is wooded, unfenced, and not improved for cultivation, and that no one has ever occupied it. Respondent says:

"Since the execution of the deed I have had possession of the land. I have used timber off of the land, have used sawlogs off of it for the sawmill, have gotten rails off of the land, and have paid taxes continuously on it since the execution of the deed."

Two other witnesses say that, *as far as they know*, respondent had had possession of the land; but it does not appear that they know. Although acts of ownership on wild land need not be so frequent or extensive, if done under color of title, as would be required without it, in order to amount to a disseisin of the true owner (*Woods v. Montevallo Co.*, 84 Ala. 560, 566, 3 South. 475, 5 Am. St. Rep. 398), yet the evidence quoted falls very far short of being sufficient in any case to show an adverse possession of this land by respondent continuously for 10 years. The only acts shown are the removal of sawlogs and rails; how many, or how frequently, or when, being left entirely to conjecture. The respondent says, it is true, that he has had possession of the land *since* the execution of the deed. But, aside from the ambiguity of this language, his specification of his acts of ownership limits and defines the scope of his general claim, and neutralizes its otherwise *prima facie* sufficiency. *So. Ry. Co. v. Hall*, 145 Ala. 227, 41 South. 135.

[2] Nor can prescription aid respondent's title by the presumption that an equitable title has been converted into a legal title; for that presumption arises only in support of a peaceable possession under claim of title for 20 years. *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 6 South. 197, 13 Am. St. Rep. 73; *Kelly v. Hancock*, 75 Ala. 229; 1 Greenl. Ev. (16th Ed.) 146, 147. The occasional removal of timber or rails is not suffi-

cient for this purpose. *Alexander v. Savage*, 90 Ala. 383, 8 South. 93.

[3] If it be conceded that Jane Franklin's deed to respondent, though void as a conveyance, was nevertheless a valid agreement to convey, and passed to him an exclusive equitable interest in the land, still, since the answer does not aver an equitable interest, and no right to relief under such a claim is asserted, it is not here available in bar of complainants' right to a sale for distribution.

"In the absence of any allegation in the pleadings specially referring to equities, or to an equitable title, it must be assumed that only the legal title is in issue, and that it, when established, must prevail." 30 Cyc. 245, 246; 16 Cyc. 403.

"If, on a bill for partition, the defendant wishes to avail himself of an equitable defense, as, for instance, a defense arising under a contract for purchase, he should, to entitle himself to his defense, file a cross-bill, or, under our system, set it up in his answer in the nature of a cross-bill, with a prayer for such relief as he may claim to be entitled to." *Oliver v. Jernigan*, 46 Ala. 41, 44.

On the evidence before him, the chancellor did not err in granting the relief prayed for, and the decree will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

PHILLIPS v. SHOTTS. (6 Div. 106.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. APPEAL AND ERROR \S 1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in the exclusion of testimony upon a witness' direct examination may be cured by his answers to the same effect upon cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4201; Dec. Dig. \S 1058(2).]

2. APPEAL AND ERROR \S 1057(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In ejectment, where the undisputed evidence showed that defendant was in possession of land, other than that in dispute, at a particular time, the exclusion of evidence relating to his possession of such other land, if erroneous, was harmless as merely cumulative on a fact not in dispute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4194-4196; Dec. Dig. \S 1057(1).]

3. TRIAL \S 92—RECEPTION OF EVIDENCE—REFUSAL OF MOTION TO STRIKE—PROPRIETY.

Where a witness testified to a fact several times without objection, the court's refusal to sustain a motion made at the close of all the evidence to exclude such evidence was not erroneous, since the evidence should have been objected to when the question was asked or the evidence given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 245, 252; Dec. Dig. \S 92.]

4. APPEAL AND ERROR \S 1033(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In ejectment the admission of evidence tending to show that defendant exercised acts of ownership over the land was harmless as to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4054, 4055; Dec. Dig. \S 1033(3).]

5. APPEAL AND ERROR \S 1015(2)—REVIEW—NEW TRIAL—REFUSAL—PROPRIETY.

In ejectment, where there was a conflict in the evidence as to the defense of payment of the mortgage debt, through foreclosure of which plaintiff claimed, and defense of adverse possession, the overruling of the motion for new trial after verdict for plaintiff was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3860-3866; Dec. Dig. \S 1015(2).]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Ejectment by T. L. Shotts against J. R. Phillips. Judgment for plaintiff, and defendant appeals. Affirmed.

Testifying as a witness, J. R. Phillips said that the deed was executed by Cummins and wife to him in February, 1899, and the deed was given to him by John Cummins, that Cummins was in possession of the land when he gave him the deed, and that witness went in possession after he got the deed. Plaintiff asked the witness this question: "How much did you pay for it?" Objection was sustained, and this further question was asked by defendant: "During that time you claimed to own it?" Witness answered: "Yes, sir; I own it, and have been in possession." Plaintiff objected to the answer of witness, "I own it," and moved to exclude it, and the court sustained the motion. Defendant then asked the witness: "Have you held it since you bought it claiming to own it?" And witness answered: "I thought I owned it." This answer was excluded on motion of plaintiff's counsel. Defendant's counsel then asked the witness: "Did you recognize Shott's title?" Objection was sustained to this question. It appears that in other parts of the witness' testimony that he stated that he owned the land and did not recognize Shott's title, and that nobody else had been in possession. Plaintiff claimed through a mortgage executed to him in May, 1897, by John and Mary Cummins, foreclosure of said mortgage, and a deed from Shotts to himself on January 2, 1899, under the power contained in the mortgage. Other evidence was introduced showing a foreclosure under power; also a mortgage from D. T. and S. C. Goddard, and a foreclosure of that mortgage. Defendant claimed through a deed from T. L. Shotts and wife to John Cummins, executed December 31, 1896, and from John Cummins and wife to himself, executed February 21, 1899, together with adverse possession.

A. H. Carmichael and Kirk & Rather, all of Tusculumbia, for appellant. E. B. & K. V. Fite, of Hamilton, for appellee.

ANDERSON, C. J. [1] The errors complained of in the exclusion of certain statements of the defendant, J. R. Phillips, while

a witness upon direct examination, if error, was fully cured by his answers upon cross-examination and which were not excluded.

[2] Assignment of error 2½, as argued in brief, says:

"The court erred in refusing to allow the witness Hiram Davis to state who was in possession of the land in the year 1909."

This witness testified that he cultivated the land in dispute the year 1909, and the only objection we find to any of the evidence of this said witness was as to who had the Arnold land that year—quite a different question from the one assigned as error. Moreover, the undisputed evidence showed that the defendant was in possession of the Arnold land at this time, and the exclusion of this evidence, even if it related to the Arnold land instead of the land in dispute, was without injury, as it was merely cumulative of an undisputed fact.

[3, 4] We cannot put the trial court in error for failing to sustain a motion to exclude the evidence of the defendant that he made a deed to the land to Haley. In the first place, the witness testified to this fact several times, and there seems to have been no objection whatever at the time, and the motion to exclude this part of the evidence appears not to have been made until the close of all the evidence. If this evidence had been bad, it should have been objected to when the question was asked or when the evidence was given. Moreover, the witness also testified that Haley deeded it back to him, and that he never gave up his possession to Haley, and this evidence was rather beneficial than detrimental to the defendant, as it showed that he was exercising acts of ownership of the land. We have examined all the charges complained of as given for the plaintiff, and find that they are all abstractly correct, and, if they were misleading for not including the possession of the defendant's tenants or in not tacking the possession of the defendant to others, or in any other respect, they could have all been cleared up by counter charges. Indeed, such charges were given at the request of the defendant.

[5] We do not think that the trial court erred in overruling the motion for a new trial, as there was a conflict in the evidence as to the payment of the mortgage debt, as well as to the defendant's adverse possession for ten years, as several witnesses testified that the land was not used or cultivated during some of the time of which defendant claimed to have rented it and had some of it cultivated through tenants.

The judgment of the Circuit Court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

CLARK v. WATSON. (4 Div. 615.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. TIME \Leftrightarrow 9 (7)—COMPUTATION—EXCLUDING FIRST OR LAST DAY.

A bill of exceptions, not presented to the trial judge until June 28th was more than 90 days from March 29th, the date on which judgment was rendered, and would be stricken on motion of the appellee.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 28, 32; Dec. Dig. \Leftrightarrow 9 (7).]

2. JUDGMENT \Leftrightarrow 253 (1) — CONFORMITY TO PRAYER FOR RELIEF.

In such cases as ejectment and detinue, where the amount recoverable is liquidated and necessarily increases by mere lapse of time after the suit is filed, the plaintiff may recover the full amount due to the date of the judgment, although a smaller sum is claimed as interest or damages in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. \Leftrightarrow 253 (1).]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Ejectment by D. L. Watson against J. R. Clark. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Hill, of Dothan, and J. Lee Holloway, of Montgomery, for appellant. W. O. Mulkey, of Geneva, for appellee.

SOMERVILLE, J. [1] It appears that the bill of exceptions in this record was presented to the trial judge on June 28th, and that the judgment appealed from was rendered on March 29th preceding. As it was not presented within 90 days, as prescribed by law, it must be stricken on the motion of appellee. A case involving a similar calculation between March and June will be found in Deason v. Gray, 189 Ala. 672, 68 South. 646.

[2] No errors are assigned on the record proper, except it is suggested that as the complaint—which is in ejectment—claims only \$100 damages for detention, and the verdict and judgment are for \$160, the judgment ought to be now reduced to the amount claimed. It is, of course, the general rule that a plaintiff cannot recover more than he claims. But to this rule there is a well-settled exception in such cases as debt, detinue, and ejectment, where the amount recoverable is liquidated and necessarily increases by mere lapse of time after the suit is filed, which allows the plaintiff to recover the full amount due to the date of the judgment, although a smaller sum is claimed as interest or damages in the complaint. McWhorter v. Standifer, 2 Port. 519; Elliott v. Smith, 1 Ala. 74; Bumpass v. Webb, 3 Ala. 113; Pool v. Devers, 30 Ala. 672.

Under this exception, the complaint in this case supports the verdict and judgment, and, no error being apparent, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

READ v. STATE. (4 Div. 600.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. CRIMINAL LAW §589(5)—CONTINUANCE—VARIANCE IN NAME OF VENIREMAN.

Under section 32 of the jury law (Acts Sp. Sess. 1909, p. 320), providing that if there is a mistake in the name of any juror drawn or summoned, it shall not be sufficient ground to quash the venire, or to continue the case, the fact that one of the veniremen, named "Walker L. Brooks," was drawn and summoned under the name of "Walter L. Brooks," and so noted in the copy served on the defendant, in the absence of proof to the contrary, would be presumed to be merely a mistake, not justifying a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1815; Dec. Dig. §589(5).]

2. CRIMINAL LAW §406(1), 516—EVIDENCE—CONFESSIONS DISTINGUISHED FROM INCULPATORY ADMISSIONS.

There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts and confessions or admissions in the nature of confessions of actual guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894, 895, 1139-1145; Dec. Dig. §406(1), 516.]

3. CRIMINAL LAW §409—EVIDENCE—INCULPATORY ADMISSIONS—PREDICATE.

Defendant's conversations with the state's witnesses in the nature of inculpatory admissions of collateral facts, and not confessions of guilt, prima facie voluntary, were admissible without a predicate of voluntariness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972; Dec. Dig. §409.]

4. CRIMINAL LAW §511(1)—ACCOMPLICE TESTIMONY—CORROBORATION.

Under Code 1907, § 7897, evidence, in a prosecution for homicide, held to warrant a conviction independently of accomplice testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1128; Dec. Dig. §511(1).]

5. CRIMINAL LAW §780(4)—TRIAL—INSTRUCTION—CORROBORATION.

In such case, an instruction that there was sufficient corroborative evidence of the accomplice to submit the question of guilt, and that the question whether such evidence had been sufficiently corroborated to warrant a conviction was for the jury, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1862; Dec. Dig. §780(4).]

Appeal from Circuit Court, Bullock County; M. Sollie, Judge.

Butler Read was convicted of homicide, and he appeals. Affirmed.

T. S. Frazer, of Union Springs, for appellant. W. L. Martin, Atty. Gen., and J. P. Mudd, Asst. Atty. Gen., for the State.

SOMERVILLE, J. [1] One of the veniremen, Walker L. Brooks, was drawn and summoned under the name of Walter L. Brooks, and was so noted in the copy served on defendant. Defendant seasonably moved for a continuance of the cause on this ground, which motion was overruled. He moved the court to quash the venire on the grounds that the jury list was not properly selected by the commissioners, and that they did not

purge the jury box of names illegally placed therein. Defendant's rights with respect to this venire, no fraud or corruption appearing, were qualified by section 32 of the jury law (Special Sess. Acts 1909, pp. 305, 320), as follows:

"If the sheriff fails to summon, or any juror summoned fail or refuse to attend the trial, or there is a mistake in the name of any juror drawn or summoned, none, or all, of these grounds shall be sufficient to quash the venire or to continue the case."

In the absence of proof to the contrary, it must be presumed that the variance complained of was merely a mistake, and defendant's motions were therefore properly overruled.

[2] There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts, and confessions, or admissions in the nature of confessions, of actual guilt.

[3] In the former class of cases no predicate of voluntariness need be laid in order to render the admissions admissible in evidence. *McGehee v. State*, 171 Ala. 19, 21, 55 South. 159. Defendant's several conversations with state's witnesses, which were introduced against him, were in no sense confessions of guilt; and, being prima facie voluntary, they were admissible without the predicate. It is therefore not necessary to consider the sufficiency vel non of the predicates offered.

[4, 5] The chief question presented by the record is whether the testimony of the state's witness, Jim Thomas, who was confessedly an accomplice, and who testified directly to defendant's commission of the murder, was corroborated by any other evidence "tending to connect the defendant with the commission of the offense," as required for his conviction by section 7897 of the Code. On the theory that there was no such corroboration, defendant requested the general affirmative charge, which was refused by the trial judge. A critical examination of the evidence convinces us that this charge was properly refused, (1) The witness Jack Walker testified that shortly before the killing he saw deceased going down the railroad track, and defendant and Jim Thomas walking along behind him; that the two latter talked for a few minutes; and that defendant then went on and joined deceased, and Thomas came on back and went on to the big road with a gun. (2) The scene of the killing was not a public and frequented place, and defendant was present, as all the evidence shows, and had the opportunity to kill. (3) Defendant made contradictory statements as to his ability to identify the man he claimed he saw shoot the deceased in his immediate presence. From this testimony and these circumstances, which clearly differentiate this case from the cases of *Lindsey v. State*, 170 Ala. 80, 54 South. 516, and *Thompkins v. State*, 7 Ala.

App. 140, 61 South. 479, cited and relied on by appellant, the jury may well have implicated defendant in the killing, independently of Jim Thomas' testimony. On this subject, the trial judge said to the jury:

"It is insisted by the defendant that the evidence of the accomplice, Jim Thomas, has not been corroborated. I have carefully considered this question, and I have decided that there is sufficient corroborative evidence of the accomplice, at least for me to submit the question to you. However, the question as to whether this evidence has been sufficiently corroborated to warrant a conviction of this defendant is one entirely within your province, and one for you to determine."

This was a proper and correct statement, and of it defendant cannot complain.

We find no error in the record, and the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

BRACKIN v. OWENS HORSE & MULE CO. (4 Div. 617.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. APPEAL AND ERROR ¶192(2)—CHANGE OF THEORY ON APPEAL.

In a suit to foreclose a mortgage securing a note, where defendant's only contention was that the documents had been altered and the amounts increased, complainant, having met that contention, cannot complain of such evidence on appeal on the ground that the answer, which was not sworn to, was not sufficient to put in issue the execution of the note and mortgage.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶192(2); Pleading, Cent. Dig. §§ 1348, 1350, 1354.]

2. COMPROMISE AND SETTLEMENT ¶6(2)—ACCEPTANCE OF COMPROMISE.

Where defendant who purchased a mule from complainant, giving a note and mortgage to secure the purchase price, wrote complainant a letter informing it that the amount had been fraudulently increased and inclosing a check for the amount he contended was the agreed price, stating that he would pay no more, complainant by accepting and cashing such check waived any right to claim an additional amount, notwithstanding the rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum where the claim is undisputed; there being a bona fide dispute in such case.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 36-38; Dec. Dig. ¶6(2).]

Appeal from Chancery Court, Henry County; W. R. Chapman, Chancellor.

Bill by the Owens Horse & Mule Company against S. R. Brackin. From a decree for complainant, defendant appeals. Reversed and rendered.

D. C. Halstead, of Headland, for appellant. Espy & Farmer, of Dothan, for appellee.

MAYFIELD, J. This is a bill to foreclose a mortgage. The bill alleges the mortgage to have been given to secure the purchase price of one mule sold by the mort-

gagee to the mortgagor, and that the price of the mule was \$290, as evidenced by a note and the mortgage sought to be foreclosed. The bill also alleges the payment of \$190 on the note and mortgage debt before the filing of the bill.

The answer, in short, admits the sale of the mule, and the execution of the note and mortgage, but denies that the price was \$290, alleging that it was, instead, \$190, and that this amount was paid as stated. The answer also alleges that the note and mortgage were not for \$290, but were for \$190. The note and mortgage, on their face, bear evidence of alterations, changing the amount due from \$190 to \$290. Complainant's evidence tends to show that the change was made before the signing by respondent; while the respondent's evidence tends to show that the change was made after the execution of the papers. So the disputed questions were the purchase price of the mule, and the alteration of the note and mortgage; that is whether the alteration was made after the execution thereof.

There is no pretense that there was any consideration for the note and mortgage, other than the mule, and no dispute that the alteration was made. The evidence is in sharp conflict as to both these issues. The chancellor found in favor of complainant, and granted the relief prayed. After carefully examining all the proof in the case, and without indulging any presumption in favor of the ruling of the chancellor in consonance with the statute, we are of the opinion that the chancellor erred in his conclusion and in granting the relief prayed.

[1] It is insisted by appellee, and there is some intimation in the opinion of the chancellor to the same effect, that the respondent's evidence did not correspond with his allegations, and that, if the theory of his evidence be accepted, it was at variance with his allegations, and therefore was not availing. We cannot agree to this conclusion. While the bill and the answer are both very short, they are each to the point, and clearly set up the issues on which the case was tried. While the answer was not sworn to, and was therefore not sufficient to put in issue the execution of the note and mortgage under our statute, no objection or exception was taken to the answer on this account; and the complainant went into the alteration of the papers. Moreover, as we have above pointed out, there was, and is here, no contention that there was any consideration for the note or mortgage other than the sale of the mule, and this contest is between the parties to the note and mortgage; and the complainant assumed the burden, both in his bill and in the proof, to show the true consideration of the note, which is conceded to be the purchase price of the mule.

The pleadings and proof leave no doubt that there was a dispute between the parties

as to the purchase price of the mule, and therefore as to the consideration of the note, and the amount of the indebtedness due from respondent to complainant. In view of this dispute, respondent paid the complainant \$190, the amount he claimed to be due, and paid in on condition only that complainant accept it in full discharge of the indebtedness, in payment of the note and mortgage. The complainant accepted the \$190, but declined to treat it as payment in full, treating it only as payment pro tanto.

[2] The true rule was stated by this court, with authorities, Weakley, C. J., writing, in the case of *Hand Lumber Co. v. Hall*, 147 Ala. 563, 564, 41 South. 79:

"The rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum without a release by deed applies only to conceded or undisputed demands. Where the claims are in dispute, the compromise and part payment thereof are sufficient consideration to support the discharge." 24 A. & E. Enc. of Law (2d Ed.) p. 288. The cases of *Barron v. Vandvert*, 13 Ala. 232; *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159, and *Hodges v. Tenn. Implement Co.*, 123 Ala. 573, 26 South. 490, each involved an indebtedness by note, and in those cases there was no dispute as to the existence of the indebtedness as evidenced by the written obligations. In each of them the holding was that on part payment of the debt, without surrender of the note, the agreement by the creditor to accept in discharge of the debt a less sum in money than the debtor owed was a nude pact, constituting no bar to a recovery of the balance. Those cases, therefore, do not at all conflict with the settled rule above announced, and which has also been thus stated: 'When a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed in satisfaction operates as an accord and satisfaction, as the rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply when the plaintiff's claim is disputed or unliquidated. In such case the concession made by one is a good consideration for the concession made by the other. The fact that the creditor was not legally bound to make any abatement of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered had he brought action, does not in any way affect the rule.' 1 Cyc. 229."

While there is a note in this case, it was in dispute whether it evidenced the debt except as to \$190. One hundred dollars of the indebtedness was in dispute, as much as if there was a separate note evidencing it, and, of course, a court of chancery would not enforce the note, as between the parties to it, except there was a consideration for it. Where there is no dispute as to the amount due, the debtor has no right to ask the creditor to accept less than is due in settlement; and, if the creditor does accept a less amount, and agree not to collect the balance, the agreement is void because not supported by a consideration. But, where there is a dispute as to the amount, and the debtor pays all that he claims is due, and the creditor accepts it in discharge of his claim, there is a consideration.

The payment of the \$190 was made on the following facts and stated conditions: Respondent sent plaintiff a check for \$190, on its face reading:

"Headland, Ala., March 20, 1914.
"The Farmers' & Merchants' Bank 61-203:
"Pay to the order of J. G. Owens \$190.00, one hundred ninety and no/100 dollars, in full payment of purchase price of mule bought from you on the 22 Jan., 1914. S. R. Brackin.
"Paid Mar. 26, 1914.
"Farmers' & Merchants' Bank."

This check was sent in a letter as follows:

"March 20, 1914.
"Mr. J. G. Owens, Dothan, Ala.—Dear Sir: I inclose herewith my check for one hundred and ninety (\$190.00) dollars, in full payment of my note executed to you on or about the 22 day of Jan., 1914, for the sum of one hundred and ninety (\$190.00) dollars for the purchase price of the mule bought from you on that date.
"Return this check to me at once at Headland, Ala., if same is not accepted in full payment of this said note.
"Yours truly."

And it was preceded by a letter as follows:

"February 26, 1914.
"Mr. J. G. Owens, Dothan, Ala.—Dear Sir: In reply to yours of the 20th inst., will say that you know as well as I do that the note which Cooton fixed up and that I signed for the mule in question was for only \$190.00; you also know the present condition of the note and what it calls for, and so does several other good men that a jury will believe without question.
"You also know that I was down at Dothan and offered to give you your mule back for my note and you refused to do it. You also know that if I should pay the note of \$190.00 that I gave you within sixty days from the date of making same there was to be no interest but if the note run over till fall there was to be 10% interest added. You also know that where there was once a figure 1 in said note that there is now a figure 2, that where there was once the letters 'o-n-e' there is now written over said letters the following letters, 't-w-o.' The note shows this and I can establish that fact, and you know the silent voice of the note speaks on this matter in such tones that can not be contradicted.

"I am going to treat you fair in this matter, I am going to send you a check for \$190.00, the face of my note, and what my note called for when I signed it, upon receipt of this check you must forward me my note, this done all is well, otherwise we will see what there is in this matter in every detail.

"You will receive my check within sixty days from the time this note was given for the sum I executed my note for; you can accept this in full settlement of this matter and the matter will be over with so far as I am concerned, or you can reject it and we will let the courts go into every detail of this matter.

"Yours truly, S. R. Brackin."

The complainant could not accept this tender on these conditions and then hold the respondent for the other \$100. What was said in *Hand's Case*, supra, 147 Ala. 567, 41 South. 80, is apt and conclusive here:

"The plaintiff must have known the tender was made on condition, and, having accepted and collected the check, was bound by the condition. 1 Cyc. 333. 'While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet when made in full of the amount due and accepted, without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition

that he receive it in full of his claim; but, if he accept it, he is bound by the condition, and will not be allowed to keep the money and repudiate the conditions.' *Hanson v. Todd*, 95 Ala. 328, 10 South. 354. The plaintiff, no doubt, in the course he pursued, supposed he was safe in doing so, because a somewhat similar action was held in *Hodges v. Tenn. Imp. Co.*, 123 Ala. 573, 26 South. 490, not to constitute full satisfaction of the debt; but that case involved an undisputed indebtedness and is distinguishable from this."

For these reasons, the decree of the chancellor is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

WILLIAMS, Probate Judge, v. STATE ex rel. MOBILE LIGHT & R. CO.

(1 Div. 917.)

(Supreme Court of Alabama. Feb. 10, 1916.)

TAXATION — 526 — FRANCHISE TAXES — ASSESSMENT.

Revenue Law (Acts 1915, p. 397) § 16, imposes on private corporations franchise taxes, but does not provide when such taxes shall be paid. Section 8 provides that all taxes otherwise directed shall become due and payable on the 1st day of October in each year. Acts 1915, p. 495, § 18, prescribing and fixing the license or privilege tax to be paid by every person, provides that on January 1, 1916, there shall be collected a three-fourths license tax, which license shall expire September 30th, and the licenses thereafter taken out shall expire at that time. *Held*, that the time for payment of franchise taxes was governed by Code 1907, § 2403, declaring that all licenses shall expire on the 31st day of December in each year, and by Acts 1911, p. 184, §§ 33E, 33G, making similar provisions as to licenses; section 8 of the Revenue Act applying only to other taxes levied, while the same license tax act has no application to corporation franchises.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 969; Dec. Dig. 526.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Petition by the State of Alabama, on the relation of Mobile Light & Railroad Company, for writ of mandamus directed to Hon. Price Williams, as Judge of Probate of Mobile county, directing him to issue a franchise license covering the year from January 1, 1916, to December 31st, both inclusive. From the decree granting the mandamus as prayed, respondent appeals. Corrected and affirmed.

The petition alleges that prior to the approval of the act of September 14, 1915, petitioner had paid his franchise tax for the year 1915, as required by law, and that said license tax covered a period from January 1, 1915, to December 31st, inclusive. It is further alleged that prior to December 31, 1915, the commissioners' court of Mobile county at a regular meeting thereof levied a county franchise tax of 20 cents on every \$1,000 of the capital stock of domestic cor-

porations for county purposes. It is further alleged that petitioner has a capital stock of \$2,225,000, and on Friday, December 31, 1915, tendered to Price Williams, as such judge of probate, \$1,013, and requested from him the issuance of a license covering the period from January 1, 1916, down to and including September 30, 1916, which tender the judge of probate refused to receive, and that petitioner thereupon tendered to said Price Williams the sum of \$1,350.50, and requested him to issue a license from January 1, 1916, to September 30, 1916, both inclusive, which petitioner refused to receive, and refused to issue license. It is then alleged that petitioner tendered said last-mentioned sum to the said judge of probate as such judge, in payment of whatever franchise tax, state and county, which "might be due and payable by your petitioner for the period including the 1st day in January, 1916, which said tender the said Price Williams, as such judge of probate, accepted, and your petitioner then demanded the issuance of a state and county franchise license tax covering the year 1916, from the first to the last day thereof, inclusive," but that said judge of probate declined to issue such license. The decree was that the judge of probate accept the sum of \$1,013 in payment of the franchise tax down to and including September 30, 1916, and issue license accordingly.

W. L. Martin, Atty. Gen., and L. E. Brown, Asst. Atty. Gen., for appellant. Harry T. Smith & Caffey, of Mobile, for appellee.

PER CURIAM. While section 16 of the new revenue law (Acts 1915, p. 397) fixes a franchise tax on all corporations and provides for the payment and collection of same, it does not attempt to fix the time for the payment of same or the commencement of the tax year. Therefore the time for the payment of a franchise tax and the period that the same should cover is fixed by Acts 1911, p. 184, §§ 33E and 33G, and Code 1907, § 2403. Section 8 of the revenue law of 1915 (page 392) does not apply to the franchise tax mentioned in section 16 of said act, as it does not apply to taxes not otherwise directed in the act, but otherwise directed by any law. Indeed, counsel for appellant does not contend that section 8 of the revenue act applies to the franchise tax as covered by section 16 of said act, but does insist that the franchise tax is a license tax, and the time for paying same and the period it should cover is controlled by section 18 of the act of 1915 (page 489), providing and fixing the license or privilege tax to be paid by every person, etc. It may be that a franchise tax has been regarded in some instances as a license tax, and has been spoken of indiscriminately as a license tax, though a distinction has been generally

recognized. *City of Montgomery v. Kelly*, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43. The case of *Bigbee Fertilizer Co. v. Smith*, 186 Ala. 552, 65 South. 37, dealt with a remedial statute which provided for the refund of "license money," and, as a license was issued in each instance, we hold that it applied to the refund of a privilege tax, as well as a license tax. In the case at bar, however, the Legislature has made and recognized a distinction between a franchise tax and a privilege or license tax by dealing with them differently in separate and distinct acts, and we are satisfied that it was not intended that section 18 of the license tax act refers to the franchise tax, as provided by the revenue act in section 16 of same. Section 18 of the license tax act only applies to licenses therein treated, and not to taxes provided by the revenue act, which is a separate and distinct law from the license act. We therefore hold that the franchise tax provided by section 16 of the revenue act of 1915 (page 397) is due and payable the 1st of January, and should cover a calendar year; that is, from January 1st to and including December 31st.

The law and equity court properly awarded the mandamus, but should have directed the issuance of the franchise license for the entire year, instead of for nine months, as the relator offered to pay the full amount due. The judgment of the trial court in awarding the mandamus is affirmed, but is corrected so as to direct that the license be issued for the full year upon payment of the amount provided by section 16 as a franchise tax.

The judgment of the law and equity court is affirmed in part, but is corrected in part, and one is here rendered directing the respondent to issue a license to the relator for the full year 1916 upon payment of the amount required by section 16 of the revenue act of 1915 (page 397).

Affirmed in part and corrected.

ANDERSON, C. J., and McCLELLAN, SAYRE, and GARDNER, JJ., concur.

TEASLEY, Judge, v. HIX-GRAVELY CIGAR CO. (3 Div. 232.)

(Supreme Court of Alabama. Feb. 10, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Application by the Hix-Gravelly Cigar Company for writ of mandamus against Charles B. Teasley, as Judge. From a decree granting mandamus, respondent appeals. Corrected and affirmed.

W. L. Martin, Atty. Gen., for appellant. George W. Jones, J. M. Foster, and J. B. Jones, all of Montgomery, for appellee.

PER CURIAM. Corrected and affirmed upon the authority of *Price Williams v. Mobile Light & Railroad Co.*, 71 South. 99.

BOWER, Tax Collector, v. AMERICAN LUMBER & EXPORT CO. (6 Div. 213.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. TAXATION \S 604—REMEDIES OF TAXPAYERS—EQUITY JURISDICTION—RECOVERY OF TAXES.

Equity will afford no relief to or for a complaining taxpayer or one assessed as a taxpayer, unless his case presents some special matter of equitable cognizance; mere illegality, hardship, or irregularity being insufficient to justify the interposition of equity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1228, 1228½; Dec. Dig. \S 604.]

2. TAXATION \S 530—ASSESSMENT—COLLECTION.

Where a tax charged on a subject of taxation has been once seasonably paid, it cannot be again rightfully collected or assessed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 985, 988; Dec. Dig. \S 530.]

3. TAXATION \S 406—CORPORATIONS—ASSESSMENT—OMITTED PROPERTY.

Under Code 1907, \S 2032, subd. 9, requiring a corporation to make return to the assessor of its capital stock and its par value per share, and to make at the same time a return of all taxable personal and real property, whereupon the assessor must deduct the aggregate amount of the assessment of real and personal property from the aggregate of the assessment of all shares of the capital stock, the remainder, if any, affording the assessed value of the entire capital stock, the failure of a corporation to make a statement of its solvent credits for taxation does not, such credits being included in the taxable value of its capital stock, render the corporation liable to subsequent assessment on such credits as if they were omitted property; for, while the practice of omitting such credits is improper, the state has collected taxes thereon.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. \S 406.]

4. TAXATION \S 530—ASSESSMENT—VOLUNTARY RETURNS.

Where a corporation which omitted a statement of its solvent credits, such credits being assessed to its capital stock, thereafter furnished the assessor with a statement of such credits on his demand, the return did not, though voluntarily made, warrant taxation on such credits; taxes thereon having already been paid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 985, 988; Dec. Dig. \S 530.]

5. TAXATION \S 541—PAYMENT—RECOVERY BACK.

Where a corporation which had omitted a statement of its solvent credits at the request of the tax collector furnished a report of such credits, and, though taxes were not due, paid them to avoid the collector's levying execution on its property, it was entitled to recover such payment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1002; Dec. Dig. \S 541.]

6. TAXATION \S 543(1)—PAYMENT—REMEDY OF TAXPAYER—EQUITY JURISDICTION.

Where a corporation, to avoid the tax collector levying execution against its property, paid taxes illegally assessed, it was not entitled to equitable aid in recovering the same; for it must be presumed to have known its rights, and it could have withheld payment or invoked the remedy provided by Code 1907, \S 2340-2347.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1006; Dec. Dig. \S 543(1).]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Bill by the American Lumber & Export Company against P. B. Bower, as Tax Collector, to recover a sum of money paid voluntarily to defendant, as Tax Collector. Decree overruling demurrers to the bill, and defendant appeals. Reversed and remanded.

As last amended, the bill shows that complainant has always returned its property for taxation fully and without evasion, but prior to July, 1914, it did not list separately its solvent credits, which were included in and taxed as a part of the value of its capital stock, and that the solvent credits were not deducted therefrom as provided by law; that for each of the six years last preceding the filing of the bill, as well as for the current year, the complainant made its return of property and shares of stock for assessment according to the instructions of the tax assessor, and, acting upon his advice and according to his instructions in making the same, it had never failed to make return of any of its property for the purpose of evading or avoiding or escaping taxation upon the same; that prior to the decision of the Supreme Court of Alabama holding the solvent credits law as constitutional it was generally believed that the law did not require solvent credits to be listed for taxation, and that the tax assessor shared this erroneous belief, and therefore misled and improperly advised complainant by instructing it to make its returns, without separately listing its solvent credits, thereby causing the value of such solvent credits not to be deducted for the value of its shares of capital stock, as the same might have been under the law. Paragraph 6 of the bill alleges that during the month of July, 1914, or about that time, the back tax commissioner of Jefferson county sent out a great number of mandatory notices requiring the taxpayers of said county to come to his office and make returns of their solvent credits; that complainant received such a notice, and in answer thereto its president, Fred Larkin, appeared before said back tax commissioner, and stated substantially the matters hereinabove averred, and explained the manner in which the complainant's solvent credits had been taxed as aforesaid, but the said deputy then and there instructed Larkin that it would be necessary for said solvent credits to be listed as escaped property, and said back tax commissioner did then and there order and require said Larkin, as president of the complainant, to make return of complainant's solvent credits, which said Larkin accordingly did, as president of said corporation. The bill further alleges that, having made the return of the solvent credits voluntarily, it has no adequate remedy at law for the recovery of the money paid, and for not deducting same from its capital stock assessment. The bill further alleges that the payment of this sum, along with the penalty provided for failure to make the same, de-

prives complainant of its property without due process of law. The prayer is for general relief, and specially that the court order and decree that the said sum of money paid to respondent as aforesaid be returned to complainant.

Frank S. White & Sons, of Birmingham, for appellant. Allen, Fisk & Townsend, of Birmingham, for appellee.

McCLELLAN, J. The matter of controversy here brought under review results from the ruling of this court sustaining the validity of the statute subjecting "solvent credits" to taxation. Code, § 2082, par. 1, subd. 7; *State v. Alabama Fuel & Iron Co.*, 188 Ala. 487, 66 South. 169, L. R. A. 1915A, 185. Before that deliverance was made the expression to the contrary in the opinion in *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947, was generally regarded as decisive of the invalidity of the provision subjecting "solvent credits" to taxation. The expression was found upon full consideration to be obiter dictum. At the recent session of the Legislature "solvent credits," other than those specially therein excepted, were exempted from taxation. Acts 1915, p. 107.

The complainant (appellee), a corporation, filed this bill against the tax collector, Bower. The bill was twice amended. As finally constructed, the prayer of the bill is that the court order and decree the return to complainant of a certain sum of money which it has paid to the tax collector as taxes charged against the complainant, together with prayer for such other, different, or additional relief as to the court might seem just and proper. The object sought to be attained is the return to the complainant of money paid by it to the tax official in discharge of an exaction made of it under the tax laws of the state. The complainant's assessments for the years 1909 to 1914, inclusive, were governed by the provisions of subdivision 9, Code, § 2082. The system therein provided requires the corporation to make return to the assessor of its capital stock and its value per share, together with possible data serviceable in arriving at its value, and also to make at the same time a return to the assessor, duly verified, of all taxable personal and real property owned by the corporation and its value or values, whereupon the assessor, if the values noted were satisfactory to him, must deduct the aggregate amount of the assessment of real and personal property from the aggregate of the assessment on all the shares of the capital stock of the corporation, and the remainder, if any, affords the assessed value of the entire capital stock of the corporation; but, if the aggregate value of the shares does not exceed the aggregate value at which the real and personal property is assessed, then no tax is demandable or collectible on the shares. The complain-

ant regularly assessed at value the shares of its capital stock for the years 1909 to 1914, inclusive, but did not for those years make return of the "solvent credits" owned by it, thus rendering impossible the deduction of the aggregate assessed value of this personal property from the aggregate value of all shares of its capital stock. After notice and in response to the urgent solicitation of the tax commissioner of Jefferson county, the corporation's president made a verified return of its "solvent credits" for the years 1909 to 1914, inclusive, at an agreed like value for each of these years. On this assessment, as for escaped or omitted subjects of taxation, the corporation has been required to pay the collector, notwithstanding protest, it is averred, \$720, being the principal sum and an additional 10 per cent. penalty upon the said return, together with interest. It is asserted in the amended bill that this exaction was and is unconscionable, illegal, and should be returned, for that the "solvent credits" were not escaped or omitted subjects of taxation; that the full assessment of the capital stock and the punctual payment of the annual taxes thereon for the years 1909 to 1914, inclusive, comprehended the value of the "solvent credits" assessed by the tax commissioner, the value of the capital stock not exceeding during those tax years the value of the "solvent credits" in question; that the omission to note "solvent credits" when the corporation made its returns for the years 1909 to 1914, inclusive, was due at the time to the generally accepted view that "solvent credits" were not taxable; that "the assessor, sharing in this erroneous belief, misled and improperly advised complainant by instructing it to make its returns without separately listing its solvent credits, * * * thereby causing the value of said solvent credits not to be deducted from the value of its shares of capital stock; * * *" that in response to notice from the tax commissioner the complainant's president appeared and stated to an authorized deputy substantially what has been before recited, and explained to him the manner in which complainant claims its solvent credits had been taxed, but nevertheless the deputy instructed the complainant's president that it was necessary for the solvent credits to be separately listed as escaped property, and thereupon ordered and required the complainant's president to make return of the solvent credits for the years 1909 to 1914, inclusive, which he accordingly did.

[1] This court has repeatedly ruled that equity will afford no relief to or for a complaining taxpayer, or one assessed as a taxpayer, unless his case presents some special matter of equitable cognizance. *Oates v. Whitehead*, 173 Ala. 209, 55 South. 803, and cases therein noted. Illegality, hardship, or irregularity alone in respect of taxation or of its exaction in a concrete case will not suffice to justify the interposition or action

of a court of equity at the instance of a complaining taxpayer. Authorities *supra*.

[2] The sum of complainant's contention is that it, in fact, assessed and paid, at the regular periods, all the taxes properly exactable on or for the solvent credits here involved. The facts averred show this to be true. This court has heretofore held that, when the tax charge on a subject of taxation has been once seasonably paid, it cannot be again rightfully collected (*Pickler v. State*, 149 Ala. 669, 42 South. 1018), and that, where the taxes have been paid, a sale of property to effect a second collection is void (*State Land Co. v. Mitchell*, 162 Ala. 469, 472, 50 South. 117). A valid second assessment cannot be made of a subject of taxation that has been already assessed for taxation.

[3] Under the system established by subdivision 9 of section 2082, outlined before, for the assessment of corporations, the purpose is to assess the capital stock, to ascertain and fix its aggregate value, and to avoid double taxation of corporate property by exempting the stock value that is represented, entire or pro tanto, by its taxable real and personal property. To the extent that the assessed stock value is represented by the value of real and personal property owned by the corporation, the value of such real and personal property is, in fact, necessarily comprehended in the assessment of the capital stock; and, if the value representative of the personal and real property does not exceed the aggregate of the assessed value of the capital stock, the assessment of the value of the capital stock is an assessment of the representative value of the personal and real property owned by the corporation. In these circumstances the failure, from whatever cause, to separate in the return the stock value from the value of the real and personal property, does not, and did not in this instance, allow the characterization or treatment of the value of the representative real or personal property owned by the corporation as an escaped or omitted subject of taxation. Manifestly a subject of taxation which has been, in fact, assessed and the tax charge paid cannot be regarded as an escape. If a corporation owns and assesses personal or real property, or both, of an assessed value equal to or exceeding the aggregate value of its capital stock, and omits entirely to assess its capital stock for taxation, and pays the full tax charge on the assessment, such capital stock is not an escaped or omitted subject of taxation, for the evident reason that, under the system provided, the assessment and payment supposed discharges the obligation the corporation owes to the taxing authority. The omission to separate, or to separately list the stock value and its representative value in personal and real property, or either, is, of course, a dereliction not to be commended; but such an omission does not affect the substance of the duty and obligation of the corporation

to satisfy the demand of the taxing authority.

[4, 5] On the facts averred in the amended bill, the assessment by the back tax commissioner was but a reassessment of a subject of taxation that had been theretofore assessed and the tax charges upon which had been paid by the corporation for the years 1909 to 1914, inclusive, and hence was a nullity. Being void for the reason stated, the return exacted by the tax commissioner, though it was in a legal sense voluntarily made, did not effect to bind or to conclude the appellee in the premises. 1 Cooley on Taxation (3d Ed.) pp. 618, 619; C. B. & Q. R. Co. v. Cass County, 51 Neb. 369, 70 N. W. 955. A different rule has been recognized in some other jurisdictions and by text-writers where the return, voluntarily made, has been held to conclude the taxpayer at least as to the nature, title, and value of his property. 37 Cyc. pp. 994, 995, and notes. There is no sound reason, suggested by justice or by public policy, that would found such an estoppel upon the mere fact that the taxpayer made voluntary return of property for taxation which, in fact, was not for that tax period a subject of taxation; the tax charge having already been satisfied for the period to which the return was referable. The assessment as for an escape being wholly unauthorized, the tax, as well as any penalty or fee incident thereto, was not due from the appellee, and could not be lawfully exacted of it. The ninth paragraph of the amended bill is as follows:

"That the complainant was assessed the sum of \$720 as principal sum and additional 10 per cent. penalty upon said return of solvent credits, with interest, which sum it has been required since the commencement of this proceeding to pay in order to prevent an impending levy of execution upon certain of its properties, and which sum it has duly paid under protest to the above-named respondent, as tax collector, with due and sufficient notice to him that it denied the right to require payment of the same."

According to the averments of the quoted paragraph of the bill as last amended, the payment of the money to the tax collector was involuntary, not voluntary. *Raisler v. Mayor, etc.*, 66 Ala. 194; *Prichard v. Sweeney*, 109 Ala. 651, 657, 658, 19 South. 730; *Lamborn v. County, etc.*, 97 U. S. 181, 24 L. Ed. 926, and other authorities therein cited. The facts averred show a right in the appellee to recover the money paid to the collector under the circumstances disclosed. *Raisler v. Mayor, etc.*, supra; *Erskine v. Van Arsdale*, 15 Wall. 75, 77, 21 L. Ed. 63.

[6] From the averments of paragraph 9 it appears that this cause was pending against the collector when the payment by the appellee was compelled. Notwithstanding the right of the appellee to have the entire sum restored, the appellee has mistaken its remedy. There is nothing averred in the amended bill that would justify the interposition of a court of equity. The appellee was fully advised of the facts. It must be held to have

known what the law was—to have known its legal rights. It was not warranted in relying upon misinformation or misdirection of officials as to what its legal rights were. There was no fraud averred. The appellee might have brought its action in a court of law against the tax collector, and therein have shown the facts alleged in its amended bill. If the appellee did not desire to proceed against the collector, it might, as far as the asserted and demanded tax was concerned, have invoked the remedy afforded by article 16 of chapter 45 of the Political Code. The amended bill is without equity. The demurrer thereto was erroneously overruled.

The decree is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

BROWN v. SHORTER et al. (6 Div. 95.)
(Supreme Court of Alabama. Feb. 10, 1916.)

1. APPEAL AND ERROR ⇐725(2) — ASSIGNMENT OF ERROR—ASSIGNMENT ONLY PARTIALLY GOOD.

Where some of several pleas were not subject to any grounds of demurrer assigned, the assignment of error that the trial court erred in overruling demurrers to all such several pleas must fail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3004; Dec. Dig. ⇐725(2).]

2. APPEAL AND ERROR ⇐1078(1)—ASSIGNMENT OF ERROR—WAIVER.

Assignments of error, not argued by counsel's brief, must be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ⇐1078(1).]

3. TRIAL ⇐253(1)—INSTRUCTION — IGNORING ISSUES.

A proper charge on a single issue, which ignored the other issues made by special counts and required a verdict on the whole case, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 614; Dec. Dig. ⇐253(1).]

4. BILLS AND NOTES ⇐489(3)—PAYMENT.

Where defendants gave notes to plaintiff to secure back royalties due him by former lessees of his coal mine, the consideration of the notes being the acquisition by defendants of mining equipment and improvement left by the former lessees and the execution by plaintiff to defendants of a new lease of the mine, and defendants thereafter transferred their lease to a coal corporation, which assumed the payment of defendants' notes to the plaintiff, plaintiff assenting but retaining his rights against defendants under the original lease, and where such coal company failed in its undertaking and the plaintiff sued it, recovering a judgment, covering the royalty debt secured by defendants' notes, which was partially satisfied, in suit by plaintiff on one of defendants' notes to recover the remainder, under issues framed by special pleas, such as one charging that plaintiff took possession of other improvements than those sold under execution on his judgment, of sufficient value to satisfy the whole debt, defendants could prove the value of the improvements made by them on the mining property, including only such as were not sold under execution by plain-

tiff and which came into his hands as assets of the coal company to which defendants transferred, since by the terms of the lease such improvements belonged to defendants or their assignees, though subject to plaintiff's lien for royalties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1590-1595; Dec. Dig. ⚡ 489(3); Pleading, Cent. Dig. § 1325.]

5. BILLS AND NOTES ⚡511 — PAYMENT OR SATISFACTION — PROPERTY IN HANDS OF PAYEE—VALUE.

In suit on a note by the lessor of a coal mine against lessees who gave their notes to secure back royalties, and thereafter transferred to a coal company, which assumed payment of the notes, the lessor suing such coal company upon default and partially satisfying a judgment, including the amount covered by the notes, it was proper to show the value of a compressor in the mine, equitable title to which was in the coal company, in connection with evidence tending to show that the lessor took possession of it as an asset of the company with which he should be charged as a credit on his judgment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1760-1770; Dec. Dig. ⚡ 511.]

6. BILLS AND NOTES ⚡432—VALUE OF PROPERTY IN HANDS OF PAYEE.

Where lessees of a mine, who gave the lessor notes to secure back royalties, transferred to a coal company, which assumed the notes and thereafter defaulted, the lessor suing and recovering judgment which included the amount of the notes, and the coal company had sufficient property not sold under execution and which came into the lessor's possession to satisfy the unpaid balance of the judgment, the lessor could not recover against the original lessees on the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1259, 1451-1458, 1460; Dec. Dig. ⚡432.]

7. BILLS AND NOTES ⚡439—PAYMENT.

Where the transferee of lessees of a coal mine assumed payment of the lessees' notes to the lessor, and satisfied the debt, the lessor could not recover against the lessees on a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1281-1285; Dec. Dig. ⚡ 439.]

8. MINES AND MINERALS ⚡70(6)—PARTIES BOUND — LEASES — NOTES FOR ROYALTIES — ACTIONS.

Lessees of a coal mine, who gave notes to the lessor to secure back royalties owed the lessor by another party, were not liable for the original obligation, but only on the notes.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 197; Dec. Dig. ⚡ 70(6).]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

"Not to be officially reported."

Assumpsit by W. T. Brown against H. R. Shorter and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The complaint declares on a promissory note, and also on an account. The special pleas set up a material alteration in the note sued on, after its delivery, and the fact of a former decree secured by plaintiff in the chancery court against the Plateau Coal Company embracing this same demand. On the first question the evidence is in dispute,

but on the second question the facts are without substantial dispute, and are substantially as follows: The note sued on, along with another note, was given to plaintiff by defendant, to secure some back royalties due plaintiff by former lessees of his coal mine, the consideration of the notes being the acquisition or use by defendants of certain mining equipment and improvement left the said former lessees, and the execution by plaintiff to defendant of a new lease on the same mine. Defendants soon afterwards transferred their lease to the Shorter Coal Company, a corporation, and a part of the consideration therefor was the assumption and payment by said company of defendants' said notes to the plaintiff. Plaintiff assented in writing to the transfer, but expressly retained his rights against the defendants under the original lease contract. The Shorter Coal Company changed its name to the Plateau Coal Company, and, having failed in its undertaking, plaintiff filed his bill in the chancery court, praying for a cancellation of the lease, an accounting by respondent for all royalties due complainant, and a judgment therefor, with a lien on the mining equipment and improvements for its satisfaction. The complainant proved the back royalty debt secured by the two notes of defendants, and recovered a judgment for \$3,750, which included the amount covered by the two notes, and the royalties due directly from the coal company. The mining equipment, consisting of personalty, was sold under execution and brought \$2,000, which was credited as a payment on the decree.

McGregor & McGregor, of Jasper, for appellant. Gray & Wiggins, of Jasper, for appellees.

SOMERVILLE, J. [1, 2] The first assignment of error is that the trial court erred "in overruling the demurrers to pleas A, B, C, D, E, and F." Some of these pleas, notably B and F, are clearly not subject to any grounds of demurrer assigned, and hence the whole assignment must fail. Moreover, neither the first nor the second assignment of error is argued by brief of counsel, and must therefore be treated as waived.

[3] Charge 1, refused to plaintiff, was a proper charge on the issue of unauthorized alteration of the note, but was properly refused because it required a verdict for plaintiff on the whole case, thereby ignoring the issues made by the other special counts.

[4] As the issues were framed by these special pleas, some of which, it may be conceded, were fatally defective on demurrer, but which nevertheless went to the jury, the trial judge did not err in allowing defendants to prove the value of the various improvements made by them on the mining property, including, however, only such as were not sold under execution, and which

came into plaintiff's hands as assets of the company; since by the terms of the lease they belonged to defendants, or their assignee, though subject to plaintiff's lien for royalties.

[5] Plea B especially charges that plaintiff took possession of other improvements than those sold, of sufficient value to satisfy the whole debt. While the legal title to the "compresser" was not in the coal company, yet its equitable title was; and it was proper to show its value in connection with evidence tending to show that plaintiff took possession of it as an asset of the company, with which he should be charged as a credit on his judgment. No such evidence was offered, and the undisputed evidence shows the contrary. The trial judge, therefore, erred in allowing defendants to prove the value of the compresser.

For the same reason there was error in allowing proof of the value of the steel rails laid by defendants, which, as the evidence shows, were sold under execution, and therefore already credited on the decree.

[6, 7] If there was sufficient property of the Plateau Coal Company (which was not sold under execution and which came into plaintiff's possession) to satisfy the unpaid balance of the decree, then the jury would properly find for defendants. But it was erroneous to give such an instruction with the parenthetical clause omitted, as the record shows was done. The question of course is, Was the judgment satisfied either by property sold by the court or by property otherwise appropriated by plaintiff? If this debt had been already satisfied by the Plateau Coal Company, then of course plaintiff could not recover in this suit. And the charge to that effect, even if abstract, was not reversible error.

[8] Defendants were not liable on the original demands for which the notes were given, and hence there was no error in charging out the second count of the complaint, based upon an account. They were liable, if at all, on their promise to pay, evidenced by these notes.

The assignments of error above sustained were not waived by appellant, being sufficiently argued in brief, and they must work a reversal of the judgment.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

O'REAR v. AMERICAN TRUST & SAVINGS BANK. (6 Div. 64.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. BILLS AND NOTES — 485—ACTIONS—ISSUES NOT PROVED.

In an action against an indorser of a note, where the name of the payee was indorsed on the note, and neither the execution nor assignment

to plaintiff is denied by sworn plea as required by Code 1907, § 5332, the note was properly admitted in evidence without other proof that it had been executed or assigned to plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1543, 1552; Dec. Dig. — 485; Pleading, Cent. Dig. § 866.]

2. BILLS AND NOTES — 525—ACTIONS—EVIDENCE.

That a note was seen after its negotiation to the plaintiff in the hands of an attorney was insufficient to show that the plaintiff was not a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. — 525.]

3. APPEAL AND ERROR — 907(2)—REVIEW—PRESUMPTIONS.

Where the contents of a letter referred to in the record on appeal do not appear, it will be assumed that they tend to support the trial court's conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2913, 2915, 2916; Dec. Dig. — 907(2).]

Anderson, C. J., and Gardner, JJ., dissenting.

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Assumpsit by the American Trust & Savings Bank against Caine O'Rear. From a judgment for plaintiff, defendant appeals. Affirmed.

The note was made by Caine O'Rear to one W. E. Thomas, and is alleged in the plea to have been given for 20 shares of the capital stock of the Standard Coal Company. The pleas further allege fraud, misrepresentation, and failure of consideration, going into details as to the fraud and misrepresentations complained of.

Gray & Wiggins, of Jasper, for appellant. Max J. Winkler and Victor Smith, both of Birmingham, and McGregor & McGregor, of Jasper, for appellee.

SAYRE, J. Suit by appellee as indorsee of a negotiable promissory note against the maker.

[1] The name of the payee was indorsed on the note, and, neither its execution nor assignment to plaintiff being denied by sworn plea (Code, § 5332), or at all for that matter, it was properly admitted in evidence without other or further proof that it had been executed and assigned to plaintiff.

[2, 3] The note in suit was executed May 4, 1912, and made payable January 1, 1914. The defense was that it had been obtained by the fraud of the payee, and that plaintiff, not being a holder in due course, was charged with notice of the fraud. The only evidence offered in support of the allegation that plaintiff was not a holder in due course was the testimony of the maker that he had seen the note in the possession of W. H. Smith, a lawyer, in January, 1913. This testimony was not corroborated by Smith, and was flatly contradicted by the officers of the plaintiff bank. But, of course, the jury

had a right to believe the maker, and we shall assume that they did. In view of the uncontradicted proof that the note had been negotiated in 1912, without notice of any defect in its consideration, to secure loans made by plaintiff to the payee in August and October of that year, there being no explanation by the maker of how or why Smith held the note in January, 1913, if he had it, we entertain the opinion that the isolated fact of such possession did not tend to cast any cloud upon plaintiff's previous and continued ownership in good faith. If Smith had the note in suit, there is nothing to indicate for what purpose he had it. It cannot be assumed that he got it from the payee, or, even if he did, that his temporary possession was inconsistent with the otherwise well-established and uncontradicted prior ownership of the plaintiff. Smith had for collection a claim of Thomas, the payee and indorser of this note, against O'Rear, the maker. But there is nothing to show that he had this note for any such purpose. There is also reference in the record to a letter written about that time by Smith to O'Rear, but the transcript, which purports to contain all the evidence, does not contain a copy of the letter. Assuming that it had some relevance to the point at issue between the parties, it must also be assumed that its contents tended to support the trial court's conclusion that plaintiff was entitled to the general charge which the court gave on its request.

Affirmed.

MCCLELLAN, MAYFIELD, SOMERVILLE,
and THOMAS, JJ., concur. ANDERSON, C.
J., and GARDNER, J., dissent.

BRANNAN v. SHERRY. (4 Div. 602.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. EXCEPTIONS, BILL OF \S 41(6)—PRESENTATION AND SIGNING.

That the bill of exceptions was presented to the presiding judge within the 90 days required by Code 1907, \S 3018, is attested by the fact that it shows it was signed by him within that period.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. $\S\S$ 70, 71; Dec. Dig. \S 41(6).]

2. EXECUTORS AND ADMINISTRATORS \S 221(1)—ACTION AGAINST—PRESENTATION OF CLAIM—BURDEN OF PROOF.

Plaintiff in an action against an executrix, by joining issue on the plea of the statute of nonclaim, assumes the burden of proof of presentation of the claim within the time provided by Code 1907, \S 2590, and in one of the ways provided by section 2593.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S\S$ 901, 1858, 1861-1863; Dec. Dig. \S 221(1).]

3. EXECUTORS AND ADMINISTRATORS \S 227(3)—CLAIMS—PRESENTATION—VERIFICATION.

Under Code 1907, \S 2593, providing that presentation of a claim against a decedent's estate may be made to the executor, or by filing

the claim or a statement thereof in the probate court, and that every such claim so presented to the executor "and" filed in the probate court must be verified, while presentation need not be to the executor personally and by filing in the probate court, whether made in the one or the other way, the claim must be verified.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S\S$ 814-816; Dec. Dig. \S 227(3).]

4. EXECUTORS AND ADMINISTRATORS \S 222(3)—CLAIMS—NECESSITY OF PRESENTATION.

To prevent the bar of the statute of nonclaim, actual formal presentation of the claim must be made by one having right to make the presentation; and mere knowledge by the executrix of its existence is not enough.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 766; Dec. Dig. \S 222(3).]

5. EXECUTORS AND ADMINISTRATORS \S 228(2, 3)—CLAIMS—PRESENTATION TO ATTORNEYS.

Presentation of a claim against decedent's estate to the attorneys of executrix is not a presentation to her authorized by Code 1907, \S 2593; and this though they then present it to her, they not being persons authorized to make the presentation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S\S$ 820, 822-824½; Dec. Dig. \S 228(2, 3).]

Appeal from Circuit Court, Barbour County; M. Sellie, Judge.

Action by P. T. Brannan against Janie Sherry, as executrix of John Sherry, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

G. L. Comer and McDowell & McDowell, all of Eufaula, for appellant. A. H. Merrill & Sons, of Eufaula, for appellee.

THOMAS, J. The cause is submitted on motion to strike the bill of exceptions, and on the merits.

[1] The cause was tried on December 2, 1914. The bill of exceptions, signed by the presiding judge, bears date February 27, 1915, and is indorsed, "Filed September 7, 1915." From an inspection of the certificate of appeal by the clerk of the circuit court, the latter date appears to have had reference to the filing of the bill of exceptions in his office. The appeal was taken to this court on September 20, 1915. Does it thus affirmatively appear from the record that the bill of exceptions was presented to, and signed by the presiding judge within 90 days from the day on which the judgment was entered? Code 1907, $\S\S$ 3018, 3019.

True, the bill of exceptions bears no date of presentation. It is evident, however, that it was presented and signed after the entry of the judgment, and within 90 days thereafter. Under the statute the bill must be tendered by the party supposing himself aggrieved, and if correctly stated, it is the duty of the presiding judge to sign the same, which thereby becomes a part of the record. Code, \S 3018. The time in which a bill of exceptions may be tendered or presented is "90

days from the date on which the judgment is entered," and the judge must indorse thereon, as a part of the bill, the true date of its presentation; and if the bill be correctly stated, it must be signed by him "within 90 days thereafter." Code 1907, § 3019. And the bill may be stricken from the record, on motion of a party to the record or of his attorney, if not "signed within the time required by law." Code 1907, § 3020. When the bill of exceptions is presented to, and signed by, the presiding judge within the time prescribed by law, it becomes a part of the record when brought here by appeal. *State ex rel. Tate v. Powell*, 184 Ala. 46, 50, 63 South. 542. The statute does not require that it be filed in the clerk's office within the 180 days from the date on which the judgment was entered. If filed within the time for taking the appeal, and the appeal is taken as required by the statute, then the bill of exceptions becomes a part of the record. *Edinburgh-American Co. v. Canterbury*, 160 Ala. 444, 450, 53 South. 823.

In *Box et al. v. Southern Railway Co.*, 184 Ala. 598, 64 South. 69, the record did not show a timely presentation to the presiding judge as required by the statute, and the decision was rested on the fact that "an examination of the bill discloses nothing from which the date of its presentation can be determined." Here the efficacious signing of the bill of exceptions by the presiding judge within the statutory period for presentation to him attests the timeliness of the presentation. The motion to strike the bill of exceptions is overruled.

[2-5] This suit was brought on March 19, 1913, by P. T. Brannan against Janie Sherry, as executrix of John Sherry, deceased. The contracts sued upon bore date of March 11, 1893, and had certain credits indorsed thereon. A verified statement of the claim was given to the attorneys of the executrix, and was indorsed: "Presented for payment, July 29, 1911. Janie Sherry, Executrix of the Estate of John Sherry, Deceased."

The original contracts described in the sworn statement were delivered to the attorneys for Janie Sherry as executrix of said estate for her inspection, and she "looked them over" in her attorney's office. The plaintiff and his attorney knew at the time the verified statement and the original contracts were left at the attorney's office that said attorneys were the attorneys of the executrix.

The evidence fails to show the date of the death of John Sherry, or the date of issue of letters testamentary on his estate, or the date of the qualification of Mrs. Janie Sherry as executrix of said estate. The burden is on the plaintiff to make out his case. Proper averments of the date of Sherry's death, and of the issue of letters testamentary, is contained in the complaint.

On defendant's plea No. 11, of the statute

of nonclaim, the plaintiff joined issue and thereby assumed the burden of proof of due presentation of the claim against the Sherry estate in accordance with the statute. *Weller & Son v. Rensford*, 185 Ala. 333, 64 South. 366; *McKenzie v. Matthews*, 153 Ala. 437, 44 South. 958; *Mitchell v. Lea*, 57 Ala. 46; *Evans, Adm'r, v. Norris et al.*, 1 Ala. 511. The plaintiff must therefore show compliance with sections 2590 and 2593 of the Code of 1907.

Claims may be presented against a decedent's estate, then, in either one of three ways: (1) By presenting the claim, duly verified, personally to the administrator or the executor (Peavy, Adm'r, v. F. & M. Nat. Bank, 132 Ala. 82, 84, 85, 31 South. 466, or (2) by "filing" the claim in question, duly verified, in the office of the judge of probate in which the letters testamentary or of administration were granted (Peavy, Adm'r, v. F. & M. Nat. Bank, supra; *Weller & Son v. Rensford*, supra); or (3) by filing a statement of the claim, duly verified, in the office of the judge of probate, etc. The statute as amended (Code of 1907, § 2593) expressly requires that "every such claim so presented to the executor or administrator and filed in the probate court must be verified by the oath of the claimant," to the effect that the amount claimed is justly due, or to become due, after allowing all proper credits. It is thus noted that the statute is materially changed by the addition of the words, "to the executor or administrator and filed in the probate court," after the word "presented," and before the words, "must be verified," in section 133 of the Code of 1896, which section was construed in *Nicholas v. Sands*, 136 Ala. 267, 33 South. 815, and in *Peavy, Adm'r, v. F. & M. Nat. Bank*, supra, not to require verification of the claim when it was presented personally to the personal representative.

It may be here stated that no reasonable construction of the amendment found in section 2593 (Code of 1907) would require a due presentation of the claim both to the personal representative and in the office of the judge of probate. Either one of the methods of due presentation is as efficacious as the other methods prescribed, and either one of the three may be pursued, at the election of the claimant.

It is axiomatic that letters testamentary could not issue before the death of the testator; and the date of this fact in the case at bar is not fixed by the testimony, nor is the fact of due presentation of the claim, which must have occurred after the issuance of letters testamentary, and within 12 months of its accrual, so established. The evidence is silent on these dates.

There is no pretense that the presentation was made by plaintiff's filing the claim in the office of the judge of probate. His proof must be of personal presentation to Mrs. Janie Sherry as executrix of the estate of

John Sherry, deceased. Mere knowledge of its existence, on the part of the executrix, will not prevent the bar of the statute. *Jones v. Lightfoot*, 10 Ala. 17; *Owens v. Corbitt*, 57 Ala. 92; *Smith v. Fellows*, 58 Ala. 467; *Allen v. Elliott*, 67 Ala. 432; *Jones v. Peebles*, 130 Ala. 269, 30 South. 564. The actual formal presentation of the claim must be made by one having the right to make the presentation. In *Jones v. Peebles*, supra, the court said:

"It is indispensable not only that the claim should be brought to the attention and knowledge of the executor or administrator, but this must be done by one having an interest in it, and a legal right to enforce its payment, and it must be evidenced by some act or word which indicates an intention to look to the estate of the deceased debtor for its payment." *Allen v. Elliott*, 67 Ala. 432, and cases cited. Or, to restate the principle in the language employed by *Stone, J.*, in *Smith v. Fellows*, 58 Ala. 472: "The result of our rulings on this question is, that to constitute a sufficient presentation, the nature and amount of the claim must be brought to the attention of the personal representative, by some one authorized in law or fact to make the presentation, and the representative must be notified, expressly or impliedly, that the estate is looked to for payment."

See, also, *Allen v. Elliott*, 67 Ala. 432; *Bank v. Hawkins*, 12 Ala. 755; *Jones v. Lightfoot*, 10 Ala. 17.

The attorneys for the executrix could not be the agent or the attorneys for the plaintiff claimant. The attorneys for the defendant openly held themselves out as the attorneys of the executrix and the estate. The claimant could not treat such agents and attorneys as his agents or attorneys. *Spratt v. Wilson*, 94 Ala. 608, 10 South. 209; *Commercial Fire Ins. Co. v. Allen et al.*, 80 Ala. 571, 1 South. 202.

As to presentation, the statutes governing must be followed. The statute does not authorize the presentation of a claim against an estate, to the attorneys representing its personal representative; neither does it warrant the presentation, to the personal representative of an estate, of the claim of a third person, by the attorneys of its personal representative. Decedents' estates should not be so bound, and the statute of nonclaim thus suspended. The orderly administration of estates requires adherence to the statute, to bind the estate to the payment of the just claim and suspend the statute of nonclaim.

It is not necessary to consider the statute of limitations, or the evidence as relating thereto. But we have carefully considered the evidence bearing on the issue of nonclaim, and find no error in the rulings of the trial court.

The case is affirmed.
Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

BROWNING v. ST. CLAIR COUNTY. (7 Div. 672.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. APPEAL AND ERROR ⇐661—RECORD—PETITION.

On the contest of a stock law election, where the probate court upon certiorari from the Supreme Court certified as part of the record omitted from the transcript a copy of the petition calling for a stock election, and which was part of the proceedings in the cause, the petition might be considered as part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2848, 2849; Dec. Dig. ⇐661.]

2. ANIMALS ⇐50(2)—STOCK LAW ELECTION—VALIDITY.

On appeal from the ruling in the contest of a stock law election the validity of the petition and order for the election, prescribed by Code 1907, § 5882, and of the proceedings in the commissioners' court, in view of section 455, prescribing the grounds of election contests, are matters not properly presented on the contest; as, if the election was void, there was nothing to contest.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 149-151; Dec. Dig. ⇐50(2).]

3. ANIMALS ⇐50(2)—STOCK LAW ELECTION—VALIDITY—REMEDY.

In such case the remedy for the review of such questions was by certiorari to quash the proceedings.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 149-151; Dec. Dig. ⇐50(2).]

4. ANIMALS ⇐50(2)—STOCK LAW ELECTION—PRESUMPTION OF REGULARITY—STATUTE.

Under Code 1907, § 3312, giving the court of county commissioners original and unlimited jurisdiction in regard to stock law elections, where the record affirmatively shows that the orders entered upon the minutes of the court in respect to the election contained all necessary and jurisdictional averments, and their regularity is not questioned, the proceeding should not be quashed upon a petition for certiorari.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 149-151; Dec. Dig. ⇐50(2).]

Appeal from St. Clair County Court; James L. Herring, Judge.

Contest of stock law election by J. R. Browning against St. Clair County. Judgment for contestee, and contestant appeals. Affirmed.

M. M. Smith, of Pell City, for appellant. James A. Embry, of Ashville, for appellee.

GARDNER, J. This cause originated in the contest of a stock law election for precinct No. 3, St. Clair county. From an adverse ruling, the contestant prosecutes this appeal.

[1] In response to a writ of certiorari from this court the probate court certified as part of the record omitted from the transcript a copy of the petition calling for a stock law election in said precinct. Upon submission of the cause motion was made by counsel for appellee to strike said petition from this record. The petition was a part of the proceedings in the cause, and we can see no valid reason why the same should not be con-

sidered a part of the record. The motion is denied.

[2, 3] The appeal is upon the record alone, and the only ground for reversal urged by counsel for appellant seems to be that the petition certified in response to the certiorari does not disclose that it was marked "filed," that no order whatever was made on the petition (Code 1907, § 5882), and that the court did not acquire jurisdiction to order the election. Ruling as to any other grounds of contest are not insisted upon.

The argument of counsel is directed to the validity vel non of the order for the election, and of the proceedings in the commissioners' court. We entertain the opinion that this is matter not properly presented in a contest of the election. See sections 5882 and 455, Code 1907. As said by this court in *Commissioners' Court v. Johnson*, 145 Ala. 553, 39 South. 910, if the "election was void, there was nothing to contest." The remedy for review of such questions is by certiorari to quash the proceedings. However, as we deem the matter of such character as should be determined without further litigation, we will discuss the question argued by counsel.

[4] The brief of counsel discloses that his reliance is upon that class of cases decided prior to what is now section 3312 of the Code, which gives the court of county commissioners original and unlimited jurisdiction in relation to such matters as we now have under review. The following quotation from the recent case of *Edwards v. Bibb County Com'rs*, 69 South. 449, is applicable here:

"Appellant relies on *Commissioners' Court v. Holland*, 177 Ala. 60 [58 South. 270], and the cases therein cited. When the cases cited * * * came up for decision the court of county commissioners was esteemed as an inferior tribunal of a strictly limited jurisdiction in respect of roads and stock law districts, and to its orders and sentences in such matters it was necessary that its records should show affirmatively the facts upon which its authority depended. It was to prevent the frequent miscarriages resulting from this status of the court's jurisdiction that the statute was amended (section 3312, supra) to make it a court of original and unlimited jurisdiction in relation to the establishment of roads and stock law districts. Uniformly it has been held under the statute in its present form that, where the record affirmatively shows that the court acquired jurisdiction of the subject-matter by the filing of a proper petition, as the record by its recital of facts found does show in this case, errors and irregularities intervening in the subsequent proceedings will not furnish ground for quashing the proceeding on common-law certiorari. *Benedict v. Commissioners' Court*, 177 Ala. 52, [58 South. 306]; *Cook v. Comma. Ct.*, 178 Ala. 394 [59 South. 483]; *Stephens v. Commissioners' Court*, 180 Ala. 581 [61 South. 917]; *Wright v. Commissioners' Court*, 180 Ala. 534 [61 South. 918]. See, also, *Kirby v. Commissioners' Court* [186 Ala. 611] 65 South. 163."

The case of *Stephens v. Commissioners' Court*, supra, is very much in point in the instant case.

The record before us shows that the orders

entered upon the minutes of the court of county commissioners in respect to the stock law election contained all necessary and jurisdictional averments, and the regularity of the orders of said court is not here attacked. The order calling for the election recites, among other things, that the petition was filed on November 4, 1913. In *Stephens v. Commissioners' Court*, supra, it was held that although the petition did not conform to the requirements of law, yet, as the order of the commissioners' court affirmatively adjudged that every jurisdictional requirement of the law was met, the proceeding should not be quashed upon the petition for certiorari. Speaking of the effect of the change of the provision of the Code as now found in section 3312, the opinion says:

"The effect of the amendment was to convert commissioners' courts, and courts of like jurisdiction, * * * unless 'otherwise provided by law'—a condition not present in this instance."

By what is here said we do not mean to indicate that it would be held, even in the absence of the change wrought by section 3312, that a failure to have the petition marked "filed," or to have any order indorsed on the petition itself, would affect the proceeding; the records of the court showing that the petition was, in fact, before the commissioners' court and acted upon. Indeed, we are inclined to the contrary view. However this may be, we think it quite clear that under the statute as it now exists, and under the decisions of this court, the point is not well taken.

We have given consideration to the only question presented in brief of counsel for appellant.

The judgment is affirmed.

Affirmed.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

ROE et al. v. DURHAM. (1 Div. 887.)
(Supreme Court of Alabama. Feb. 10, 1916.)

1. CORPORATIONS §630(1) — DISSOLUTION — EFFECT.

Where a corporation is dissolved by agreement and recorded declaration of all stockholders, under Code 1907, § 3510, the corporation, though the rule is otherwise when it has been dissolved by decree of the chancery court on petition of majority stockholders under section 3511, falls within section 3516 declaring that corporations whose charters expire by limitation and which are dissolved by forfeiture or other cause, except by judicial decree, exist as bodies corporate for the term of 5 years after dissolution for the purpose of prosecuting or defending suits, settling their business, disposing of their property, and dividing their capital stock, and hence a corporation so dissolved by agreement of its stockholders may within the 5-year period be joined as a party to a suit to hold it liable for the failure of its officers to comply with Code 1907, § 4105, declaring that when an execution or attachment is levied on the stock of the defendant in any corporation, the officer levying

shall declare the fact of the levy and demand of any corporate officer a statement in writing of the amount of the defendant's stock, and failure to furnish such statement shall render the corporation liable for the full amount of the judgment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482, 2483; Dec. Dig. ¶630(1).]

2. CORPORATIONS ¶396—PENALTIES—STATUTES.

A corporation is not liable under Code 1907, § 4105, declaring that when execution shall be levied on the stock of the defendant in any corporation, the officer shall declare the fact of the levy, and the corporation shall, under penalty of being liable for the judgment, furnish a statement of the amount of defendant's stock, for failure to furnish a statement of a defendant's stock where it did not appear that the defendant owned any stock whatsoever; hence a bill seeking to hold a corporation liable is without equity, where it did not show that the original defendant owned any stock in the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 683, 684, 1579-1584; Dec. Dig. ¶396.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by Joseph F. Durham against John T. Roe, Bell McGowin Roe, Lena McGowin, and the Roe Drug Company, to hold the corporation liable in judgment for a certain debt owed to the corporation by one W. T. McGowin, and to compel its payment out of corporate assets. From a decree overruling demurrers, defendants appeal. Reversed and rendered.

The parties named as respondents were, on November 14, 1914, directors and sole stockholders of the corporation which was on December 12, 1914, voluntarily dissolved by them, by proceedings under and in conformity with section 3510, Code 1907, whereby they came into possession of the corporate assets. The theory and equity, if any, of the bill are disclosed by the allegations of paragraph 3 as follows:

Complainant heretofore brought a suit in the circuit court of Mobile county, Ala., against one W. T. McGowin as defendant, and as such plaintiff in said suit, recovered on January 27, 1914, against said W. T. McGowin a judgment in the sum of \$2,326.16, together with \$9.65 costs, no part of which said judgment has ever been satisfied; that on September 1, 1914, complainant caused an alias execution to be issued on said judgment which said execution was on the same day levied on all the stock, shares, or interest of the said W. T. McGowin in the Roe Drug Company, a corporation; that the officer making said levy went to the office or principal place of business of said Roe Drug Company, a corporation, and demanded of an officer of said corporation, who was there present and who was not the defendant in the suit in which said judgment was rendered, a statement in writing under oath of the amount of W. T. McGowin's stock, the number of his shares or the extent of his interest in said corporation and left with said officer a copy of the writ; that the said corporation neglected or failed for more than 10 days after said levy to deliver to the officer making the levy or to any other officer duly authorized by law to make the returns, such statement in writing under oath of the particulars demanded by said officer and of the value of W. T.

McGowin's stock, shares, or interest in the said corporation. Wherefore complainant says that the Roe Drug Company became liable to him under the terms of section 4105, Code 1907, in the full amount of said judgment, \$2,335.81.

The following demurrers were interposed by the personal respondents:

- (1) There is no equity in the bill.
- (2) There is no allegation in the bill that W. T. McGowin, the defendant in the judgment mentioned in the said bill, was the owner or holder of any of the corporate stock of the alleged Roe Drug Company at the time the alleged demand was made on an officer of the said Roe Drug Company for a statement as to the amount of stock, or number of shares then held or owned by W. T. McGowin, the defendant in the judgment.
- (3) There is no allegation in the bill that W. T. McGowin, the defendant in the judgment, ever had at any time held or owned any stock or shares in the Roe Drug Company.
- (4) Because the complaint fails to allege the name of the officer upon whom the alleged demand was made.
- (5) Because the bill shows upon its face that it is an attempt to collect a penalty as against the dissolved corporation as provided for under section 4105, Code 1907, and is a proceeding to collect same under the provisions of section 3516, Code 1907, while the said latter section makes no provision for, nor embodies, nor does it authorize such a procedure as this against the directors or stockholders of a dissolved corporation for the collection of a penalty.

The corporation assigned an additional ground of demurrer, viz., its misjoinder, as a party respondent.

Gordon & Edington, of Mobile, for appellants. Hugh M. Caffey, Jr., and Gregory L. & H. T. Smith, all of Mobile, for appellee.

SOMERVILLE, J. [1] When a corporation has been dissolved by a decree of the chancery court on petition of its majority stockholders, under the provisions of section 3511 of the Code, it is not then within the influence of section 3516 of the Code, providing that:

"Corporations whose charters expire by limitation and which are dissolved by forfeiture or by any other cause, except by judicial decree, exist as bodies corporate for the term of five years after such dissolution, for the purpose of prosecuting or defending suits, settling their business, disposing of their property, and dividing their capital stock."

But a dissolution by the agreement and recorded declaration of all the stockholders, under section 3510 of the Code, unquestionably leaves the corporation within the terms of section 3516. See *Nelson v. Hubbard*, 96 Ala. 238, 246, 11 South. 428, 17 L. R. A. 375.

The respondent corporation is therefore still subject to a suit upon any liability which accrued prior to its dissolution in December, 1914. And it can make no difference whether the liability sued on grows out of a contract or a tort. It may be that the power given to the directors, by section 3516, to pay the corporate "debts," would not authorize them to pay claims in tort—a point which we do not decide. But, if that proposition be conceded, it would be a compelling rea-

son why a suit should lie against the corporation to convert the claim into a judgment debt, so that it could be paid by the directors.

It results that the corporation is not misjoined as a party respondent to the bill, and that, if the corporation is shown to be liable for the amount of the complainant's judgment against W. T. McGowin, by reason of the failure or refusal of its officers to comply with the requirements of section 4105 of the Code, then there is equity in the bill.

[2] The substance of section 4105 is that when an execution or attachment is levied on the stock of the defendant in any corporation, the officer shall go to the corporation's office and there declare the fact of the levy; and he shall demand of any corporate officer or agent there present a statement in writing, under oath, "of the amount of the defendant's stock, the number of his shares, or extent of his interest in such corporation or company, and shall leave with the officer, agent or clerk a copy of the writ." The penalty for neglect or refusal by the corporation to furnish such a statement within 10 days is that it shall be liable to the plaintiff for the full amount of his judgment or decree.

The bill does not show that W. T. McGowin ever at any time owned any stock or interest in the Roe Drug Company, and the demurrers challenge the liability of the corporation under this statute, and the equity of the bill itself, in the absence of any allegation that W. T. McGowin was the owner of stock or other interest in the corporation at the time of the officer's demand for information thereof.

We have given due consideration to the language and the purpose of the statute in question, and we are led to the conclusion that it applies, *ex vi terminorum* only to the execution or attachment debtor who has at the time an interest in the capital or joint stock of the corporation as shown by its records. Even if the language of the statute were doubtful in this regard, it could never be intended that corporations should be penalized by the imposition of the judgment liabilities of defendants to whom they are strangers, and with whom they have no affiliations and no interests in common. Such a construction of the statute might, indeed, subject it to the gravest constitutional objections.

But, very plainly, the purpose behind this extraordinary penalty is to prevent corporations and stock companies from protecting their stockholders against the process of creditors by concealing the character and extent of their holdings. It presupposes that such judgment debtors are in fact stockholders, or have an interest known to the corporation; and the demand for information is expressly predicated upon the offi-

cer's levy on the defendant's stock or interest—a manifest impossibility if he has no stock nor interest.

The inquiry authorized is, not whether such judgment debtor owns any stock, and, if so, how much; but, assuming that he owns stock—upon which the officer must have effected a levy—how much does he own? If he is not a stockholder, and has no interest in the corporation, there is of course no levy; and that relationship does not exist between the corporation and the plaintiff and defendant in execution, upon which alone the statute grounds the right and the duty therein stated.

In its present state the bill is in this respect subject to the demurrers, both general and special. It results that the decree appealed from must be reversed, and a decree will be here rendered sustaining the demurrers to the bill of complaint, which will stand dismissed, unless amended within 30 days.

Reversed and rendered.

PORTSMOUTH COTTON OIL REFINING CORP. v. MADRID COTTON OIL CO. (4 Div. 595.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. EVIDENCE \S 155(8)—TELEGRAMS—ADMISSIBILITY.

In an action for defendant's breach of its agreement to sell cotton seed oil, where the sale was made through a broker, defendant having introduced, over objection, a telegram as evidence of the broker's efforts to sell the oil to third persons, plaintiff was entitled to bring out all that was done in connection with the transaction by introducing the answer to the telegram.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 453; Dec. Dig. \S 155(8).]

2. EVIDENCE \S 155(1)—MATERIALITY—COMPETENCY.

Where, in an action for defendant's breach of its agreement to sell cotton seed oil, as to the price of which the parties disagreed, the court allowed defendant to prove its broker's offer to sell to another party at a price in excess of the contract price as claimed by plaintiff, it was error to decline to allow plaintiff to rebut that by showing the answer received and the fate of similar offers, and the error was reversible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S\S$ 445, 446; Dec. Dig. \S 155(1).]

3. BROKERS \S 32 — AGENCY — FOR WHOM AGENT.

A broker employed by defendant to sell its cotton seed oil is not the agent of one purchasing through such broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 25; Dec. Dig. \S 32.]

4. BROKERS \S 91—OCCUPANCY—AGENCY.

A "broker" is an agent employed to make bargains and contracts between other persons in the course of trade, and, while ordinarily authorized to buy or sell a particular thing in specified quantities and at a limited price, secret instructions which conflict with his apparent

powers have no effect on the rights of third persons, dealing with him in good faith.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 134; Dec. Dig. ¶ 91.

For other definitions, see Words and Phrases, First and Second Series, Brokers.]

5. APPEAL AND ERROR ¶ 1057(2), 1058(1) — REVIEW—HARMLESS ERROR.

Where the evidence was subsequently received or the facts sought to be established were conceded, the erroneous exclusion of evidence was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4197, 4198, 4200, 4205; Dec. Dig. ¶ 1057(2), 1058(1).]

6. TRIAL ¶ 256(2)—INSTRUCTIONS—REVERSIBLE ERROR.

A judgment will not be reversed because charges possess misleading tendencies and could have been refused for that reason, where the opposing party, who could and should have corrected such misleading tendencies by countercharges failed to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 629; Dec. Dig. ¶ 256(2).]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by the Portsmouth Cotton Oil Refining Corporation against the Madrid Cotton Oil Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. S. Thigpen, of Dothan, for appellant. Farmer & Farmer, of Dothan, for appellee.

MAYFIELD, J. Appellant claims to have purchased two tanks of cotton seed oil from appellee, through a commercial broker, one C. G. Hewitt, and that appellee failed and refused to deliver according to the contract; that appellant was forced to go into the market and purchase other oil, and hence sues to recover the difference between the contract price and the price which appellant was compelled to pay in the open market. The defense of appellee was that it never sold, or agreed to sell, the oil in question to appellant at the price and on the terms claimed by appellant, but that it did agree to sell to the broker at the price of 27 cents per gallon, and he declined to take the oil at the price agreed. This record shows beyond doubt that appellant did purchase, through Hewitt, and on the terms named, and that appellee declined to sell or ship on those terms, after demand by appellant; that the price of oil was higher, at the time for delivery, than it was at the time of the alleged sale by appellee to appellant, and that the latter went into the market and purchased the oil at an advanced price over the alleged contract price. There is no doubt that Hewitt was a broker merchant, and that as such he was held out by the defendant to the plaintiff as its agent to sell its oil, and that as such agent he sold the oil to plaintiff; and that defendant declined to be bound by the contract of sale made by its agent. This is shown by a telegram from

defendant to Hewitt, of date October 24, 1914, which read as follows: "Offer tank of oil for immediate shipment. [Signed] Madrid Oil Co." Acting on this, and other undisputed authority from defendant, the broker did sell two tanks of oil, one for immediate delivery, and one for November delivery, at 26.55 cents per gallon. The real contention of defendant was that the agent was not authorized to sell except for 27 cents per gallon. Mr. Watford, defendant's general manager, who sent the telegram set out above, and who held telephonic communications with the broker, and conducted a correspondence with him about the sale, testified in part as follows:

"That he knew that C. G. Hewitt was a broker in Montgomery; that he knew that Hewitt had made sales as a broker prior to that time for the Madrid Cotton Oil Company; that Hewitt had made sales under his direction to the Portsmouth Cotton Oil Refining Corporation prior to that time, as a broker; that the Madrid Cotton Oil Company had some oil that it wanted to sell; that he wired Hewitt for the purpose of getting a price on that oil; that he didn't know that Hewitt wasn't dealing in cotton seed oil; that he knew that Hewitt was a broker in cotton seed oil; that he sent a telegram to Hewitt on October 24th; that Hewitt did not tell him in the conversation over the telephone that he had sold the oil at \$3.54 per 100 pounds, and that he didn't hear anything about any price per pound; that he didn't know that Hewitt was to sell the oil for the Madrid Cotton Oil Company, to some other person; that at the time he asked him for prices on oil, he expected that he would sell it to some other person; that he received a letter from Mr. Hewitt right after the 27th day of October, inclosing contracts, showing that the two tanks of oil had been sold to John Aspegren; that he retained those contracts; that he didn't answer that letter; that the letter that Hewitt wrote him told him that he had sold the oil for account of Madrid Cotton Oil Company at \$3.54 per 100 pounds; that he received another letter from Mr. Hewitt, dated the 2d day of November, inclosing copies of corrected contracts. Witness was shown the contracts and corrected contracts that had been introduced in evidence, and stated that the copies sent to Madrid Cotton Oil Co. were copies of those contracts. Witness stated that in that letter of November 2d, Mr. Hewitt sent copies of contracts, showing the sale of the oil that was made to the Portsmouth Cotton Oil Refining Corporation on account of Madrid Cotton Oil Company at \$3.54 per 100 pounds, one tank to be shipped upon prompt forwarding of tank car, and the other tank for November shipment from mill; that he did not remember what date the letter, inclosing the corrected copies, was received; that he remembered the telegram that he sent to Mr. Hewitt about the tank car, but did not remember whether the letter, inclosing the corrected contracts, was received before he sent the telegram about the tank or not; that the Madrid Cotton Oil Company retained that letter and those contracts, and never returned them to C. G. Hewitt and never wrote C. G. Hewitt about that contract at all. Witness further testified that he received the letter from Hewitt, dated October 27th, inclosing the contracts of John Aspegren, and subsequently he received the letter, dated November 2d, inclosing corrected contracts of the Portsmouth Cotton Oil Refining Corporation, stating that he had sold this oil for the Madrid Cotton Oil Company, retained them, and never said anything at all about them."

The plaintiff offered to prove by the broker, Hewitt, that after he received the telegram from defendant, as above set out, and before any telephonic or other communication had with defendant, he, the broker, did get prices from dealers in crude oil such as the defendant had offered for sale. The trial court sustained defendant's objection to this testimony, and plaintiff excepted. The plaintiff also offered to prove by this witness, Hewitt, that he had made other sales of oil for the defendant, as broker, and that witness did not represent any particular refining, or oil mill, in his sales of crude oil; but the court declined to allow this proof to be made. The plaintiff also offered to prove by this witness that after he had a telephonic communication with the general manager of defendant, as to the sale of the oil in question, and after reading the telegram above set out, the witness wired various buyers, to get bids on the oil; but the court declined to allow this evidence to be introduced. The trial court then allowed the defendant to offer in evidence, over the plaintiff's objection, a copy of a telegram purporting to have been sent by Hewitt to an oil company of Cincinnati, Ohio, reading as follows:

"The Proctor and Gamble Co., Cotton Oil Dept., Cincinnati, Ohio. Bought one Madrid Cold pressed immediate twenty eight Confirm. "[Signed] C. G. Hewitt."

The plaintiff then offered to prove by the witness Hewitt, who sent the telegram, that it was sent for the purpose of obtaining an offer from the Cincinnati company to purchase the oil. The plaintiff, also in this connection, offered to introduce the answer to this telegram, in which the oil company declined to purchase; but both offers were denied to the plaintiff, and it excepted. The plaintiff also offered to prove by this witness, after the defendant had introduced the copy of the telegram above set out, that witness sent other telegrams, relating to the particular oil, to other purchasers of crude oils, in order to obtain the best price, and in his endeavor to get 27 cents for the oil; and in this connection the plaintiff offered the telegrams claimed to have been so sent; but the court declined to allow the proof, and the plaintiff excepted.

[1] It is difficult to see how any of these telegrams sent by Hewitt to third parties were binding on this plaintiff, and some of them were probably not binding on the defendant. But, the defendant having introduced one of these telegrams sent out by Hewitt, which related to the sale of the oil in question to a third party, the answer to that telegram, declining to purchase, was certainly admissible. The defendant having thus, over the plaintiff's objection, brought out a part of Hewitt's efforts to sell the oil in question to third parties, the plaintiff was entitled to bring out all that was done in connection with the transaction in his efforts to sell the oil to third parties.

The defendant could not select one of these matters, a mere part of a general transaction, and then not allow the plaintiff to prove all that was done in reference to such matter.

[2] The plaintiff first offered to prove the efforts of Hewitt to sell the oil to third parties, and the court declined to allow the proof, but later allowed defendant to prove his offer to sell to one party, and declined to allow plaintiff to rebut this by showing the answer received, and also his similar offers to other third parties. This was prejudicial error to reverse.

[3, 4] The trial court seems to have treated Hewitt as the agent of plaintiff, and not of the defendant. In this the trial court was in error. So far as this plaintiff is concerned, in connection with the sale in question, Hewitt was the agent of defendant, and as such agent sold the oil to plaintiff. The plaintiff did not engage him to buy the oil for it, but the defendant engaged Hewitt to sell the oil for it—not especially to this plaintiff, but to any one who would purchase it. It is true there is some evidence tending to show that defendant sold the oil directly to Hewitt; but there is no evidence to show that plaintiff purchased directly from Hewitt. But all the evidence shows that plaintiff only purchased through Hewitt as a broker and as defendant's agent in selling the oil. There can be no doubt that Hewitt was authorized by the defendant to sell the oil in question, and that he did sell it to the plaintiff. There is nothing in this record to show, or to even put plaintiff on notice, that Hewitt was acting in bad faith to his principal, or was even violating any instructions given him by his principal.

We are of the opinion that the record shows conclusively that Hewitt was a commercial broker, and was so known to both the plaintiff and the defendant, and that defendant authorized him, as such broker, to sell for it the oil in question. What was said in the case of *Stratford v. City Council of Montgomery*, 110 Ala. 619, 625, 20 South. 127, 128, defining a commercial broker, is accurate and apt:

"A 'broker' is defined as 'an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation for a compensation commonly called "brokerage." Story on Agency (8th Ed.) § 28. Every broker is, in a sense, an agent, but every agent is not a broker. There are, however, so many incidents common to both relations that it is difficult to define the precise line of demarcation."

Mr. Mechem, in his excellent work on Agency (volume 2 [2d Ed.] p. 1966, § 2397), has well stated the law as to the authority of commercial brokers to bind their principals:

"A broker in the ordinary case is known to be an agent acting under a limited authority. He is usually authorized to buy or sell a particular thing in specified quantities and at a limited price. He is often described in the books as a special agent, and in order to bind his prin-

principal he must keep within the limits of the authority conferred upon him. Secret or private instructions, as that term has heretofore been defined, which conflict with the usual or apparent powers will no more affect the rights of third persons who in good faith deal with the broker in ignorance of them than in the case of dealing with any other agent, though their violation may make the broker liable to his principal."

On the subject of the broker's authority to fix the price, the same author (Id. § 2401) proceeds to say:

"A broker, who is instructed to buy or sell property, with no limitations as to the price, would have implied authority to agree upon the price and to bind his principal by such agreement, where the broker acts honestly and in good faith, and the price fixed is the usual one, or, where there is no usual price, then a fair and reasonable, and not an extraordinary, one. If there is a market price, that price should govern in the absence of anything indicating a contrary intent on the part of the principal."

While a broker sometimes represents both parties as to certain matters, and is sometimes spoken of as the agent of both parties, he is not always *ex vi termini* agent for both; that he is such agent rests upon presumptions which may be rebutted by the attending facts and circumstances. 2 Pars. Contracts, 292. In *Ruling Case Law* (volume 4, p. 255), text, the rule is thus stated:

"Ordinarily a broker does not act in a dual capacity as the representative of both sides to a negotiation, but only as the agent of the party who first employed him. Once a deal is concluded, however, the law permits him to act as the representative of both parties, if they assent thereto."

[5] Appellant, plaintiff below, complains of many adverse rulings as to the admission and the rejection of evidence. As to the errors of rejecting evidence offered by plaintiff touching the custom obtaining in such sales, and as to the meaning of certain terms and phrases used in the contracts of sale, such as, "immediate shipment," "November delivery," etc., it appears that many of these rulings were without injury, because the evidence thus declined was subsequently admitted, or because the facts sought to be proven thereby were proven without dispute or were conceded.

[6] The plaintiff also complains of the giving of several written charges at the request of the defendant. These charges each stated correct propositions of law as applied to actions like this, for breaches of contracts of sale. The charges, however, possessed misleading tendencies, and could have been refused for that reason; but we will not reverse in such cases if the opposing party could and should have corrected or prevented such misleading tendencies by countercharges, and this could and should have been done in this case.

As the judgment must be reversed for the errors pointed out, it is unnecessary to now pass upon the weight or the sufficiency of the

evidence, raised only by the motion for a new trial.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

BARNES v. WHITE et al. (4 Div. 572.) (Supreme Court of Alabama. Feb. 10, 1916.)

1. SPECIFIC PERFORMANCE §121(1)—ORAL CONTRACT FOR LAND—EVIDENCE.

To authorize specific performance of an oral contract to convey land, as taken out of the statute by part performance, its terms must be established by clear, definite, and noncontradictory evidence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387, 388; Dec. Dig. §121(1).]

2. WITNESSES §150(3) — COMPETENCY — TRANSACTION WITH DECEDENT.

A party to a contract with decedent is incompetent to testify thereto for persons claiming under him against the heirs of decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 655; Dec. Dig. §150(3).]

Appeal from Chancery Court, Covington County; Ed T. Albritton, Chancellor.

Suit by William R. Barnes against Frank White and others. From an adverse decree, complainant appeals. Affirmed.

Jones & Powell, of Andalusia, for appellant. Baldwin & Murphy, of Andalusia, for appellees.

MAYFIELD, J. [1] This is a bill for specific performance to convey land, where there is no written contract or even memorandum of the terms of sale. The bill is sought to be maintained under the exception mentioned in the statute of frauds; that is, on the ground that a part of the purchase price was paid, and the vendee was put in possession of the lands agreed to be conveyed. The bill is not filed by a party to the contract nor against a party to the contract to convey. It is filed by the vendee of one party to the contract against the heirs of the other party. It is filed more than ten years after the date of the alleged contract to convey. One of the parties to the contract had been dead for more than ten years before the bill was filed.

What was said by Stone, J., in *Pike v. Petrus*, 71 Ala. 99, 100, is conclusive of this case:

"In *Waterman on Specific Performance*, § 265, it is said: 'The parol agreement must be clearly proved, in order to take it out of the statute by part performance. * * * Equity will not enforce specific performance of a parol agreement, if the evidence of such agreement is contradictory.' And in 1 *Sto. Eq. Jur.* § 762, it is said: 'In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of

the agreement.' After mentioning certain acts which are insufficient, this author proceeds to say that it is not enough when the proof only shows acts of an equivocal nature, but that, to be deemed a part performance, the acts 'should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution.'

To entitle a complainant to specific performance of such contracts, the terms must be distinctly alleged, and established by clear and definite testimony; and, if the proof fails to establish the contract as alleged, or if any of its terms are left in doubt or uncertainty, specific performance should not be decreed. *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Goodwin v. Lyon*, 4 Port. 297; *Ellis v. Burden*, 1 Ala. 458.

[2] The evidence in this case is far from being certain and definite as to the terms of such contract as is sought to be enforced. Every material allegation is denied by allegation and proof. One of the parties to the contract is dead, and the other, of course, is incompetent to testify as to the transaction which he had with the deceased party when the heirs of the latter are interested in the suit. What was said in the case of *Boykin v. Smith*, 65 Ala. 290, is conclusive as to the competency of Will White to testify as to the contract in question. It was there said:

"In permitting Christopher Boykin to testify that he acquired possession of the lands from his deceased father, and that his father said he would give him title to the lands, the circuit court erred. True, the witness is not a nominal party to this suit; but the defendant is his grantee, claiming to have derived from him the title which was vested in his father while living. The appellant was claiming to recover an undivided one-eleventh part of the lands, as having descended to him from his father. If the suit were between the appellant and Christopher Boykin, the latter would be within the words of the exception in the statute prohibiting a party from testifying 'to transactions with, or statements by, a deceased person, whose estate is interested in the result of the suit.' Code of 1876, § 3058. The purpose of the evidence, and the only result to be reached by it, would be to take away the legal rights of the appellant as heir at law. The policy of the exception is the exclusion of the parties in interest from testifying to transactions with or statements by a deceased person when the purpose of the evidence is to diminish the rights of the deceased, or of those claiming in succession to him. *Key v. Jones*, 52 Ala. 247."

But, if the evidence of Will White is admitted, it is denied by many witnesses and circumstances, and for the court to grant the relief prayed might achieve a result never contemplated by the parties, and might enforce a contract never made. Apropos to this is the dictum of Lord Erskine (13 Ves. 77, 79), as follows:

"If a court of equity can compel a party to perform a contract substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that, from which he stipulated, without some very distinct

limitation of such jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain." 6 Eng. Rul. Cas. 754, note.

We do not desire to be committed to the proposition that the complainant can maintain this bill against these respondents. We leave that question undecided, for the reason that, if the bill could be maintained, the proof does not warrant the relief prayed, or any other appropriate relief, against these respondents, appellees here.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

WILSON v. STATE. (6 Div. 151.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. CRIMINAL LAW — 485(1) — EXPERT WITNESSES — EXAMINATION — HYPOTHETICAL QUESTIONS.

On cross-examination of expert witnesses, hypothetical questions need not be based on facts proven in that particular case, but may rest on an assumed state of facts, for the purpose of getting an opinion on all possible theories of the case, and of testing the value and accuracy thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. — 485(1).]

2. CRIMINAL LAW — 483, 1153(4) — REVIEW — DISCRETION — EXAMINATION OF EXPERTS.

In examination of expert witnesses, the range of the examination is largely within the discretion of the trial court, which in the absence of prejudice will not be revised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1071, 1075, 3064; Dec. Dig. — 483, 1153(4).]

3. CRIMINAL LAW — 476 — EXPERT WITNESSES — EXAMINATION.

Where one accused of murder defended on the ground that the deceased was killed by falling against a railroad rail and not by a blow from a blunt instrument as charged, he should have been permitted to ask physicians as expert witnesses whether the blow which caused the death could have been inflicted by falling on the rail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. — 476.]

4. WITNESSES — 268(1) — CROSS-EXAMINATION.

In cross-examination of witnesses, great liberty should be allowed by the court in order to afford the defendant the full right of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931, 938, 939; Dec. Dig. — 268(1).]

5. HOMICIDE — 329 — REVIEW.

On appeal from a conviction of murder, the court must act with great caution on the question whether proper evidence was excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 696; Dec. Dig. — 329.]

6. CRIMINAL LAW — 1120(1) — APPEAL AND ERROR — REVIEW — SUFFICIENCY OF EXCEPTIONS.

Error cannot be predicated upon the asking of a question which the record fails to show was asked and objected to or excepted to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2931; Dec. Dig. — 1120(1).]

7. CRIMINAL LAW §1134(3)—REVIEW—MATTERS NECESSARY TO DECISION.

On appeal from a conviction, the court, when reversal is required on other grounds, need not consider improper argument of counsel, since that would not arise on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2989, 2990, 3056; Dec. Dig. §1134(3).]

McClellan, Somerville, and Thomas, JJ., dissenting.

Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge.

John Wilson was convicted of murder, and he appeals. Reversed and remanded.

B. M. Allen and M. H. Murphy, both of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Hugo L. Black, Sol., of Birmingham, for the State.

GARDNER, J. Appellant was indicted for the murder of one Hugh Guthrie. The indictment charged that the crime was committed by the defendant's striking the deceased with some blunt instrument, a more particular description of which was unknown to the grand jury.

On the night of the fatal difficulty, in the town of Wylam, Ala., the defendant, the deceased and others were together playing pool. They were all on friendly terms and were drinking to a greater or less extent. They left the poolroom and walked along until they reached a point on the railroad track near Forty-Second street, where they stopped and sang a few songs. One of the songs was the Scotch ballad, as named in this record, "Wee doch and dorriiss." The deceased, who was a Scotchman, resented the fact that the defendant, who insists he is of French descent, was unable to properly pronounce the words of the song, and called him a "—— blather," at the same time striking him a blow in the face. Thereupon the defendant struck the deceased and knocked him down. Deceased regained his feet and he and the defendant clinched, and both fell together on the railroad track between the rails, in an "angling" position, as described by the defendant; the two rolled off the track a few feet, and when a few moments later the defendant regained his feet, the deceased was found to be in a dying condition, and within a few minutes was dead. No sign of blood was found on any portion of the railroad track nor on the cross-ties protruding from the roadbed; but blood was found on the ground where deceased lay, a few feet away from the track. Without waiting to ascertain deceased's condition the defendant went to his home a few blocks away, and a few minutes later when informed of the serious condition of deceased he returned and assisted in removing the dying man to the hospital.

The above facts appear to be practically undisputed, as we gather from the record of the case and from briefs of counsel. No witness testified to the use of any weapon by the

defendant, but those present at the time of the difficulty stated that he had no weapon and only struck deceased with his fist. A piece of two-inch piping was found by one of the officers, lying among some weeds in a patch about 40 feet from the scene of the difficulty, and the officer testified to certain indications tending to show that this piece of piping (which he thinks was used as a stake) had been freshly thrown in the patch of weeds. No blood was found on the piping, however. Defendant testified that he struck deceased with his fist, knocking him down, and that when deceased regained his feet they clinched and he tripped deceased, again throwing him down on the railroad track. There was evidence tending to show that deceased fell face downward. Defendant insists that he had no weapon of any kind, and that when he went to his home he was unaware that the deceased had been seriously injured. It was the contention of the state that defendant struck deceased with some blunt instrument.

Examination of the deceased showed that the frontal bone was fractured, the nose broken, and a part of the upper jaw and several teeth broken loose. There seems to be an agreement among the physicians that the fracture of the skull was the cause of the death. The theory of the defendant is that this fracture was caused by the fall on the railroad track when deceased's head struck the iron rail or a cross-tie, or some other hard substance on the track. The defendant was found guilty of murder in the second degree, and his punishment fixed at imprisonment for 65 years.

Dr. Roundtree, a witness for the state, after testifying that it was the fracture of the skull which caused the death of deceased, and that the injury could not have been inflicted by the naked fist of a man but was probably caused by some blunt instrument, said that in his opinion a fall on the railroad track and the striking of one's head or face on the rails or on the end of a cross-tie would not produce such injuries. He further testified that he had heard of a man's falling on the ground or sidewalk and sustaining a fractured skull, but that it was a fall of some distance from the ground. Dr. Roundtree was then asked the following question by defendant:

"I asked you whether or not a man standing in an upright position on the ground, if you have not known of his falling and getting a fractured skull by hitting it on the ground or any hard substance?"

The state objected to the question on the ground that it did not hypothesize the facts in the case. The court sustained the objection.

Dr. Davidson, a witness for the state, after testifying substantially as did Dr. Roundtree, was asked similar questions by the defense, to which objections by the state were sustained by the court. A somewhat kindred

ruling was made, on the objection of the state to a question asked Dr. Hamrick, a witness for the defendant.

In *Parrish v. State*, 139 Ala. 16, 43, 36 South. 1012, 1020, it was said:

"The hypothetical question to an expert witness should not contain matter as to which there is no evidence tending to support. However, technical accuracy is not required as to this. It is for the jury to scrutinize the evidence and to determine what part of the question is true or supported by the evidence and what is not, and the adverse party may ask for instructions, that the jury do not accept the facts as true, but that they should determine whether such facts were in evidence, and that they might disregard the opinion of the expert if not based on facts in evidence. * * * Expert witnesses may be cross-examined and their opinion obtained, based on other states of facts, assumed by the party examining them to have been proven upon a hypothetical case; and they may be cross-examined on purely imaginary and abstract questions. Such questions are not only permissible in order to get the opinion of the expert witness upon all possible theories of the case, but they are allowable also to test the value and accuracy of the opinion of the witness himself."

See, also, *Southern Bitulithic Co. v. Perrine*, 67 So. 601, and *Jones on Evidence* (2d Ed.) § 389.

[1] As stated in *Parrish v. State*, supra, on cross-examination of expert witnesses, hypothetical questions need not be based on facts proven in that particular case, but may rest upon an assumed state of facts; and such witnesses may be cross-examined on abstract questions, not only to elicit the opinion of the expert upon all possible theories of the case, but also to test the value and accuracy of his opinion.

[2, 3] The questions asked Drs. Roundtree and Davidson were entirely pertinent upon the theory of the defense and were highly important from his standpoint. These physicians had given it as their opinion that the injuries received by the deceased could not have been caused by a fall on the rails or cross-ties, or other hard substance, but in their opinion were produced by a blow inflicted by some blunt instrument. The defendant insisted that the injuries resulted from the fall. Death resulted from the fracture of the skull; and the fracture of the skull, therefore, was the most material and important inquiry with which the defendant was concerned. That the questions were entirely proper is quite clear.

We are aware of the fact that in the examination of expert witnesses the questions to be asked, and the range of the examination, must be left largely to the discretion of the trial court, and particularly so, doubtless, in cross-examination of witnesses (*Sou. Bit. Co. v. Perrine*, supra; *Mitchell Co. v. Grant*, 143 Ala. 194, 38 South. 855); and that the court's decision on these questions will not be revised, unless it is made clearly to appear that error intervened and that it worked prejudice to the defendant. The questions asked involved the most vital parts of the

defense, and the court consistently ruled these questions improper.

In *Tate v. State*, 86 Ala. 33, 5 South. 575, it was said:

"The Constitution (article 1, § 7) secures to every one on trial for a public offense the right 'to be confronted by the witnesses against him.' This constitutional right would lose half its value, if the kindred right of cross-examination were denied. That right is probably and generally the most effective instrumentality for eliciting the witness' 'means of obtaining correct and certain knowledge of the facts to which he bears testimony.' 1 Greenl. Ev. § 448."

The importance of cross-examination was again recognized by this court in the more recent case of *Wray v. State*, 154 Ala. 36, 45 South. 697, 129 Am. St. Rep. 18, 16 Ann. Cas. 362, wherein it is said:

"It necessarily results that, where the opportunity is given by the trial court in its well-reposed discretion in the premises, its action will not be condemned in exercise in the given case, unless it clearly appears that that discretion has been prejudicially exerted against the right of the accused to cross-examine the witness."

[4] It is usual in cross-examination that great liberty is allowed by the court. *Jones on Evidence*, supra. And while the right to cross-examine may be afforded the defendant, yet if it is so circumscribed and limited as to strip it of its benefit, the right "loses its substance and becomes a shadow." Sustaining an objection to a proper question on cross-examination was held reversible error in *Parrish v. State*, supra. See 139 Ala. pages 45, 46 of opinion, 36 South. 1012. See, also, *De Arman v. State*, 71 Ala. 351, eleventh headnote.

[5] We are mindful that in passing upon questions of this character this court should act with great caution. To that end the record has been most carefully examined. We do not think it would serve any good purpose to discuss the testimony further. Suffice it to say that we are of the opinion that the right of cross-examination was too narrowly confined, and that the error was of such prejudicial character as to call for a reversal of the case. The only objection by the state was that the questions asked failed to hypothesize all the facts—meaning that they did not enumerate all the injuries found on the face of the deceased. The question did hypothesize, however, the most material fact—that of the fracture of the skull, which caused the death. But whether so or not, on cross-examination it was not necessary to so hypothesize all the facts.

[6] Counsel argue upon the assumption that this record shows the question asked by the state of the defendant, if he did not belong to a detective agency, or was not sent down as a detective for the Tennessee Coal & Iron Company. We find no such question in the record before us, but only find in the testimony of the defendant a denial of that charge, given in a narrative form, with no objection or exception. It is clear, therefore, that the record in this respect presents nothing for review.

[7] The question as to argument of counsel for state doubtless will not arise upon another trial and needs no treatment here. It results that the judgment is reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SAYRE, JJ., concur. McCLELLAN, SOMERVILLE, and THOMAS, JJ., dissent, entertaining the view that the rulings of the court upon which the reversal is based were matters as to which the trial court exercises a discretion, and of which no abuse is disclosed by the record.

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO. (2 Div. 600.)

(Supreme Court of Alabama. Dec. 16, 1915.
On Application for Rehearing, Feb. 15, 1916.)

1. APPEAL AND ERROR — 1097(1) — SUBSEQUENT APPEALS—LAW OF THE CASE—STATUTORY PROVISIONS.

Under Code 1907, § 5965, requiring the Supreme Court, in deciding a case when there is a conflict between its existing opinion and any former ruling in the case, to be governed by its later opinion it is the duty of the court, where its former ruling that petitioner had a right to condemn the property desired is attacked on appeal, after the award of damages, to reconsider the former opinion, and, if convinced that it is erroneous, to disregard and overrule it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4353, 4359, 4363, 4427; Dec. Dig. —1097(1).]

2. EMINENT DOMAIN — 47(3)—PROPERTY DEVOTED TO PUBLIC USE—RAILROAD RIGHT OF WAY—TELEGRAPHS.

Code 1896, §§ 1244, 1246, which gave any telegraph company the right to construct its lines along a railroad right of way, and authorized it to condemn an easement for that purpose, were omitted from the Code of 1907 and thereby repealed. An act approved in 1903 (Laws 1903, p. 374), now codified in part as Code 1907, § 3867, provided that, if the property sought to be condemned had already been devoted to public use, it should not be taken for another and different character of public use, unless an actual necessity for the specific land shall be shown, and unless it be shown that the different use will not materially interfere with the public use to which such property is already devoted. *Held*, that these changes in the statutes indicated an intention to limit the right of a telegraph company to condemn an easement along a railroad right of way to the cases provided for by Code 1907, § 3867.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 109, 110, 114, 116-120; Dec. Dig. —47(3).]

3. TELEGRAPHS AND TELEPHONES — 11—USE OF RAILROAD RIGHT OF WAY—STATUTE.

Code 1907, § 5817, which granted rights of way for telegraph lines along the margins of public highways, does not, in connection with Const. 1901, § 242, declaring railroads not constructed and used exclusively for private purposes to be public highways, give a telegraph company an easement along a railroad right of way, since the constitutional section was only

intended to make railroads highways in a limited sense and subject them to state and federal control, not to deprive them of their private ownership of their rights of way.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. —11.]

4. EMINENT DOMAIN — 3—REGULATION—AUTHORITY OF LEGISLATURE.

Const. 1901, § 23, providing that the exercise of the right of eminent domain shall never be abridged or so construed as to prevent the Legislature from taking the property of corporations and subjecting them to public use in the same manner as the property of individuals, does not prevent the Legislature from exempting property already devoted to public use from condemnation except in cases of actual necessity, as it did by Code 1907, § 3867.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 13; Dec. Dig. —3.]

5. EMINENT DOMAIN — 47(3)—PROPERTY DEVOTED TO PUBLIC USE—STATUTE—"ACTUAL"—"SPECIFIC."

Code 1907, § 3867, providing that property already devoted to public use shall not be taken for a different character of use, unless an actual necessity for the specific land or portion thereof shall be alleged and proven, does not authorize a telegraph company to condemn an easement for its lines along the unused portion of a railroad right of way, merely because it is more convenient to do so, or because the easement can be secured at less cost, since "actual," as used in the statute, means real, as distinguished from apparent, constructive, or imputed, and "specific" means tending to specify, or to make particular, definite, limited or precise.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 109, 110, 114, 116-120; Dec. Dig. —47(3).]

For other definitions, see Words and Phrases, First and Second Series, Actual; Specific.]

6. STATUTES — 190—CONSTRUCTION—UNAMBIGUOUS STATUTE.

Where a statute is plain and unambiguous, whether expressed in general or limited terms, there is no room for construction to determine its meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. —190.]

7. CONSTITUTIONAL LAW — 70(3)—JUDICIAL AUTHORITY—STATUTES—CONSIDERATION OF PUBLIC INTEREST.

The Legislature having, by Code 1907, § 3867, providing that property already devoted to public use shall not be taken for a different character of use unless there is an actual necessity therefor, declared the public policy of the state regarding the condemnation of land already devoted to public use, courts cannot, in determining the right of a telegraph company to condemn an easement along a railroad right of way, be influenced by considerations of the public interest.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. —70(3).]

On Application for Rehearing.

8. EMINENT DOMAIN — 255—CONDEMNATION PROCEEDINGS—QUESTIONS PRESENTED FOR REVIEW.

On appeal from a decree in condemnation proceedings, the Supreme Court is a court of review and can be expected to pass only on questions raised in the court below.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666; Dec. Dig. —255.]

9. TELEGRAPHS AND TELEPHONES \Leftrightarrow 11—CONSTRUCTION ALONG RAILROAD RIGHT OF WAY—EASEMENT—CONTRACT.

A contract, giving a telegraph company the right to maintain its wires along a railroad right of way for a term of 25 years, and providing that at the expiration of that period either party might terminate the contract by giving one year's notice, does not give the telegraph company a permanent easement.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 7; Dec. Dig. \Leftrightarrow 11.]

Anderson, C. J., and McClellan and Somerville, JJ., dissenting.

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Action to condemn an easement for telegraph line by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. From a judgment condemning the property, assessing the damages at \$1, the defendant appeals. Reversed and remanded, and application for rehearing denied.

H. L. Stone, of Louisville, Ky., Mallory & Mallory, of Selma, and George W. Jones, J. M. Foster, and S. L. Field, all of Montgomery, for appellant. Albert T. Benedict, of New York City, Forney Johnston, of Birmingham, and Rushton, Williams & Crenshaw, of Montgomery, for appellee.

GARDNER, J. By this proceeding the appellee seeks the condemnation of that portion of the right of way of appellant on its South Alabama Division from Selma to Flomaton; on its Myrtlewood branch from Selma to Myrtlewood, and on its Camden branch from Nadawah to Camden, which is already occupied by petitioner's poles and wires for use as a telegraph line. Upon the first hearing the probate court of Dallas county denied the application, and appeal was taken to the circuit court in that county, where the petition was likewise denied, and on appeal to this court the cause was reversed. *W. U. Tel. Co. v. L. & N. Co.*, 184 Ala. 673, 674, 62 South. 797. The second trial resulted in a judgment of condemnation and an assessment of damages of \$1 by the jury. From this judgment this appeal is prosecuted.

Upon the former appeal in this case no opinion was written, but the cause was determined upon the opinion of this court, rendered at the same term, in the case of *W. U. Tel. Co. v. S. & N. Ala. R. R. Co.*, 184 Ala. 66, 62 South. 788, as the result of that case was conclusive as to this, the question presented being identical; and, for the purpose of the present appeal the opinion above referred to may be taken and considered as the opinion of this court on the former appeal in this case, and for convenience it will be referred to as the "former opinion in this case." Counsel for appellant earnestly urge a reconsideration by this court of said former opinion, and much of

their argument is devoted to an attack upon said holding.

[1] Out of a desire that exact justice might be done as nearly as possible in the administration of the law by the court of last resort, where the rights of parties are to be finally adjudicated, the Legislature many years ago enacted the following, which is now section 5965 of the Code of 1907:

"The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time, is law, without any regard to such former ruling on the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling."

However great, therefore, may be the desire of courts for stability of decisions, it yet becomes the duty of this court, in cases of this character, in conformity with the above-quoted statute, to review and reconsider its former decision, and, if convinced that the ruling was erroneous, to disregard and overrule the same and be governed by what, in the opinion of the court, at this time, is the law.

[2] It was held on the former appeal that the amendatory act of 1903 (*Laws 1903*, p. 374), which is codified in part as section 3867 of the Code of 1907, worked no material change in the law as respects the question here under consideration, and that the same was but a succinct statement of the law as it existed at the time of the passage of the act. To use the language of the opinion:

"In other words, section 3867 of the Code is but a codification of previous decisions of this court, construing what is now section 3860 of the Code of 1907, and its incorporation into our Code has made no material change in our laws on the subject of Eminent Domain."

After mature consideration this court, as presently constituted, has reached the conclusion that it was in error on the former appeal of this case, and that, in fact, the above-cited section of the Code has worked a material change in our law so far as respects the rights of this appellee.

It may be said in the outset that the decisions of other courts can be of little service to us in the consideration of this case, for the reason that the determination of this cause rests upon a construction of our own statutes, and there is a lack of similarity as to verbiage and history with those of other states. Nor do we deem an elaborate discussion necessary on this appeal, but will attempt, in a brief way, to state the reasons which impel us to the conclusions we have here reached.

Section 3867 of the Code of 1907 reads as follows:

"If the property sought to be condemned, or any portion thereof, or interest therein, has already been subjected or devoted to a public use, such land or portion thereof, or interest therein, shall not be taken for another and different character of public use unless an actual necessi-

ty for the specific land or portion thereof or interest therein shall be alleged and proven, and unless it be alleged and proven that such other and different character of public use will not materially interfere with the public use to which such property is already subjected or devoted."

This section represents the codification of the last sentence in section 3 of the act approved October 1, 1903, amending several sections of the Code of 1896, concerning the right of eminent domain. At the time of the passage of said amendatory act there were in the Code of 1896 sections 1244 and 1246, which read, respectively, as follows:

"Any telegraph company, incorporated under the laws of this or any other state, shall have the right to construct, maintain and operate lines of telegraph along any of the railroads or other public highways in this state; but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway. * * *

"Such telegraph company shall be entitled to the right of way over the lands, franchises and easements of other persons and corporations, and the right to erect poles, and to establish offices, upon making just compensation as now provided by law."

These sections were, respectively, sections 1652 and 1654 of the Code of 1886.

Much stress is laid in the former opinion in this case upon the decision in *M. & O. R. R. Co. v. Postal Tel. Co.*, 120 Ala. 21, 24 South. 408. The opinion in that case cites the statutes, the above-mentioned sections of the Code of 1886, and states that:

"The petition makes a very clear case for the application of the rights conferred by statute for the condemnation of this right of way."

The rights conferred by the statute were, of course, expressly defined in said sections 1652 and 1654 of the Code of 1886, which, as previously stated, were made sections 1244 and 1246 of the Code of 1896.

It is to be noted that counsel for appellant in *The Postal Telegraph Case* contended that no reason or necessity was shown for taking the right of way, and cited the cases of *M. & O. R. R. Co. v. A. M. R. R. Co.*, 87 Ala. 501, 6 South. 404, and *A. & C. R. R. Co. v. Jacksonville, etc., Ry. Co.*, 82 Ala. 297, 2 South. 710. In answer to this insistence and argument of counsel the court, after stating that the petitioner had made out a case for the application of the rights conferred by statute, laid the above-cited cases out of view by merely stating that "these authorities are not in point." The court so stated, in that case, for the simple reason that the right rested upon a clear declaration of the statute, and the decisions of the court involving the condemnation of the right of way of one railroad by another were therefore without application. Sections 1244 and 1246 of the Code of 1896 were not brought forward into the Code of 1907, and they were therefore repealed. The statutes giving to telegraph companies authority to condemn the right of way of a railroad, while in full force and effect and relied upon by

the court at the time of the decision of the *Postal Telegraph Case*, supra, were not in existence at the time of the trial of this cause. It therefore appears that the decision of that case can have no material bearing upon the question now under consideration, and we think it was accorded too much weight on the former appeal.

[3] In the former opinion, it was said:

"Section 2490 of the Code of 1896, which provided that 'the right of way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state to construct them along the margin of public highways,' was brought forward into the Code of 1907 as section 5817, to which we have above referred, and that section, read in connection with section 242 of our Constitution, which we have also set out in full, means exactly what was meant by said omitted section 1244 of the Code of 1896."

Section 242 of the present Constitution provides that all railroads and canals not constructed and used exclusively for private purposes shall be public highways; and section 5817 of the present Code provides that:

"The right of way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state to construct them along the margin of public highways."

This section is found in the chapter of the Code devoted to public roads, and was, as previously shown, section 2490 of the Code of 1896, having appeared (same chapter) in the Code of 1886 as section 1434, in the Code of 1876 as section 1670, and in the Code of 1867 as section 1364. That the right of way of a railroad is private property is well settled, and was fully recognized in the former decision of this case. Section 5817 expressly grants the right for the construction of telegraph lines along the margin of public highways. As the ultimate owner of the beneficiary interest in the public roads of the state, the Legislature doubtless had the power to make such a grant as to the margin of public roads; but, as the right of way of a railway is private property, no such power would seem to exist, for it would infringe upon constitutional provisions. The location of said section 5817 in the Code, and its terms granting an unconditional and free right to use the margins of public highways, tend clearly to show that by "public highways" is meant public roads. We are of the opinion that the language of that statute has no application to the right of way of a railroad. While railroads are denominated public highways, yet they are such in a more or less limited sense, such as to be within state and federal control; but are not public highways in the general sense, such as would permit their use by the public, as in the case of public roads. The language of the Supreme Court of the United States in the case of *W. U. Tel. Co. v. Pa. R. R. Co.*, 195 U. S. 573, 25 Sup. Ct. 142, 49 L. Ed. 312, 1 Ann. Cas. 517, is of interest in this connection, and we quote the following:

"It is contended by the telegraph company that the charters under which the several railway companies constituting the system of the railroad company were organized expressly created them 'public highways,' and that in the acquisition of land for their purposes they were public agents, 'and the land was taken by the government, and in the eye of the law as completely subject to public uses as though it had been taken by the state itself;' that is to say, if we understand the argument, have become 'highways' in the full sense of that word. And counsel further say the difference between them and ordinary highways 'is not a legal difference, but is the difference of the kind of use to which the highway is subject—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by locomotives along and upon iron rails.' They are subject, therefore, it is urged, as ordinary highways, and streets of a city are subject, to the control of Congress by virtue of its power over interstate commerce. Counsel in advancing the argument exhibit a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a railroad right of way public property. To that extreme we cannot go, for the reasons which we have already indicated. The right of way of a railroad is property devoted to a public use, and has often been called a 'highway,' and as such is subject, to a certain extent, to state and federal control; and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation."

We therefore conclude that the repeal of sections 1244 and 1246 of the Code of 1896 cannot be declared to be of no significance because of the presence of section 5817 of the Code of 1907, as we are persuaded that this section is without application to the present case.

[4] There is nothing in section 23 of our present Constitution which, in our opinion, militates against the conclusion we have here reached. This section, with a few slight differences, is the same as section 24, art. 1, of the Constitution of 1875. In construing said section 24, this court in *M. & G. R. R. Co. v. Ala. Mid. Ry.*, 87 Ala. 501, 6 South. 404, said:

"The section does not profess to grant, but simply recognizes, a right which existed prior to the Constitution, as an incident of sovereignty, and is declaratory of the doctrine that the property and franchises of corporations are held subject to the eminent domain, the same as the property of individuals. Its purpose is to reserve in the General Assembly, as the conservator of the public welfare, unabridged and unimpaired, the exercise of an existing right, and to prevent a construction discriminating in favor of corporations. The office of the proviso is to authorize the Legislature, by delegating the power of condemnation, or otherwise, to secure to persons or corporations the right of way over the lands of others, and to provide for and regulate, by general laws, the exercise of the right. The government cannot be coerced to grant the privilege of exercising this prerogative power to any citizen, company, or corporation. It is only granted when the public welfare will be promoted or conserved by the grant. It cannot be exercised or granted in aid of any interest that is not public; and when part of this sovereign power is granted to a railroad corporation, it is not solely, nor chiefly, that the corporation may be aided thereby."

It is therefore clear that this section is not a restriction upon legislative power and discretion, but that it in fact reserves in the Legislature full power and authority over the subject, as well as plenary discretion in regard to the granting and regulating of the rights of eminent domain.

By the provisions of section 3867 the Legislature, in the exercise of this power and discretion, has merely seen fit to exempt, to a modified degree, certain kinds of property; that is, property belonging to a certain class, such as that impressed with a public use, which in the judgment of the lawmaking body, for reasons of policy, should not be interfered with except upon certain conditions. We are clear to the opinion that the Legislature was acting within its rightful discretion in making such exceptions. 10 A. & E. Enc. L. (2d Ed.) 1099.

The cases of *M. & G. R. R. Co. v. Ala. Mid. Ry. Co.*, 87 Ala. 501, 6 South. 404, and *Annis-ton, etc., Ry. Co. v. Jacksonville, etc., Ry. Co.*, 82 Ala. 297, 2 South. 210, which find frequent citation and reference in our former decision in this case, involved the condemnation by one railway of the right of way of another. In neither of these decisions, however, was there used language so definite and emphatic as that now found in section 3867 of our present Code. The strongest expression there used, in this connection, was that there should be a reasonable necessity for the taking of such right of way. The decisions recognize the difficulty of laying down any specific rule, as to the measure of necessity, of sufficient scope to include all cases.

In the case of *M. & G. R. R. Co. v. Ala. Mid. Ry. Co.*, supra, the rule of strict construction of statutes granting the right of eminent domain is fully recognized, as shown by the following quotation:

"Statutes delegating the paramount right of eminent domain must be strictly construed, and the authority strictly pursued in the manner prescribed. They are not to be extended by implication further than is necessary to accomplish their general purpose; but not so literally construed as to defeat the manifest objects of the Legislature."

In the opinion in that case it is further said:

"The settled rule is that the legislative intent to grant authority to one railroad to take and condemn a franchise of another must appear in express terms, or must arise from necessary implication, founded on an existing and particular need. No room for doubt or uncertainty must be left. Should the General Assembly empower a company to construct a railroad between designated and fixed terminal points, and, to accomplish this object, it becomes necessary to take the franchises, or any part, of another corporation, power to do so arises from necessary implication; the presumption being that the Legislature deemed the later use the more important, and of greater public benefit. The implication rests on the general rule that the grant of power to do a particular thing of a public nature carries with it implied authority to do all that is necessary to accomplish the principal and general purpose."

It is seen, from a reading of the cases, that much stress is laid upon the rule that where the Legislature has granted power to a railroad company to build a railway between two terminal points, and to accomplish this object it becomes necessary to condemn a portion of the right of way of another road, the power to so condemn is necessarily implied from the corporate authority originally given, and that the question of practicability is considered of great importance, as well as that of avoiding interference with the operation of the road, the right of way of which is sought to be condemned. Reasoning along these lines, the rule as to reasonable necessity was stated, in the former opinion in this case, as follows:

"When a right of way is essential to a public service corporation, and there are two possible routes, one upon unused lands previously acquired by some other public service corporation for a public use, and the other upon private lands, then (the rights of the public being in equipoise) when the cost of the right of way over such private lands and the labor and expense of putting such right of way in proper shape to be used by such second public service corporation are not disproportionate to the benefit likely to accrue therefrom, then the right of way over the private lands is practicable, and a right of way over the unused portion of the lands previously set apart to the first public use should be denied. When, however, the cost of acquiring and constructing the right of way, with its attendant circumstances, over the private lands is so much greater than would be the cost of constructing such right of way over the unused portion of lands previously acquired by the first public service corporation for public use as to clearly outweigh and sensibly exceed the injury which would proximately result to such first public service corporation, then, under such circumstances, so much of the unused portion of the lands belonging to such first public service corporation as is necessary to the actual occupancy and use of the second public service corporation may be condemned for its purposes, but not more."

Upon the former hearing this court held that it was largely a question of practicability, as measured by the further questions of convenience and expense, of comparative advantage and injury—

"having regard always to the interests of the public, for whose benefit the general authority is given and the particular taking proposed."

In the case of *S. & N. R. R. Co. v. Highland Ave., etc., Ry.*, 119 Ala. 105, 24 South. 114, this court called attention to the rule which required only a reasonable necessity for such condemnation in the following language:

"It also had a right to take a portion of the right of way of the defendant, upon showing a reasonable necessity therefor, and that such taking would not destroy the usefulness of the right of way as a franchise, or so impair the capacity or the easement as to render it unsafe; and both of these rights could have been enforced by statutory proceedings provided for this purpose" (citing *M. & G. R. Co. v. Ala. Mid. Ry.*, 87 Ala. 501, 6 South. 404, and *Anniston & Cin. R. Co. v. Jacksonville, etc., R. Co.*, 82 Ala. 297, 2 South. 210).

Whether in the two cases cited in the *S. & N. v. Highland Ave. Case*, there existed in fact an actual necessity for the specific

land, or portion thereof, sought to be condemned, within the meaning of section 3867 of our present Code, we need not stop to inquire. Both dealt with the right of condemnation granted to a railroad empowered by law to construct a road between two terminal points. The *Anniston, etc., Case*, had to deal with the condemnation of a right of way through a narrow gap in the mountains. In the building of railroads, as is a matter of common knowledge, the question of grades is an essential factor. In their construction the general topography of the country may, under certain circumstances, render absolutely necessary the use by a second road of a portion of the right of way of another. But such factors would not ordinarily create such imperative necessity in the erection of telegraph lines, and therefore what might be considered an indispensable necessity as a right of way for one would not be so considered for the other. The idea was expressed in *W. U. T. Co. v. Penn. R. R. Co.* (C. C.) 120 Fed. 362, in the following language:

"In railroad location, as we have noted above, grade is an essential factor; in telegraph construction it is, at most, a mere convenience. In railroad construction, the narrowness of defiles, the opening of gorges, the location of streams, the general topography of the country, or the lack of curve space may, under certain circumstances, render it imperatively necessary that the second road should intrench upon a primary location. None of these factors ordinarily create imperative necessity in the case of telegraph lines. With them grades may be ignored, gorges avoided, hills or mountains crossed. In other words, there is no necessity, in the nature of things, that ordinarily requires a telegraph line to be placed on a railroad right of way. Its location there is obviously a matter of convenience and economy."

No language so emphatic as that employed in the last sentence of section 3 of the act of October 1, 1903, which is now codified as section 3867 of the Code of 1907, is found in any of our decisions, and it was new to our statutory system at that time. The act of which this provision was a part purported to amend many of the sections of our Code relating to the power of eminent domain. The language of the statute now under review is therefore radically different from that of the statutes at that time. Research fails to disclose more than one case where there has been longitudinal condemnation of the right of way of a railroad for telegraph purposes for any great length (*M. & O. R. Co. v. Postal Tel. Co.*, supra); and, as we have heretofore stated, this decision was rested upon the express terms of the statute then in existence. The Legislature, in revising the various sections of the Code relating to the power of eminent domain, and making material changes therein, will therefore be presumed to have intended some change in the law with respect thereto.

"It will be presumed that the Legislature, in adopting the amendment, intended to make some change in the existing law; and therefore the courts will endeavor to give some effect to the amendment." 36 Cyc. 1165.

"When the Legislature employs different language in a subsequent statute in the same connection, the courts will presume a change of the law is intended. The Legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and, if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended, and after a consideration of the spirit and letter of the statute, will give effect to its terms according to their proper signification." *Lehman Durr Co. v. Robinson*, 59 Ala. 219.

That some material change was intended by the Legislature in the enactment of what is now section 3867 of the Code is strengthened by the fact that they declined to repeal this section when the effort to that end was made. Referring to the Senate Journal of the Legislature of 1907 (*Henderson v. State*, 94 Ala. 95, 10 South. 332), it is noted that Senate bill No. 81 was introduced, seeking to amend section 3 of an act, entitled "An act to amend sections 1713, 1714, 1717, 1718, 1719 and 1720 of the Code, approved October 1, 1903," and was referred to the committee on revision of laws. See Senate Journal, 1907, p. 143. On page 744 of the said journal it appears that motion was made to take said bill No. 81 from the adverse calendar, which motion was continued until Wednesday, November 14, 1907; and on page 849 it appears that on the latter date, upon a consideration of the same by the Senate, the motion was laid on the table by a vote of 25 to 5; the Senate thus refusing to take said bill from the adverse calendar and place it on a second reading. Bills of this character—such as are referred to, and adversely reported by, a standing committee—are required, under the provisions of section 911, Code of 1907, to be preserved, and said Senate bill 81 is therefore before us, and properly so, for consideration. It reads as follows:

"* * * That section 3 of an act entitled 'An act to amend sections 1713, 1714, 1717, 1718, 1719 and 1720 of the Code, approved October 1, 1903,' be and the same is hereby amended so as to read as follows:

"Section 3. Be it further enacted, that section 1717 of the Code be amended so as to read as follows:

"1717 (3211) *Allegations, Objections and Proof to be Heard*—On the day appointed or any other day to which the hearing may be continued, the court must hear the allegations of the application and any objections which may be filed to the granting thereof, and any legal evidence touching the same, and shall make an order granting or refusing the application—

"Provided; that if there are several distinct tracts of lands owned by different persons embraced in the application, the owners of each tract may have a separate hearing as to the right to condemn their lands, and the court may, if it finds that the application should be granted as to some and not as to other of the owners, make and enter its decree accordingly.

"The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law."

On the back of the bill is the following indorsement:

"This bill was considered by the committee on revision of laws in session and received adverse report. Oscar O. Bayles, Chairman, January 31, 1907."

A reading of the bill readily discloses that its sole purpose was to repeal the last sentence of section 3 of the act of 1903, above referred to, which is now section 3867 of the Code of 1907, and place the law back as it was before the passage of said act in so far as it concerns the matter here under consideration. The bill, as is noted, is but a copy of said section 3 of the above-mentioned act, with the exception that the last sentence thereof is omitted, and which sentence now constitutes section 3867 of our Code. It was therefore a direct effort to repeal this section. The refusal of the Legislature, or at least, of an important branch of that body, to repeal said section is not without some significance, and lends color to the theory that the lawmaking body considered the change proposed thereby as material and important and not to be disregarded.

The introduction of the bill, with its history, was not called to the attention of this court, on former appeal, and therefore did not enter into the consideration of the cause at that time. That it is a matter to be considered by this court would seem quite clear.

To summarize the situation, we find that sections 1244 and 1246 of the Code of 1896, which expressly authorized such condemnation of the right of way of a railroad, were repealed by the adoption of the Code of 1907, with these sections omitted. In addition to this, the Legislature of 1903 amended the statutory provision in reference to condemnation proceedings and, in section 3 of the act of October 1, 1903, incorporated the language now found in the Code as section 3867, requiring the existence of an "actual necessity for the land or specific portion thereof" before that which has already been devoted to a public use may be subjected to condemnation. In the Legislature of 1907, effort was made to repeal that portion of section 3 of the act above referred to, and which is now section 3867 of the Code, but the bill for this purpose was defeated.

[6] We are persuaded that the Legislature intended a material change of the law in the use of the language, "actual necessity for the specific land, or portion thereof, or interest therein," and that such could not be rested upon the mere questions of economy or convenience to the telegraph company. What would be such actual necessity is difficult of definition so as to lay down a specific rule which would embrace all cases, and would best be left for determination according to the circumstances of the particular case. The cause proceeded to final judgment upon the theory of petitioner that it had the right to condemn the railroad right of way because it needed a right of way and this was to it the most convenient and eco-

nomical, and such additional use would work no material interference with respondent railway. A necessity that springs merely from the choice or desire of the petitioner is insufficient. As stated in the former opinion, the word "actual" is used here as a word of emphasis, meaning "real as distinguished from apparent, constructive or imputed." Under the language of the statute, therefore, there must be first a real necessity for the specific land or portion thereof sought to be condemned. The word "specific" finds definition in the former opinion as "tending to specify, or to make particular, definite, limited or precise, as a specific statement." The language there used is strong, emphatic, and definite, and without ambiguity or uncertainty.

[6] Speaking to the question of the construction of legislative or constitutional provisions, this court, in *State ex rel. Robertson v. McGough*, 118 Ala. 166, 24 South. 397, said:

"There are other rules of interpretation that may override all others, as: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature (or framers of a Constitution) should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.' *Cooley on Const. Lim.* 69, 70. The framers of the Constitution 'must be understood to have employed words in their natural sense, and to have intended what they said.' *Id.* 73; *Gibbons v. Ogden*, 9 Wheat. 188 [6 L. Ed. 23]; *Ex parte Mayor*, 78 Ala. 423. 'We can only learn what they intended from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for an imaginary purpose.' *Lehman v. Robinson*, 59 Ala. 241."

This statute cannot be so construed as to mean merely such necessity as springs from economical reasons or matters of convenience for this would be but substituting the word "reasonable" for the word "actual." The necessity is defined by the act as "actual," meaning "real," and we are of the opinion that by such language is meant such actual necessity as arises from either physical or overpowering economical conditions, the question of practicability to be, of course, kept constantly in view. No effort was made by the petitioner to prove such actual necessity within the meaning of the language of our statute as now construed by us. For aught that appears, no difficulty exists as an obstacle to the condemnation and use of a right of way. The testimony of the witness for petitioner shows, of course, additional cost for the erection of the telegraph line outside of the railroad right of way, but this is purely an economical consideration, and one which appears to be by no means overpowering. As before noted, the erecting of telegraph line and the laying of a railroad are entirely different propositions, and what would constitute actual necessity for the one,

within the meaning of our statute, might not be at all such to the other. Indeed, from the very nature of things, it is difficult to conceive of an actual necessity, as here construed, for the condemnation by a telegraph company of the longitudinal right of way of a railroad for any considerable distance. It may, of course, exist for short distances on account of peculiar conditions; but these are matters to be determined when the particular case arises.

[7] Much was said in the former opinion in reference to the public good; it using the language "public interest is the lodestar of every statute conferring the right of eminent domain." The question here under consideration was one resting within the discretion of the Legislature. The right of way of a railroad, acquired by condemnation proceedings, is permitted by the law to extend far beyond the actual roadbed, the usual width being 100 feet. Obviously the authority to condemn a way of that width is given the railroad to be exercised, and upon the assumption, at least, that such width is reasonably needful for its purposes. If one telegraph line is permitted to use a part of this right of way, then, under the language of the former decision in this case, other such lines, such as telephone and power transmission lines, would be entitled to use it, and so, by gradual encroachment, ultimately deprive the railroad of its entire right of way, except that portion actually occupied by the railroad. The mere fact that this petitioner agrees to remove its poles, from time to time, from the margin of the right of way, as occasion may require the use of the space by the railroad (conceding that such averments in the petition are binding and effective), would not alter the situation; for it clearly appears that the telegraph company is seeking a permanent location on the right of way, although agreeing to shift the line from place to place. At the time of the passage of the act of 1903, previously referred to, there had been a longitudinal condemnation of a railroad right of way for telegraph purposes, rested upon sections 1244-1246 of the Code of 1896, and a decision by this court (*M. & O. R. Co. v. Postal Tel. Co.*, supra), in which it was held that in such proceedings a railroad company is entitled to only nominal damages. It was therefore the law of this state at that time that a telegraph company could, through condemnation proceedings, acquire the use of the right of way of a railroad without the payment of any substantial damages, and could thus acquire a most valuable right practically free of cost. It therefore clearly appears that the right of way of a railroad, already cleared and so kept by the railroad company, was a most inviting field for the erection of telegraph lines, and it did not seem unlikely that in the future development of the state advantage would be taken of the situation. It may be that con-

siderations like those above noted actuated the Legislature in enacting into law what is now section 3867 of the Code, and thus declaring that it is not the public policy of the state to condemn, for another use, property already devoted to a public use, unless an actual necessity therefor exists. The law-making body has spoken in emphatic terms in declaring the public policy, and it is not for us to "wander into the maze of conjecture or to search for imaginary purposes." Indeed, we are unable to see that the public good requires that the petitioner be permitted to locate its line upon the right of way of this railroad, but on the contrary, we think that the public interest is in equipoise. Petitioner went upon this right of way under contract, which contract, as we understand was conceded by counsel in argument, was terminated by the voluntary act of the petitioner. No reasons, except those of economy and convenience, appear why petitioner may not erect its line elsewhere than on this railway. If, upon petitioner's failure to acquire this right of way, and before it acquired a right of way elsewhere, the railroad company should begin at once a destruction of petitioner's telegraph line, it may be that a court of equity, on account of, and for the conservation of, public interests might enjoin such act of destruction pending the acquirement of a right of way elsewhere within a reasonable time. This, of course, need not be determined here. But the situation thus presented, brought on by the voluntary act of petitioner, clearly can afford no foundation for the argument that an actual necessity existed for the condemnation of the railroad right of way.

We have dealt with the one question which we deem of vital importance on this appeal and as conclusive of the result thereof. It is therefore unnecessary to enter into a consideration of whether or not the condemnation here sought was upon the margin of the right of way, or whether, if judgment of condemnation were entered, more than nominal damages should have been assessed. These were questions of secondary consideration, and are unnecessary to be here determined.

This cause was tried, in so far as the evidence of the petitioner is concerned, in conformity with the former opinion in this case. The trial judge, although entertaining a contrary view as to the law, followed in his rulings upon this question the holding of this court on the former hearing, which of course was entirely proper. While the record before us, under the view we now entertain of the case, would justify a final disposition of the cause on this appeal, yet, in view of this situation, we have concluded to remand the cause.

The former opinion was not decided by the full court, the then Chief Justice being absent and Mr. Justice SAYRE dissenting. The

writer of this opinion and Mr. Justice THOMAS were not then members of this court. As presently constituted, the court has reached the conclusion that the former holding was erroneous.

We are fully mindful of the importance of this holding, both to the parties and to the public; but it is our sole duty to declare the law as we find it. The case of *W. U. T. Co. v. S. & N. R. R. Co.*, supra, is therefore overruled, and the judgment of the court below will be reversed, and the cause remanded.

Reversed and remanded.

MAYFIELD, SAYRE, and THOMAS, JJ., concur. ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., dissent.

SAYRE, J. (concurring). I am not prepared to say that the action of the Legislature, or its lack of action, in reference to the bill to amend section 3 of the act to amend certain sections of the Code of 1896, should have any influence in the decision of this case. I place my concurrence upon the other considerations stated in the opinion. In this Mr. Justice THOMAS also agrees.

On Application for Rehearing.

GARDNER, J. [8] Upon this application for rehearing counsel for appellee, for the first time during this litigation it would seem, insist that the proceeding brought against the appellant was not for the purpose of acquiring an easement in the right of way, but was merely to ascertain the amount of compensation which should be paid therefor. This theory rests upon the assumption, on their part, that the appellee already owned a perpetual easement on the right of way by virtue of the contract of 1884. By what is here said we do not intend to indicate that such theory would support a condemnation proceeding. That might be conceded, for the sake of argument and for that purpose only, but we pass that question by as unnecessary to be determined. There is no intimation in the entire record that such a theory was even hinted at on the former trials of this cause, and the former opinion in the case discloses no such intimation upon the first appeal. This court, so far as cases of this character are concerned, is a court of review only, and is expected to pass only upon questions arising in the court below.

[9] The petition filed in this cause, seeking a condemnation of the right of way, conceded that the appellee went upon and occupied the right of way under a contract, soon to expire and is disclosed by the following quotation from section 1 thereof:

"Your petitioner has for many years, to wit, 20 years, occupied the right of way of the Louisville & Nashville Railroad Company, with its lines of telegraph, consisting of poles, wires, appurtenances and fixtures, under a contract with the said railroad company, which will expire on or about the 17th day of August, 1912; and your petitioner desires to continue to occupy

said right of way and maintain and operate its said lines of telegraph where they are now placed and located," etc.

But notwithstanding this question is presented now for the first time, in view of the carefully prepared briefs of the able and diligent counsel for appellee, we have deemed it proper to give it consideration.

This record shows, indeed the petition itself discloses, that appellee went upon the right of way of appellant under contract of 1884. The opinion in this cause recited that it was conceded by counsel in argument that the contract was terminated by the act of the petitioner. This was in accordance with the very terms of the contract, which provided a continuation of the same for a period of 25 years, and that at the expiration of said period either party thereto might terminate the contract on giving one year's notice. There is nothing in the contract giving a perpetual easement to the appellee, and nothing that would lead thereto by necessary implication. No such insistence was made by counsel in their former brief, but on this appeal, in one of their briefs, they referred to the contract in the following language:

"We then have left a working agreement which, by its terms, implies a permissive occupation of the property for telegraph purposes, possibly something in the nature of a tenancy at will."

It is thus seen that there was no contention that by the contract a perpetual easement was granted. Section 3 of the petition avers the ownership by the railroad of the easement sought to be condemned.

But we need not pursue the subject further. The contract was terminated according to its terms, and terminated in its entirety. No effort seems to have been made—and we do not see how it could have been made—to terminate that part of the contract which is burdensome and retain that which is beneficial.

As an exhibit to the last brief filed by appellee, there is attached the opinion of the United States District Court for the Southern District of Georgia, recently delivered in the case of *W. U. Tel. Co. v. Ga. R. R. & Banking Co.* (D. C.) 227 Fed. 276, and counsel seem to be impressed with the idea that that decision lends color to the theory now advanced. The statement of facts, as well as the opinion itself show, however, that the telegraph company in this instance had acquired by contract a perpetual easement in the right of way. We quote from the opinion as follows:

"A reading of these two contracts discloses beyond question that the predecessors of the Western Union Telegraph Company were granted perpetual easement in and upon the rights of way of the said railroads for the construction, maintenance, and operation of telegraph lines on same, and that such grants became irrevocable and assignable upon the construction of said telegraph lines as long as same should be kept in operation."

A reading of the case therefore discloses that it is easily differentiated from the one here under consideration. We are therefore not at all impressed with this last theory of counsel for appellee, and the application for rehearing will be overruled.

MAYFIELD, SAYRE, and THOMAS, JJ., concur.

JEFFERSON COUNTY SAVINGS BANK v. CARLAND et al. (8 Div. 104.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. PROCESS — 19 — SUMMONS — SERVICE — JURISDICTION.

The process of the city court of Birmingham, a court of general jurisdiction having jurisdiction coextensive with that of the circuit and chancery courts, runs to any sheriff in the state according to the form prescribed by Code 1907, § 5298, and under the express provisions of section 5301 must be executed by the sheriff or other officer in any county.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 15; Dec. Dig. — 19.]

2. VENUE — 26 — NONRESIDENT DEFENDANTS — OPERATION OF STATUTE.

Code 1907, § 6110, providing that personal actions must be brought in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence, does not apply to a personal and transitory action where the defendants are non-residents.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 39, 40; Dec. Dig. — 26.]

3. VENUE — 26 — PERSONAL ACTION AGAINST NONRESIDENT.

Under the common law, there being no controlling statute, a personal and transitory action may be maintained against a nonresident on service in a county of the state other than that in which the suit is brought.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 39, 40; Dec. Dig. — 26.]

4. VENUE — 32(1) — PRIVILEGE OF RESIDENT — PERSONAL NATURE.

The privilege which a resident of the state has under Code 1907, § 6110, of being sued in the county of his permanent residence, is personal to him.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47, 48, 50; Dec. Dig. — 32(1).]

5. CONSTITUTIONAL LAW — 249, 305 — DUE PROCESS — EQUAL PROTECTION — VENUE.

Due process and equal protection, which respectively are satisfied by any practice having the sanction of common-law usage and have reference to substance and not form, do not require that the privilege of localizing actions shall be conferred alike on resident and nonresident defendants.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 710, 925-927; Dec. Dig. — 249, 305.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by the Jefferson County Savings Bank against J. C. Carland and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

Sterling A. Wood, of Birmingham, for appellant. George H. Parker, of Cullman, and Eyster & Eyster, of New Decatur, for appellees.

SAYRE, J. The Jefferson County Savings Bank brought this action in Jefferson county on a contract made in that county. Defendants were nonresidents, their place of residence being in the state of Ohio. Process was served upon them in Cullman county. They pleaded in abatement that they were subject to suit in this state only in the county where they were found, and the trial court sustained their plea. Plaintiff appeals.

[1] The question presented is whether on the facts stated defendants were suable in Jefferson county. The city court of Birmingham, from which process issued, is a court of general jurisdiction. By the act of its creation its jurisdiction is coextensive with that of the circuit and chancery courts, and its process runs to every part of the state. *Wolfe v. Underwood*, 91 Ala. 523, 8 South. 774. Its process runs to any sheriff of the state of Alabama, and must be executed by the sheriff or other officer in any county. Code, §§ 5299, 5301.

[2] The action is personal and transitory, and the defendants are nonresidents, so that our venue statute (Code, § 6110), providing that personal actions must be brought in the county in which the defendant, or one of the defendants, resides, if such defendant has within the state a permanent residence, has no application, and the question is to be determined on common-law principles.

[3] In *Brown on Jurisdiction*, § 39, it is said, without citation of authority, that the venue in transitory actions, when brought against nonresidents, should be laid in the county where the defendant is found. The text is quoted in *Kress v. Porter*, 132 Ala. 577, 31 South. 377; but that was a proceeding in rem by attachment against a nonresident on whom no personal service was had, and the evident purpose of the quotation was to bring into view the connected statement of the text to the effect that such proceedings should be brought in the county where the property is seized. In *Smith v. Gibson*, 83 Ala. 284, 3 South. 321, the court said:

"The general rule is that every country has jurisdiction over all persons found within its territorial limits, for the purposes of actions in their nature transitory. It is not a debatable question, that such actions may be maintained in any jurisdiction in which the defendant may be found, and is legally served with process."

That case was cited in *Steen v. Swadley*, 126 Ala. 617, 28 South. 620, and *Lee v. Baird*, 139 Ala. 526, 36 South. 720, and its language may have been accepted as the substantial equivalent of the text of *Brown on Jurisdiction*, to which we have made reference. But our investigation of the sources from which the language was derived leads us to believe that jurisdiction, as there used, meant the territorial jurisdiction of the sovereignty in

which the suit was brought. Thus in *Peabody v. Hamilton*, 106 Mass. 217, it was said that:

"Personal actions, of a transitory nature, may be maintained in any jurisdiction within which the defendant is found, so that process is legally served upon him."

At any rate, in *Steen v. Swadley*, this was the language:

"When as in this case a cause of action is transitory in its nature, it may be sued on wherever within the state the defendant may be personally served with process, though he be a nonresident"

—all which was well said in those cases, for in each of them nonresidents were sued in the counties where they were found, and may be accepted as true in general without involving any necessary implication that a nonresident found in one county of this state may not be haled to court in another county.

An old Georgia case (*Murphy v. Winter*, 18 Ga. 690) holds that a citizen of another state, who is merely passing through, resides, as he passes, wherever he is. But in that case the defendant, a citizen of Alabama, was sued in the county in Georgia where he was found, properly so of course, and the case is like those cases of our own to which we have referred. In Ohio the ascertained policy of state legislation induced the ruling that a nonresident must be sued in the county where found, but the court said that it was aware that its decision was an innovation upon the subject as understood in England, and perhaps in some or all of the other states of the Union. *Genin v. Grier*, 10 Ohio, 210. In Indiana, on the other hand, a suit against a nonresident was maintained on service in a county other than that in which the suit was brought, and that against just such a plea in abatement as was filed in the case at bar. *Reed v. Browning*, 130 Ind. 576, 30 N. E. 704.

In England the place in transitory actions is never material, except where by acts of parliament it is made so, and the venue may be laid in any county. *Tidd's Pr.* pp. 427, 428. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material. *Mostyn v. Fabrigas*, *Cowp.* 161, 177.

[4, 5] The privilege, which a resident of this state has, of being sued in the county of his permanent residence, is personal to him. *Weaver v. Crenshaw*, 6 Ala. 873. It is conferred by our statute of venue, without which the place of trial would be optional with the plaintiff. But the statute makes no provision as to venue in transitory actions against nonresidents. By coming here, however transiently, defendants have submitted themselves to the jurisdiction which every state exercises over all persons within its limits in respect to matters purely personal, which, in contemplation of law, have no locality; and we apprehend there is no good reason why they should have the benefit of a personal privilege of mere convenience

which the statute has conferred only upon persons having a permanent residence in this state. Every substantial right they have may, and will beyond peradventure, be as fairly adjudicated, and for aught we can see, as conveniently, in Jefferson county as anywhere else in the state. Due process and equal protection, which, respectively, are satisfied by any practice having the sanction of common-law usage, and have reference to substance and not form, do not require that the privilege of localizing actions should be conferred alike on resident and nonresident defendants, though in some states it has been done. *N. Y., etc., R. R. Co. v. Estill*, 147 U. S. 591, 608, 13 Sup. Ct. 444, 37 L. Ed. 292. The plea was insufficient.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(138 La.)

No. 21735.

CROWLEY BANK & TRUST CO. v. HURD.
(Supreme Court of Louisiana. Feb. 7, 1916.)

(Syllabus by the Court.)

1. MORTGAGES \S 575—INJUNCTION—EFFECT.

Where a writ of injunction prevents the collection of only a part of the amount for which executory proceedings issued, and the injunction is dissolved by the district judge, and a suspensive appeal is taken by the defendant in the executory proceedings, the plaintiff is not required to await the recording of the mandate of the appellate court before proceeding with the seizure and sale for the amount acknowledged to be due.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1652; Dec. Dig. \S 575.]

2. NEWSPAPERS \S 3—NOTICE—PUBLICATION.

The law does not require that advertisements of sheriffs' sales of property seized in executory or ordinary proceedings shall be published in the official journal of the parish. Such advertisements may be published in any newspaper of the parish wherein the judicial proceedings are carried on or where the sale is to take place.

[Ed. Note.—For other cases, see *Newspapers*, Cent. Dig. \S 16-19; Dec. Dig. \S 3.]

3. JUDICIAL SALES \S 6—NOTICE—SERVICE.

Ten days before proceeding to sell immovable property the sheriff must serve upon the defendant whose property is seized a written notice to appear and appoint an appraiser. Section 10 of Act No. 83 of 1828 (an act purporting to amend certain articles of the Civil Code and Code of Practice), providing that two days' notice to appoint appraisers shall be sufficient, was not adopted in the Revised Code of Practice, approved on the 14th of March, 1870. The provisions of section 10 of Act No. 83 of 1828 were embodied in the Revised Statutes approved on the 14th of March, 1870; but these provisions of the law were abrogated in the concluding section (3990) of the Revised Statutes, declaring that, in so far as there may be a conflict between the provisions of the Revised Statutes and any provision of the Revised Civil Code or Code of Practice, the Code shall be taken as the law governing the case.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. \S 21-24; Dec. Dig. \S 6.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by the Crowley Bank & Trust Company against Charles H. Hurd. From judgment for plaintiff, defendant appeals. Reversed.

See, also, 137 La. 787, 69 South. 175.

Philip S. Pugh, of Crowley, for appellant. Smith & Carmouche, of Crowley, for appellee.

O'NIELL, J. The plaintiff instituted executory proceedings against the defendant on a mortgage note for \$4,000. The note was held by the bank as collateral security for a debt of \$2,750, represented by two promissory notes due by the defendant, on which he also owed interest at 8 per cent. per annum on \$100 from the 27th of October, 1914, and on \$2,650 from the 31st of December, 1914, and 10 per cent. attorney's fees.

Acknowledging the indebtedness of \$2,750 and the interest and attorney's fees due, and alleging that that was all he owed, the defendant sued for and obtained a writ of injunction, the effect of which was to prevent the collection of the excess claimed on the mortgage note. Instead of proceeding with the sale of the defendant's property to collect the amount acknowledged to be due by him, the plaintiff moved to dissolve the injunction, and withheld the sale pending the trial of the motion to dissolve the writ. Judgment was rendered dissolving the injunction, and on appeal to this court the writ was perpetuated only in so far as it prevented the collection of more than the \$2,750 and the interest and attorney's fees acknowledged to be due by the defendant. See *Crowley Bank & Trust Co. v. Hurd*, 137 La. 787, 69 South. 175. A rehearing was denied, and the judgment became final on the 28th of June, 1915.

A certified copy of the mandate of this court was filed in the district court in which the judgment had been rendered, but it was not recorded.

Thereafter the property was readvertised to be sold on the 31st of July, 1915; and on the 30th of that month the defendant sued for and obtained a second writ of injunction arresting the sale of his property.

In his petition for this second injunction the defendant alleged that the property had been seized and the sale enjoined on the ground that the writ had issued for a greater amount than was due; that the writ of injunction was dissolved and set aside by a judgment of the district court, from which he (defendant) prosecuted a suspensive appeal to the Supreme Court, where the injunction was reinstated and perpetuated in so far as to prevent the collection of more than the \$2,750 and the interest and attorney's fees acknowledged to be due; that it

was then ordered that the writ of seizure and sale be executed for the collection of the amount due to the bank; that the mandate of the Supreme Court was not recorded, as required by article 619 of the Code of Practice; and that therefore the plaintiff had no right, and the sheriff no authority, to readvertise the property for sale under the writ of seizure and sale.

In the alternative, in the event the above contention should be overruled, the defendant alleged that the attempted sale was not advertised in the newspaper required by law nor for the time required by law.

In the alternative, in the event both of the foregoing contentions should be overruled, the defendant alleged that he was not served with a notice to appoint an appraiser, and that he was entitled to have service of such notice 10 days before the sale.

The plaintiff filed a motion to dissolve the injunction. In response to the defendant's first complaint the plaintiff showed that the sheriff was proceeding, not under a mandate of the Supreme Court, but under the original order of seizure and sale issued from the district court. The plaintiff averred that the defendant's first writ of injunction had not at any time prevented the collection of the amount which the defendant acknowledged he owed; that the defendant's suspensive appeal to the Supreme Court had had no greater effect than the injunction; and hence that the executory proceedings to collect the amount acknowledged to be due were not arrested or held in abeyance awaiting the registry of the mandate of the Supreme Court. In answer to the defendant's second contention the plaintiff alleged that the notice of the proposed sale was published in a newspaper in the parish of Acadia once a week during a period exceeding 30 days, and that the defendant had not exercised his right to select the newspaper. As to the defendant's third complaint, the plaintiff alleged, in the motion to dissolve the injunction, that the notice to appoint an appraiser had been served upon the defendant within the time required by law, and that whether the notice was or was not served was of no importance, since the defendant had taken cognizance of the proposed sale in ample time to have appointed an appraiser if he had seen fit. The plaintiff therefore prayed for the dissolution of the writ of injunction and for a judgment against the defendant for \$300 damages for attorney's fees for dissolving the writ.

As the motion to dissolve the injunction denied some of the allegations on which the writ had issued, it was properly referred to the merits. Judgment was rendered in favor of the plaintiff dissolving the injunction and condemning the defendant to pay \$100 damages for attorney's fees. The defendant has appealed, and the plaintiff prays that the judgment for damages be increased to \$300.

Opinion.

[1] There is no merit in the defendant's contention that the sheriff should not have proceeded with the executory process to collect the amount acknowledged to be due before the judgment of this court was recorded in the district court. Articles 618 and 619 of the Code of Practice provide that a judgment rendered by an appellate court, whether affirming or reversing the judgment appealed from, cannot be executed until it has been recorded in the court which first had cognizance of the cause. But there was no attempt to execute the judgment rendered on appeal in this case. The plaintiff had the right to proceed with the sale in the executory proceedings to collect the amount acknowledged to be due, after being enjoined from collecting the excess called for on the mortgage note. *C. P. 298 (No. 10), 739 and 743; Whitney-Central Trust & Savings Bank v. Sinnott, 135 La. 790, 66 South. 222; Crowley Bank & Trust Co. v. Hurd, 137 La. 787, 69 South. 175.*

[2] The defendant's contention that the notice of sale should have been published in the official journal of the parish in which the sale was to be made is also without merit. The law provides that such an advertisement shall be published once a week for a period of 30 days in a newspaper of the parish wherein the judicial proceedings are carried on or where the sale is to take place; and when there are two or more newspapers published in the parish, the defendant has the right, within 3 days after receiving notice of the seizure, to select the newspaper in which the advertisement shall be published. See sections 1 and 2 of Act No. 91 of 1876. In this case the advertisement of the proposed sale appeared in a daily newspaper published in the parish seat where the sale was to be made, in its issues of Wednesday, the 30th of June, and of Saturday, the 3d, 10th, 17th, and 24th of July. The writ of injunction issued on the 30th of July, and perhaps prevented the publishing of the notice of sale again on the morning of the 31st of July, the date of the proposed sale. The law regarding the advertisement of the proposed sale was therefore complied with up to the time the injunction issued.

It was admitted on the trial of this case that the defendant was never served with a notice to appoint an appraiser of his property. The plaintiff's counsel contends that this notice was waived 2 days before the day of the proposed sale by the defendant's making affidavit for the writ of injunction on the 29th of July, 1915. We cannot agree with that contention, because, in the first place, it does not appear that it was 2 full days before the time of the proposed sale when the defendant took cognizance of the proceedings, and, in the second place, we are of the opinion that the defendant was entitled to be served with the notice to appoint an ap-

praiser 10 days before the date of the proposed sale.

[3] Section 10 of Act No. 83 of 1828, p. 154, entitled "An act further amending several articles of the Civil Code and Code of Practice," provided:

"That, after the promulgation of this act, two days' notice given to the plaintiff and defendant, by the sheriff, to appoint men to value property under execution, shall be sufficient, any law to the contrary notwithstanding."

The foregoing provisions of the statute of 1828 were not adopted in the Revised Code of Practice, approved on the 14th of March, 1870. On the contrary, article 671, C. P., provides:

"Ten days before proceeding to the sale of the property seized, if it consists of immovables, the sheriff shall summon the party whose effects are seized, by a written notice, delivered to him in person, or left at his usual place of residence, to appear on the day, place and hour which he shall mention to him, for the purpose of naming an appraiser of the property to be thus sold," etc.

The substance of section 10 of Act No. 83 of 1828 was embodied in the Revised Statutes adopted and approved on the 14th of March, 1870, as sections No. 64, No. 576, and No. 3426, viz.:

"Two days' notice given to the plaintiff and defendant by the sheriff to appoint men to value property under execution shall be sufficient, any law to the contrary notwithstanding."

The concluding section (3990) of the Revised Statutes of 1870, however, provides that, in so far as there may be any conflict between the provisions of the Revised Statutes and any provision of the Revised Civil Code or the Code of Practice, the Code shall be held and taken as the law governing the case. Hence we are constrained to hold that the provisions of article 671 of the Code of Practice must prevail over the provisions of sections No. 64, No. 576, and No. 3426 of the Revised Statutes, and that the defendant was entitled to 10 days' notice to appoint an appraiser.

The judgment appealed from is annulled, and it is now ordered and decreed that the writ of injunction herein be perpetuated to the extent of preventing the sale of the defendant's property without giving him 10 days' notice to appoint an appraiser, according to article 671 of the Code of Practice. The appellee is to pay the costs of the second advertisement and costs of the injunction in both courts.

(138 La.)

No. 21139.

TRICHEL et al. v. DONOVAN et al.

(Supreme Court of Louisiana. Jan. 24, 1916.
Rehearing Denied March 6, 1916.)

(Syllabus by the Court.)

LANDLORD AND TENANT — 26 — LEASE —
WAIVERS—RECORDATION.

Waivers entered into between lessor and lessee, after the recordation of the lease such as

a written consent to sublease, are not required to be inscribed on the books of conveyance.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 76-79; Dec. Dig. —28.]

Appeal from First Judicial District Court, Parish of Caddo; John R. Land, Judge.

Action by J. C. Trichel and another against R. F. Donovan and another. From a judgment for plaintiffs, defendants appeal. Reversed and dismissed.

Foster, Looney & Wilkinson, of Shreveport, for appellants. Hall & Jack, of Shreveport, for appellees.

LAND, J. This litigation to annul certain subleases held by the defendants and to eject them from the premises arose from the following state of facts:

On October 23, 1909, J. T. Hagens, sublet to C. M. Taylor the property formerly known as the Manhattan Saloon, No. 429 Texas street, Shreveport, La., for a term of five years commencing January 1, 1910, and for a monthly rental of \$200, represented by the notes of the said C. M. Taylor to the order of his lessor. The lease contained the following stipulation:

"It is further agreed that the leased premises shall not be sublet without the written consent of the lessor obtained in advance."

On November 14, 1910, J. T. Hagens leased to C. M. Taylor the north half of the same building, known as the Bon Ton Restaurant, No. 427 Texas street, with all the second floor of the entire building, for a term of four years beginning January 1, 1911, at a monthly rental of \$200, represented by the notes of the said C. M. Taylor delivered to his said lessor. This lease also contained the same stipulation against subleasing without the written consent of the lessor.

On November 16, 1910, C. M. Taylor leased to R. F. Donovan the property known as the Bon Ton Restaurant for four years commencing on January 1, 1911, at a monthly rental of \$150, represented by notes of R. F. Donovan to the order of his lessor.

On April 10, 1911, J. T. Hagens leased to C. M. Taylor the building in the corner of Marshall and Texas streets described as "occupied by C. M. Taylor and R. F. Donovan" for a term of five years beginning January 1, 1915, at a monthly rental of \$400, represented by notes of said Taylor. This lease also contained the usual stipulation against subleasing.

On April 11, 1911, C. M. Taylor re-leased the Bon Ton Restaurant to R. J. Donovan for a term of five years commencing January 1, 1915.

On August 22, 1912, with the written consent of Mrs. J. T. Hagens, representing her husband, then deceased, C. M. Taylor transferred and assigned to the plaintiffs all of the leases made to him by said Hagens; they assuming all of his obligations thereunder.

On September 5, 1912, C. M. Taylor transferred to the plaintiffs the two leases made by him to R. F. Donovan.

It appears from the record that by a written instrument of date August 7, 1912, C. M. Taylor authorized R. F. Donovan to sublet the leased premises.

It also appears that in July, 1914, R. F. Donovan subleased the premises to his co-defendant, John Demopolis.

Plaintiffs allege in their petition that this sublease was made by Donovan in violation of the stipulations of the leases to him, prohibiting him from subleasing said premises, and pray for judgment annulling all of the leases under which the defendants pretended to hold.

When confronted with the aforesaid written permit to sublease, plaintiffs took the position that the same was null and void as to them, because it had not been duly recorded in the parish of Caddo. The judge a quo sustained this contention.

The rule that no one can transfer a greater right than he has disposes of plaintiffs' demand, as their vendor, C. M. Taylor, was bound by his permit to R. F. Donovan to sublease the premises.

Plaintiffs, however, contend that this permit was utterly null and void as to them, because not duly recorded.

The first question is whether the law of this state requires the registry of such a written consent or permit, where the leases themselves have been duly recorded.

The leases, as recorded, gave notice to the public and to the plaintiffs that the stipulation against subleasing was not absolute, but was subject to waiver by consent of the parties.

Such a stipulation is not of the essence of a lease, but is merely an incident created by consent, and voidable by consent, or by acts purporting acquiescence.

Plaintiffs, bound to know that the stipulation was subject to waiver, were put on inquiry as to whether the stipulation was still in force at the date of their purchase of the leases.

In the case of a recorded oil lease, where the term was continued, and forfeiture was waived by the common consent of the parties, this court held that assignees of the lessor stood in the shoes of the lessor, as the law does not require a registry of the action of the parties under a recorded agreement. *Hudspeth v. Producers' Oil Co.*, 134 La. 1013, 64 South. 891.

In another case of an assignment of an oil lease this court held that it was not necessary for the lessee to have his rent receipts recorded in order to give notice that the lease had not been forfeited. *Busch-Everett Co. v. Vivian Oil Co.*, 128 La. 886, 55 South. 564.

A stipulation against subleasing is for

the exclusive benefit of the lessor, and no one else can enforce it. *Montecon v. Faures*, 3 La. Ann. 43. The stipulation in this case was likewise for the benefit of the lessor, and the requirement of his written consent to a sublease of the premises was for his protection alone. The lessor might have given him verbal consent, or merely have acquiesced in the subletting of the premises. The written consent subsequently given by the lessor operated as a removal of the interdiction in the contract against subleasing the premises. The abrogation of the stipulation vested in the lessee the right to sublease, or even cede his lease, as provided in C. C. art. 2725. The stipulation being for the sole benefit of the lessor, he had the right to waive it at any time, and no other person has any right to complain.

We know of no law which requires waivers of this kind made after leases have been duly recorded to be inscribed in the same manner as leases, sales, and other conveyances.

It has been held that the transfer of a lease need not be recorded. *Gay & Co. v. Nicol*, 28 La. Ann. 227.

Having reached this conclusion, it is unnecessary to consider other points made by counsel on both sides.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiffs' suit be dismissed, with costs.

MONROE, C. J. I concur in the decree.

PROVOSTY, J. (concurring). The thing transferred was not the real estate, but the lease, which is not real estate, and the law requires registry only of acts affecting real estate.

(138 La.)

(No. 21770.)

STATE v. MILANO.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 101(2) — TRANSFER OF CAUSE—RIGHT.

When a criminal prosecution is commenced in a court having jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction; and what the prosecuting attorney cannot do directly he should not do indirectly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 200, 205; Dec. Dig. § 101(2); Removal of Causes, Cent. Dig. § 127.]

2. CRIMINAL LAW — 302(1) — NOLLE PROSEQUI—TRANSFER OF CAUSE—RIGHT.

Therefore, when several of a large number of prosecutions for the same crime or misdemeanor have been tried and resulted in acquittal in a court having jurisdiction of all of the cases, the district attorney should not enter a nolle prosequi in the remaining cases, and renew the prosecutions for the same offense in another court of concurrent jurisdiction for no other

purpose than to have them tried by the other judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 688, 691-693, 696, 697; Dec. Dig. § 302(1).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Mike Milano was convicted of retailing spirituous liquor without a license, and appeals. Reversed, and ordered that defendant be discharged.

Charles F. Crane and E. P. Mills, both of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendant was indicted for the offense of retailing spirituous liquor without a license. He was tried and convicted, and sentenced to pay a fine of \$350 and to serve 3 months' imprisonment in the parish jail, and, in default of his paying the fine and costs, to serve an additional 4 months in the parish jail. He has appealed from the conviction and sentence, and relies upon three bills of exception.

It appears from the recitals of the bill of exceptions taken to the overruling of his demurrer or plea to the jurisdiction of the district court, and from the allegations of the motion referred to in the bill, that the defendant was first informed against in the city court of Shreveport, by an affidavit charging him with the same offense, based upon precisely the same alleged transaction, for which he was afterwards prosecuted in the district court. It also appears that, on information furnished by negro "spotters," who were employed to detect violations of the prohibition ordinance of Caddo parish, many other persons were informed against, in the city court of Shreveport, for retailing intoxicating liquors without a license, at the same time that the affidavit was filed against this defendant; and all of the defendants were arraigned, pleaded not guilty, and their cases were set down for trial. On the trial of the first four or five cases (other than the case of the present defendant) the judge of the city court acquitted the accused parties, announcing that he would not convict on the uncorroborated testimony of hired negro "spotters." Inasmuch as the state depended upon the testimony of such witnesses to convict the other defendants, including the present appellant, the district attorney entered a nolle prosequi in each case that had not been tried, including that of the present appellant. Thereafter, the cases in which nolle prosequis had been entered in the city court, including that of the present appellant, were presented to the grand jury, and indictments were found against the parties accused, including this appellant, in the district court, having jurisdiction of such cases, concurrent with that of the city court.

The present defendant filed a demurrer or plea to the jurisdiction of the district court, setting forth the facts above recited, and alleging that the only purpose of the district attorney, in entering the nolle prosequi in the city court, was to transfer the case from that court, which had taken jurisdiction, to the district court.

[1, 2] In the statement per curiam in the bill of exceptions taken to the overruling of the defendant's demurrer or plea to the jurisdiction, the district judge virtually conceded that the only purpose and effect of the nolle prosequi was to accomplish indirectly what the state had no right to do directly, i. e., to transfer the case from one court to another of concurrent jurisdiction, and this was virtually conceded in the argument before this court. The district judge condemned the arbitrary use of the district attorney's power to enter the nolle prosequi, but held that he knew of no law to prevent the prosecuting officer's use of the authority which the law had given him.

In *Coleman v. State*, 83 Miss. 290, 35 South. 937, 64 L. R. A. 807, the Supreme Court of Mississippi cited *State v. Pauley*, 12 Wis. 533, *Ex parte Baldwin*, 69 Iowa, 502, 29 N. W. 428, *State v. Chinault*, 55 Kan. 320, 40 Pac. 662, *State v. Branon*, 6 Kan. App. 765, 50 Pac. 986, and *State v. Williford*, 91 N. C. 529, in support of the proposition that the state cannot, after filing an indictment or information in a court having jurisdiction, enter a nolle prosequi and file an indictment or information charging the same crime in another court of concurrent jurisdiction. It was said that the statute, providing that jurisdiction of a criminal case of which two or more courts had concurrent jurisdiction should vest in the court where the prosecution was begun, was only declaratory of a well defined and firmly established legal doctrine, recognized in the comity of courts and necessary for an orderly administration of justice.

In *Ex parte Baldwin*, 69 Iowa, 502, 29 N. W. 428, it was said of this doctrine:

"It is in accord with the familiar rule prevailing everywhere, that where courts have concurrent jurisdiction the court where jurisdiction first attaches must retain the case for final disposition. Authorities need not be cited to support this familiar elementary rule. But few cases are or can be cited announcing the rule, doubtless for the reason that it is rarely, if ever, disputed or doubted."

The abandonment of a prosecution, in a court having jurisdiction, for an alleged violation of a sumptuary or blue law, and the institution of the prosecution, for the same offense, in another court of concurrent jurisdiction, under the circumstances and for the apparent purpose for which it was done in this case, is not calculated to increase the respect that is due to the courts; and we would not be inclined to encourage the practice, if we had no precedent for our present ruling.

The verdict and sentence appealed from are annulled, and it is ordered that the defendant be discharged.

PROVOSTY, J., takes no part.

(138 La.)

No. 21774.

STATE v. NEJIM.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

F. A. Nejim was convicted of retailing spirituous liquor without a license, and appeals. Reversed, and ordered that accused be discharged.

Charles F. Crane and E. P. Mills, both of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. For the reasons assigned in the opinion in the case entitled *State of Louisiana v. Mike Milano* (No. 21770) 71 South. 131, this day decided, the verdict and sentence appealed from are annulled, and it is ordered that the accused be discharged.

(138 La.)

No. 21781.

STATE v. MAROUN.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Philip Maroun was convicted of retailing spirituous liquors without a license, and appeals. Reversed, and ordered that accused be discharged.

Chas. F. Crane and E. P. Mills, both of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. For the reasons assigned in the opinion in the case entitled *State of Louisiana v. Mike Milano* (No. 21770) 71 South. 131, this day decided, the verdict and sentence appealed from are annulled, and it is ordered that the accused be discharged.

(138 La.)

No. 21783.

STATE v. FULCO.

(Supreme Court of Louisiana. Feb. 21, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1134(3)—APPEAL—JURISDICTION.

The jurisdiction of the Supreme Court is limited to questions of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2989, 2990, 3056; Dec. Dig. §1134(3).]

2. CRIMINAL LAW §1151—APPEAL—DISCRETIONARY RULING—CONTINUANCE.

Motions to continue are largely left to the discretion of the trial judge; and, unless it appears that the accused has been in some way

prejudiced by the ruling, usually the verdict will not be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. §1151.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Tony Fulco was convicted of selling liquors without a license, and appeals. Affirmed.

Murff & Roberts, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Defendant was convicted of selling liquors without first having obtained a license. The record contains but one bill of exceptions, taken to the ruling of the court in refusing a new trial.

In the motion for a new trial it is alleged that defendant, just prior to his trial, was forced to be in attendance upon a sick wife, and for that reason had not been able to employ counsel to represent him and to prepare for the trial of his case; that on the day of trial he called the attention of the court to these facts, and asked for a continuance of the case, which was refused, and he was forced to go to trial without an attorney and without time under the circumstances to prepare his case for trial.

In the per curiam attached to the bill of exceptions the judge says:

"This defendant had had every opportunity to employ counsel before trial. When he was arraigned two or three weeks before the trial, he stated he had no counsel, and the court offered to assign counsel to him if he was not able to employ, but he refused, stating that he did not want any lawyer," etc.

[1, 2] The reasons given by the judge for refusing a continuance and for not granting a new trial show that the matters under consideration were clearly within the discretion of the trial judge; and it is equally clear that the discretion vested in him has not been abused in this case. No question of law is presented in the motion for a new trial, and the action of the judge thereon is not reviewable in this court. Marr's Crim. Jur. § 486, pp. 841, 842.

No brief has been filed on the part of the defendant; and the court has not been pointed to any law which requires the trial judge to appoint counsel for a defendant charged with a misdemeanor. Defendant not only failed to request the court to appoint counsel to defend him but he refused the offer of the court to appoint counsel for him. He cannot be heard to complain of the ruling of the court denying a continuance in such circumstances.

Judgment affirmed.

(138 La.)

No. 21780.

STATE v. FULCO.

(Supreme Court of Louisiana. Feb. 21, 1916.)

*(Syllabus by the Court.)*CRIMINAL LAW \S 641(1)—COUNSEL FOR ACCUSED—OFFER TO ASSIGN—REFUSAL—RIGHT TO COMPLAIN.

The accused, who declined to accept an offer of the court to assign counsel to defend him, and, not mindful of the old adage, elected to act as his own lawyer, has no ground for complaint that he was not represented by counsel at the trial of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1496; Dec. Dig. \S 641(1).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

John Fulco was convicted of retailing intoxicating liquors without a license, and appeals. Affirmed.

Murff & Roberts, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondrean, of New Orleans, of counsel), for the State.

LAND, J. Defendant has appealed from a sentence of fine and imprisonment for retailing intoxicating liquors without previously obtaining a license therefor from the proper local authorities.

The appeal is based on a single bill of exception taken to the refusal of the trial judge to grant defendant's motion for a new trial.

The first ground of the motion is that the judgment is contrary to the law and the evidence and presents no question of law for review.

The other grounds are that the accused is an Italian who does not understand court proceedings, and speaks and understands the English language very badly; that, when his case was called, the defendant was not prepared to go to trial, and did not have an attorney to represent him, and was forced to go to trial without having his witnesses summoned, or having counsel to represent him; that he believes he has a good defense, and that, if he had been represented by counsel, he would have been able to have proved his innocence; and that he has employed counsel since the trial.

The per curiam reads as follows:

"This defendant had every opportunity to employ counsel before trial. When he was arraigned two or three weeks before the trial, he stated he had no counsel, and the court offered to assign counsel to him if he was not able to employ counsel, but he refused, stating that he did not want any lawyer; and it was not until after the state had put in its evidence in the Tony Fulco Case, 71 South. 133, that he wanted a lawyer bad, and asked for a continuance to get one, which the court refused."

The facts stated in the per curiam demonstrate that the motion for a new trial is

without merit. The accused refused to accept the offer of the court to assign counsel to defend him, and, not mindful of the old adage, elected to act as his own lawyer.

Judgment affirmed.

(138 La.)

No. 21167.

BARTON et al. v. BURBANK et al.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)

*(Syllabus by the Court.)*1. ACTION \S 70—ABANDONMENT OF SUIT—STAY BY INJUNCTION—OPERATION OF STATUTE.

If Act No. 107 of 1898, which provides that a plaintiff is to be considered to have abandoned his suit when he allows five years to elapse without taking any step in its prosecution, could properly be applied in a case where a seizure under executory process is stayed by injunction and the judge delays his decision for five years after the submission of the matter, such application would result in a judgment to the effect that plaintiff in injunction had abandoned his suit, and not plaintiff in seizure, the execution of whose judgment was enjoined, but in such case the statute mentioned is inapplicable to either litigant, since, having submitted their case to the judge, they should not be held responsible for his delay in the discharge of his duty; the idea of the statute being to hold a plaintiff responsible for delay, attributable to his nonaction in and failure to prosecute his suit up to the point at which the court is placed in a position to render judgment.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 752-755; Dec. Dig. \S 70.]

2. JUDGES \S 32—RENDITION OF JUDGMENT—SUCCESSOR OF TRIAL JUDGE—EVIDENCE.

Where a case has been tried and submitted, with full opportunity for the cross-examination of witnesses, but the judge before whom it was tried retires from the office before giving judgment, there is no reason why his successor in office should not give such judgment, after hearing argument and without hearing further testimony.

[Ed. Note.—For other cases, see Judges, Cent. Dig. \S 158-164; Dec. Dig. \S 32.]

3. EXECUTORS AND ADMINISTRATORS \S 438—SUCCESSION—MORTGAGES—ENFORCEMENT AGAINST SUCCESSION—LOSS OF RIGHT.

The holder of a note, secured by mortgage, does not lose the right to proceed against the succession of the maker, contradictorily with the administrator, because of subsequent transactions in which the heirs co-operate with the administrator in borrowing other money from such holder for carrying on the plantation, constituting the main asset of the succession upon which the original mortgage was imposed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 1765-1785, 1790; Dec. Dig. \S 438.]

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; C. T. Wortham, Judge.

Action by E. H. Barton and others against E. W. Burbank and others. From judgment for defendants, plaintiffs appeal. Affirmed.

See, also, 114 La. 224, 38 South. 150; 119 La. 224, 43 South. 1014.

Pugh & Himel, of St. James, for appellants. J. Zach Spearing and W. B. Le Bourgeois, both of New Orleans, for appellee heirs of E. W. Burbank.

Statement of the Case.

MONROE, C. J. On March 5, 1894, E. D. Barton, by authentic act, imposed a mortgage upon his St. Clair plantation, in the parish of St. James, to secure a debt of \$16,000, due and to become due to E. W. Burbank, and represented by his note for that amount, and in June, 1895, Barton died, leaving a widow in community and a number of children, major and minor, one of whom, Walter I. Barton, was appointed administrator of his estate. In April, 1904, Burbank sued out executory process to enforce payment of a balance of \$2,134.15, with interest, etc., then due upon the original debt, and caused Walter I. Barton, administrator, to be served, as required in such proceedings, and he was met by a writ of injunction, issued at the instance of the widow and heirs of E. D. Barton, who, alleging the appointment of the administrator, as above stated, further alleged that, in 1896, with the consent of the court, so far as the minor heirs were concerned, and without opposition, they had gone into possession of the estate of the decedent, that title thereto had become vested in them, that the succession had ceased, that Walter I. Barton, with the full consent and approval of Burbank had been discharged as administrator, and, that he was without capacity to stand in judgment in that capacity.

An exception of no cause of action was filed on behalf of Burbank, and was maintained by the district court, and plaintiffs in injunction appealed from the judgment dismissing their suit, and this court reversed that judgment and remanded the case for further proceedings according to law. *Barton v. Burbank*, 114 La. 224, 38 South. 150. Burbank then pleaded to the merits, and there was a trial by jury, which resulted in a verdict and judgment in his favor, from which plaintiffs again appealed, and the judgment was again reversed and the case remanded, for the reason that, the stenographer by whom the testimony had been taken having lost his notes before translating and transcribing them, the court found it impossible to review the judgment in the absence of the testimony upon which it was predicated. *Barton v. Burbank*, 119 La. 224, 43 South. 1014. The case was then again tried before the judge without a jury, and was submitted on December 12, 1908, and no further steps were taken until October 5, 1914, when counsel for defendant in injunction filed a motion alleging the submission, as above stated, further alleging that the judge, then presiding, had ceased to hold that position without having disposed of the case, and praying that it be reassigned for argument

upon the record and evidence as already made up and filed, and the reargument was accordingly set for October 21st, from which day it was continued by consent to October 28th, when plaintiffs in injunction moved that the case be stricken from the docket on the ground that "plaintiffs" had allowed five years to elapse without having taken any steps in the prosecution thereof, and with reservation and protest excepted to the jurisdiction and authority of the court to proceed in the matter without hearing the testimony anew, which motion and exception were denied and overruled, and judgment was again rendered in favor of defendant in injunction, and plaintiffs have again appealed.

Opinion.

[1] The only reference to the motion and exception last above mentioned that we find in the briefs filed in this court on behalf of the appellants is the statement:

"We abandon none of the positions assumed by us in the court a qua, but submit them on the record."

We are of opinion that both motion and exception were properly disposed of by the trial judge. Act 107 of 1898, p. 155, amending and re-enacting article 3519 of the Civil Code, provides that:

"Whenever the plaintiff, having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."

If the statute thus quoted could properly be applied to this case, such application would result in a judgment to the effect that appellants had abandoned their suit, since they are the plaintiffs in this proceeding, who have stayed, by injunction, the execution of the judgment, or quasi judgment, which the appellee obtained in 1904 and is still endeavoring to execute. But, we are of opinion that, having submitted their case to the judge, they should not be held responsible for his delay in the discharge of his duty; the idea of the statute being merely to hold a plaintiff responsible for delay attributable to his nonaction in and failure to prosecute his suit up to the point at which the court is placed in a position to render judgment.

[2] As to the exception, the litigants had had their day in court, with full opportunity to cross-examine each other's witnesses. They came before the successor in office of the judge, who heard the testimony upon terms of perfect equality, and there was no more reason why he should not have decided the case upon that testimony, than why this court should not do so. *Saint v. Martel*, 127 La. 86, 87, 53 South. 432.

[3] The petition upon which plaintiffs obtained the injunction contains, among others, the following sworn allegations, to wit:

"That, shortly after the death of E. D. Barton, Walter I. Barton was appointed adminis-

trator of said succession, but in 1896 the widow and heirs, with the consent of the court, so far as the minor heirs of said succession were concerned, and without opposition, took possession of all the property left by the said deceased, E. D. Barton, and since then said owners of said property have been, and are now, in quiet, open, and undisturbed possession of said property left by the said E. D. Barton, as widow and heirs, and that the effect of the widow and heirs taking possession of all the succession property of E. D. Barton was to end the succession and vest the title in said heirs and widow. That ever since 1896 there has been no administration of said succession, but that the heirs and widow have been in possession and carried on said property as joint owners thereof. * * * That E. W. Burbank, alleging himself to be a creditor of the succession, * * * has obtained * * * an order of seizure and sale, and has seized and is about to sell the property of your petitioner herein above described [being the property upon which the mortgage had been imposed by E. D. Barton, the then owner]; * * * that the defendant in said proceeding is Walter I. Barton, alleged to be the administrator of said succession, * * * but in truth and in point of fact said succession has long since ceased to exist, and the said Walter I. Barton, as administrator, with the full consent and approval of said E. W. Burbank, has been discharged and released and relieved of all the duties as administrator of said succession; that said Walter I. Barton ceased to be administrator of said succession, and was functus officio when the property of the succession was turned over and delivered to the widow and heirs, with the consent of the said Burbank," etc.

So far as we are informed by the record, not one of the plaintiffs has ever appeared in court to sustain by his, or her, testimony any one of the above allegations. Walter I. Barton, who died before the last trial, testified before the jury on the first trial (as is shown, without attempt at contradiction), to the effect that he administered the property of the succession, in his capacity of administrator, from the date of his appointment to the date of the seizure; that the administration went on after 1896 as it had done prior to that time; that the heirs knew that he was in charge, and that, in dealing with Mr. Burbank—signing checks and drawing on him—he acted as administrator; that in all his dealings with Burbank, he had dealt as the administrator of the succession of E. D. Barton; that the widow and heirs exercised no control over the management of the property, but that he controlled it without consulting them; and that testimony is abundantly corroborated by the testimony of other witnesses and by authentic documents executed by the plaintiffs themselves, the fact being that when, in 1905, E. D. Barton died, his estate was heavily mortgaged to Burbank, and probably owed other debts besides, and he left a widow and several minor children, issue of his last marriage, and several other children, major and minor, by previous marriages. The widow and children of the last marriage were living on the plantation, and Walter I. Barton, a son by a prior marriage, was, perhaps, living there also, though we do not speak with certainty on that point. At all events, he was appoint-

ed administrator; and for nearly 10 years thereafter he carried the burden of operating the plantation, keeping it from being sold in satisfaction of the mortgage, and thereby providing a home, with food and shelter, for his father's widow and children. In order to accomplish that, it became necessary to secure the co-operation of the major heirs and of family meetings acting in behalf of the minors; and, even then, as can well be understood, the burden was not easy to carry. Mr. Barton, however, continued to act as administrator up to the time of his death (which occurred after the institution of this suit), and Mr. Burbank (who has also died since this litigation began) alleged in his petition for executory process that, in addition to the balance due upon the note sued on, there is a further balance of about \$38,000 due him for money advanced after the death of E. D. Barton, agreeably to certain acts of mortgage executed by the widow and major heirs, and by tutrices and tutors, authorized by family meetings, and orders of court in behalf of the minors. Those acts were executed in March, 1896, May, 1897, and May, 1898, respectively, and contain recitals such as the following (quoting from the act of May 28, 1898) to wit:

"Which appearers severally declared that Walter I. Barton, the administrator of the succession of E. D. Barton, is carrying on and cultivating the St. Clair plantation, belonging to said succession, for the joint account, interest, benefit, and concern of themselves and said minors; that said administration has no funds belonging to said succession wherewith to defray the expenses of the cultivation of said plantation and for the support of the widow and children of the said deceased, and of Effie Barton, widow of Frank Pike and her minor child, * * * and that the said administration has applied to E. W. Burbank, a commission merchant of New Orleans, for said advances, who has consented to make said advances for the purposes above mentioned," etc.

It is neither alleged nor shown that Walter I. Barton ever filed a final account as administrator, ever applied for his discharge, or that any order of court was ever made granting his discharge; and, though it is alleged, it is not proved, but is disproved, that he ever intimated to Mr. Burbank that he considered himself functus officio, and that his administration was ended. To the contrary, it may be said, after the seizure of the plantation, as the property of the succession, it being desirable that the "administration" and the widow and heirs of the decedent, through the administration, should reap and sell the growing crop, and the law providing that:

"The defendant in execution, whose property has been seized, shall have the right to retain such property in his own possession from the time of such seizure until the day of sale, on condition that said defendant shall execute his bond in favor of the plaintiff in execution," etc. (R. S. 8411)

—an order was made, on application of counsel for "defendant in exception" (should be execution), directing the sheriff to release

the seized property "on defendant's furnishing bond," etc.; and a bond was furnished by, and the property released to, "Walter I. Barton, Administrator, Succession of E. D. Barton," who was represented by the same counsel who then and now represented and represent the plaintiffs in injunction, and who drew the petition in which those plaintiffs alleged that Walter I. Barton had ceased to be the administrator of E. D. Barton's succession some eight years prior to the date at which the bond was furnished. Where an administrator has been appointed to a succession, the law contemplates and provides that he shall continue in office until the succession shall be finally wound up; that the heirs shall be put in possession by the judge of the place where the succession is opened, after having cited the administrator; and that the administrator shall then file an exact account of his administration as a condition precedent to the obtention of his discharge. C. C. 1193, 1194, 1195. It may be that, if there be but a single creditor of the succession and it is shown that he has consented thereto, the administrator can obtain his discharge without showing the payment of that debt, and it was upon the theory that the consent of the alleged single creditor was alleged that this court held, upon the first appeal (114 La. 224, 38 South. 150) that plaintiffs' petition disclosed a cause of action. The facts, as now disclosed, are that no such consent was given or contemplated, and that the administrator was never discharged, and never asked to be discharged; from which it follows that he was the proper person to cite in a proceeding to enforce payment of a succession debt, and that the obtention of the injunction herein was an abuse of the process of the court. *Nuttall v. Kirkland*, 8 Mart. (N. S.) 292; *Ledoux v. Breaux*, 27 La. Ann. 190; *Leonard v. Smith*, 28 La. Ann. 810; *Freret v. Freret*, 31 La. Ann. 506; *Dreyfus, Ex'r. v. Richardson & May*, 33 La. Ann. 602; *Verrier v. Loris*, 48 La. Ann. 717, 19 South. 677; *Succession of Hart*, 52 La. 364, 27 South. 69.

The judgment appealed from is therefore affirmed.

(138 La.)

Nos. 21743, 21745.

STATE v. AMERICAN SUGAR REFINING CO.

(Supreme Court of Louisiana. Jan. 26, 1916.
Rehearing Denied in No. 21743,
March 6, 1916.)

(Syllabus by the Court.)

1. PLEADING — 48 — "PETITION" — REQUISITES.

A "petition" is a written document which the plaintiff addresses to a competent judge, setting forth the cause of the action which he intends to bring against the defendant, and praying to be permitted to cite that defendant before him, in order that he may be ordered to do or to give a certain thing. It must contain a clear and concise statement of the object of the de-

mand, as well as the nature of the title, or the cause of action on which it is founded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 106, 106; Dec. Dig. 48.]

For other definitions, see Words and Phrases, First and Second Series, Petition.]

2. CORPORATIONS — 370(1) — CONDUCT OF BUSINESS—CONSTITUTIONAL LAW.

Corporations must conduct their business in such manner as not to infringe the equal rights of individuals or the general well-being of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1513, 1518; Dec. Dig. 370(1).]

3. CORPORATIONS — 651—FOREIGN CORPORATIONS—REVOCATION OF LICENSE—RIGHT.

Where a foreign corporation commits acts which are forbidden by its charter or by a general rule of law, and that act is dangerous to the public, it may be sufficient ground for the state to ask for a revocation of license to do business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2574, 2575; Dec. Dig. 651.]

4. CONTRACTS — 103—VALIDITY.

The cause (of contract) is unlawful when it is forbidden by law, when it is contra bonos mores, or to public order.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468-476; Dec. Dig. 103.]

5. MONOPOLIES — 1—DEFENSES.

Monopoly is defined to be: "A license or privilege allowed by the King for the sole buying and selling, making, working, or using, of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 1; Dec. Dig. 1.]

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

6. CORPORATIONS — 613(1) — PROCEEDINGS AGAINST — DISSOLUTION — OUSTER — PARTIES—ATTORNEYS.

The state is a necessary party to a proceeding against a corporation either for its dissolution or for ouster; and the Attorney General or district attorney is the proper officer to institute proceedings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431-2434; Dec. Dig. 613(1).]

7. CORPORATIONS — 613(1) — PROCEEDINGS AGAINST — DISSOLUTION — OUSTER — PARTIES—ATTORNEYS.

"All combinations, trusts, or conspiracies in restraint of trade or commerce, and all monopolies or combinations to monopolize trade or commerce, are hereby prohibited in the state of Louisiana, and it shall be the duty of the Attorney General, of his own motion, or any district attorney of the state, when so directed by the Governor or the Attorney General, to enforce this provision, by injunction or other legal proceedings, in the name of the state of Louisiana, and particularly by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the state of Louisiana, and for the ouster from the state of foreign corporations: Provided, however, that nothing herein contained shall prevent the Legislature from providing additional remedies for the enforcement of this article. The provisions of this article are self-operative."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431-2434; Dec. Dig. 613(1).]

8. FORFEITURE OF CORPORATE CHARTER.

The Civil Code provides in article 447 that corporations legally established may be dissolved "by the forfeiture of their charter, when the

corporation abuses its privileges, or refuses to accomplish the conditions on which such privileges were granted, in which case the corporation becomes extinct by the effect of the violation of the conditions of the act of incorporation."

9. STATUTES \Leftrightarrow 118(2)—**TITLE AND SUBJECT-MATTER.**

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title." Const. art. 31.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 158; Dec. Dig. \Leftrightarrow 118(2).]

10. STATUTES \Leftrightarrow 211—**CONSTRUCTION—TITLE AND SUBJECT-MATTER.**

Where the title refers to unlawful acts, and the body of the act leaves out the word "unlawful," the whole act will be construed to refer to unlawful acts.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \Leftrightarrow 211.]

11. INDICTMENT AND INFORMATION \Leftrightarrow 2(4)—**ANTI-TRUST ACTS—MISDEMEANOR.**

The anti-trust acts of the state define a misdemeanor.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 7, 8; Dec. Dig. \Leftrightarrow 2(4).]

12. MONOPOLIES \Leftrightarrow 24(1) — **INJUNCTION AGAINST UNLAWFUL RESTRAINT—RIGHT TO ISSUANCE.**

Authority given in an act of the Legislature to issue a preliminary injunction to protect trade and commerce against unlawful restraint, etc., when it is shown to the satisfaction of the court that a defendant has violated the provisions of the statute, does not give countenance to the assumption that the Legislature intended that the courts should issue an injunction of such a general character as would be violative of the most elementary principles of justice, and deprive a defendant of his property rights without a hearing before the court.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 24(1).]

13. MONOPOLIES \Leftrightarrow 24(1) — **INJUNCTION—RIGHT—ANTI-TRUST LAWS.**

The anti-trust legislation of the state provides for the issuance of a preliminary injunction to prevent any and all illegal acts charged against a defendant when he is a party to an illegal combination in restraint of trade, but not to prevent the doing of all business by the defendant.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 24(1).]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Actions by the State against the American Sugar Refining Company. From a judgment overruling its exceptions to plaintiff's original and supplemental petitions, and denying its motion to strike from the petitions certain records, documents, and letters, defendant appeals, and from a judgment dismissing the rule taken by plaintiff for writs of injunction and sequestration and for the appointment of a receiver, plaintiff appeals. Modified and affirmed.

See, also, 137 La. 407, 68 South. 742.

R. G. Pleasant, Atty. Gen., Harry Gamble, Asst. Atty. Gen., and Donelson Caffery, Associate Counsel, of New Orleans (Daniel Wendling, of New Orleans, of counsel), for the State. Joseph W. Carroll, George Dene-

gre, and Hugh C. Cage, all of New Orleans (James M. Beck, of New York City, of counsel), for defendant.

SOMMERVILLE, J. This suit of the state is brought under the anti-trust laws of the state, and was filed July 10, 1915. It is alleged in the petition that the defendant is a New Jersey corporation, with a domicile in the city of New Orleans. It is charged that the defendant corporation is a result of a combination and conspiracy, and that it has combined and conspired with other organizations to operate as a trust in restraint of trade in the state of Louisiana, in violation of the laws of this state, that it is engaged in the lawful business of buying, selling, and refining sugar, but that its business is operated in an unlawful manner. In the petition there is traced the history of the defendant company and its alleged illegal practices from the time of its formation, showing how, through its efforts, the price of raw and refined sugar, an important industry of this state, has been illegally controlled. It further shows that the defendant company controls nearly all of the sugar refineries in the United States and the interstate and foreign trade, commerce, and business in sugar in the United States, and that it holds an unlawful monopoly thereof. It is alleged that the defendant company, as it exists, was organized in January, 1891. The petition further charges defendant with having attempted to restrict legislation in this state.

The petition charges specifically that the combination, consolidation, and purchases of some competing companies, and of stock in others, and other acts mentioned therein, by the defendant company and its predecessors, were done with the object and purpose of monopolizing, or combining, or attempting to monopolize, and of restraining intrastate and interstate commerce and foreign trade in sugar, and that through the illegal acts of defendant there is little or no competition in the business of importing and buying raw sugars and in the refining thereof; that the defendant's object and purpose were to depress the price of raw sugar, and that it conspired to unduly depress the price of raw sugars for speculative purposes within the state of Louisiana, and of unduly enhancing the price of refined sugar for speculative purposes within the state, and of engrossing unto itself all of the business therein; that it has obtained control of sugar in the New Orleans market, and in an illegal and surreptitious way has shut off the sale of yellow clarified sugar in the markets of the United States, which sugar was manufactured in the state of Louisiana; that it has driven the planters of Louisiana out of competition with it in the market of this state and of other states; that it has compelled the planters of this state to make only raw sugars, of

which the defendant company was virtually the only buyer, at prices fixed by it (the defendant); that it forced brokers and wholesale dealers to buy only the sugar refined by it.

The petition further states that many unlawful acts were committed by the defendant, some of which are set forth in the petitions, and among them, in order to keep up an appearance of competition, it had permitted the operation of the Henderson Sugar Refinery in New Orleans, which the state avers has been kept from and not permitted to develop into a large unit for operating, or of giving genuine competition to the American Sugar Refining Company, and that through its monopoly of the sugar trade it has refused to sell to Wogan Bros., Incorporated, an independent corporation, which was buying sugar from the year 1905 to 1908, and which sought to make arrangements with the planters in a small way to refine sugar, and it has thus forced said corporation out of business. It is further alleged that, while the defendant company was depressing the price of sugar in Louisiana through its monopoly and restraint of trade, it was buying sugar in New York and elsewhere at a greater price than it paid in Louisiana, because of its complete monopoly of the market in the state, and that defendant is depressing prices and monopolizing its control down to the date of the filing of this suit. It is alleged that the state of Louisiana produces 600,000,000 pounds of sugar per annum; that it is the chief industry of the state; and that it is being destroyed by the unlawful acts of the defendant. It is alleged that refined sugar is a necessary foodstuff; that the production of raw sugars furnishes a livelihood to many thousand persons in the state, and that the livelihood of such persons and the right of the public to have refined sugar at a reasonable price are imperiled by the continuous exercise of the monopoly of the defendant; that because of these illegal acts of the defendant, and the monopolizing of the industry of refining sugars in the state, and the arbitrary closing down by it of its refinery, the sugar industry has come to a complete standstill, and that the same results follow when the defendant withdraws from the market as a buyer of raw sugar, which it frequently does without legitimate reason; that the refining of sugar has become, because of the monopoly thereof by defendant, a business to which a public interest has attached; and that it should be taken out of the hands of the defendant, and be operated by the court, through a receiver, or otherwise, so as not to oppress the citizens of the state. The petition declares defendant is a grave public menace, and that its methods of business are against the public policy of the state; that the refinery of the defendant company in the parish of St. Bernard is the only refinery that can refine the Louisiana crop of sugar

and which is in condition to be operated at the present time; and that defendant has arbitrarily closed said refinery.

A supplemental petition was filed by the state October 16, 1915, in which the allegations of the original petition are referred to, and some of them reiterated. It is further charged that there is a suit pending in the Southern District of New York wherein the United States government is seeking to enforce the Sherman Anti-Trust Law against the American Sugar Refining Company, which suit, together with the testimony taken therein, is contained in some 22 printed volumes, and which it (the state) asks the court to consider in connection with a rule nisi which has been issued in the case, and which will be mentioned hereafter. There are copied in said supplemental and amended petitions numerous letters which were taken and copied from the above-named record, many of which appear to have passed between the officers and employes of the defendant company, and that said letters constituted, in so far as petitioner was concerned, the first tangible proof of the existence of the felonious operations of the monopoly and conspiracy of the defendant.

The state asks that there be judgment against the defendant finding it guilty of offending against the anti-trust and anti-monopoly laws of the state of Louisiana, and particularly of having engaged in a conspiracy to force down the price of raw sugar, an agricultural product of this state, and to enhance the price of refined sugar in the state for speculative purposes, and of having conspired to restrain trade and commerce in sugar within the state of Louisiana, and of having monopolized and combined and conspired to monopolize the trade and commerce of sugar within the state, and to have thereby forfeited the right to engage in the sugar refining business in the state, that the license of the defendant to do business in the state be revoked, canceled, and annulled, and that it be ousted from the state and perpetually enjoined from doing any business therein. It asks that a rule issue commanding the defendant to show cause why an injunction should not forthwith issue, prohibiting the misuse and abuse by the defendant of the corporate franchises heretofore enjoyed by it under the Constitution and laws of this state and the carrying on of any business by it within the state, to show cause why, in order to render an injunction fully effective, there should not be a receiver appointed to all the property, rights, and credits of the defendant within the state, and why, in the interest of the public, the business of said defendant pendent lite should not be carried on by a receiver, and especially why the Chalmette Refinery should not be operated by him, and, in the alternative, if a receiver be not appointed with authority to operate it, why there should not be a judicial sequestra-

tion of all the property, rights, and credits of the defendant within the state of Louisiana, and why the preliminary injunction should not be perpetuated.

Defendant appeared and excepted to each and every one of the records and documents annexed to the petitions, and the copies of letters, telegrams, minutes of the defendant company, etc., which are incorporated in the petitions and purported to be made parts thereof, and objected to their being annexed to and made parts of the petition upon the ground that the same are scandalous and impertinent, are purely evidentiary in nature and character, and subject to such legal objections as defendant may make thereto when offered in evidence, if they are ever offered.

The motion to strike out was denied, but it was ordered and decreed that the documents and letters were not parts of the pleadings, and defendant was dispensed from answering to them, and the right was reserved to defendant to object to such letters and documents when offered in evidence, if ever offered. From this ruling, both parties have appealed.

Defendant further excepted on the ground that the petition of the state disclosed no cause of action.

The exceptions, in so far as they applied to the rule to show cause why a preliminary injunction should issue and a receiver be appointed, and a judicial sequestration be issued, were maintained, and the rule was dismissed, with the right reserved to plaintiff to renew said rule in the event that judgment of ouster be rendered in the case. The state has appealed from this judgment.

Act No. 11, p. 23, of the Extra Sessions of the State Legislature of 1915 is the last anti-trust statute on the books of this state. The first three sections of the act provide for criminal prosecution against offenders in the district courts of the state and in the criminal district court for the parish of Orleans, which has exclusive criminal jurisdiction in that parish. Const. art. 139. The other sections of the act refer to civil proceedings in the district courts throughout the state and in the civil district court for the parish of Orleans, which has exclusive civil jurisdiction (Const. art. 133), for the purpose of forfeiting charters of domestic corporations and the ouster from the state of foreign corporations which offend against the provisions of the act.

In this case the state is proceeding against the defendant corporation civilly in the civil district court for the parish of Orleans. In section 13 of the act it is provided that the defendant in such case shall file all exceptions in limine litis, and that such exceptions shall be tried by preference, and that the appeal taken from the judgment rendered shall be taken within 5 days. This appeal is made returnable within 10 days, and the

act further provides that the case shall be heard and determined within 40 days.

In the first section of the supplemental and amended petition filed by plaintiff it is alleged:

"That in the suit now pending in the Southern District of New York where the United States government seeks the enforcement of the Sherman Anti-Trust Law against the American Sugar Refining Company, the taking of testimony has been finished, and the case is being prepared for submission; that, inasmuch as the record in such proceeding is, under the law, cognizable in this court, petitioner will present herewith a true and correct copy of the case, and will ask that the court consider the same, particularly on the pending rule nisi."

Under the above allegation plaintiff has placed in the record and filed with the clerk of the civil district court for the parish of Orleans printed volumes containing some 9,500 pages, being the record and evidence above referred to; and defendant has excepted to such proceeding on the ground that the record and evidence contained therein are purely evidentiary in nature and character, and subject to certain legal objections as it may make when offered in evidence, if ever so offered.

[1] A "petition" is defined to be a written document which the plaintiff addresses to a competent judge, setting forth the cause of the action which he intends to bring against the defendant, and praying to be permitted to cite that defendant before him in order that he may be ordered to do or to give a certain thing. It must contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded. Code of Practice, arts. 171 and 172. The petition must not contain some other cause of action which another party has brought against the defendant in another jurisdiction.

The plaintiff in its petition must state his cause of action articulately, that is to say, he shall, so far as practicable, state each of the material facts upon which he bases his claim for relief in a separate paragraph, separately numbered, and the defendant in his answer must either admit or deny specifically each material allegation of fact contained in plaintiff's petition, and all material facts contained in the petition which are not denied in the answer are deemed to be admitted, and the plaintiff may, by rule, submit to the court the question of his right to a judgment upon the petition and answer. Act No. 157 of 1912, p. 225. Defendant cannot be called upon to admit or deny any material allegation of fact contained in the petition of another than plaintiff itself, and it cannot be called upon to deny allegations of the government of the United States made in a suit against the defendant in a federal court of New York. The record in such suit may, under the act, be offered in evidence; and the court will determine whether it shall be admitted or not, after considering objections

which may be made to the offer. But the defendant in this cause cannot be called upon to answer the allegations made in the petition in the suit referred to; and, as the documents can form no part of the petition in this case, they should have been stricken from the record.

In its original and supplemental petitions the state has referred to certain letters said to have been issued and received by the defendant, and has copied some 80 to 100 letters, telegrams, documents, etc., in its supplemental petition which it declares—

“were discovered in the possession of the American Sugar Refining Company by the federal government during the trial of the suit mentioned in paragraph 1, above, and in paragraph 48 of the original petition herein.”

It was further alleged:

“That said letters constituted, in so far as the petitioner was concerned, the first tangible proof of the existence of the felonious operation of the monopoly and trade conspiracy of the American Sugar Refining Company. Said letters were introduced by the United States government in said suit in the year 1912.”

These letters should not have been copied into and made parts of the supplemental petition filed by plaintiff. Some of them are simply evidence of some material facts alleged in plaintiff's petition, and they really form no part thereof. For the same reason stated in connection with the record in the federal court, these letters, telegrams, etc., might be stricken from the petition; but, as they are copied therein and form physical parts thereof, they will not be ordered stricken, but the judgment appealed from will be affirmed in so far as it holds:

That “said documents are not parts of the pleadings, and defendant is dispensed from answering thereto; that said documents are merely exhibits to be offered in evidence on the trial of the cause, subject to defendant's right to interpose such objections to the admissibility in evidence thereof, or of any part thereof, as may be lawful and as it may be advised, the right thereto being hereby specially reserved to defendant.”

The second exception filed by the defendant is to that portion of the original petition and the rule of plaintiff calling on it to show cause why a preliminary injunction and sequestration should not issue and for the appointment of a receiver.

The exceptions of the defendant to the rule were maintained, and the rule was dismissed, with the right reserved to plaintiff to renew said rule in the event that judgment for ouster was rendered. This exception will be considered later.

Defendant excepted further on the ground of prematurity, as Act No. 267 of 1914, § 29, p. 535, provides:

“That no action for the causes set out in paragraphs (b), (c), (e), (f) and (g) shall be instituted until thirty days notice shall have been given the corporation to correct the specific acts of which complaint is made,” and that no such notice was given or is alleged to have been given.

Plaintiff on its brief, at page 12 says:

“This suit was not brought under Act No. 267 of 1914.”

The exception was properly overruled, and will not therefore be further considered.

On the ground of vagueness and indefiniteness, the exceptions were properly overruled.

Next defendant excepts on the ground that the petition and amended petition do not disclose a cause of action on several grounds, which will be considered in their order.

[2] Const. 1879, arts. 235 and 237, require corporations to conduct their business in such manner as not to infringe the equal rights of individuals or the general well-being of the state, and that no corporation shall engage in any business other than that expressly authorized in its charter or incidental thereto. The same provisions of law are contained in articles 263 and 265 of the Constitutions of 1898 and 1913. In Const. 1898, art. 190, it is provided that:

“It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests for the purpose of forcing up or down the price of any agricultural product or article of necessity, for speculative purposes,” etc.

So that the acts of the defendant set forth in plaintiff's petition charging conspiracy by defendant with others in uniting or pooling their interests for the purpose of forcing up or down the price of sugar for speculative purposes are in violation of the law as contained in the articles of the Constitution; and, where it is alleged that they were entered into subsequent to the adoption of the Constitution of 1898, they are properly charged as being unlawful.

[3] Morawetz (paragraph 645) lays down the rule:

“Any act of a corporation which is forbidden by its charter, or by a general rule of law, and, strictly, every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful; and, if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture of the corporate franchises.”

And, where a foreign corporation commits acts which are forbidden by its charter or by a general rule of law, and that act is dangerous to the public, it may be sufficient ground for the state to ask for a revocation of license to do business within the state. A foreign corporation, under the comity existing between states, is authorized or licensed to do business within this state; but the business must be conducted in a lawful manner, and not in an unlawful manner and in a way injurious to the public.

The allegations of the petition show that the defendant, from almost the time it entered the state up to the present time, has grossly, deliberately, and persistently violated the public policy of the state by a monopoly of the sugar industry and trade, and that in its unlawful operation it has oppressed, and is oppressing, and will continue, if allowed to continue at all, to oppress, an absolutely dependent public in its use of one of the necessary foodstuffs produced and for

sale in the state. And, as was said in the case of *State v. Waterworks Co.*, 107 La. 1, 27, 31 South. 395, it requires no other law, and no other construction of law, than such as is found in, and authorized by, the Civil Code of this state, to reach such a conclusion in this case, if the state sustains its allegations with proper proof.

[4] The Civil Code declares in article 1895:

"The cause [of contract] is unlawful, when it is forbidden by law, when it is *contra bonos mores* or to public order."

And from the earliest times the courts of the state have declared contracts against the public policy of the state to be illegal and not enforceable. 2 Hennen's Digest, p. 1007, No. 1; *India Bagging Association v. Kock*, 14 La. Ann. 168; *T. & P. Ry. Co. v. S. P. Ry. Co.*, 41 La. Ann. 970, 6 South. 888, 17 Am. St. Rep. 445; *Fabacher v. Bryant & Mather*, 46 La. Ann. 826, 15 South. 181.

"It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy. The essentials of a conspiracy, whether viewed with regard to its importance in a criminal prosecution or its significance in a civil action for damages, are commonly described in this general language: 'It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means.'" 8 Cyc. 620.

It has been held that the term "conspiracy" is divisible into three heads: (1) Where the end to be attained is in itself a crime; (2) where the object is lawful, but the means to be resorted to are unlawful; (3) where the object is to do any injury to a third person or a class, although, if the wrong were inflicted by a single individual, it would be a wrong, and not a crime. *Reg. v. Cornell*, 14 C. C. 508.

Defendant is not only charged with having conspired to gain a monopoly of the sugar trade of this state, but that it has actually accomplished the monopoly of that trade, thereby unlawfully restraining the sugar trade of this state.

[5] "Monopoly" is defined in the English law to be:

"A license or privilege allowed by the King for the sole buying and selling, making, working, or using, of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before." 4 Blackstone, Com. 159; 4 Stevens, Com. 291; *Black's Law Dict.*

"It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure." 27 Cyc. 889.

Any scheme to corner the market by getting control of the available supply of an article of commerce is illegal; and so all contracts made in promotion of such a scheme are unenforceable.

Whatever device may be used to get control of supplies, whether by option or by lease, may be held to have the taint of monopolization, if the intent is to regain control of the market thereby. 27 Cyc. 898.

Whether a monopoly has been created by

the state or by private parties, it has been considered in modern times as opposed to the interests of the people; as it deprives them, or it may deprive them, of their livelihood, and it has a tendency to enhance the price which people must pay for the article monopolized. There was much legislation under the early law to bring about the punishment of those persons who gained a monopoly of the market of any article by any means. Such action was said to be opposed to the common law. And the persons engaging in monopolies were declared to be guilty of criminal acts. From the earlier times it was considered a serious matter if several combined and controlled trade at enhanced prices, whether or not the conspiracy was carried out or individuals were harmed. In consequence of all this, contracts and understandings in restraint of trade or labor were held unenforceable as against public policy. It may be said in general monopolization of any thing which the public needs is against public policy.

The commonest type of combination has been that of pool of some sort, in which the participants agreed to suppress the competition between themselves to some extent without surrendering altogether all their rights and conduct of their own business. Under similar principles any device or arrangement by way of license or lease whereby competition is suppressed is illegal both by common law and statutes. Agreements by way of trusts or otherwise whereby competition between concerns is suppressed are held illegal both under the common law and statutes. By weight of authority it seems to be illegal to bring about a monopoly for the formation of a consolidated corporation to acquire existing competing concerns by outright purchase of their property; and sugar refiners are mentioned in 27 Cyc. 902, as having been engaged in carrying on a monopoly in the sugar trade in restraint of trade.

All of these offenses are charged in the petition of the state against this defendant; and, as this is a civil proceeding, the declarations in the petition sufficiently set forth a conspiracy and unlawful monopoly in restraint of trade, which are the gist of the action.

It is generally agreed that statutes directly against competition in restraint of trade are not in violation of the constitutional provision guaranteeing liberty and property, since the regulation of monopolies, as dangerous to society, have always been a recognized part of the police power of the state; but it is not clear that such statutes will be supported if they are retrospective in their operation or discriminating in their application.

The ground upon which agreements and combinations in restraint of trade are held illegal at common law is that they are contrary to public policy; and the public policy

of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts. But, when the Legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statutes passed by it enacts public policy to be. The only authentic and admissible evidence of public policy of a state on any given subject are its Constitutions, laws, and judicial decisions. The public policy of a state, of which courts take notice and which they give effect, must be decided from those sources. Where the state has spoken through its legislators, there is no room for speculation as to what the policy of the state is. 9 Cyc. 482. And the state of Louisiana has announced its public policy with respect to combinations and monopolies in restraint of trade for the first time, in so far as the court is informed, in Act No. 86 of 1890, p. 90. That is a criminal statute entitled:

"An act to protect trade and commerce against unlawful restraints * * * and to provide penalties for the violation of this act."

[6] The state is a necessary party to a proceeding against a corporation either for its dissolution or for the revocation of its license to do business in the state, if it is a foreign corporation. In the latter case the judgment would be that the party be ousted. Chancellor Kent, in his Commentaries (volume 2, p. 378, Comstock's Edition), says that there were two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power—the one by *scire facias*; the other an information in the nature of a *quo warranto*; both these modes of proceeding against corporations being at the instance and on behalf of the government.

The state did not, by granting permission to defendant to carry on the business of dealing in and refining sugar, preclude itself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she had given, when they should be so misused as to defeat the object of the grant, or when the company had become insolvent and not able to meet the obligations which it may have assumed. The claim therefore cannot obtain that the ouster of defendant from doing business in the state of Louisiana for the violation of the charter of defendant and the revocation of the license granted it by the state, as authorized by the anti-trust statutes, would be the taking of defendant's property without due process of law, or that a judgment to that effect would deny to defendant the equal protection of the law.

Revised Statutes, § 131, makes it the duty of the Attorney General, in cases where the state is plaintiff for the dissolution of a corporation and the forfeiture of its charter, to appear for the state and prosecute and conduct in the district courts of the city of New Orleans all such suits. As a suit for the revocation of a license to do business in the state by a corporation of another state is

similar to the proceedings for the dissolution of a home corporation which has violated the laws of the state, the Attorney General had the right to institute and prosecute this suit.

[7] And article 190 of the Constitution, as it is enlarged in the Constitution of 1913, specially provides that:

"All combinations, trusts, or conspiracies in restraint of trade or commerce, and all monopolies or combinations to monopolize trade or commerce, are hereby prohibited in the state of Louisiana, and it shall be the duty of the Attorney General, of his own motion, or any district attorney of the state, when so directed by the Governor or the Attorney General, to enforce this provision, by injunction or other legal proceedings, in the name of the state of Louisiana, and particularly by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the state of Louisiana, and for the ouster from the state of foreign corporations. Provided, however, that nothing herein contained shall prevent the Legislature from providing additional remedies for the enforcement of this article. The provisions of this article are self-operative."

There is therefore special authority given to the Attorney General to appear for the state in this suit, and to ask for the ouster of the defendant corporation in the ordinary form of procedure without resorting to the writ of *quo warranto*.

In the case of *Chicago Life Insurance Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084, it is held that:

"The right of the plaintiff in error to exist as a corporation, and its authority in that capacity to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 43, 51 [3 L. Ed. 660]; *Angell & Ames on Corporations* (9th Ed.) § 1024, notes.

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created. * * * It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide by reasonable regulations against the misuse of special corporate privileges which it has granted, and which could not, except by sanction, express or implied, have been exercised at all. * * *

"It is only as bearing upon the question of the power of the state without any express reservation to that end having been made in the charter of the company, to subject it to such regulations as those established by the act of 1869, or to compel it to cease doing business when the circumstances exist which are set out in the act of 1874, that we have referred to, the facts which counsel for the state contend are fully es-

tablished by the evidence. If the state had no such power, then the statute under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible that the state, which brought this corporation into existence for the purpose of conducting the business of life insurance, is powerless to protect the people against it, when, assuming, as we must, the facts to be such as the judgment below implies, its further continuance in business would defeat the object of its creation and be a fraud upon the public and on its creditors and policy holders? * * * The act of 1869 does not contain any regulation respecting the affairs of any corporation of Illinois which is not reasonable in its character, or which is not promotive of the interests of all concerned in its management. It only guards against mismanagement and misconduct; its requirements constituted reasonable regulations of the business of such local corporation; it does not impair the obligation of any contract which this company had with the state; the conditions imposed upon the rights of the company to continue the issuing of policies are neither arbitrary nor oppressive. * * *

"There is no denial, as counsel supposes, of the equal protection of the laws, nor any deprivation of property without due process of law; for that statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defense, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions, or conditions prescribed by law, grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the state should be no longer enjoyed. * * * That a suit, for such purposes, might be instituted if, in the opinion of the auditor of state, any of those grounds existed, affords no justification to characterize this proceeding as harsh or arbitrary; for at last the final judgment of the court must depend upon the facts as established by competent evidence, and not upon the mere opinion of that officer. * * *

"A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuse and nonuse. * * * And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter. * * * The state did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she had given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which, under the authority of the state, it had assumed to policy holders and creditors."

Article 190 of the Constitution and Act No. 11 of the Extra Session of 1915 do not contain any regulation with reference to proceedings against persons and corporations for the commission of unlawful acts there set out which are not reasonable in their character, or which are not promotive of all concerned. The state permitted or licensed this defendant to do business in this state, and the state alone has the power to protect the people against it, assuming, as we must on the trial of this exception, that the allegations contained in plaintiff's petition

are true. The further continuance in business by defendant would defeat the very object of admitting it into the state to transact business, and it would be a fraud upon the public, and upon those who are forced to transact business with it.

[8] The Civil Code provides in article 447 that corporations legally established may be dissolved—

"by the forfeiture of their charter, when the corporation abuses its privileges, or refuses to accomplish the conditions on which such privileges were granted, in which case the corporation becomes extinct by the effect of the violation of the conditions of the act of incorporation."

The Legislature passed anti-trust statutes in 1890, 1914, and 1915. These statutes refer to persons and to home and foreign corporations. The first is a criminal statute, Act No. 86 of 1890, p. 90, and makes it a misdemeanor to enter into a contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state; and section 3 of the act declares it to be a misdemeanor to monopolize, or attempt to monopolize, any part of the trade or commerce within the limits of this state. This act is embraced in the last act on the subject-matter, Act No. 11 of 1915, p. 23. So that every alleged illegal act of the defendant since the year 1890 has been done, if done, in contravention of the statute of that year; and competent evidence of such acts would be admissible on the trial of the cause.

Defendant attacks the constitutionality of the several anti-trust acts of the Legislature and the validity of article 190 of the Constitution of 1913. If they are invalid, or if they are prospective only in their terms, the cause of action set up in the petition of the state is sufficient under the general laws of the state, and all of the acts of the defendant which are alleged and complained of in that petition are and were in violation of those laws, and the petition therefore contains a cause of action, and the allegations, if proved, would sustain a judgment of ouster.

But article 190 of the Constitution of 1913 and the anti-trust acts of 1890 and 1915 are not inoperative or invalid.

[9, 10] The first objection leveled at the acts of 1890 and 1915 is that the titles thereof do not express the objects thereof, in that the titles purport to legislate with regard only to unlawful restraints of trade, whereas the acts themselves embrace "all" restraints of trade, whether lawful or unlawful; and therein the said titles of the acts violate article 31 of the Constitution of Louisiana, which provides that:

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title."

The article of the Constitution just quoted makes the title of the act a very important

part of that instrument; and, when the title provides against unlawful restraints and monopolies, and the body refers to "every contract, combination in the form of trusts, or conspiracy, in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state," as, being illegal, it is clear that only unlawful acts in restraint of trade are declared to be illegal, and punished in the manner indicated in the act.

Judge Cooley, in the seventh edition of his work on Constitutional Limitations (page 89 et seq.), lays down the rule of construction of statutes and Constitutions in the following language:

"The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws it is the intent of the law-giver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.

"Whether we are considering an agreement between parties, a statute, or a Constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor Legislatures have a right to add to or take away from that meaning."

The title to Act No. 86 was adopted at the same time that sections 1, 2, and 3 were adopted, and they were adopted as a whole. The sections are construed with the title to get at the intention and action of the Legislature.

"It is therefore a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part; and this Sir Edward Coke regards as the most natural and genuine method of expounding a statute. If any section of a law be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must har-

monize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which will make some words idle and nugatory. * * *

"In interpreting clauses we must presume the words have been employed in their natural and ordinary meaning. As Marshall, C. J., says: 'The framers of the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said." This is but saying that no forced or unnatural construction is to be put upon their language.' Cooley, p. 91.

"We are not to import difficulties into a Constitution by a consideration of extrinsic facts when none appear upon its face. If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic ways which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aides is a contemplation of the object to be accomplished or the mischief designed to be remedied or guarded against by the clause by which the ambiguity is met with. 'When we once know the reason which alone determined the will of the lawmakers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. Great caution should always be observed in the application of this rule to particular given cases; that is, we ought always to be certain that we do know, and have actually ascertained, the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjecture, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty.' The prior state of the law will sometimes furnish the clew to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor to another, and in the particular in question essential changes have apparently been made." Cooley, p. 100.

The intent of the Legislature, as expressed in the title to the act under consideration, is to protect trade against unlawful restraint and monopoly; and, as these unlawful restraints and monopolies have been known to exist from time immemorial, and as this reason is that which existed for the passage of the act, the construction that only unlawful acts are referred to in the body of the act is certain.

[11] The next objection to the act is that, if the language thereof be construed to embrace only unlawful restraints of trade, then that it violates article 8 of the Constitution, in that it does not define what constitutes an unlawful restraint of trade, and the courts are without power to supply such definition without violating articles 10, 16, 17 and 21 of the Constitution.

Article 10 of the Constitution provides that the accused in all criminal prosecutions shall be informed of the nature of the accusation against him; and it is argued that Act No. 86, at present under consideration, does not define the crime or offense charged against this defendant. It provides:

"That every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce or to fix or limit the amount of quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state is hereby declared illegal.

"Sec. 2. That every person who shall make any such contract, or engage in any such combination, or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both of said punishments, in the discretion of the court.

"Sec. 3. That every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce within the limits of this state, shall be deemed guilty of a misdemeanor," and on conviction shall be punished in the manner indicated in section 2.

The offense is clearly defined in the sections of the act. The words used therein are simple and definite in their meaning. In construing Constitutions and statutes the courts cannot forget the well-understood meaning of words and phrases which have long been in use; and these meanings will be attributed to the words used in the statute. Every contract between individuals and corporations which is made in restraint of trade or commerce, every combination in the form of trust or conspiracy in restraint of trade or commerce, or any other form of trust or conspiracy to limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, is declared to be illegal. Every person or corporation charged with doing any one or all of these acts in restraint of trade, after hearing and trial, may be convicted under the act as having been guilty of a misdemeanor; and may be punished. The statute is clear in its intent and meaning; and one charged under the terms thereof is fully informed as to the nature and cause of the accusation against him.

The other articles of the Constitution, Nos. 16, 17, and 21, refer to the three departments of the government and the respective duties and functions attaching to each. As we have seen that the Legislature has clearly defined the misdemeanor which might be charged under Act No. 86 of 1890, it is unnecessary to discuss these articles.

The last objection to the act is that it does not apply to corporations. This may be true, but the act nevertheless provides against every unlawful contract, combination, etc., in restraint of trade or commerce; and it has therefore been unlawful for any person, natural or artificial, to do any of the acts therein enumerated in restraint of trade or commerce.

Defendant next urges that no cause of action is shown in the petition under article 190 of the Constitution of 1913. Objection is here made to the general language used in the article, which defendant contends makes it unlawful for corporations to combine and to effect monopolies, etc. It is quite clear, as has been seen in considering the act of 1890, that the intention was to punish unlawful acts in restraint of trade, and not lawful acts which operated as monopolies, etc.

[12, 13] It is next urged that the terms of said article of the Constitution are prospec-

tive, and have, and can be held to have, no retrospective effect or ex post facto application, and, as the petition alleges that the acts said to have been committed were committed prior to the adoption of article 190 in 1913, that the remedy prescribed in said article cannot be enforced against it. It has just been held that the acts complained of in the petition of the state—that is, those acts subsequent in date to the passage of Act No. 86 of 1890—are violative of the terms of that act; that they are illegal, and were illegal at the time of their commission. The remedies provided for in the article of the Constitution may clearly be applied by the state in the prosecution of this defendant, or for the forfeiture of charters of offending corporations incorporated under the laws of the state, and for the ouster from the state of a foreign corporation.

Article 190 of the Constitution and the anti-trust act of 1915 give relief by injunction or other legal proceeding, and defendant pleads that such relief is in violation of its property rights. The Constitution and the acts of the Legislature provide for the issuance of the writ of injunction, in the discretion of the court, "because of irreparable injury to the public interests," and the issuance of an injunction has always been a form of procedure in the courts of the state upon proper showing being made. The writ of injunction is, like those for attachment, sequestration, etc., a conservative writ; and any one of these writs may be issued by the court, in the exercise of a sound discretion. If a preliminary injunction were to issue on the allegation of the state that the defendant corporation was bankrupt, or had abandoned its property, or had been convicted in the criminal court of violating the anti-trust laws of this state, a preliminary injunction might probably issue. And defendant in its brief says:

"It is freely conceded that a law may validly provide for the issuance, at any stage of the proceedings, of an injunction to restrain or prevent the continuance of unlawful acts; in which case the particular unlawful acts being done or threatened to be done must be specified. The person so enjoined is in such case advised as to what he may not lawfully do under the court's order."

And again:

"It is plain that, if a violation or violations of the law be charged against a sugar refiner, the continuance of the illegal act or conduct may be fully and completely suspended pendente lite by an injunction against the doing of the specific illegal acts."

And that is all that the Constitution and the act of 1915 authorize to be done in the way of issuing a preliminary injunction.

The judgment of the district court overruling the exception of no cause of action to the petition of the state for ouster and a definitive injunction is sustained.

Turning now to a further consideration of that portion of the petition which in-

volves the application for a preliminary injunction or writ of sequestration against defendant, and the appointment of a receiver in limine, in which plaintiff seeks to take possession of defendant's property and business before a judgment of ouster has been rendered, and which is covered by a separate exception by defendant and a separate judgment, from which the state appeals, we fail to find sufficient allegations in the petition for such relief.

The act, in section 8, provides a mode of relief for persons, firms, corporations, or associations which may have suffered loss or damage by violations of the act.

Under act 11 of 1915, p. 23, a preliminary injunction may issue, on petition of the state, in case of irreparable injury to the public interest; and the state has not shown irreparable injury to the public interests.

The petitions do not show a cause of action for the issuance of a preliminary injunction or for a writ of sequestration; and, as the appointment of a receiver depends upon the issuance of an injunction, no cause of action is shown for them.

It is therefore ordered, adjudged, and decreed that the two interlocutory judgments appealed from in this case be amended by striking from the record the printed volumes in the case of the United States of America v. The American Sugar Refining Company and Others, pending in the District Court of the United States for the Southern District of New York in the Second Circuit, and, as thus amended, the two judgments are affirmed; costs of appeal to be paid by the state.

O'NEILL, J. I concur in the foregoing decree, except in so far as it orders the record in the case of the United States v. American Sugar Refining Company et al. stricken from the record in this case, and in so far as it holds that the state's petitions do not disclose a cause of action for a preliminary injunction.

The defendant is not required by law to answer separately each and every allegation or paragraph contained in the documents annexed to the petition. It is only required to answer the allegations in the petition in support of which the documents are annexed and referred to.

In support of the demand for a preliminary injunction, the state has, in my opinion, alleged irreparable injury to the public interests. The people of this state may not all be interested in the price of raw sugar, but they are all interested in the price of refined sugar. The question whether the court should apply such a drastic remedy after hearing on the rule to show cause before a full hearing on the merits of the case is not before us on this appeal. The question presented is whether the civil district court has authority in law to grant the relief if the allegations of the state's petitions are true.

(133 La.)

Nos. 20829, 21467.

COLONIAL TRUST CO. v. ST. JOHN LUMBER CO.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)

(Syllabus by the Court.)

CORPORATIONS ~~§~~482(5)—MORTGAGES—FORECLOSURE—DECLARATION OF MATURITY BY TRUSTEE—PROOF BY RECITALS OF WRITTEN INSTRUMENT.

Where the trustee sued out executory process to enforce, by a cash sale, a mortgage and pledge to secure the payment of serial bonds due and to become due, and the petition alleged that all the bonds had become due by virtue of a declaration made to that effect by the trustee, pursuant to a stipulation in the authentic act of mortgage, *held*, that such declaration was sufficiently proven by the recitals of a written instrument, issued under the corporate seal and signed by the vice president and secretary of the plaintiff corporation, and attached to the petition of the trustee for executory process, authentic evidence of the declaration being impossible from the nature of the case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1870; Dec. Dig. ~~§~~482(5).]

Appeals from Eighth Judicial District Court, Parish of Franklin; R. J. Wilson, Judge.

Action by the Colonial Trust Company, trustee, against the St. John Lumber Company. From an order of seizure and sale, defendant and certain alleged stockholders and unsecured creditors appeal. Affirmed.

Smith & McGregor, of Rayville, and J. Zach Spearing, of New Orleans, for defendant, appellant. Farrar, Jonas, Goldsborough & Goldberg, of New Orleans, for appellee.

LAND, J. The two appeals are from the same order of seizure and sale. The first was taken by the defendant, and the other by alleged stockholders and unsecured creditors.

In May, 1909, the defendant company by notarial act mortgaged and pledged all of its property to the plaintiff company, as trustee, to secure the issue of 350 (6 per cent.) coupon bonds of \$1,000 each, divided as to maturity into 12 series, due at various dates from May 1, 1912, to May 1, 1923.

The 27 bonds due May 1, 1912, were paid. Of the 27 bonds due May 1, 1913, only 9 were paid.

On April 17, 1914, the trustee notified the defendant that at the request of more than 25 per cent. of the bonds outstanding it had declared the whole of the principal on said bonds due.

On April 29, 1914, the plaintiff sued out the present executory proceedings. To the petition of the trustee was annexed a certified copy of the original act of mortgage, and 289 of the unpaid bonds, with interest coupons thereto attached. To the petition was also attached the notice of April 17, 1914, above mentioned, under the corporate

seal, and signed by the vice president and secretary of the plaintiff company. The petition was also verified by the oath of C. F. Babcock, who swore that he was the duly authorized agent of the plaintiff company.

The contract of mortgage and pledge was made between the president of the defendant company, duly authorized, and the vice president of the plaintiff company called the "trustee."

Each bond was made payable unto the bearer, or if registered, to the registered holder thereof, at the office of the plaintiff company.

It was stipulated that, in case of any default in the payment of interest or principal on the bonds:

"Then and in every such case the trustee may, and if so requested by the holders of twenty-five (25%) per cent., in amount of the bonds then outstanding, shall declare the principal of the bonds hereby secured, and then outstanding, due and payable forthwith; and upon any such declaration the same shall become due and payable forthwith, anything in this act of mortgage and pledge, or in said bonds to the contrary notwithstanding."

It was further stipulated that in case of such declared default, the defendant company should, on the demand of the trustee, forthwith surrender unto him all and singular the property mortgaged or intended to be mortgaged, with the right to enter thereon and to take exclusive possession thereof, with or without process of law, and with the power to manage and administer the same in the interest of the bondholders.

It was further provided that the principal of the bonds having become due, or having been made due as above stated, the trustee in its discretion might take possession of, and should if so required in writing by the holders of 25 per cent. of the bonds then outstanding and unpaid, proceed through court to have the property sold at public auction in one lot to the highest bidder in the city of Winnsboro, La., after such notice and upon such terms as the law provides; or the trustee might proceed to protect and enforce its rights and the rights of the bondholders by suit or foreclosure "as the trustee being advised by counsel in law shall deem most effectual to protect and enforce the rights aforesaid"; and the section concludes as follows:

"And it shall be legal for the trustee, and the lumber company does hereby authorize the trustee, or in the event of its refusal to act, the holder or holders of any of the bonds hereinbefore described, or any of them, to cause all and singular the hereinbefore described mortgaged and pledged property to be seized and sold under executory process issued by any competent court, without appraisal to the highest bidder for cash."

Defendants' counsel in their brief contend that there is no *authentic* evidence in the record that the holders of 25 per cent. in amount of the bonds then outstanding requested the trustee to declare the principal of the unmatured bonds to be due and pay-

able. The answer is that the act in express terms *authorizes* the trustee to make such a declaration at its discretion, and *requires* the trustee to declare such bonds due and payable if so requested by the holders of 25 per cent. in amount of the outstanding bonds.

Defendant's counsel further contend that there is no *authentic* evidence that the trustee was required in writing by the holders of 25 per cent. in amount of the bonds then outstanding and unpaid to proceed through the court.

The answer is that under the express terms of the act of mortgage, the trustee was also authorized to proceed by suit or foreclosure, as advised by counsel; and the lumber company itself specially authorized the trustee or the holders of any of the bonds to cause the mortgaged and pledged property to be seized and sold under executory process.

It is next objected that the letter or notice of April 17, 1914, addressed to the defendant company, does not furnish *authentic* evidence of the facts therein recited. The letter, or notice itself, *declared* all the then outstanding bonds to be due and payable, and *demand*ed possession of the mortgaged and pledged property pursuant to the terms of the contract. The trust deed does not prescribe any form or mode of *declaration*, or for notice of the same to the defendant company. Hence the declaration in question might have been made by words or by writings of any kind. An *authentic* act, as relates to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in presence of two competent witnesses, and of three, if a party be blind. C. C. art. 2234. Such an act must be passed in the presence of the parties, and by them signed in the presence of the witnesses and the notary. Executory process is based on acts of this kind which import a confession of judgment in matters of privilege and mortgage. C. P. art. 733.

Now, how could the *declaration* in question, unilateral in its nature, have been made to appear by an *authentic* act as defined in our Codes? The notice given to the defendant was under the corporate seal and was signed by the vice president and secretary of the corporation. A corporate act so verified makes *prima facie* proof of the facts recited, but is not an *authentic* act. See *Interstate Trust & Bank Co. v. Powell Bros. & Sanders Co.*, 126 La. 25, 52 South. 179. An acknowledgment of the notice before a notary and two witnesses would not have converted the notice into an *authentic* act. *Baker v. Baker*, 125 La. 974, 52 South. 115. As the deed of trust required no particular form or proof of the declaration in question, and as *authentic* evidence of the action of the corporation in the premises was impossible from the nature of the case, we are of opinion that

the notice as given under the seal of the corporation was sufficient. C. P. art. 732; Garland, note F.

The bonds sued on were payable at the office of the trustee, and therefore it was not necessary to demand payment of lumber company, or to give it notice of its own default.

We may add that as a portion of the bonds were past due, the writ was not prematurely issued, even from defendant's standpoint. See Penouilh v. Abraham, 44 La. Ann. 188, 10 South. 676.

Judgment affirmed, at costs of appellants.

(138 La.)

No. 21394.

CLARKE v. NATAL.

(Supreme Court of Louisiana. Feb. 21, 1916.)

(Syllabus by the Court.)

1. HOMESTEAD §46—REGISTRY OF DECLARATION—CONSTITUTIONAL LAW.

Act No. 114 of 1880, requiring the registry of a declaration of the homestead exemption under the Constitution of 1879, remained in force in the parish of Orleans under the Constitutions of 1898 and 1913.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 63; Dec. Dig. §46.]

2. HOMESTEAD §55—EXEMPTION—REGISTRY OF DECLARATION.

The right to acquire the homestead exemption, by recording the declaration required by law, is not itself an exemption and does not affect the rights of those who become creditors of the owner of the homestead before the registry of the declaration.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 77-80; Dec. Dig. §55.]

3. GUARDIAN AND WARD §130—TUTORSHIP—PETITION—PARTIES—EXECUTORY PROCEEDINGS.

One who sues individually and as tutrix of her minor children to enjoin a seizure and sale, without stating the names of the children, nor their interest in the property, and without praying that their claims be recognized, does not disclose a cause or right of action in their behalf.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 440-446; Dec. Dig. §130.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Suit by Mrs. Lillian Lyons Clarke against Mrs. Lizzie Natal to foreclose mortgage by executory process. An injunction was sued out by Mrs. Natal, and from a judgment dissolving the injunction, she appeals. Affirmed.

J. B. Rosser, Jr., of New Orleans, for appellant. Henry L. Sarpy, of New Orleans, for appellee.

O'NIELL, J. The defendant, appellant, purchased from the plaintiff a certain lot of ground on Baudin street in New Orleans for \$2,500, giving her promissory note for the purchase price, secured by a vendor's lien and special mortgage on the property. In the act of sale, she also mortgaged a lot on Sal-

cedo street, as additional security for the payment of the note. The note was not paid at maturity, and the plaintiff proceeded to foreclose her mortgage by executory process, causing both lots to be seized and advertised for sale. The defendant, individually and as natural tutrix of her minor children, filed a petition, praying that the plaintiff and the sheriff be enjoined from selling the property on Salcedo street, and the preliminary writ of injunction issued. The defendant alleged in her petition for injunction that the property had been purchased by her husband during the existence of the community of acquets and gains, and that, since his death, she and their children had owned it in indivision. She alleged that she was therefore the head of the family, having the minor children dependent upon her for support; that she and they resided on the property, which was their homestead bona fide, and which she and they owned in indivision. She alleged that she had had a declaration of the homestead exemption recorded in the mortgage office as required by the Constitution of this state. She did not state, in her petition, the date of registry of the declaration of the alleged homestead exemption, but the document annexed to her petition shows that it was recorded after the sheriff had seized the property in these executory proceedings. The defendant prayed, individually and as natural tutrix, that the plaintiff and the sheriff be enjoined from selling the property, that judgment be rendered in her favor, individually and in her representative capacity, recognizing the homestead exemption, and ordering the mortgage canceled.

The plaintiff in the executory proceedings, defendant in injunction, filed a motion to dissolve the writ, on the ground that the petition did not disclose a cause of action for an injunction.

The district judge rendered judgment, dissolving the injunction, reserving to the plaintiff in the executory proceedings her right of action for damages for the unwarranted issuance of the writ. The defendant in the executory proceedings, plaintiff in injunction, has appealed, individually and as tutrix of her children.

Opinion.

[1, 2] Article 247 of the Constitution of 1913 provides that:

"In the parish of Orleans, the homestead (exemption) to be valid shall be recorded as is now or may be provided by law."

The same provision was made in the Constitution of 1898, which did away with the requirement of registry in other parishes. Act No. 114 of 1880 declared that a person claiming the homestead exemption provided in articles 219 and 220 of the Constitution of 1879 was required to record a declaration, sworn to, describing the property, etc., in the mortgage records of the parish in which the

property was situated. The provisions of the statute were therefore retained in force in the parish of Orleans, by the Constitutions of 1898 and 1918. There is no homestead exemption in the parish of Orleans, unless and until the person claiming it has had recorded the declaration required by law. The right to acquire the exemption by recording the declaration is not in itself a right of exemption from seizure of the homestead, and it cannot affect creditors of the owner of the homestead until he has availed himself of the exemption by recording the declaration. The defendant in this case had no homestead exemption when she gave the mortgage on her home, and the subsequent registry of her declaration could not prejudice the rights of the mortgagee. To hold otherwise would be contrary to our laws of registry, and would be an unreasonable construction of the provisions of the Constitution and statute on the subject.

[3] The appellant contends that the exception of no cause of action should not have been maintained entirely, because, as tutrix of her minor children, she had the right to enjoin the sale of their interest in the property. This would be true if she had made the necessary allegations. But she did not state the extent of her children's interest, directly nor by alleging whether her husband had left other children, nor did she state the names of the children in whose behalf she sued, or pray that their interest in the property be recognized. See *Delisle v. Bourriague*, 105 La. 77, 29 South. 731, 54 L. R. A. 420. The judgment appealed from goes no further than to dissolve the preliminary injunction. The injunction suit was not even dismissed. The defendant, as tutrix and as a plaintiff in injunction, may renew their demand on proper allegations.

The judgment appealed from is affirmed, at the cost of the appellant.

(138 La.)

No. 20414.

MERCIER v. YAZOO & M. V. R. CO.

(Supreme Court of Louisiana. Feb. 21, 1916.)

(Syllabus by the Court.)

EVIDENCE §588—PROBATIVE EFFECT—PHYSICAL FACTS.

In an action for damages for the death of a trespasser on a railroad track, killed by a fast passenger train, the testimony of the engineer, fireman, and station agent, that the deceased was in such a position as not to be visible, in time to avert the accident, cannot be disregarded on a hypothesis of visibility, based on the location of the wound on the head of the deceased.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588; Witnesses, Cent. Dig. § 1164.]

Appeal from Twenty-Eighth Judicial District Court, Parish of St. John the Baptist; Prentice E. Edrington, Judge.

Action by Mrs. Alida Mercier, wife of Octave Landreau, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Hunter C. Leake, Gustave Lemle, and Arthur A. Moreno, all of New Orleans (Blewett Lee, of Chicago, Ill., and C. N. Burch and H. D. Minor, both of Memphis, Tenn., of counsel), for appellant. Prentice E. Edrington, Jr., of New Orleans, for appellee.

LAND, J. Plaintiff sued the defendant for \$15,000 damages for the death of her husband, alleged to have been killed by one of defendant's passenger trains, on Sunday, July 20, 1913.

The petition alleged that Octave Landreau on that day seated himself on the end of a cross-tie on the right of way of said company, and fell asleep; and while thus asleep, a train of the defendant, called the Memphis Express, going north at a high rate of speed, struck the said Landreau, inflicting a wound in the head, which caused his death.

The petition charges the defendants' trainmen with negligence in not keeping a proper lookout for persons near or on the track, in not sounding a warning, and in not trying to stop the train which killed the deceased.

The answer is, in substance, a general and special denial of the acts of negligence charged in the petition, and a charge that the accident was due solely to the fault and negligence of the deceased, a trespasser, in seating himself on defendants' track in such a way that it was impossible for the agents of the respondent to see him, even in spite of the fact that they were keeping a proper lookout.

The case was tried before a jury, which found a verdict for \$4,000 in favor of the plaintiff.

Defendant has appealed from a judgment pursuant to the verdict.

One witness testified that about 2 p. m. on the day of the accident he saw a "fellow" sitting, with arms folded, on the cross-ties, at the point where the body of Landreau was afterwards found. The same witness testified that the man "was not asleep to his knowing." Between 2 p. m. and 3:55 p. m., when the train passed, there is a hiatus in the evidence, and we cannot assume, first, that the man seated on the ties was Landreau; and, secondly, that he maintained the same attitude for 1 hour and 50 minutes. Landreau may have come on the track later and assumed an entirely different position.

There is the positive testimony of three witnesses that the body of Landreau was not visible above the rails at the time of the accident. The engineer and fireman swore that they were keeping a sharp lookout, as they approached the station and saw no person in any position on or near the point

where Landreau was supposed to have been struck. Both of these witnesses testified that they knew nothing of the happening of the accident until many hours later. The station agent at Reserve testified that he was looking at the train as it approached, and had a clear view of the track where Landreau's body was afterwards found, and saw no man in any attitude on the ties or track at that point. The agent heard nothing about the accident until later in the day after the finding and identification of the body.

The witness Voisin found the body lying on its face, "head sticking between the cross-ties," arm lying on cross-ties near the rail, one leg on ground. On turning over the body, it was recognized as that of Landreau. The mortal wound was in the back of the head, and it is argued by defendant's counsel that as the wound was more to the left than the right, the deceased must have been sitting on the end of a tie when he was struck by the train. No autopsy of the body was made, or photograph of the body taken. The photo in the record is that of another man, in the supposed position of the dead body. As the head and body in the photo are parallel to the rail, they cannot represent the body as found by Voisin, with "the head sticking between the cross-ties."

On this photo, the location and extent of the wounds on the head of the deceased have been marked by witnesses, whose whole

knowledge on the subject rests on a mere casual view of the wound.

We do not think that a blow on a particular part of the skull necessarily indicates the position of the body at the time of the impact, as the head may be readily turned in several directions.

If, as argued by plaintiff's counsel, the deceased when struck by the train was sitting on the end of a cross-tie, he would not have been struck at all, or would have been struck in the side or back by the pilot, which, according to the testimony of the engineer, extends eight inches beyond the rails. As a matter of fact it is not proven what was the position of the deceased at the time he was struck by the train.

It is the duty of courts to reconcile the evidence, if possible, and this can readily be done in the case at bar by assuming that the deceased was in such a position that he was not visible to the engineer and fireman on the approaching train.

The burden of proof was on the plaintiff to establish the alleged negligence of the defendant, which she has failed to do by a preponderance of the evidence.

It is therefore ordered that the verdict and judgment below be avoided and reversed, and that plaintiff's suit be dismissed.

O'NIELL, J., takes no part, not having heard argument.

(138 La.)

No. 20244.

ELDRIDGE et al. v. CHESBROUGH & GRAVES.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 6, 1916.)*(Syllabus by the Court.)*LANDLORD AND TENANT \S 55(3)—DAMAGES TO SAWMILL MACHINERY—SUFFICIENCY OF EVIDENCE.

Only questions of fact are involved.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 146, 147; Dec. Dig. \S 55(3).]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; R. S. Ellis, Judge.

Action by Mrs. F. C. Eldridge and others against Chesbrough & Graves. From judgment for defendants, plaintiffs appeal. Affirmed.

Purser & Magruder, of Amite, and B. M. Harvard, of New Orleans, for appellants. R. C. & S. Reid, of Amite, for appellees.

SOMMERVILLE, J. The plaintiff partnership is composed of two married women, sisters-in-law, and it is carried on by the husband of one of them, the firm name being "C. R. Eldridge, Agent."

It entered into a contract of lease with defendant in January, 1905, when it was stipulated that the lessor agreed "to furnish all material and labor and to erect, equip, and maintain during the life of this contract, a sawmill plant, buildings, etc., ready for use," etc.; the term was for 30 months from the completion of the plant. It was "agreed that all the machinery, heating apparatus, appliances, or appurtenances now at the Eldridge plant near Gulletts shall be placed in said plant to be erected," etc. The lessee was "to take ordinary care of the machinery, and shall at his expense make such ordinary repairs as become necessary from the use of the same," etc.

October 8, 1906, the parties abrogated and canceled the lease between them, after a full settlement, and they entered into a new one, ending November 1, 1907; with the right of the lessee, or its successors or assigns, to renew "this lease at its termination, upon a monthly renewal and rental, for a period not to exceed 3 years from date of this act." The parties declared in the lease "that the machinery and buildings on the premises described in said annexed (original) lease, belong in part to party of the first part (lessor) and to Chesbrough & Graves" (lessee). The lessee was to keep the leased property up, and at the end of the lease to return it in its present condition, ordinary wear and

tear excepted. The rent was \$140 per month.

Plaintiff, the lessor, sues defendant for \$962.31 for balance of rent alleged to be due, to October 1, 1910, and for \$1,620 for damages to buildings and machinery.

Defendant answered, admitting that \$262.31 was due for rent, and that \$150 was due for damages. There was judgment for these last amounts, and plaintiff has appealed.

The case presents only questions of fact. The district judge gave patient hearing to much testimony, of a conflicting nature, and after seeing and hearing the witnesses, and considering their testimony, he gave judgment for defendant, and we find no error in his judgment.

As to the rent claimed, most of which was for months after defendant had vacated the buildings of plaintiff, it was shown that defendant gave notice to plaintiff that it would vacate by May 1, 1910, and it vacated at that time. The claim is not well founded.

As to the damages done to the machinery, it is recited in the lease that it belonged in part to defendant, and that the part which belonged to plaintiff was secondhand machinery in 1905, and was to be moved from the Eldridge plant, near Gulletts, to the mill to be erected at Amite City, by plaintiff for defendant. Two bills of sale offered by plaintiff would indicate that some of this machinery was bought by it in the year 1899, and some in the year 1904. It may have been repaired, but it was not new in 1906, the date of the lease, and it certainly was not in first-class condition in 1910, at the time of the expiration of the lease, after long and hard usage.

The principal witness for plaintiff testified that he had gone to work for defendant in 1906, shortly after it took charge, and that the general condition of the entire outfit "was then in a rather bad condition." He says, "The buildings were bad; the buildings were in bad condition" while he was working there. He testified to the bad condition of the outfit after defendant gave up the mill, and how much worse it was then than when defendant took charge; but, he admitted on cross-examination, that he had not made any examination of the machinery of the two planing mills in 1906, 1907, 1908, or 1909.

It would serve no useful purpose to review the testimony further. The machinery was subjected to the rough usage for which it was intended in a sawmill, and much of it was worn out by the ordinary wear and tear of the work.

Plaintiff has failed to make out its case. Judgment affirmed.

PROVOSTY, J., takes no part.

 \S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(138 La.)

No. 20367.

SAUNDERS v. BUSCH-EVERETT CO.(Supreme Court of Louisiana. Nov. 4, 1914.
On the Merits, Feb. 21, 1916.)*(Syllabus by Editorial Staff.)*

On Motion to Dismiss.

1. APPEAL AND ERROR §154(1)—GROUNDS FOR DISMISSAL—ACQUIESCENCE IN JUDGMENT.

That plaintiff pending his appeal from an adverse judgment in a suit to annul an oil and mineral lease sold to a third party an undivided one-half of the oils and minerals under a part of the land and conveyed same by an instrument specifying that the land was leased to defendant, and that the sale was made subject to such lease and included an undivided half interest in all royalties due under such lease, did not require the dismissal of the appeal on the ground that plaintiff had acquiesced therein, even though it be deemed an express admission of the validity of the lease and the correctness of the judgment appealed from; an admission of the correctness of a judgment, though good ground for affirming a judgment, constituting no ground for dismissing the appeal on the ground of acquiescence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 958, 961, 962; Dec. Dig. §154(1).]

2. APPEAL AND ERROR §154(1)—GROUNDS FOR DISMISSAL—"ACQUIESCENCE"—"ADMISSION."

"Acquiescence," in a judgment such as will authorize dismissal of an appeal implies consent, and is not the same as an "admission" of the correctness of the judgment. A candid person admits a thing not because he wants to do so, but because truth compels him to do so, whereas it is the element of consent in acquiescence that furnishes the ground for dismissing an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 958, 961, 962; Dec. Dig. §154(1).]

For other definitions, see Words and Phrases, First and Second Series, Acquiescence; Admission.]

3. APPEAL AND ERROR §154(1), 805—RATIFICATION OF JUDGMENT—ABANDONMENT OF APPEAL.

That plaintiff pending his appeal from an adverse judgment in a suit to annul a duly recorded oil and mineral lease stated in an instrument whereby he conveyed an interest in the oil and mineral to a third person, that the land was leased to defendant, and that the sale was made subject to the lease and covered an interest in royalties and rents due under it, did not amount to a ratification of the judgment by plaintiff and a consequential abandonment of his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 3174, 3175; Dec. Dig. §154(1), 805.]

4. ESTOPPEL §56—ADMISSION—INDUCEMENT TO ACTION.

Such alleged admission by plaintiff of the correctness of the judgment could not serve as a basis for estoppel where it was not acted on by defendant.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. §56.]

5. ESTOPPEL §25—DEEDS—RIGHTS OF STRANGERS.

Strangers to a deed cannot avail themselves of an estoppel arising from it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 61, 62; Dec. Dig. §25.]

6. APPEAL AND ERROR §780(2)—DISMISSAL—RIGHT—TRANSFER OF INTEREST.

That one to whom plaintiff had sold an interest in property and royalties pending his appeal from an adverse judgment in a suit to annul an oil and mineral lease, could, by setting up the sale, have prevented plaintiff from further prosecuting the suit, did not entitle defendant to a dismissal of the appeal because of the sale.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §780(2).]

7. APPEAL AND ERROR §154(1)—RIGHT OF APPEAL—ABANDONMENT—ACQUIESCENCE IN JUDGMENT.

For an acquiescence in a judgment to take away the right of appeal, there must be an unconditional, voluntary, and absolute acquiescence by appellant, and he must have intended to acquiesce and abandon his right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 958, 961, 962; Dec. Dig. §154(1).]

(Syllabus by the Court.)

On the Merits.

8. MINES AND MINERALS §58—OPTION TO DRILL FOR OIL AND GAS—"POTESTATIVE CONDITION."

A contract whereby the owner of land grants to another, in consideration of payments, made and to be made, of certain agreed sums of money and other considerations which are to arise in a certain contingency, his right, or option, to drill for oil or gas within a year, and to extend the time thus granted, quarter by quarter, until it reaches a limit of 5 years, contains no potestative condition by reason of its failure to impose upon the grantee any obligation to drill, since it is not within the contemplation of the contract that he should drill, unless he so elects. The purpose is to confer the right to drill without imposing the obligation, and there is nothing in that purpose or in the nature of the contract which contravenes any law of this state.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. §58.]

For other definitions, see Words and Phrases, First Series, Potestative Condition.]

9. MINES AND MINERALS §58—OPTION TO DRILL FOR OIL AND GAS—CONSIDERATION—"SERIOUS CONSIDERATION."

Where, as a consideration for an option to drill for oil and gas upon lands in improved territory, the grantee pays, cash in advance, an amount equal to 3 per cent. on the market value of the lands for one year's time within which to exercise his option, and a like amount, in quarterly payments, in advance, during four years for quarterly extensions of the time, it cannot be said, either that the price (if the transaction be considered a sale) is not "serious" or that it is "out of all proportion to the value of the thing," within the meaning of Civ. Code, art. 2464. Whether it is adequate or inadequate is a question with which the courts have no concern, where neither error nor fraud are alleged and shown.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. §58.]

Appeal from First Judicial District Court, Parish of Caddo; John R. Land, Judge.

Action by D. W. Saunders against the Busch-Everett Company. From judgment for defendant, plaintiff appeals, and defendant moves to dismiss. Motion to dismiss overruled, and judgment affirmed.

Scarborough & Carver, of Natchitoches, and Hall & Jack, of Shreveport, for appellant. Alexander & Wilkinson and Hampden Story, all of Shreveport, for appellee. Thigpen & Herold, of Shreveport, amici curiæ.

On Motion to Dismiss.

PROVOSTY, J. [1, 2] This being a suit to annul an oil and mineral lease made by the plaintiff to the defendant, the Busch-Everett Company, to a large tract of land, and plaintiff having appealed from an adverse judgment, motion is made to dismiss the appeal on the ground that plaintiff has acquiesced in the judgment. This acquiescence is sought to be deduced from the fact that subsequently to the rendition of the judgment plaintiff sold to a third party an undivided half of the oil and minerals in and under a part of said land by a notarial act duly recorded, containing the following clause:

"And, whereas, said land is now leased to the Busch-Everett Company, and by the Busch-Everett Company assigned to the Pasadena Petroleum Company, for development for oil and gas, as shown by lease recorded in the records of De Soto parish, this sale is made subject to said lease, and this sale covers and includes an undivided one-half interest in all royalties and rentals that may be due under the terms of said lease."

It is argued that by this clause plaintiff admitted the validity of the lease as to the part of the land embraced in the sale, and that, the lease being indivisible—not susceptible of being valid in part and invalid in part—the recognition of its validity as to a part of the land was a recognition of its validity as to the whole; and, ergo, was an admission of the correctness of the said judgment, and an acquiescence therein. That it was either this, or it was a fraudulent attempt on the part of plaintiff to defraud said third person by depriving him of "an undivided interest in all the royalties and rentals that may be due under said lease."

[3] This argument impresses us not at all. Even if plaintiff had made an express admission of the validity of the lease and of the correctness of the judgment appealed from, this would not have furnished ground for dismissal. While the admission of the correctness of a judgment may furnish the best of grounds for affirming the judgment on appeal, it furnishes no ground whatever for dismissing the appeal on the ground of acquiescence; acquiescence implies consent; admission does not. A candid person admits a thing, not because he wants to do so, but because truth compels him to do so; whereas, it is the element of consent in acquiescence that furnishes the ground for dismissing an appeal. What we here say with regard to an admission not forming a basis for dismissal is illustrated by the fact that an admission furnishes no ground for estoppel until it has been acted on to the prejudice

of the person to whom it was made. 16 Cyc. 755. But, putting all this aside, as savoring, perhaps, more or less of refinement, what are the plain facts of the matter? The lease was duly recorded, and therefore any sale made by plaintiff of the oils and minerals embraced in it was necessarily subject to it. This condition of things was an existing, stubborn fact, which plaintiff did not have the power to change. The concealment, or attempted concealment, of it by plaintiff from his vendee would have constituted—what the defendant intimates the mention of it was—a fraud upon the said vendee. In common honesty it had to be mentioned. So that, all that plaintiff could do was to do exactly what he did do, namely, mention the fact of the existence of the lease and of the property passing subject to it, and, at the same time, convey all the rights he had under it. By this means the vendee was placed exactly in plaintiff's shoes with reference to the oils and minerals proposed to be sold; in other words, the object of the sale was fully accomplished.

To argue from this, that plaintiff intended to ratify the judgment from which he was appealing, and abandon his appeal, appears to us to be far-fetched in the extreme. Nothing shows that he intended anything of the kind. He had to either do as he did, or else not make the sale; and, unquestionably, he was at perfect liberty to make the sale. Perhaps, for his own greater safety, he might have gone further and mentioned the fact of the pendency of the present suit; but his not having done so is a matter which in no way, shape, or form concerns the defendant.

[4-6] It is argued, further, that if this sale had been made prior to the institution of the present suit, it would "indubitably" have operated as an estoppel to it, and that therefore it is an acquiescence in the judgment.

We fail entirely to see the force of this reasoning. An admission not acted upon cannot serve as a basis for estoppel. Defendant has never acted on this so-called admission; so that, even if it had been made prior to this suit, the defendant could not have invoked it as a basis for estoppel. Moreover, nothing is more fundamental in the law of estoppel than that strangers to a deed cannot avail themselves of an estoppel arising from it. 16 Cyc. 710. True, if, in the present case, plaintiff's vendee should prefer that the lease should not be annulled, but should continue in existence, so that he might reap the advantages under it, he might set up this sale of all the plaintiff's right under the lease as an estoppel to the further prosecution by plaintiff of the present suit to annul said lease; but this is no business of the defendant. And, besides, we have little doubt that plaintiff's said vendee is as desirous to have said lease annulled as plaintiff himself is, and for the same reasons.

[7] In the said act of the plaintiff and ap-

pellant we fail to discover even the slightest evidence of acquiescence, whereas to take away the right of appeal there must be an unconditional, voluntary, and absolute acquiescence in the judgment on the part of the appellant, who must have intended to acquiesce and abandon his right of appeal. *Sims v. Jeter*, 129 La. 263, 55 South. 877, and authorities there cited.

The motion to dismiss is therefore overruled.

On the Merits.

MONROE, C. J. Plaintiff seeks to annul two contracts, relating to oil and gas, made by him with defendant on March 10 and March 13, 1909, respectively; the one, concerning the rights to the oil and gas to be found beneath the surface of certain tracts of land aggregating 1,745 acres, and the other, concerning those minerals to be found beneath the surface of a tract of 100 acres, both of which contracts, he alleges, are void for want of mutuality, in that neither of them binds the defendant to bore any well or explore the land, and that both of them reserve to defendant the right to remove its fixtures, machinery, and improvements at its pleasure.

Another ground of attack, alleged in a supplemental petition, was, that the contracts had not been signed by defendant, but, as that ground is not here insisted upon, we need not consider it. The defense is, in effect, that plaintiff received, by cash paid in advance, an adequate consideration for the privilege accorded defendant of delaying the attempt to develop the land and cannot be heard to attack the contracts before the expiration of the periods covered by that privilege, and whilst still retaining the consideration, and, the less so, as defendant was engaged, when served with citation herein and before the expiration of such periods, in drilling a well.

The contracts contain provisions which are practically identical (and will be fully stated hereafter); the consideration, paid and to be paid, for the right to delay operation during the maximum term of 5 years, aggregating \$267.72 per annum, or about 15 cents per acre; the whole amount due for the first year's delay having been paid upon the signing of the contracts, after which there were quarterly payments in advance, as will hereafter appear.

We find from the evidence that the territory (in the parish of De Soto) in which plaintiff's lands are situated was unproven and untried as an oil and gas field in 1909 (when the contracts were entered into), and so remained for about 2 years, when gas was discovered, and that the lands were worth barely \$5 an acre. M. M. Nabors, a resident and landowner in that vicinity, gives the following testimony concerning the general situation, before, at the time of, and

after the making of the contracts here in controversy, and his testimony is corroborated by that of other witnesses:

"Q. What kind of land is it? (referring to plaintiff's land). A. Average hill land, some creek bottom, good average land. Q. What is it worth for agricultural purposes? A. Well, you have a hard proposition; I don't know. Q. What was it worth for agricultural purposes in 1909 and 1910? A. Well, I guess \$5 an acre would have been a good price; I do not know of any hill land selling for more than that. Q. In 1909 and 1910, what was paid and what were the usual prices for leases around there? A. About 10 cents an acre was the best price that I know of; when I was trying, before that, for coal, there was paid 10 cents an acre and (we) carried it until it broke the company. Q. Who raised the price? A. I think that the Busch-Everett was the first. Q. What did they pay? A. 15 cents, I was told. Q. In 1909 and 1910, there were no developments there? A. No, sir. Q. It was wild cat territory? A. Yes, sir. Q. When was the first well, gas or oil, produced, east of Mansfield? A. It was in April, 1911. Q. What was it? A. Gas well. Q. Who brought that in? A. The Christine Oil Company. Q. How far was that from the plaintiff's property? A. I do not know; I suppose Mr. Saunders' land—the nearest to that—was probably a mile and a half or two miles. Q. What was the first oil well produced there? A. The first oil well was the Jennings A1—that proved good. Q. When was that? A. That was in 1913—in May. * * * Q. (by the Court). Prior to the time, that any of those wells were drilled, what efforts did you make to get people to go in there and drill for oil? A. I tried for 11 or 12 years. * * * Q. And the first drilling done in that community was in 1911? A. Yes, sir."

It appears from the testimony of plaintiff that the gas well which was brought in in April, 1911, was quite near some of his land, and that later in the year he made a demand on defendant for the development of his land, and was told that they would attend to it as soon as they could, but that nothing was done. In the meanwhile he continued to receive the quarterly payments in advance, amounting, under the two contracts, to \$69.18—the last of such payments having been received by him for the quarters ending, respectively, on June 10 and 13, 1913. Thereafter, on May 10, 1913, the first paying oil well in that territory was brought in, about three-quarters of a mile from plaintiff's land, and, on May 17th, he instituted this suit, but service was not made on defendant until May 21st, and, prior to the service on the day that the suit was instituted, defendant had selected a site and begun operations for the drilling of a well by hauling material on the land for the building of a derrick, and on June 3d actually began drilling a well, which reached a depth of some 200 feet on June 29th, and produced gas, since which time, according to the brief of its counsel, other wells have been drilled and the work of development is being continued, though with what success is not shown, as other testimony concerning such operations, since the institution of the suit, was excluded.

There was judgment in the district court in favor of defendant, and plaintiff has appealed.

Opinion.

[8, 9] The Civil Code contains the following among other provisions, to wit:

"Art. 1764. All things that are not forbidden by law, may legally become the subject of or the motive for contracts. * * *

"Art. 1885. All things, in the most extensive sense of the expression, corporeal or incorporeal, movable or immovable, to which rights can legally be acquired, may become the object of contracts. * * *

"Art. 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to wit: The thing sold, the price and the consent. * * *

"Art. 2449. Not only corporeal objects, such as movables and immovables, live stock and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, * * * a servitude or any other rights. * * *

"Art. 2451. It also happens * * * that an uncertain hope is sold; as the fisher sells the haul of his net before he throws it; and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught. * * *

"Art. 1901. Agreements legally entered into have the effect of laws on those who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed in good faith. * * *

"Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties. It ought to consist of a sum of money, otherwise it would be considered as an exchange. It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid. It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised. * * *

"Art. 2024. The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder. * * *

"Art. 2034. Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself.

"Art. 2035. The last preceding article is submitted to potestative conditions, which make the obligation depend solely on the exercise of the obligor's will; but if the condition be, that the obligor shall do or not do a certain act, although the doing or not doing of the act depends on the will of the obligor, yet the obligation * * * is not void. * * *

"Art. 2679. Certain incorporeal things may also be let out, such as the right of toll, and the like; but there are some [things] which cannot be the object of hire, such as a credit."

Full liberty is therefore recognized as inherent in every person of legal capacity to enter into such contracts as are *not forbidden by law*, and, specifically, to contract with reference to *all things, in the most extensive sense of the expression, corporeal and incorporeal to which rights can legally attach; to sell corporeal objects, incorporeal things, including a hope, together with the right*

to have what the buyer may hope to obtain in making the purchase; and to lease *certain incorporeal things, such as a right of toll, and the like*. And we have a specific declaration of the lawmaker to the effect that, *if the condition of an obligation be that the obligor shall do, or not do, a certain act, although the doing, or not doing, of the act depends on the will of the obligor, yet the obligation is not void*. And there are still other provisions (of article 1764) which distinguish between those things which are of the essence of the contract and others which are implied, if no stipulation be made concerning them, but which may be waived or renounced without destroying the contract or changing its description; and between things which are of the essence and accidental stipulations which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties.

The contracts here sued on declare that:

"D. W. Saunders * * * in consideration of the sum of \$261.75 [and \$14.97, respectively], paid by the Busch-Everett Company, * * * and the further consideration hereinafter mentioned, has granted, bargained, sold, * * * unto said party of the second part, * * * all of the oil and gas in and under the following described land, together with the right of ingress and egress at all times for the purpose of drilling, mining, and operating for oil, gas, or water, and to conduct all operations; to erect storage tanks and other necessary structures and to lay all pipes necessary for the production, * * * mining and transportation of oil, gas, and water, with the right to use sufficient water, gas, or oil to operate said property, and shall have the right to remove all machinery, fixtures, and improvements placed thereon, at any time, reserving, however, to the party of the first part the equal one-eighth of all oil produced and saved upon said premises. * * * If gas is found, the party of the second part agrees to pay the party of the first part \$200, * * * each year, payable quarterly, for the product of each well, while the same is being used off the premises, and party of the first part, by furnishing his own pipe and connections, shall have sufficient gas, free of cost, for use in one dwelling house on the premises, at his own risk. No well shall be drilled within 200 feet of any building now on said premises without the consent of the first party. Said land being of the following description: * * * To have and to hold the above-described premises to the said party of the second part, his heirs and assigns, on the following conditions: In case operations for either the drilling of a well for oil or gas is not commenced within one year from this date, then this grant shall immediately become null and void as to both parties; provided, that second party may prevent such forfeiture, from quarter to quarter, for 5 years, by paying to the first party the sum of \$261.75 [and \$14.97, respectively] per year, until such well is commenced; and it is agreed that the completion of a well shall operate as full liquidation of all rentals under this provision during the remainder of the term of this lease. * * * In case the party of the second part should bore and discover oil or gas, then, in that event, this grant, incumbrance, or conveyance shall be in force and effect for 25 years from the date of the discovery of said product and as much longer as oil or gas may be produced in paying quantities thereon. This grant is not intended as a mere franchise, but is intended as a conveyance of the property, for the purposes herein mentioned, and

it is so understood by both parties to this agreement. If, at the time operations are begun under this lease, there are growing crops on the land, the said party of the second part agrees to pay all damages occasioned to such growing crops by such operations. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, administrators, and assigns."

It has been held by this court, after mature deliberation (and we find no reason for changing our opinion), that:

"Oil and gas while in the earth are not the subject of ownership distinct from the soil; and the grant of the oil and gas therefore is a grant, not of the oil or gas that is in ground, but of such part as the grantee may find, and passes nothing except the right to explore for the same under the terms of such contract." *Rives et al. v. Gulf Refining Co. of La.*, 133 La. 178, 62 South. 623.

In the more recent case of *Strother v. Mangham*, 70 South. 426 (No. 21436 of the docket of this court, not yet officially reported) it was said:

"The doctrine that the owner of the land has no property right in the oil or gas beneath the surface until he has reduced it to possession in no manner denies to such owner the exclusive right to the use of the surface for the purposes of such reduction, or for any other purpose not prohibited by law, but, to the contrary, concedes that right, as inherent in the title to the land, and subject only to the control of the state, in the exercise of its police power; and the right may be sold, as may be any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession."

Let us assume that the contracts here in question are not sales within the meaning of C. C. 2451, nor, yet, leases of incorporeal rights, within the meaning of C. C. 2679, they are, nevertheless, contracts, whereby, upon terms and for considerations which were agreeable to the parties thereto (who were both capable of contracting, and are not alleged to have been influenced by either fraud or error), the plaintiff conveyed to the defendant, for a price, in current money, paid and to be paid, and upon certain conditions, his (the plaintiff's) right to explore his land for oil and gas, at any time within 5 years, the right so conveyed to be exercised, or not exercised, at the option of the defendant.

We are not here necessarily concerned then with the question, whether the contracts thus entered into fall under one classification or another (though that question might arise in another case), but are inquiring whether they are forbidden by law, or were lawfully entered into; and if we find that they were lawfully entered into, we must hold that they "have the force of laws upon those who have formed them," and "cannot be revoked unless by the mutual consent of the parties, or for causes acknowledged by law," but "must be performed in good faith."

The Civil Code (article 1779) also declares that:

"Four requisites are necessary to the validity of a contract: (1) Parties legally capable of

contracting. (2) Their consent legally given. (3) A certain object, which forms the matter of agreement. (4) A lawful purpose."

The capacity of the parties to the contracts here in question is not in dispute, and it will not be disputed that plaintiff had acquired, as inherent in his title, the right to explore his land for oil and gas, or that it was competent for him to make that right the object of a contract, and sell, or otherwise convey, it to defendant, or that a contract making such conveyance would have a lawful purpose. Nor do we think it can be effectually denied that by means of those contracts plaintiff did convey the rights thus mentioned to defendant; but, while there is no uncertainty concerning the thing conveyed, counsel for plaintiff, as it appears to us, have somewhat confused the purposes of the contracts, as disclosed by the terms in which they are framed with the purposes of the parties, respectively, in entering into them. As we read the contracts, the purposes of the parties were, upon the one hand, to convey to defendant plaintiff's right to explore his land for oil and gas, with the privilege of exercising it, or not, as defendant may choose, within a maximum delay of 5 years, conditioned upon defendant's making the payments as agreed on; and, in the event of the discovery of those minerals, or either of them, and their reduction to possession, to secure to defendant a certain property right in them; and, upon the other hand, to secure to plaintiff a certain price or consideration, payable in current money, and a certain other consideration, in the event of the discovery of oil and gas, in the shape of \$200 per annum for the product of each gas well, while the gas is being used off the premises; the right to have sufficient gas, free of cost, for one dwelling house on the premises, so long as it is utilized off the premises, and an equal one-eighth of all oil produced and saved on the premises.

In other words, plaintiff, for a consideration, paid and to be paid in advance, and the promise of a further consideration in the event that defendant should elect to explore for, and should find, oil and gas, conveys to defendant his (plaintiff's) right to explore his land, at defendant's option, expense, and risk, within the maximum term of 5 years, and defendant, having paid the price of the option, exercised it by *not exploring* for several years, and was then engaged in exercising it *by exploring*, when it was cited to defend this suit.

We are unable to discover anything in the nature of the contracts which brings them within any prohibition of our law to which our attention has been called; and the same thing may be said of the law of our sister states and of the United States.

Under our law, the owner of property may agree with another that he shall have the right to purchase the same at a fixed price, within a certain time. C. C. 2462; *Smith v.*

Hussey, 119 La. 32, 43 South. 902; Legier v. Braughn, 123 La. 464, 49 South. 22; Lyons v. Woman's League, etc., 124 La. 222, 50 South. 18.

It is held, in other jurisdictions, concerning such a contract, that:

"It is, in legal effect, an offer to sell, coupled with an agreement to hold the offer open for acceptance for the time specified, such agreement being supported by a valuable consideration, or, at common law, being under seal, so that it constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified. * * * There may also be an option to sell. An option to sell land is as valid as an option to buy." 39 Cyc. pp. 1232, 1233.

"When there is an agreement, founded on consideration, it is not invalid for want of mutuality because one party has an option while the other has not, or, in other words, because it is obligatory on one and optional with the other. * * * So want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right. Such contracts, however, although good at law, are not favored by, and will not always be enforced in, a court of equity." 9 Cyc. 334.

And, by way of illustration of the last proposition, two cases from 8 Pa. Co. Ct. R. are cited, in one of which it was held that an agreement, whereby a baseball player bound himself to play for a club for a period of time, at the option of the club, which might equal the term of his life, and left the club at liberty to discharge him at will, would not be enforced; and in the other of which such an agreement, for 7 months, was sustained.

In all jurisdictions, the owner of land may convey to another his right to possess and use the land, and the contract is none the less valid that it leaves the lessee at liberty to cultivate or otherwise use the land, or leave it uncultivated or unused at his option.

If, then, the owner may bind himself to convey his property to another, with all of the elements of ownership, within a specified time, at the option of the other, or may convey to another his right to occupy the surface of the land, with the right to cultivate or improve it, at his option, he may also convey to another his right and option to explore beneath the surface of the land for oil, gas, or other minerals.

It is argued, on behalf of plaintiff (quoting from the brief of his counsel):

"That these leases are * * * void for want of mutuality and as containing a potestative condition, for the reason that the company does not agree or obligate itself to do anything at all, or to drill any well, or to make any effort to explore the land, but reserves the right to remove all machinery, fixtures, and improvements from the land, at any time, at its own will and pleasure."

And that argument is based upon expressions found in one or two of the opinions of this court concerning contracts which are as-

sumed to be similar to, or identical with, those now under consideration; from which the inference is drawn that, in the view of this court, all such contracts, however remotely or contingently the exploration of land for oil or gas is contemplated, are to be construed as having such exploration for their immediate and main objects, no matter what may be the language in which the contracting parties have expressed themselves. We apprehend, however, that upon a careful consideration of the cases upon which the counsel rely, as well as of others which are supposed to have dealt with the issues here presented, it will be found that in each of them, by reason of differences in the contracts, the issues were not the same as here, and that upon the whole, the conclusions of the court were predicated upon its finding that there was no serious price, or price proportioned to value, as contemplated by C. O. 2464, moving to the owner of the land as a consideration for the rights conveyed to the other party.

In *Murray v. Barnhart*, 117 La. 1026, 42 South. 489, the owner leased his land, exclusively for oil and gas development, for 25 years, for the consideration of one dollar and the further consideration that the lessee should deliver to him one-tenth of all the oil produced and saved and pay him \$100 per annum for each gas well, the product of which was used off the premises, to which was added the following:

"Second party covenants and agrees * * * to complete a well on said premises within one year, * * * or pay, at the rate of \$4 quarterly, in advance, for each additional 8 months such completion is delayed. * * * It is agreed that the second party is to have the privilege, * * * at any time, to remove all machinery and fixtures placed on said premises, and, further, upon the payment of \$2, at any time, * * * shall have the right to surrender the lease," etc.

From which it appears that, after acquiring, for \$1, the lease of the property for 25 years, "for the sole and only purpose of mining and of operating for oil and gas," and after affirmatively binding himself "to complete a well on said premises in one year," or pay \$4 a quarter, for each additional quarter's delay, the lessee was authorized to remove his machinery and cancel the lease, upon payment of \$2, considering which various stipulations it was held that the main purpose of the contract was the development of the mineral-bearing properties of the land; that the lessee incurred no other obligation save for the initial payment of \$1 and the \$2 to be paid for the cancellation of the contract, and that they were not serious or valuable considerations, under our law. But the court did not hold that there is any law of this state which prohibits a contract whereby the owner of land, for a serious consideration, or a consideration not utterly disproportioned to value, as \$1 would be to the value of a planta-

tion, conveys to another the right to drill thereon for oil and gas, within a limited period, or refrain from drilling, at his option, with the privilege of extending such period upon conditions agreed on between him and the grantee. And of that character are the contracts here in controversy. They contain no provision whatever requiring defendant to drill a well, or to begin one. They merely confer upon it the right, in consideration of payments, made and to be made, of certain sums of money, to commence the drilling of a well within one year, and the further right to extend the time thus granted, quarter by quarter, until it reaches the limit of 5 years. There is therefore no potestative condition in the contract resulting from its failure to impose upon defendant the obligation to drill a well, since it was not within its contemplation that defendant should do so, unless he should so elect. What defendant contracted and paid for was the right to drill, without incurring the obligation to do so, just as one may contract for the right to buy land or any other property at a stipulated price, or, for the right to extend the lease of the house that he lives in, without, in the one case, incurring the obligation to buy, or, in the other, the obligation to renew the lease.

In *Martel v. Jennings-Heywood, etc.*, 114 La. 351, 38 South. 253, it was found that, by one of the several contracts involved, the owner, for the consideration of \$1, and a certain royalty, to be paid in the event of the discovery of oil or other minerals, conferred on the grantee the right to drill at any time within 99 years, but the grantee assumed no obligation to drill, and the court held, in effect, that it was a nudum pactum, as the grantee gave no consideration and bound itself to nothing.

In *Gray v. Spring*, 129 La. 360, 56 South. 305, Ann. Cas. 1913B, 372, the court ignored a recited payment by the grantee of \$1, and held that he paid nothing and bound himself to nothing.

In *Goodson v. Vivian Oil Co.*, 129 La. 958, 57 South. 281, there was a so-called lease for 10 years, with an option to drill within 6 months, for which the grantee paid \$150, and drilled a well, which produced nothing but mud and water, and, the time having expired, the owner objected to the drilling of another well, and the objection was sustained, no consideration having been given for anything save the 6 months' option.

The opinion in *Berl v. Kehoe*, 130 La. 1020, 58 South. 864, contains the following:

"The '\$1 in hand paid by the lessee' is no 'consideration,' and may be disregarded; * * * and there is nothing else in the contract which bears any resemblance to a consideration moving from the lessee in return for the right, granted to him by the lessors, to take possession of and exploit their land, and buy it at \$50 an acre, in the event of the discovery of oil, save the stipulation, 'the lessee agrees to commence the drilling of a well within 6 months.' It will be observed that he imposes upon himself no obliga-

tion to prosecute the work * * * after it has begun or to complete it within any given period."

And the case was held to fall within the rulings in the cases above cited and others.

In *Long v. Sun Co.*, 132 La. 601, 61 South. 684, the contract appears to have been similar to that which was before the court in the *Murray-Barnhart Case*. The grantee assumed the obligation to drill a well, from which the court as in the *Murray-Barnhart Case*, concluded that the development of the mineral products of the land was the main object of the contract, and that the initial payment of \$1, and the quarterly payments of 10 cents an acre, with the privilege of canceling the contract at any time after the expiration of 12 months from its date, on payment of \$1, was not a consideration proportioned to the value of the thing granted, and as, after the lapse of 3 years, there had been no well drilled, or begun, the contract was held to be void.

The case of *Houssiere-Latreille, etc., v. Jennings-Heywood, etc.*, 115 La. 107, 38 South. 932, was a possessory action in which were involved certain questions of practice, as, also, the interpretation, on its face, of an oil contract. As to the latter, the view of the court is fairly stated in the last paragraph of the syllabus, on rehearing, which reads as follows:

"A contract purporting to be a lease for a term of 10 years of mineral rights in a 40-acre tract of land in an unproved part of the country, whereby the contractor agrees to commence operations within 6 months, or pay \$50 quarterly, in advance, for each additional 3 months such operations are delayed, until an oil well is completed, and whereby he is given the right to remove his machinery at any time, and cancel the contract on payment of \$100, and whereby in the event of the discovery of oil and gas, the gross yield is to be shared, in certain proportions, by the contracting parties, is not void upon its face for want of mutuality or as containing a potestative condition."

The case then went back to the district court and was fully tried upon its merits, and, upon the second appeal, on the rehearing, it was held by a majority of the members of this court as follows (quoting, in part, the syllabus on rehearing), to wit:

"That, since the sole object and purpose of the contract was to exploit the land for oil and gas, and the contract left the lessee at liberty to do so or not, at his option, there was, in reality, no contract binding on the lessee.

"That if, however, there was a contract, it was either in the nature of an option to the lessee to begin operations within the time fixed in the contract, with the right to prolong the term by making quarterly payments, in advance, or else it was a commutative contract, wherein the obligation was to exploit the land for oil or gas. If it was the former, it came to an end by the lessee not exercising the option timely. If it was the latter, the lessee broke it by not beginning operations, nor offering to do so, within the term of the contract or within a reasonable time thereafter.

"That, even if the obligation of the lessee was alternative, namely, either to exploit the land for oil or gas, or else pay \$50 in advance, quarterly, it became pure and simple when the alter-

native right to make the payments vanished from the contract as the result of failure to exercise that right in time; and, from that time, the only useful offer of performance the lessee could have made would have been to develop the land for oil or gas.

"An option must be exercised within the time limit, or the right will be lost." *Jennings-Heywood, etc., v. Houssiere-Latreille, etc.*, 119 La. 864, 44 South. 510.

Plaintiff's counsel have argued, to some extent, that the consideration, agreed upon and paid by defendant, for the extension of the delay within which the option to drill was to be exercised, was not serious, and was not proportioned to the value of the right granted, but we find nothing upon that subject in their petition. It is to be observed, in that connection, that C. C. 2464 deals exclusively with the question of the price, in a contract of sale, and we shall have to assume that the contracts under consideration are of that character in order to bring them within its application. Having so assumed, it will further be observed that the article makes no declaration concerning adequacy of price. It provides that the price should be certain, that it should consist of money, that it should be serious; that is to say, that it should not be a mere pretended price the payment of which is not contemplated; and, that, it should not be out of all proportion to the value of the thing. In this instance, the price, paid at the signing of the contracts, for the option for one year, was \$276.72, after which there were 14 quarterly payments, of \$69.18 each, up to, and inclusive of, the quarters ending June 10-13, 1913, all in strict accordance with the terms of the contract. The price (if the transaction be regarded as a sale) was therefore certain. It was paid in money. And, having been actually so paid, it

cannot be said that it was not serious, within the meaning of the article to which we have referred. Nor do we think it can be said to have been out of all proportion to the value of the "thing" for which it was paid, according to the standard established by the illustration contained in that article. Plaintiff's lands, at the date of the contracts, were in a section of country in which no exploration for oil or gas had ever been made; they are said to have been worth about \$5 an acre; and the amount paid, annually, by defendant was equal to about 3 per cent. upon that valuation, which, in all probability, was sufficient for the payment of the taxes.

There are, no doubt, thousands of landowners in Louisiana and elsewhere in this country who would be glad to enter into such contracts. Whether, however, the amount paid in this instance was adequate or inadequate is a matter with which we have no concern. It was certainly not disproportioned to the value of the thing acquired, as would be \$1, in comparison to the value of a plantation, and, as plaintiff received in all 15 payments, extending over a period of about 4 years, it does not appear that he so considered it. We think it proper to add, in conclusion, that it is not the intention of this opinion to convey the idea that a landowner who has granted an option for the drilling of his land for oil or gas would be without remedy in a case in which it should be made to appear that, while the exercise of the option was being delayed, the land was being drained of those minerals. But that is not the case here presented, and, upon the other grounds set up, plaintiff is not entitled to the relief prayed for.

The judgment appealed from is accordingly affirmed.

LOUISVILLE & N. R. CO. v. PRICE
(No. 17614.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

COMMERCE \Leftrightarrow 8—INTERSTATE COMMERCE—AP-
PLICATION OF STATE LAWS.

Code 1906, § 4853, provides that if a common carrier receive freight from another carrier on a contract for continuous carriage, and it arrives at the place of delivery in a broken or damaged condition, it is the duty of the last carrier to obtain and furnish to the consignee on demand true copies of all notations, exceptions, records, and memoranda entered on the books of each carrier touching the receipt, transfer, and handling of the freight, and that if it shall not furnish such copies within 30 days after demand, it shall be presumed to have caused the damage. *Held*, that this is superseded in so far as interstate shipments are concerned by the Carmack Amendment (Act Cong. June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1913, § 8592]); and in an action against the delivering carrier for damage to an interstate shipment, it was error to exclude evidence to show that it was not responsible for the damage, because of its failure to comply with section 4853.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 8.]

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action by Mrs. W. E. Price against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Gregory L. Smith and J. W. Goldsby, both of Mobile, Ala., and H. Bloomfield, of Gulfport, for appellant. Dodds & Montgomery, of Gulfport, for appellee.

POTTER, J. This was a suit brought in the circuit court of Harrison county, Miss., by Mrs. W. E. Price, the appellee, against the Louisville & Nashville Railroad Company, the appellant, to recover damages for injury to certain household furniture, china-ware, and other effects shipped by her from Faunsdale, Ala., to Biloxi, Miss.; the same being consigned by appellee to herself.

The shipment in question originated at Faunsdale, Ala., a station on the Southern Railway, was carried over the Southern Railway from Faunsdale to Mobile, Ala., and was there delivered to the Osborne Transfer Company of Mobile, an independent carrier having no connection with the Louisville & Nashville Railroad, and by the transfer company carried to the depot of the appellant in Mobile, Ala., the distance between the two depots being about a mile and a half. The goods were received by the Southern Railway at Faunsdale in good order, except as was noted upon the bills of lading. The shipment was made under through bills of lading issued by the Southern Railway Company from Faunsdale, Ala., to Biloxi, Miss., and was therefore an interstate shipment, the Southern Railway Company being

the initial carrier and the Louisville & Nashville Railroad Company the delivering carrier. In the trial of the case the plaintiff showed that the freight was delivered to the Southern Railway Company in good order, and that she had made proper demands under section 4853 of the Code of Mississippi of 1906, for true copies of all notations, exceptions, records, and memoranda entered on the books of each carrier touching the receipt and handling of the freight while in transit, and claimed that her demand for such information was ignored. The appellant offered to prove on the trial of the cause that from the time of the delivery of the freight in question to it to the time of delivery to appellee at Biloxi, Miss., that it had handled the freight carefully and in every respect without damage or injury to the freight, and alleged that it delivered the freight to the appellee in the same condition it had received same from the transfer company; but the trial court refused to permit the introduction of this testimony, holding in effect that having failed to comply with the provisions of section 4853 of the Code of Mississippi of 1906 to obtain and furnish to the consignee, demand having been made, true copies of all notations, exceptions, records, and memoranda entered on the books of each carrier touching the receipt, transfer, and handling of said freight while in transit, that the appellant was conclusively presumed to have done the damage complained of.

Section 4853 of the Code of 1906 is superseded, in so far as interstate shipments are concerned, by the Carmack Amendment. *Charleston & Western Carolina Railway Co. v. Varnville Furniture Company*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137.

It was therefore error to exclude the testimony offered.

Reversed and remanded.

LAUREL COMPRESS CO. v. POWER et al.
(No. 17354.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

WAREHOUSEMEN \Leftrightarrow 24(3)—Loss of Goods—
NOTICE OF ARRIVAL.

A compress company was not liable for the value of cotton destroyed by fire while in its warehouse because of its failure to promptly notify the shipper of the arrival of the cotton as requested by the shipper, where it did not know of the shipper's custom to insure cotton upon its arrival at warehouses under a blanket policy, and no general custom to that effect among those engaged in the cotton business appeared.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 51; Dec. Dig. \Leftrightarrow 24(3).]

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action by George B. Power and another, trustees of the Farmers' Warehouse Com-

pany, against the Laurel Compress Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Green & Green, of Jackson, for appellant. G. Montgomery, of Laurel, for appellees.

POTTER, J. The appellee filed this suit in the circuit court of Jones county, and the case was tried by the judge by agreement without a jury. The appellee, plaintiff in the court below, was awarded damages to the extent of \$503. The substance of the ground of recovery is, that the Farmers' Warehouse Company, for whom appellees are receivers, shipped six bales of cotton from Stringer, Miss., to the Laurel Compress Company at Laurel, Miss., with the request that it be promptly notified upon receipt of the cotton. Three bales of the cotton in question arrived at the defendant's compress on December 9th, and three other bales arrived on December 14th, and the warehouse in question burned and the cotton in question was destroyed on the morning of the 17th day of December. The appellee had written the appellant to promptly notify it of the arrival of the cotton at its warehouse and sets out as its ground of recovery that the appellant failed to notify appellee of the arrival of the cotton promptly as requested; that on account of the appellant's negligence in this respect appellee had failed to have the cotton in question covered by a blanket policy it carried on cotton it had in various warehouses, and consequently the appellee's cotton was burned up without any insurance, due to appellant's negligence in not promptly notifying appellee of the arrival of the cotton at its compress at Laurel. It is claimed by the appellee that the appellant had notice of the existence of the blanket policy and its custom to place its cotton under the protection of the same whenever notified of its arrival at warehouses.

The appellee, however, utterly failed to produce any testimony to show that appellant knew of its custom to insure cotton on reaching warehouses under a blanket policy, but the court seemed to take judicial notice of the existence of such custom. On the other hand, the agents for the appellant company testified that they did not know of the arrangement in question, but, to the contrary, had been given the impression by Mr. Robertson, the general attorney for the appellee, that appellee had an arrangement whereby cotton was covered under a blanket policy held by appellee from the time of the issuance of bills of lading for same upon delivery to carriers. The testimony fails to show that it was the general custom, if such is the case, of those engaged in the cotton business to insure cotton on arrival at the warehouse. In fact, the testimony in this case fails entirely to show that the appellant had any notice of the character of damage its

alleged negligence would probably cause the appellee to sustain. *Western Union Telegraph Co. v. Watson*, 82 Miss. 101, 33 South. 76; *Western Union Telegraph Co. v. Pearce*, 82 Miss. 487, 34 South. 152.

Reversed and remanded.

MONTGOMERY, Sheriff, et al. v. MUTUAL LIFE INS. CO. OF NEW YORK et al. (No. 17981.)

(Supreme Court of Mississippi, Division B. March 20, 1918.)

1. EXECUTORS AND ADMINISTRATORS \S 87—
COLLECTION OF ASSETS — COMPROMISE OF CLAIMS.

Notwithstanding Code 1906, \S 2065, providing that the court or chancellor in vacation may authorize an executor or administrator to sell or compromise any claim not readily collectable, where an administrator acts in good faith, a compromise by him of a claim or debt due the estate is valid and binding without previous authorization by the chancery court or the chancellor in vacation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. $\S\S$ 323, 384-392; Dec. Dig. \S 87.]

2. INSURANCE \S 244 — SURRENDER — REIMBURSEMENT OF PERSON PAYING PREMIUMS.

After a wife's death, her husband paid two premiums on a policy on his life which had been assigned to the wife, and subsequently surrendered the policy in exchange for a paid-up policy. Afterwards, the husband and the wife's administrator surrendered the paid-up policy upon payment of its cash surrender value. The premiums paid by the husband with interest then amounted to more than the surrender value. *Held*, that the administrator properly paid this amount to the husband; the payments by the husband having insured to the benefit of his cobeneficiaries, the heirs of the wife.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. $\S\S$ 194, 524-530; Dec. Dig. \S 244.]

Appeal from Chancery Court, Lincoln County; P. Z. Jones, Chancellor.

Action by T. H. Montgomery, Sheriff and administrator, and another, against the Mutual Life Insurance Company of New York and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

M. McCullough, of Brookhaven, for appellants. R. H. Thompson and J. H. Thompson, both of Jackson, and H. Cassedy and J. W. Cassedy, both of Brookhaven, for appellees.

POTTER, J. On the 1st day of March, 1892, William R. Kennedy insured his life in the Mutual Life Insurance Company of New York for \$2,500, and the policy was made payable to himself, his executors, administrators, or assigns. The annual premium on the policy was \$97. One premium was paid at the time the policy was issued, and future payments of the same amount were to be made each year after that date until 20 payments should be made. On August 1, 1892, Mr. Kennedy assigned the policy of life insurance above mentioned to his wife, Mrs. Amanda E. Kennedy, and the in-

insurance company was notified of the assignment. Mrs. Kennedy died intestate in the year 1895 and left surviving her husband, William R. Kennedy, and her six children, all adults, as her heirs. After the death of Mrs. Kennedy, Mr. Kennedy paid two premiums on this policy, one March 1, 1897, and one March 1, 1898.

The policy contained a provision that:

After "three full annual premiums having been paid on this policy, the company will, upon the legal surrender thereof before default in the payment of any premium or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years premiums paid bear to the total number required."

On March 18, 1898, within the six months definitely specified in the paid-up policy provision, Mr. Kennedy, the insured and one of the heirs of his deceased wife to whom the original policy had been assigned, mailed an application to the company for a paid-up policy, and the same was issued in conformity with the terms of the original policy. The amount of the paid-up policy was \$750. In other words, at the death of Mr. Kennedy the estate of Mrs. Kennedy would be paid \$750 by the insurance company. On June 4, 1904, Mr. Applewhite, at that time the sheriff of Lincoln county, was appointed the administrator of the estate of Mrs. Kennedy, and the United States Fidelity & Guaranty Company became surety on his bond as administrator, and on June 15, 1904, Applewhite, the administrator, and William R. Kennedy, the payee in the policy, surrendered the policy in question to the insurance company and executed a joint receipt to the insurance company for \$233 in full settlement and surrender of the policy. That the amount received by the administrator was the full cash surrender value of the policy is not controverted; in other words, the administrator was paid all the policy was worth at the time the surrender of same was made. This money was paid by the administrator to William R. Kennedy.

After this time T. H. Montgomery, sheriff, qualified as administrator of the estate of Mrs. Kennedy as successor to Applewhite, administrator, and brought suit in the chancery court of Lincoln county against the Mutual Life Insurance Company, and R. C. Applewhite, the administrator, and the surety on his bond, the United States Fidelity & Guaranty Company, for the entire \$750, claiming that the cancellation and surrender of the policy by the administrator Applewhite was void, because section 2065 of the Code of Mississippi of 1906 was not complied with, and that therefore the paid-up policy of \$750 was in full force and effect at the time of Mr. Kennedy's death. Section 2065 of the Code of 1906 is as follows:

"The court, or chancellor in vacation, on petition for that purpose, may authorize the executor or administrator to sell or compromise any

claim belonging to the estate which cannot be readily collected; but an order authorizing a sale of any claim shall not be made until after twelve months from the grant of the letters. The court or chancellor shall specify the terms, conditions, and notice of such sale. In compromising any claim, the executor or administrator may receive property, real or personal, in his name as such, and he shall account for the same as assets of the estate. The executor or administrator shall report, in writing, all sales and compromises to the next term of the court."

[1] The settlement of the policy above mentioned for its cash surrender value was made without the authorization of the court or chancellor in vacation, as provided in the above section. But the administrator received the full cash surrender value of the policy at the time the settlement was made. There is no showing of either negligence or fraud or other wrongdoing on the part of the administrator, and the only question here to be determined is whether or not he could make a binding agreement of settlement and acquit and discharge the insurance company without first having obtained the authorization from the chancellor in the manner provided in the Code section above mentioned. We think, where the administrator acts in good faith, a compromise by him of a claim or a debt due to the estate is valid and binding without previous authorization by the chancery court or the chancellor in vacation. *Long v. Schackelford*, 25 Miss. 559; *Gulledge v. Berry*, 31 Miss. 346; *Martin v. Tarver*, 43 Miss. 517; *Anderson v. Gregg*, 44 Miss. 170. This settles the case in so far as the insurance company is concerned.

[2] The sum of \$233 was paid by the administrator Applewhite to Mr. Kennedy. Kennedy, after the death of his wife, paid the premiums on the policy of \$97 due March 1, 1897, and March 1, 1898, respectively, which inured to the benefit of his co-beneficiaries, and the settlement was made on the policy in 1904. The amount paid by him, with the legal interest thereon from the time of payment until the surrender of the policy, more than consumes the \$233 paid by the administrator to him.

The chancellor dismissed the bill. We think he was correct in his finding, and the case is therefore affirmed.

Affirmed.

BOARD OF LEVEE COM'RS FOR YAZOO-MISSISSIPPI DELTA v. FOOTE & DAVIES CO. (No. 17352.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

1. LEVEES ~~AND~~ LEVEE BOARDS—AUTHORITY OF MEMBERS AND OFFICERS.

The secretary of a board of levee commissioners had no authority to bind the board by a contract for stationery and office supplies, as such boards are agencies created by the state for administering the affairs of levee districts, its members are public officers, and those dealing with public officers must look to the stat-

utes for their duties and powers, and there is no statute authorizing such secretary to make a contract binding upon the board.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 18; Dec. Dig. ¶9.]

2. LEVEES ¶9—LEVEE BOARDS—LIABILITY ON CONTRACTS—ESTOPPEL.

A board of levee commissioners, which accepted and paid part of an account for stationery and office supplies ordered by its secretary without authority, was not thereby estopped to deny its liability for the balance of the account.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 18; Dec. Dig. ¶9.]

3. LEVEES ¶11—LEVEE BOARDS—REJECTION OF CLAIMS.

In an action on a claim against a board of levee commissioners for stationery and office supplies ordered by its secretary without authority, the court had no power to go into the question of whether the board arbitrarily rejected a part of the claim, as it might have refused to pay anything, and, when it paid a part of the account, plaintiff received more than he could have legally demanded.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 20; Dec. Dig. ¶11.]

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Action by Foote & Davies Company against the Board of Levee Commissioners for the Yazoo-Mississippi Delta. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Gary & Rice, of Charleston, for appellant. D. A. Scott and E. M. Yerger, both of Clarksdale, and Somerville & Somerville, of Cleveland, for appellee.

COOK, P. J. This action was begun in a justice of the peace court against the board of levee commissioners for the Yazoo-Mississippi Delta, upon an open account, embracing stationery and office supplies. In the circuit court oral evidence and depositions were offered by the plaintiff, appellee here, in support of the account. At the close of the evidence, the trial judge instructed the jury to find for the plaintiff; hence this appeal.

The bill of goods in question was sold to the secretary of the board of levee commissioners. It appears that the secretary had no authority from the board of levee commissioners to buy the goods, but it is contended here that it had been the custom for a number of years for the secretary to buy goods of this character, and for the board of commissioners to pay the bills so bought as a matter of course.

[1] "The board of levee commissioners is an agency created by the state for administering the affairs of the levee district. Its members are public officers." *State v. Board of Levee Com'rs of Yazoo-Mississippi Delta*, 96 Miss. 685, 51 South. 211. Those who deal with public officers must look to the statutes for their duties and powers, and, unless the statutes of the state confer upon the secretary of the levee board the power

to bind the board of levee commissioners in contracts of the sort here involved, no such authority existed. We have examined all of the laws passed by the Legislature which refer to the board of levee commissioners for the Yazoo-Mississippi Delta, and have been unable to find anything which suggests that the secretary of the board may, under any circumstances, make a contract binding upon the levee commissioners. As his official title implies, he is merely the secretary of the board—the keeper of the minutes and the books of the board. It is his duty to keep the minutes, and records, and he is the official scribe. The secretary may be likened to the clerk of the board of supervisors of a county, or the clerk of a city, or town council, and has no more authority to make contracts for the levee district than would the clerk of the board of supervisors for the county.

[2] It appears that the board of levee commissioners accepted, and ordered paid, some part of the account, and from this it is contended that it is estopped to deny its liability for the entire account.

We do not believe that this contention is sound. The board decided, no doubt, that some of the items of the account were needed, and therefore paid for such items, and decided that the other items were not needed, and, not being legally bound to pay for the same, the board of commissioners declined to do so.

[3] The record suggests that the board arbitrarily rejected a part of the claim, some part of which had been used by the secretary and other officers of the board. We do not think that this court is empowered to go into this question, because the board had the undoubted power to refuse to pay anything; but, having paid a part of the account, the plaintiff got more than he could have legally demanded.

Reversed and dismissed.

BOYD et al. v. ALABAMA & V. RY. CO. *
(No. 17286.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

1. CARRIERS ¶281 — PERSONAL INJURY — MANAGEMENT OF TRAIN.

A railroad, which did not contract to carry an insane person unaccompanied by a caretaker, and whose employes anticipated no effort on the part of such person to jump from the moving train, was not negligent in permitting a window to be open, or in allowing him to jump or throw himself through the window while the caretaker occupied a seat in front with his back to him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093-1097, 1241; Dec. Dig. ¶281.]

2. CARRIERS ¶295(8) — PASSENGERS — MANAGEMENT OF TRAIN—DUTY AS TO PASSENGER FALLING FROM TRAIN.

In such case, the carrier, which did not know that the insane person was seriously hurt

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on suggestion of error, see 71 South. 655.

or injured, which could not have safely backed down to the place where he fell, which permitted the relative of the injured passenger to leave the train to go back to his assistance, and which could not have prevented his death or have relieved his suffering by going back and taking him up, was under no duty to back its train to take him up.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1220; Dec. Dig. ¶ 295(8).]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Suit by Pearl Boyd and others against the Alabama & Vicksburg Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

F. V. Brahan, of Meridian, and Byrd & Byrd, of Newton, for appellants. R. H. & J. H. Thompson, of Jackson, for appellee.

STEVENS, J. Appellants, the widow and children of H. V. Boyd, deceased, as plaintiffs in the court below, sued the Alabama & Vicksburg Railroad Company, appellee, for the death of H. V. Boyd, a passenger on said railway. The deceased took passage on said road as a passenger from Meridian to Jackson in February, 1913, and after proceeding on his journey for some distance, and before the train reached the town of Newton, Mr. Boyd either jumped from or fell through an open window of the passenger coach and received injuries from which he subsequently died. It appears that, several years before, deceased suffered from an attack of lunacy and became, and was for some time, a patient in the Mississippi Insane Asylum at Jackson. After he was discharged from the institution, he returned to his home in Noxubee county, married, and became the father of the four minor children, who, with the widow, instituted this suit. A short time before the injury complained of, Mr. Boyd suffered spells of melancholy, and seemed to be conscious of a return of his lunacy, and voluntarily consented to return to the insane asylum in company with his brother-in-law, a Mr. McCallom. These two were making the journey on one of the regular passenger trains of appellee and for a time occupied the same seat. McCallom, because the window sash was up and the wind too cold, left the seat occupied by Boyd and took the seat next in front with his back turned toward Boyd. A short while thereafter some one of the passengers exclaimed, either that a man had fallen from the window, or had jumped out of the window, when McCallom, turning, looked out of the window and saw Mr. Boyd just as he struck the ground. McCallom thereupon pulled the bell cord and caused the train to stop about a quarter of a mile from the place where his companion had fallen, and demanded of the conductor that the train should be backed to the place where Boyd left the train. The conductor declined to comply with this request or to back the train, but did permit Mr. McCallom to get off the train and go

back in search of his charge. Mr. McCallom walked back and found Boyd by the side of the railroad track in a semiunconscious condition and suffering from injuries which subsequently proved fatal. There were residents near by who furnished a wagon and assisted McCallom in promptly removing Mr. Boyd to a sanatorium at Newton, where he died the next day.

There is some complaint in the declaration against the railroad company for permitting the window, through which Boyd either jumped or fell, to remain open and not fastened. But the main ground relied upon for recovery is the contention that the railroad company was under a duty to back the train to the point where deceased fell off and to remove the injured passenger to Newton, or to some other point, for prompt surgical treatment. At the conclusion of the plaintiffs' testimony, the court sustained the motion of appellee to exclude all the evidence on behalf of the plaintiffs and to grant the defendant a peremptory instruction. In pursuance of this motion, final judgment was entered in favor of the railroad company.

[1] On the facts of this case, no negligence can be imputed to the railroad company for permitting the window sash to be open, or for allowing Mr. Boyd to escape from the coach. The railroad company did not contract to convey a lunatic unaccompanied by a caretaker, and there is no evidence even that the employés of the road anticipated any effort on the part of Mr. Boyd to jump from the moving train. It is manifest that Boyd either jumped through the window, or so protruded his body as practically and effectually to throw himself from the moving train. The contract of carriage was in no wise broken, and indeed counsel for appellants do not here contend that the railroad company was negligent, so far as we are concerned with the fall of Mr. Boyd from the moving train.

[2] It is contended, however, that the railroad company was under a duty to back its train and pick up the fallen and injured passenger. On the facts of this case, we cannot say that such a duty existed. In the first place, it assumed that the railroad company knew, or had good cause to know, that the man was in fact seriously hurt or injured. As a matter of fact, the railroad company did not know that the necessity existed. In the next place, there is no evidence that the train could have safely been backed without a collision with other trains, or without materially inconveniencing many passengers and causing them to miss regular connections with other railroads. Then the evidence does show that Mr. McCallom, the brother-in-law of the deceased and the one standing as sponsor and serving as caretaker for Mr. Boyd, was permitted to leave the train for the purpose of rendering any needed assistance, and that he did promptly, by the help of neighbors, remove the injured man.

to a creditable and nearby sanatorium, where physicians administered such relief as they could afford, and the evidence therefore utterly fails to show that the employés could have prevented the death of the passenger by going back and picking him up, or even that they could have in any wise more effectually relieved his suffering. The gravamen of this suit is a claim of \$25,000 for the death of H. V. Boyd caused by the failure of the railroad company to perform its duty toward him as a passenger. The evidence fails to show that his death could have been avoided by any assistance which the employés could possibly have rendered in addition to those that actually were rendered by his faithful companion and good Samaritan neighbors. This case is different from that of *Railroad Co. v. Byrd*, 89 Miss. 308, 42 South. 286, and authorities there relied on. We have examined all the cases cited by counsel and find no adjudicated case which, in our judgment, conflicts with the decision we are announcing.

Affirmed.

HESDORFFER v. HILLER. (No. 17307.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

1. WITNESSES §195—CONFIDENTIAL COMMUNICATIONS—HUSBAND AND WIFE.

A divorced husband could not testify against his wife as to a confidential communication between him and his wife.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 743; Dec. Dig. §195.]

2. WITNESSES §64(1)—COMPETENCY—HUSBAND AND WIFE.

Where a husband pledged stock certificates belonging to his wife and purporting to have been indorsed by her, and was subsequently divorced from her, he was a competent witness against her as to the indorsement of the certificates, since, if she indorsed them to enable him to borrow money upon them, she could not have deemed the transaction confidential, and a husband or wife may testify against the other after divorce if the testimony does not relate to privileged communications.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 180; Dec. Dig. §64(1).]

3. WITNESSES §64(1)—COMPETENCY—HUSBAND AND WIFE.

Code 1906, § 1916, providing that husband and wife may be introduced by each other as witnesses in all cases and shall be competent witnesses in their own behalf as against each other in all controversies between them, leaves the common-law rule as to the competency of husband and wife applicable to the question of a divorced husband's competency to testify against his wife in a suit in which there is no controversy between the husband and wife.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 180; Dec. Dig. §64(1).]

Appeal from Chancery Court, Madison County; P. Z. Jones, Chancellor.

Suit between Leontine Hesdorffer and Effie Greener Hiller. From a decree in favor of Hiller, Hesdorffer appeals. Reversed and remanded.

Mayes & Mayes, of Jackson, for appellant.
H. B. Greaves, of Canton, for appellee.

COOK, P. J. This suit was begun in the chancery court of Madison county to settle the question of ownership of five shares of capital stock of the Illinois Central Railroad Company. Mrs. Effie G. Hiller obtained title to the stock by gift from her husband. The stock was hypothecated to secure a loan made to D. M. Hiller, the husband of Effie G. Hiller. Mr. Hiller failed to pay the loan, and, at his request, the promissory note evidencing the loan, together with the railroad stock, was sold, appellant Leontine Hesdorffer becoming the purchaser thereof. The hypothecated stock, when it came into the possession of the bank, was indorsed in blank. Mrs. Hiller, the owner, denied that she indorsed the stock, or authorized anyone to write her name thereon. The chancellor, after hearing the evidence, awarded the stock to Mrs. Hiller.

On the trial below, the appellant offered in evidence the deposition of Mr. Hiller, in which he testified that appellee, his wife, indorsed the certificate in his presence and delivered it to him to be sold or pledged. This deposition was suppressed on the ground that husband and wife are incompetent witnesses against each other; and this ruling of the chancellor is assigned as error. The point is made here that Mr. Hiller, subsequent to the time he says Mrs. Hiller indorsed the note, and before his deposition was given, had been divorced from his wife, and, therefore, he was not incompetent to testify. The contention is made that the divorce removed his disability as a witness and the chancellor erred in refusing to consider his deposition. Counsel have not cited any decision of this court wherein the precise point presented by this record was in issue, and we assume that none exists. The cases cited by appellee are not in point. Our statute does not seem to touch the facts of this case, and we must go to the rules of the common law for a solution of the question.

[1, 2] There can be no question that the chancellor was right in suppressing the deposition of Mr. Hiller if his deposition discloses a confidential communication between himself and his wife. This court is irrevocably committed to the ironclad inflexible rule that a husband or wife will not be permitted to detail in court the confidences of the marital relation. What are the facts, if Mr. Hiller is to be believed? Mr. Hiller purchased five shares of the Illinois Central Railroad Company's capital stock and presented same to his wife. According to Mr. Hiller's story, Mrs. Hiller authorized him to use this stock as collateral for loans to be obtained by him, and in order to pass title to same she indorsed the certificates in her own hand. After this transaction, and after the courts

had severed the bonds of matrimony between him and his wife, will the courts permit him to tell about this transaction between himself and his wife, over the objections of his divorced wife? If to relate this story it can be said that the witness will be disclosing the confidences of husband and wife, we think the answer will be in the negative. On the other hand, if the witness is merely relating an ordinary business transaction, which the wife could have made with any other person, and which cannot be reasonably termed confidential, the answer must be the reverse. This transaction was to be acted on, and third parties were to be induced to part with their money upon the faith of it. If Mr. Hiller is telling the truth, Mrs. Hiller has set a trap for the money changers, and the trap has been sprung. Necessarily, when stocks are offered as collateral for a loan, the ownership of the stock is a matter to be inquired about by the person making the loan. The certificate in this case was filled out in the name of Mrs. Hiller; the transfer of same purports to have been made by her; and her signature purports to have been written by her. Can it be said that Mr. Hiller would be betraying the confidential communications of his wife if he informed the bank that the signature of his wife was written in his presence? We think not. It does not seem reasonable that if Mrs. Hiller signed this certificate in the presence of her husband, for the purpose of enabling him to borrow money by using it as security for the loan, she considered, or could reasonably consider, the transaction as a confidential arrangement not to be mentioned by her husband. If, in fact, Mrs. Hiller did indorse the certificate, she is attempting to perpetrate a fraud under the cover of marital confidences. She knew, or should have known, that Mr. Hiller would put up this stock and get money on her indorsement. She knew, or should have known, that Mr. Hiller would tell the banks just what he told the court in his deposition. In the very nature of things, she could not have deemed the transaction confidential.

Now the marriage contract has been dissolved and Mr. Hiller has no interest in this transaction, and he is competent to testify if his testimony does not relate to privileged matters.

"The incompetency of one to testify *against* the other, while often treated in the same way as the incompetency of one to testify *for* the other, is based on the policy or sentiment that to permit such testimony would disturb the harmony of the marriage relation, rather than upon the idea of interest in the event of the suit, and there are exceptions that do not exist when one is testifying for the other. Both of these cases should be distinguished from mere privileged communications. As to the latter it usually makes no difference whether the husband or wife is a party or not, and the privilege may be waived, but death or divorce does not destroy the privilege." Elliott on Evidence, vol. 2, § 732.

This reasoning of the learned text writer points out the true rule of the common law. The husband or wife may testify against the other after divorce, if the testimony does not relate to privileged communications. Neither could testify *for* the other because of the identity of interest.

Mr. Wigmore, writing on this subject, says: "Nor is it material that the testimony relates to matters which occurred during the marriage. The few rulings taking the contrary view are misled by the analogy of a different privilege, namely, that which prohibits the disclosure of marital confidential communications."

This is the crux of the whole matter: Does Mr. Hiller's testimony disclose "confidential communications"? If not, he is a competent witness *against* his wife, all identity of interest having been destroyed by the divorce decree. This court had in mind the distinction made here when it decided the case of *Whitehead v. Kirk*, 104 Miss. 776, 61 South. 738, 62 South. 432, 51 L. R. A. (N. S.) 187. We used this language in that case: "Of course many things are said and done by husband or wife, which on their face bear no semblance of confidence."

[3] Section 1916, Code 1906, leaves the common-law rule applicable to the facts of this case as it originally existed. The statute removes the disability of the husband or wife on account of their identity of interest, and permits either to testify against each other "in all controversies between them." For the purposes of this decision, we will assume that the statute has nothing to do with the present case, there being no controversy between husband and wife. So, at last, the common-law rule will control. We find that the testimony of Mr. Hiller does not disclose a confidential communication between himself and his wife. This being true the divorce decree removes all incompetency of the witness to testify. The husband and wife are no longer one. The chancellor erred in suppressing the deposition of Mr. Hiller, and the judgment of the court below is reversed and the cause is remanded.

Reversed and remanded.

YAZOO & M. V. R. CO. v. SIBLEY. (No. 14981.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

STIPULATIONS 18(1)—CONSTRUCTION AND EFFECT.

In an action against a railroad for impeding the flow of water by its embankment so as to overflow certain parts of plaintiff's land and to damage his crops during the years 1910 and 1911, an agreement of the parties that the testimony of defendant's witness at a former trial, in a suit for damages to the same land and crops in previous years, might be read in evidence instead of his personal attendance and examination, under which the plaintiff introduced the entire record in the previous trial, and that the conditions in April, 1912, were the

same as they existed at the time testified to in the first examination, was tantamount to a confession of defendant's liability, leaving the jury to determine only the amount of damages.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41, 45, 47, 54; Dec. Dig. § 18(1).]

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Action by J. N. Sibley against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Cutrer & Johnston, of Clarksdale, for appellee.

POTTER, J. In April, 1912, the appellee, who was plaintiff in the trial court, filed his declaration against the appellant, defendant there, charging that prior to September 30, 1909, the appellant had built, or caused to be built and constructed, a certain railroad embankment, upon which it laid its tracks, and over which it operated a part of its line of railway, and that said embankment was built through certain land described in the declaration as belonging to the plaintiff. The land in question was 220 acres, and situated on the west or northwest side of the railroad embankment. The declaration further alleged that because of the method of construction of the railroad embankment, a certain natural water course was dammed, and the flow of the water thereby impeded and obstructed in such way as to occasion the overflowing of certain parts of the 220-acre tract of land, and the declaration alleges that the natural slope of the land in question was toward said railroad embankment, and that the natural and usual flow of the surface of the water was across the land upon which the railroad constructed the above-mentioned embankment, and that the embankment had been so negligently constructed as to occasion the damming back of surface water, thereby causing the overflow of the lands of the appellee; that the obstruction to the flow of the surface water was unnecessary, and might easily have been prevented at little cost or expense to the railroad company; and that because of the flooding of the lands in question in the manner set out in the declaration certain crops of corn, cotton, and other agricultural products, the property of the appellee, were from time to time, during the years of 1910 and 1911, destroyed, and that the appellee was prevented for the same cause from clearing and putting into cultivation other portions of said land; and alleging that the plaintiff was prevented from deriving rents and profits from portions thereof, and consequently there was a demand for damages. There had been other suits against the defendant railroad company by the plaintiff in this case, for damages done to the same land and crops thereof in previous years on

account of the construction of the railroad bank in question, and a recovery had. The testimony in this case shows that the conditions prevailing with reference to the construction and maintenance of the railroad on the day the present suit was brought were practically the same as they existed at the time the recovery was had in the last suit previous to the present one, which was brought at the April term, 1910, of the same court. During the progress of the trial, it was discovered that one of appellant's witnesses, A. J. Rylee, was absent, and the appellee was requested to agree that the testimony of Rylee, as given by him at the April term, 1910, of the court in the trial of cause No. 1694, the same being the number of the last suit previous to the present one on the docket of the circuit court of Coahoma county, might be read in evidence as the testimony of the witness in the trial of the case at bar, and the following agreement was entered into:

"It is agreed that the testimony of the witness Rylee (A. J.), given at the former trial of this cause, is to be read in evidence in lieu of the personal presence and examination of the witness. It is the further understanding and agreement that the conditions prevailing with reference to the construction and maintenance of the railroad on April 6, 1912, were the same as then existed at the time testified to in his first examination on the ——— day of April, 1910."

The appellee thereupon introduced in testimony the entire record in the former trial of the previous litigation in question. An instruction, that was in effect a peremptory instruction to find for plaintiff, was granted by the trial court, directing the jury to return a verdict for the plaintiff upon the theory that the question of the liability of the railroad company, for damages resulting from the flooding of the lands belonging to the plaintiff by reason of surface water or the waters of the natural water course, was judicially determined by the court at the trial of cause No. 1694, and for this reason the sole and only question of fact to be determined by the jury was, First, did the railroad company's embankment occasion the flooding of the lands during the years 1910 and 1911? and, second, what was the amount of damage thus done?

The evidence showed without dispute that the lands were overflowed, and that the plaintiff suffered a substantial injury, and the jury determined the amount of damages. It is complained, however, that no plea of res adjudicata was pleaded, nor was any notice that such was relied upon given appellant. But appellant's written confession that the conditions prevailing "with reference to the construction and maintenance of the railroad on April 6, 1912, were the same as they existed at the time testified to in the first examination on the ——— day of April, 1910," is of record, and the record in the previous case shows that both the subject-mat-

ter and the parties to the previous litigation were the same as the subject-matter and the parties to this litigation, and in addition to this, the testimony in the case shows that the facts agreed to by the appellant are correct, and that no substantial change had been made in the situation since the last suit. It, therefore, seems that the agreement of appellant's counsel was tantamount to a confession of appellant's liability. In the previous case the damage complained of was that the water course in question had been so narrowed by the construction of the railroad that the surface water would not drain off, thereby causing damage to the land of the appellee, and in this case it is the damming up of the same stream and the obstruction of the same surface water that is complained of; and, in view of the fact that the appellant has confessed that the conditions were the same and the record shows that the parties and the subject-matter of the suits were the same, and in view of the fact that overflow and damage was shown beyond question, we think the only matter left for the jury to determine was the amount of damage, and that this question was properly submitted.

"A fact or question, which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action." 23 Cyc. 1215.

It is not necessary to determine whether or not it is necessary to specially plead a defense of res adjudicata when raised in an action similar to this. There is conflict upon this point, some cases holding that issue res adjudicata may be proven under the general issue, but in this case the written agreement of the appellant itself shows conclusively that liability for the damage in question is established.

Affirmed.

FIRST NAT. BANK OF NASHVILLE, TENN., v. BENNETT. (No. 17193.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

1. ESTOPPEL —59—WRONGFUL ACT—LOANS TO BANK.

A bank took two trust deeds on property on the same day to secure a loan, but recorded one of them in advance of the other to give it priority. It then transferred each of the trust deeds with other collateral to a different bank to secure a note for money borrowed without informing either of the banks of the existence of the other trust deed. Subsequently the bank failed, and each of the creditor banks applied the funds on deposit with it and the proceeds of the other collateral to the payment of the notes. The

bank which received the first mortgage had its claim thereby satisfied in full and returned the trust deed to the receiver of the insolvent bank, who foreclosed it. The note of the bank holding the junior trust deed was not satisfied by the funds on hand. It brought suit to have the balance satisfied out of the proceeds of the foreclosure. *Held*, that while the constructive notice of the existence of the prior trust deed would have prevented the bank holding the second trust deed from enforcing it against the other creditor bank, the failure of the insolvent bank to inform it of the existence of the other trust deed under the circumstances estopped it from claiming thereunder as against the second trust deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 146, 147; Dec. Dig. —59.]

2. ESTOPPEL —98(1)—PERSONS ESTOPPED— RECEIVERS.

The receiver, though he is in some cases regarded as a representative of the creditor and not of the insolvent, was likewise estopped from claiming under the first trust deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. —98(1).]

Appeal from Chancery Court, Tishomingo County; J. Q. Robins, Chancellor.

Suit by the First National Bank of Nashville, Tenn., against W. T. Bennett, as receiver of the Tishomingo Banking Company. Judgment for the defendant, and plaintiff appeals. Reversed and remanded.

Lamb & Warriner, of Corinth, for appellant. H. Cassedy, of Brookhaven, and W. L. Elledge, of Iuka, for appellee.

POTTER, J. J. Carey Thompson owed the Tishomingo Banking Company a large sum of money, and to secure same executed two deeds of trust on the same property. The property was known as the Iuka Springs Hotel property. The two deeds of trust were executed, it seems, at the same time, one of them to secure \$6,500, and the other \$8,500. For some reason, we know not what, it was agreed between the creditor and the debtor that one of the mortgages should be a senior mortgage and one a junior mortgage. The senior mortgage was for the \$6,500 note, and the junior mortgage for the \$8,500 note. The method of making one of the mortgages senior and one junior was by a private unrecorded agreement, and by having the senior mortgage filed first in the chancery clerk's office, and the junior mortgage later. There were only five minutes difference between the time of the filing of the two instruments; but this is not material to the controversy.

The Tishomingo Banking Company, after the execution of the notes and mortgages above mentioned, borrowed \$9,000 from the Union & Planters' Bank of Memphis, and sent its demand note for the \$9,000, with the note above mentioned, secured by the senior mortgage, and other collateral, as security; and it also borrowed \$9,000 from the First National Bank of Nashville on its demand note for said amount and secured the same

by the junior mortgage on the same property, together with other collaterals. Neither the Nashville nor the Memphis bank knew anything of the deed of trust in favor of the other, except such constructive notice as was imported by the recordation of the instrument.

In a short time after the loans above mentioned were negotiated, the Tishomingo Banking Company failed, and made a general assignment for the benefit of creditors; and the original assignee having resigned, W. T. Bennett was appointed receiver by the chancery court in which the matter was pending. The First National Bank of Nashville disposed of the collateral it held other than the \$8,500 in question, and appropriated some cash it had on hand with it at the time of the failure of the Tishomingo Banking Company, belonging to the insolvent bank, and after applying the proceeds of the sale of the collaterals above mentioned, and the cash on hand, there was still left due it a balance of \$2,563.32 on the \$9,000 indebtedness, and it still held the \$8,500 notes of J. Carey Thompson, secured by the junior mortgage.

The Union & Planters' Bank, which held the first mortgage, had on hand enough money of the Tishomingo Banking Company, at the time of the failure, to offset the \$9,000 demand note due it, and therefore appropriated enough of the funds of the failing bank in its hands to satisfy the indebtedness due it, and thereupon surrendered to the receiver of the Tishomingo Banking Company the \$6,500 note of J. Carey Thompson, secured by the senior mortgage and such other collateral as it held as security for the said \$9,000 note. Afterwards, Thompson having failed to meet the notes, both deeds of trust on the hotel property were foreclosed; but the property brought only \$4,100. The contest then arises between the First National Bank of Nashville, claiming that it should be paid the balance due it out of the \$4,100 by virtue of the deed of trust held by it for \$8,500 as security, and the receiver of the Tishomingo Banking Company, claiming the proceeds of the sale by virtue of the prior mortgage for \$8,500. The chancery court of Tishomingo county decided in favor of the receiver and against the contention of the First National Bank of Nashville.

[1, 2] Great stress is laid in the ingenious brief of counsel on the dual relations of the receiver of an insolvent institution. For some purposes, it is contended that the receiver represents the bank; and for other purposes, he is the representative of the creditors. This court has recognized this dual relationship in so far as to permit, in some instances, the receiver to bring suits for the benefit of the creditors, that the insolvent institution itself could not have brought. In this case, the First National Bank of Nashville was under the impression that the deed

of trust it was taking as collateral security was a first mortgage on the property it conveyed. While it is true the First National Bank of Nashville may have been charged with constructive notice of the existence of the \$6,500 mortgage held by the Union & Planters' Bank of Memphis, and as between it and the Memphis bank could not have maintained priority, yet, in so far as the Tishomingo Banking Company was concerned, it could not have set up in its own behalf that the deed of trust first recorded was a paramount lien, for, under the circumstances, it was the duty of the bank to have informed the First National Bank, before the loan was made, of the existence of the first mortgage.

The note of the Tishomingo Banking Company held by the Union & Planters' Bank of Memphis was paid and discharged by the application of funds on deposit in that bank belonging to the Tishomingo Banking Company, sufficient to pay the indebtedness of \$9,000, and the indebtedness discharged, the \$6,500 note in question and the first deed of trust again became part of the estate of the Tishomingo Banking Company. The bank itself would have been estopped from denying that the lien of the First National Bank of Nashville was a first lien, and its receiver is likewise estopped from setting up any such claim.

It would be just as logical to hold that the Union & Planters' Bank of Memphis could not appropriate the funds on deposit there to the liquidation of the indebtedness due it on the ground that the deposits, on the failure of the bank, became the property of the receiver as trustee for the creditors, as it would be to hold that the receiver, as trustee for the creditors, could hold the senior mortgage in question against the First National Bank of Nashville, which held the second mortgage.

The case is therefore reversed and remanded.

Reversed and remanded.

BRAHAN v. CITY OF MERIDIAN. (No. 17302.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

MUNICIPAL CORPORATIONS—721(2)—PARKS—STATUES.

Where land was donated to a municipality for a park, it was not improper for the municipality to construct or permit to be constructed and placed in a conspicuous place in the park a statue of one of the donors; such statue not depriving the public of the park as a pleasure ground.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1524; Dec. Dig. 721(2).]

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Chancellor.

Bill by F. V. Brahan against the City of Meridian. From a decree for defendant, complainant appeals. Affirmed, and bill dismissed.

F. V. Brahan, of Meridian, for appellant. Amis & Dunn, of Meridian, for appellee.

COOK, P. J. Several public-spirited citizens of Meridian conveyed to the city a tract of land of about 35 acres to be used as a public park, which gift was accepted by the city. Now, according to the allegations of the bill of complaint, the city "has constructed or permitted to be constructed and placed in a most conspicuous and prominent spot in said park a monument containing a life-size figure and cut of one I. Marks, also a citizen of the city of Meridian, who was one of the dedicators mentioned in one of the deeds of conveyance."

It is alleged in the bill of complaint that the erection of this monument is a perversion of the park property. The bill prays for a mandatory injunction against the city requiring it to remove the monument from the park. To this bill the city interposed a demurrer, and the same was sustained; hence this appeal.

It seems to us that it was quite the proper thing for the city to erect a monument to one of the donors of the land and place same in a prominent and conspicuous place in the park. It would be difficult to find a park of any pretensions that is not adorned with works of art of the nature described in the bill of complaint, and we cannot conceive that the placing of a statue in a park can in the least degree subtract from the value of the park as a pleasure ground.

This ruling does not conflict with the decision of this court in *Jones et al. v. City of Jackson*, 104 Miss. 449, 61 South. 456.

Affirmed and bill dismissed.

STATE, to Use of LINCOLN COUNTY, v. GREEN, County Superintendent of Education, et al. (No. 16751.)

(Supreme Court of Mississippi, Division B.
March 20, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨130—PUBLIC SCHOOLS—EXAMINATION OF TEACHERS—FEES.

Code 1906, § 4549, provides that, where the number of licensed teachers is insufficient to supply the schools of a county, the board of education may grant a special examination, but the fee in such cases shall be \$2, and licenses issued shall be valid only to the next regular examination, that while special examinations shall be granted teachers under contract to teach in the county if at the time of general examination they were unable to attend, and that the superintendent may require each teacher so examined to pay him a fee of \$2.50. Section 4590 declares that to defray the cost of institutes the superintendent shall, before examining applicants to teach, collect a fee of 50 cents from

each, while section 4591 declares that the institute fund shall be deposited with the county treasurer. *Held*, that the institute fund fee of 50 cents should not be collected by the superintendent on special examinations where he received the fee of \$2.50, for such special examinations are authorized only in emergency cases, and the certificate is good only until the next examination.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 285, 286; Dec. Dig. ⇨130.]

2. SCHOOLS AND SCHOOL DISTRICTS ⇨48(6)—COUNTY SUPERINTENDENT—ACTIONS—LIABILITY.

The county superintendent having control of the educational system of the county and being required to employ teachers selected by the local trustees and enter into contracts with them and pay for their services, neither he nor his bondsmen are liable for errors of judgment and discretion in the absence of fraud, though by reason of such errors he paid to the teachers, etc., a greater remuneration than they were entitled to.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 107-111; Dec. Dig. ⇨48(6).]

Appeal from Chancery Court, Lincoln County; G. G. Lyell, Chancellor.

Bill of complaint by the State of Mississippi, for the use of Lincoln County, against Edgar Green and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Lamar F. Easterling, Asst. Atty. Gen., for appellant. Jones & Tyler, of Brookhaven, for appellees.

STEVENS, J. The state of Mississippi, for the use of Lincoln county, exhibited its bill of complaint against Edgar Green, county superintendent of education, and the United States Fidelity & Guaranty Company, surety on his official bond, seeking to recover large sums of money for the alleged failure of this officer to perform the duties of his office, constituting what the bill avers to be a breach of the bond. The action is instituted by and through H. V. Wall, the district attorney, and is based on several grounds or causes of complaint. Appellees, as defendants in the court below, filed special demurrers to each of the separate alleged breaches of the bond or items claimed. The demurrers were sustained by the chancellor, the bill dismissed, and hence this appeal by the state.

[1] The first item claimed is the aggregate sum of \$181.50, which the county claims should have been deposited with the county treasurer as a part of the institute fund and as the proceeds of the fees of 50 cents provided by section 4590, Code of 1906, to be collected by the county superintendent from applicants to teach. Under section 4549 of the Code, special examinations may be held, and under this section "the superintendent may require each teacher so examined to pay a fee of \$2.50." The bill admits that

the claim of \$181.50 is made up of the 50-cent fees which, it is alleged, the superintendent should have collected on the special examinations of teachers authorized by section 4549.

Construing sections 4549, 4590, and 4591 together, we do not think the statute requires the collection and deposit with the county treasurer of this institute fee when special examinations are held under section 4549. This section provides for emergency cases, and the licenses issued are valid only until the next examination.

[2] The claim of \$5,964.35 as the proceeds of pay certificates unlawfully issued to teachers holding illegal and fraudulent licenses was by consent of counsel withdrawn, leaving other items claimed as follows: \$6.50 as excess money paid examiners; \$8.75 unlawfully paid Mrs. Green, wife of the appellee, for service as member of the school board of examiners; \$4,798.47 paid teachers in excess of the amount called for by their contracts; \$8,927.65 paid teachers with whom no contracts had been made; \$143.50 paid assistant teachers when the average attendance was not sufficient to justify the employment of an assistant; \$202.50 paid assistant teachers in excess of the maximum salary allowed by law; \$277 paid teachers in excess of the amount allowed by law for the grade of license held by them; \$12,076.93 alleged to have been paid on reports signed by some party other than the trustees; \$725 alleged to have been paid on reports signed by one trustee only; \$744.25 alleged to have been paid on reports signed by no trustee at all.

The bill does not charge, and counsel in argument concede the point, that Mr. Green, as county superintendent, issued pay certificates or otherwise acted in the performance of the duties of his office with corrupt or fraudulent purposes, by any collusion with any teacher for the purpose of defrauding the county, or that Mr. Green profited by any of the several transaction complained of, or appropriated to his use a single dollar.

In our judgment the several special demurrers were properly sustained. While the officer whose acts are here brought in question may have acted indiscreetly in some instances, and while there may have been many irregularities in the conduct of the business of his office, it yet remains that he was a public officer charged with the duty of exercising his best judgment and discretion in the performance of his official work, and in this action instituted on his official bond he is protected by the well-recognized principle of law that the officer is not liable for any errors or omissions done or suf-

fered in the exercise of his judicial judgment or discretion. The county superintendent of education is the administrative officer for all the public schools and free school system of his county. It is true that pay certificates issued by him entitle the several teachers to warrants upon the school fund of the county without previous allowance by the board of supervisors, but this only demonstrates the importance of his position as the chief officer of the schools, the superintendent of all teachers, and the head of the entire educational department of his county. The duty is devolved on him to employ teachers selected by the local trustees, to enter into contracts with them, and to pay them for their services. There is a statutory method or rule by which he is to be governed; but for errors of judgment and discretion, in the absence of fraud, he is not liable on his official bond or otherwise. There is no statute imposing liability for any of the items here claimed. To this extent the present case is differentiated from the case of *Paxton v. Baum*, 59 Miss. 531, and, with this distinction kept in mind, the principles announced by our own court in the *Paxton* Case are in accord with the views herein expressed. The same principle was early announced by the Supreme Court of the United States in *Kendall v. Stokes et al.*, 3 How. 87, 11 L. Ed. 506, as follows:

"A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs."

It will be borne in mind that the several matters complained of in the instant case were items of business within the jurisdiction of the county superintendent, and the services charged to have been illegally paid for were services inuring to the benefit of the county, and not to Mr. Green; and the payments actually made were, in the language of Judge Campbell, in reference to "objects for which an appropriation of money is authorized." The superintendent is vested with both executive and judicial powers, and the efficiency of the public school system requires that large administrative powers be vested in him. In view of the fact, therefore, that the work paid for by the superintendent and the several alleged irregularities were within the jurisdiction of his office and no corruption is charged, the bill fails to state a cause of action. The decree of the chancellor is, accordingly, affirmed.

Affirmed.

YAZOO & M. V. R. CO. v. GASTON.

(No. 17249.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Quitman County; T. B. Watkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Taylor Gaston. From the judgment, the railroad company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. J. D. Stone, of Lambert, for appellee.

PER CURIAM. Affirmed.

BURNS v. DENTON. (No. 17201.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Calhoun County; H. K. Mahon, Judge.

Action between J. S. Burns and J. P. Denton. From the judgment, Burns appeals. Affirmed.

J. L. Bates, of Pittsboro, for appellant. Creekmore & Stone, of Water Valley, for appellee.

PER CURIAM. Affirmed.

LANIER et al. v. HOGGATT et al.

(No. 17316.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Action between Charles E. Lanier and others and Nat Hoggatt and others. From the judgment, the parties first mentioned appeal. Affirmed.

Whitfield & Whitfield, of Jackson, and N. Vick Robbins, of Vicksburg, for appellants. McLaurin & Armistead, of Vicksburg, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. YOUNG.

(No. 15204.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Quitman County; Sam C. Cook, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and J. H. Young. From the judgment, the Railroad Company appeals. Affirmed.

St. John Waddell, of Memphis, Tenn., and Mayes & Longstreet, of Jackson, for appellant. Mack & Donaldson and W. F. Gee, all of Marks, for appellee.

PER CURIAM. Affirmed.

SOUTHERN EXPRESS CO. v. HALL.

(No. 17225.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Union County; H. K. Mahon, Judge.

Action between the Southern Express Com-

pany and D. H. Hall. From the judgment, the Express Company appeals. Affirmed.

R. H. & J. H. Thompson, of Jackson, and H. D. & Z. M. Stephens, of New Albany, for appellant. Le Roy Kenneday, of New Albany, for appellee.

PER CURIAM. Affirmed.

MELLON v. STATE LIFE INS. CO.

(No. 17277.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between F. N. Mellon and the State Life Insurance Company. From the judgment, Mellon appeals. Affirmed.

W. Calvin Wells, of Jackson, for appellant. Alexander & Alexander, of Jackson, for appellee.

PER CURIAM. Affirmed.

SOUTHWORTH v. BRISTER. (No. 17366.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Leflore County; Frank E. Everett, Judge.

Action between Mrs. S. P. Southworth and Pearley Brister. From the judgment, Mrs. Southworth appeals. Affirmed.

Yerger & Hughston, of Greenwood, for appellant. J. W. Bradford, of Itta Bena, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. PARRISH & CO.

(No. 17184.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Tallahatchie County; N. A. Taylor, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Parrish & Co. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. R. L. Cannon, of Sumner, C. E. Harris, of Okmulgee, Okl., and Geo. W. May and J. O. S. Sanders, both of Jackson, for appellees.

PER CURIAM. Affirmed.

GARDNER v. DUNCAN et al. (No. 17350.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Chancery Court, Bolivar County; M. E. Denton, Chancellor.

Action between R. J. Gardner and Adaline Duncan and others. From the judgment, Gardner appeals. Affirmed.

Green & Green, of Jackson, and Thos. S. Owen and Bedford & Allen, all of Cleveland, for appellant. D. A. Scott and E. M. Yerger, both of Clarksdale, and Mayes & Mayes, of Jackson, for appellees.

PER CURIAM. Affirmed.

BRASSFIELD v. NEW ORLEANS, M. & C. R. CO. (No. 17342.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Winston County; J. A. Teat, Judge.

Action between R. O. Brassfield and the New Orleans, Mobile & Chicago Railroad Company. From the judgment, Brassfield appeals. Affirmed.

H. H. Rodgers, of Louisville, and Chalmers Alexander, of Jackson, for appellant. Flowers, Brown, Chambers & Cooper, of Jackson, for appellee.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. TANDY. (No. 17170.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Clay County; T. B. Carroll, Judge.

Action between the Illinois Central Railroad Company and T. J. Tandy. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. G. T. Ivy, of West Point, for appellee.

PER CURIAM. Affirmed.

COLUMBUS v. YAZOO & M. V. R. CO. (No. 17345.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action between Jane Columbus and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Jane Columbus appeals. Affirmed.

W. L. Dyer, of Lexington, for appellant. Mayes & Mayes, of Jackson, for appellee.

PER CURIAM. Affirmed.

TATE v. SCOTT. (No. 17399.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, De Soto County; N. A. Taylor, Judge.

Action between R. F. Tate and R. R. Scott. From the judgment, Tate appeals. Affirmed.

Watson & Perkins, of Memphis, Tenn., for appellant. R. F. B. Logan, of Hernando, and J. E. Holmes, of Memphis, Tenn., for appellee.

PER CURIAM. Affirmed.

LOUISE LUMBER CO. v. WESTER. (No. 18020.)

(Supreme Court of Mississippi. March 18, 1916.)

Appeal from Circuit Court, Jones County; J. M. Arnold, Judge.

Action between the Louise Lumber Company and Mrs. D. C. Wester. From the judgment, the Lumber Company appeals. Affirmed.

Deavours & Hilbun and Halsell & Welch, all of Laurel, and G. G. Lyell, of Jackson, for appellant. Sharborough & Bullard, of Laurel, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. DODDSVILLE LAND & MERCANTILE CO. et al.

(No. 17334.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Sunflower County; Monroe McClurg, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and the Doddsville Land & Mercantile Company and others. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, and C. O. Moody, of Indianola, for appellant. J. H. Price, of Indianola, and McLaurin & Armistead, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

WOODMEN OF UNION v. NEWELL.

(No. 17356.)

(Supreme Court of Mississippi. March 20, 1916.)

Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between the Woodmen of Union and Mary Newell. From the judgment, the Woodmen of Union appeals. Affirmed.

P. W. Howard, of Jackson, for appellant. J. G. Smythe, of Kosciusko, for appellee.

PER CURIAM. Affirmed.

Ex parte PERRY.

(Supreme Court of Florida. Feb. 23, 1916.)

*(Syllabus by the Court.)***1. STATUTES \S 225 $\frac{1}{4}$ —CONSTRUCTION.**

Two acts in pari materia, passed at the same session of the Legislature, should be read together, and so construed, if possible, as to permit a field of operation for both.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 304; Dec. Dig. \S 225 $\frac{1}{4}$.]**2. STATUTES \S 225 $\frac{1}{4}$, 225 $\frac{1}{2}$ —CONFLICTS—GENERAL AND LOCAL ACTS.**

When there is a necessary conflict between a general act and a local act passed at the same session, the local act passed subsequently will prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 304, 305; Dec. Dig. \S 225 $\frac{1}{4}$, 225 $\frac{1}{2}$.]**3. FISH \S 9—LOCAL ACT—CONSTRUCTION—ACT PROHIBITING FISHING—"IN."**

A local act, prohibiting fishing "in" the waters of a county, applies to some portion of a river within that county, when the middle of that river is made the boundary line and a portion of that river on both sides the boundary line is expressly excepted from the operation of the act.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 17, 18; Dec. Dig. \S 9.

For other definitions, see Words and Phrases, First and Second Series, In.]

4. STATUTES ~~219~~—CONSTRUCTION—STATUTE RELATIVE TO FISHING INDUSTRY.

When the meaning of an act is plain, a construction contrary to that meaning will not be placed upon it because an officer of the executive department grants a general license that may operate outside the purview of that act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ~~219~~.]

Original proceeding in habeas corpus by Lee Perry. Writ discharged, and petition remanded.

A. K. Powers and Willson & Housholder all of Sanford, for petitioner. T. F. West, Atty. Gen., and Glenn Terrell, Asst. Atty. Gen., for the State.

COCKRELL, J. Upon petition to the Chief Justice a writ of habeas corpus issued, returnable before the court. The petition, omitting formal parts, alleges:

That Lee Perry "is unjustly and without any authority in law imprisoned and restrained of his liberty in the common jail of Volusia county, Fla. That your petitioner was arrested on the 7th day of January, A. D. 1916, without warrant of law, and placed in the common jail of said county. That the affidavit and warrant upon which your petitioner was arrested states no offense known to the laws of the state of Florida, in that said affidavit charges your petitioner, 'That on the 7th day of January, A. D. 1916, in the county aforesaid (Volusia), one Lee Perry did then and there haul and drag a seine in the fresh waters of the county of Volusia, state of Florida, to wit, in the waters of the St. Johns river, for the purpose of catching food fishes,' as will more fully appear from copy of affidavit and warrant hereto attached and marked 'Exhibit A,' with the usual prayer for reference thereto as often as may be necessary.

"That your petitioner had complied with chapter 6877, Laws of Florida, Acts Legislature 1915, and was engaged at the time of his arrest in fishing under a license issued under and by virtue of said act (chapter 6877, Laws 1915), duly issued out of and under the authority of the commissioner of agriculture of the state of Florida, as will appear from a license hereto attached, and marked 'Exhibit B,' with the usual prayer for reference thereto as often as may be necessary.

"That said affidavit charges no offense in this: That it does not allege that the St. Johns river is not connected with or borders on the Atlantic Ocean, or the Gulf of Mexico, and it is apparent that the St. Johns river comes within the purview of section 1, c. 6877, Laws of Florida, Acts of Legislature 1915, 'being an act to protect and regulate the salt-water fishing industry of the state of Florida, and to provide penalties for the violation of this act,' in that the St. Johns river, not only borders on, and is connected with, but empties into, the Atlantic Ocean, and is inhabited by great quantities of recognized salt-water fish, to wit, shad, mullet, herring, croaker, flounder, crab, and shrimp, as far south in said river as Lake Harney, and large quantities of said fish being exported from Seminole county, aggregating about \$50,000 annually, as will be shown, affidavit hereto attached and marked 'Exhibit C,' and that your petitioner had complied with the requirements of said act 6877, Laws of Florida, Acts Legislature 1915, in that your petitioner was engaged, at the time of his arrest, in fishing for shad, with a licensed boat, and seine, duly issued by the commissioner of agriculture of the state of Florida, as will more fully appear from

said license hereto, attached and heretofore referred to as 'Exhibit B.'

"Your petitioner would further show that he is held in custody by said sheriff of Volusia county, Fla., without warrant or authority of law, in that the state relies solely upon chapter 7120, Acts 1915, which said chapter amends chapter 6806, Laws of Florida, Acts 1913, which is a local act, being applicable only, as is apparent from the title of said act, to the waters in Volusia and Lake counties and not to the waters in Volusia and Seminole counties, or to the waters of the state of Florida bordering on or connected with the Atlantic Ocean or the Gulf of Mexico.

"Your petitioner would further show that he is held in custody by said sheriff of Volusia county, Fla., without warrant or authority of law, in that chapter 7120, Acts 1915, Laws of Florida, which said act is an amendment to chapter 6806, Laws of 1913, under which your petitioner is held in custody, is void and of no force and effect, in that the said act is a local act, applying only to the fresh waters in Lake and Volusia counties, state of Florida, and that by reason thereof the said act 7120 is in conflict with the general act (chapter 6877, Laws of Florida 1915), which said general act provides in section 1: 'That all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets, bordering on or connected with the Gulf of Mexico and Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the state of Florida, are hereby declared and shall continue and remain the property of the state of Florida, and may be taken and used by citizens of this state and persons not citizens of this state, subject to the restrictions and reservations hereinafter imposed by this act.' And further that: 'Section 26 of said chapter 6877, Laws of Florida 1915, provides: 'Section 26. All laws and parts of laws, whether general or local in their nature, in conflict with this act be and the same are hereby repealed.' That the said local act, chapter 7120, Acts 1915, Laws of Florida, section 1, provides that: 'Section 1. It shall be unlawful for any person or persons, firm or corporation, to haul or drag any seine, of any kind, in the waters of any fresh-water rivers, * * * streams, creeks, bayous, etc., in Volusia and Lake counties, of the state of Florida: Provided, however, that none of the provisions of this act shall apply to those waters known as Lake George, lying in Volusia county.' Section 2, c. 7120, Local Laws 1915, attempts to define a fresh-water stream as follows: 'Section 2. Any river, stream, or creek, having its source in the interior of the state of Florida, and emptying into fresh water or salt water shall be deemed a fresh-water river, stream or creek.' Which sections 1 and 2 it is apparent that they are in conflict with section 1 of the General Acts of 1915, chapter 6877, Laws of Florida, and is in conflict with and repealed by section 26 of said chapter 6877, Acts 1915.

"Your petitioner would further show that he is held in custody by said sheriff of Volusia county, Fla., without warrant, or authority of law, in that chapter 7120 is against the organic law, and is in conflict with the general act (chapter 6877, Laws of Florida 1915), in that section 1 of said chapter 6877 recognizes the right of the people of the state to take and use the fish in the public waters of the state, subject to the regulations therein specified, and especially recognizes the public right and the privileges of the people by stating therein what shall be the public waters of the state, and said local act, chapter 7120, does not recognize the right of an individual to fish in the public waters of the state; but is so worded and of such a character that it does, in effect, destroy such right, and is in direct conflict with the Constitution of the state of Florida, in that it denies rights retain-

ed by the people within the meaning of section 24 of the Declaration of Rights of the State Constitution of the state of Florida, and therefore the said act (chapter 7120, Local Laws of the State of Florida 1915) is void, and unconstitutional, and is contrary and repugnant to the Constitution of the state of Florida, in that on its face it deprives your petitioner of his property rights, and his liberty without due process of law, and denies to him the equal protection of law which is guaranteed by the Constitution.

"Your petitioner would further show that he is held in custody by said sheriff of Volusia county without warrant or authority of law, in that chapter 7120, Local Special Laws, Acts 1915, of the State of Florida, purports to regulate and deny your petitioner the right to labor within the meaning of the federal Constitution, and the Constitution of the state of Florida; that said statute 7120, Local Special Laws, Acts 1915, is inoperative, and of no effect, because it, in effect, provides a special or local law for the punishment of felony or misdemeanor, which is forbidden by the Constitution of the state of Florida, article 3, § 20; that said chapter 7120, Local Special Laws, Acts 1915, is void and inoperative, because it directly affects the organic provisions of law, which requires that all laws upon stated subjects shall not be local, but shall be general, and of uniform operation throughout the state, and that said chapter 7120, Local Special Laws, Acts 1915, State of Florida, is unconstitutional because it denies to the citizens of the state equal protection of law, and is in direct conflict with section 1 of the Declaration of Rights of the Constitution of Florida."

The return of the sheriff to the writ presents no new facts, and the petition sufficiently indicates the points sought to be presented.

In the argument for the petitioner, it was earnestly urged upon us that the general act regulating the salt-water fishing industry of the state (chapter 6877) controlled the right to fish in the St. Johns river, rather than the special or local act, prohibiting the hauling and dragging of seines in the fresh-water rivers in Volusia and Lake counties (chapter 7120). Both acts were passed at the same session, the general act having been approved May 25, 1915, and the local act bearing date June 4, 1915.

[1] The two acts, being in *pari materia* and having their birth in the same Legislature, should be read together, and if we could find a field of operation for both, we should so construe them; and, with this object in view, we may assume that the St. Johns river is, in the language of the first section of the general act, a river connected with the Atlantic Ocean. Section 13 of the general act expressly prohibits the use of haul seines or dragnets in the salt waters of Volusia and certain other counties, not, however, including Lake county, and by another special act (chapter 7119) the right to so fish in the salt waters of Volusia county was further defined.

[2, 3] Does chapter 7120 leave any room for construction for a holding that so much of St. Johns river as lies within the county of Volusia should be excluded from the inhibition of the local act? That it is a river having its source in the interior of the state admits of no question, and, being such a river, it is a fresh-water river, as defined by section 2 and legislated upon in section 1. Is it a river "in" Volusia county? The legislation creating the county makes its westerly boundary go down the middle of this river. Not only was this general act of the boundaries of the counties of the state before the Legislature, but the special act removes all doubt as to the intention to include the St. Johns river within its protection, in the proviso to section 1 that none of its provisions shall apply to those waters known as Lake George lying in Volusia county. This lake is a part of the St. Johns river, which flows through it. It, too, is a boundary of Volusia, not lying wholly within that county, but belongs in part to that county, in part to Lake county, and in part to Putnam county. We are constrained to hold, therefore, that a part at least of the St. Johns river is a fresh-water river in Volusia county, and that the Legislature has made it unlawful to haul or drag seines in that part of the river. There is then a necessary conflict between the general act and the later special act, and therefore as in this particular the general act may not operate in that locality.

The power of the Legislature over the fishing industry of the state has been so recently and elaborately gone into by this court that we need only refer to our opinion in *Ex parte Powell*, 70 South. 392.

We may not consider the financial losses of those engaged in the fishing industry; such matters of policy are for the Legislature. Courts are established to apply the law, not to make it.

[4] The petitioner relies on a salt-water fishing license, granted by the commissioner of agriculture, as being a practical construction of the legislation in his favor by the executive department. Two answers present themselves to this suggestion. The courts yield to such constructions only in cases of doubt, and again the license does not purport to permit the hauling and dragging of seines in the St. Johns river in Volusia or Lake counties.

The writ is discharged, and the petitioner is remanded.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur. WHITFIELD, J., absent on account of illness.

WOOD et al. v. LETT et al. (6 Div. 207.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. HUSBAND AND WIFE §187 — CONTRACTS OF WIFE—SUFFICIENCY OF JOINDER.

Where a contract for the exchange of land between married women bears the mere signature of the husbands, that is sufficient to indicate their assent, if the wives are otherwise bound by their signatures.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 722, 723; Dec. Dig. § 187.]

2. SPECIFIC PERFORMANCE §116½ — CONSTRUCTION OF BILL—DEMURRER—EFFECT.

On demurrer to the sufficiency of a bill for specific performance, it must be assumed that a husband had no written authority to contract to convey his wife's land, where such authority is not alleged in the bill.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 376; Dec. Dig. § 116½.]

3. SPECIFIC PERFORMANCE §43 — ENFORCEMENT OF ORAL CONTRACT — PARTIAL PERFORMANCE.

While, under the statute of frauds, a contract, though partially performed, which is invalid, cannot be enforced against the party whose signature is insufficient, the statute is sufficiently complied with by such persons bringing suit for performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 125, 130, 131, 134-139; Dec. Dig. § 43.]

4. SPECIFIC PERFORMANCE §35 — SALE OF WIFE'S LAND—CONTRACT OF HUSBAND—AUTHORITY.

Code 1907, § 3355, provides that conveyances of lands must be signed at their foot by the contracting party or his agent having written authority. Section 4494 provides that the wife cannot alienate her lands without the assent and concurrence of the husband, manifested by his joining in the alienation as provided by section 3355. A husband, having no written authority from his wife to convey her lands, signed a contract to convey, for himself and as agent for his wife. *Held*, that the contract was not enforceable against the wife, since the husband did not join in the alienation, for the wife was not bound by his signature, in the absence of express written authority.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 102-106; Dec. Dig. § 35.]

5. FRAUDS, STATUTE OF §119(1)—EFFECT.

The statute of frauds does not avoid parol contracts, but merely lays down a rule of evidence by which contracts must be established, thus rendering them voidable at the election of the nonsubscribing party.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113, 266, 267; Dec. Dig. § 119(1).]

6. CONTRACTS §56 — CONSIDERATION — MUTUAL PROMISE.

While one promise is sufficient consideration for another no consideration can be established where the promise of one party, owing to defective signature to the contract, is not enforceable against him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 344, 349-353; Dec. Dig. § 56.]

7. SPECIFIC PERFORMANCE §35—CONTRACTS OF WIFE—VALIDITY—ENFORCEMENT.

While equity will dispense with mere form, and enforce a contract which is voidable under

the statute of frauds for lack of proper evidence, it cannot enforce a contract of a wife to convey her lands, not properly signed by the husband, since that is a condition of the wife's power to contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 102-106; Dec. Dig. § 35.]

8. SPECIFIC PERFORMANCE §35 — VALIDITY OF CONTRACT.

Where a contract could not be specifically enforced when made, because the signature of the husband assenting to conveyance of the wife's realty did not comply with statute, subsequent tender of a deed signed by the wife and the husband was of no avail, since the other party was without recourse between the signing of the contract and the tender of the deed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 102-106; Dec. Dig. § 35.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Action by Mrs. J. E. Wood and another against Mrs. L. M. Lett and another. Decree sustaining demurrer to the bill, and plaintiffs appeal. Affirmed.

H. K. White, of Birmingham, for appellants. George E. Bush, of Birmingham, for appellees.

SAYRE, J. The original bill in this cause was filed by the appellant Mrs. Wood, a married woman, for the reformation of a contract in writing, purporting to be an agreement between appellee Mrs. Lett on the one part and appellant Mrs. Wood on the other, by which said appellee was to sell a certain tract of land to appellant, in exchange for which appellant was to convey a certain other tract, said tracts being owned in severalty by Mrs. Lett and Mrs. Wood, respectively, and for the specific performance of the contract according to its alleged true intent and purpose. There were other stipulations, but they do not seem to affect the question raised by this appeal, and need no further reference. The instrument, exhibited with the bill as amended, witnessed an agreement for the exchange of lands such as we have noted, "for and in consideration of the sum of one dollar in hand paid by Mrs. Lett and other valuable consideration," and was by its terms to be performed after abstracts of title should be "brought down and turned over to each contracting party within ten days." Apart from the sum of \$1, which, according to the recital of the instrument, passed from the defendant (appellee) to the complainant (appellant), no consideration other than mutual promises passed between the parties. There was, of course, no mutual delivery of possession, as was the case in *Goodlett v. Hansell*, 66 Ala. 151. The cash consideration passing from defendant to complainant might seem to indicate a purchase by the former of an option to have an exchange, had the agreement been properly executed by the latter; and, had this in-

strument on both parts been completely executed to affect the interests of the parties in their respective lands, then, of course, these mutual promises to convey, apart from the option, would have constituted valuable and sufficient considerations each for the other. But, as the court observed in regard to an analogous agreement in *Linn v. McLean*, 85 Ala. 250, 4 South. 777, which is the major and which the minor factor it is not so easy to determine. We shall assume, however, agreeably with what appears to be complainant's view of the case, that the instrument in question witnessed merely mutual agreements to convey tracts of land each for the other.

[1, 2] This instrument was signed at the foot by the husbands of the respective owners. But their names did not appear in the body of the instrument, nor did they sign as contracting parties; the only purpose of their signatures being to witness their assent to and concurrence in the agreement on the part of their respective wives, for which purpose their mere signatures would have been sufficient, had the wife been otherwise bound. *Rushton v. Davis*, 127 Ala. 277, 28 South. 476. It was also subscribed, to use the term employed by the statute of frauds, by Mrs. Lett, while Mrs. Wood's execution of it was evidenced in this manner: "Mrs. J. E. Wood, by J. S. Wood, Agt." In the bill as last amended, J. S. Wood, the husband, then for the first time coming in as a party complainant, it is averred that:

"Complainant Mrs. J. E. Wood, acting through her husband, complainant J. S. Wood, entered into a [the] contract with both defendants."

It is nowhere made to appear that J. S. Wood had any written authority to execute the agreement as the agent of his wife. It must on demurrer be assumed that he had no such authority (*Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 South. 578), and from the course adopted by complainant in meeting by successive amendments the several demurrers interposed to her bill, it is clear that this assumption is in accord with the fact.

[3] It has been determined in this court that this agreement, not having been subscribed by complainant, nor by any other person by her thereunto lawfully authorized in writing, as required by certain sections of the Code, to which we will refer, could not be enforced against her, even though the agreement had been partially performed. *Morris v. Marshall*, 185 Ala. 179, 64 South. 312. But the question here is whether, in these circumstances, it can be enforced at her instance and for her benefit.

So far as the statute of frauds is concerned, it is the settled law of this court that all the purposes of that statute are satisfied, all just apprehension that the agreement will not be mutual in operation is removed, when the party who has not subscribed a contract for the sale of lands resorts to equity for

its specific performance, thereby adopting the contract and rendering it obligatory upon himself. Such is the rule where the complainant is *sui juris* in respect of the contract he seeks to enforce. His submission to the court, that it may do equity in the premises, supplies that mutuality of remedy which is essential to the obligation of bilateral contracts. *Linn v. McLean*, *supra*; *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

[4] But the trouble with complainant's bill arises out of the fact that she was not *sui juris* in respect of the contract alleged. It arises out of her personal disability to enter into such contracts, except in a certain exclusive and mandatory manner prescribed by sections 3355 and 4494 of the Code. These sections require that (3355):

"Conveyances for the alienation of lands * * * must be signed at their foot by the contracting party, or his agent having a written authority."

And (4494):

"The wife * * * cannot alienate or mortgage her lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land."

The husband signed the instrument for himself and as agent for his wife, but he had no authority, such as the statute requires, for executing it in the name of the wife. Thereby he did not join in an alienation, nor in an agreement to alienate, executed by the wife in the manner prescribed by law for the execution of conveyances of land by her, nor can his joinder in this bill be accepted, on the doctrine of relation, as an equivalent for the requirement of the statute, which contemplates an assent and concurrence manifested in a particular and exclusive mode at the time of the execution and delivery of the contract. The obligation of the paper writing exhibited with complainant's bill must therefore, in equity as in law, be determined as of the time of its execution. There can be no doubt that in a court of law, or anywhere as against the wife, this agreement would be held to confer no color of right or interest. *Scott v. Cotten*, 91 Ala. 629, 8 South. 783; *Rooney v. Michael*, 84 Ala. 585, 4 South. 421; *Blythe v. Dargin*, 68 Ala. 370.

In *Morris v. Marshall*, and the other cases cited *supra*, and in still others of a similar character that might be cited, the effort was to enforce against the wife verbal executory agreements for the sale of her lands, whereas here the wife seeks to enforce such an agreement; but the consideration here in point is that these cases, which had no reference to the statute of frauds, proceeded expressly upon the theory that the wife had no capacity to alienate her lands, except as required by the Code; this consideration being elaborately demonstrated in *Blythe v. Dargin*, in which case the wife had signed and

possession had been delivered. If the wife had any capacity to bind her conscience except in the specific mode prescribed by statute, that contract would have been enforced on the principle adopted by courts of equity in enforcing contracts not evidenced as provided by the statute of frauds, which is that such contracts, though not treated in the law courts as contracts at all, will, at the suit of the complainant, who has performed in part, be wholly executed in specie by courts of equity, where they are regarded as binding in conscience. 3 Pom. Eq. Jur. § 1297. In *Scott v. Cotten*, it was said that:

"The wife is incapable to confer authority, resting in parol, upon her husband, or any other person, to make or sign a contract in her name; this is not contracting in writing in the meaning of the statute."

[5] The statute of frauds does not absolutely avoid parol contracts, but lays down a rule of evidence by which contracts within its influence are to be established, thus rendering them voidable at the election of the party who has not signed. *Heflin v. Milton*, 69 Ala. 354; 2 Pom. Eq. Rem. § 817. Notwithstanding equity deals with agreements affecting titles to land defectively executed or evidenced under the statute of frauds, where they are within the competency of the parties, on principles different from those prevailing in courts of law, the courts have given different reasons for their decrees enforcing the specific performance of such agreements at the suit of nonsubscribing parties; and of this situation the eminent text-writer, to whom we have referred above, says that:

"It is, on the whole, best to concede that the doctrine rests upon no basis of principle; that it was arbitrarily laid down by the earlier decisions which interpreted the statute, and has been followed by the great majority of subsequent cases; and that it is useless to account for or explain it by reasons which conflict with other well settled rules." Pom. Spec. Perf. § 170; *Williams v. Graves*, 7 Tex. Civ. App. 356, 28 S. W. 834.

It is to be noted, however, that in all cases the contract must possess all the elements and features necessary to the specific enforcement of any agreement, except the written memorandum required by the statute. 4 Pom. Eq. Jur. § 1409, note 1. Hence this court has seemed careful heretofore to limit its rulings, enforcing contracts for the sale of lands at the instance of nonsubscribing parties, to cases in which the complainants were *sui juris* in respect of the contracts which they sought to enforce. The reason for this is not obscure.

[6] The line of decisions to which we have referred as dealing with the statute of frauds does not controvert the proposition that the defendant's contract must rest upon a valuable consideration. Now one promise is a good consideration for another, but not "unless there is absolute mutuality of agreement, so that each party has the right at once to hold the other to a positive agreement." 1 *Parsons, Contr.* star p. 448.

"Where the party assumes to make a contract in which a promise is a consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise." 1 *Page on Contr.* § 304. Hence the necessity for a consideration to support an option contract, commonly so called, separate and apart from that which would, by acceptance, become the consideration for the sale. *Eskridge v. Glover*, 5 Stew. & P. 264, 26 Am. Dec. 344; *Bethea v. McCullough*, 70 South. 680. Now complainant was not *sui juris* as to this agreement. She was subject to the will of her husband. The paper writing exhibited with the bill imposed no obligation on her, not only for the reason that it did not properly evidence the agreement alleged, but because the husband, since he had no authority in writing from her to make the contract, did not join in an agreement to alienate in the exclusive mode prescribed by the sections of the Code quoted above, without which the alleged agreement did not operate as an estoppel against either the husband or the wife. It was contrary to the positive mandate of the statute. It was no contract. *Scott v. Cotten*, and cases in that line, *supra*. "I know no jurisdiction which a court of equity has to say, You may do that which the law says you shall not do." *Gould v. Womack*, 2 Ala. 83. "A party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character." *King v. Warfield*, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384. In *S. & N. A. R. Co. v. H. A. & B. R. R. Co.*, 119 Ala. 105, 24 South. 114, the court quotes with approval as follows:

"A contract, to be specifically enforced, must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is incapable of enforcing it against the other, though its execution in the latter way might be free from the difficulty attending the execution in the former." *Fry, Spec. Perf.* § 286.

[7] Equity may dispense with mere form, and that is a part of what it does when it enforces contracts which are voidable under the statute of frauds for lack of proper evidence; but under the statute here in point the concurrence of the husband, expressed in a particular mode, is a condition of the wife's power to contract. Unless the statute means this, it means nothing.

[8] By her original averment complainant showed that within 30 days after the agree-

ment was entered into she and her husband executed and tendered to defendants a properly executed deed of the land, which by the agreement they were to convey to defendants, but that defendants refused to accept said deed, or to carry out the provisions of the agreement. Under the principles of law declared, this tender had no effect upon the rights of the parties. In the meantime defendant Mrs. Lett had no legal or equitable recourse against complainant, who might have refused to execute the agreement; indeed, she could not execute it unless the husband gave a new consent, and this he was free to withhold. Nor did his subsequent joinder in the bill relieve the difficulty of complainant's case. If the agreement for future conveyances had been lawfully executed by complainant, the joinder of her husband in a bill for its performance in specie, though he sought no relief, might have been proper enough as evidencing his submission to the court to perform so much of the decree to be rendered as would be for the benefit of the defendant. But neither his execution of the deed subsequently tendered nor his joinder in the bill can in justice to defendant be allowed to cure the defects in the original agreement. In fine, the alleged agreement was fatally lacking in mutuality of consideration and remedy; it was, in legal effect, nothing more than a voluntary offer on the part of Mrs. Lett to sell, revocable at her pleasure. The court will not consent to the specific performance of such an agreement. *Roney v. Moss*, 74 Ala. 390.

Our conclusion is that the decree, sustaining appropriate demurrer to the bill, should be affirmed.

Affirmed. All the Justices concur.

HARTON et al. v. AMASON. (6 Div. 174.)
(Supreme Court of Alabama. Feb. 3, 1916.)

1. ATTORNEY AND CLIENT — 186 — ATTORNEY'S FEES—SETTLEMENT—FRAUD.

No fraud on a solicitor's rights to his fee can be predicated on the conveyance to a corporation, of which his client was president, of property in the settlement of litigation, under an agreement approved by the solicitor which called for a conveyance to the client or to the corporation if he should so require.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 393; Dec. Dig. — 186.]

2. ATTORNEY AND CLIENT — 186 — LIEN OF ATTORNEY — WAIVER — CONSENT TO SETTLEMENT.

Where a solicitor who had a written contract for his fee approved an agreement for settlement, requiring the conveyance of certain land to his client, or to a corporation if the client should so require, and neither the contract for the fee nor that for settlement gave him a contractual lien, he waived his statutory lien, if Code 1907, § 3011, giving an attorney's lien upon suits, judgments, and decrees for money or personal property can be construed to give a lien

on lands the title to which is vested in the client in consideration of a dismissal of the suit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 393; Dec. Dig. — 186.]

3. ATTORNEY AND CLIENT — 182(4) — ATTORNEY'S LIEN—REAL ESTATE.

Code 1907, § 3011, giving an attorney's lien upon suits, judgments, and decrees for money or personal property made no change in the former rule that an attorney has no lien on the real estate of his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 404; Dec. Dig. — 182(4).]

4. TRUSTS — 75 — RESULTING TRUST — PAYMENT OF CONSIDERATION—ATTORNEY'S FEE.

Where an attorney who had a written agreement for his fee and the amount of which depended on the value of certain corporate stock, approved a contract for settlement which required the transfer of land to a corporation, of which his client was president, for a stated consideration, which did not include the attorney's fee, he cannot claim a resulting trust in the land on the theory that he furnished part of the consideration therefor, since such trust can arise, in cases of partial payment, only where the partial payment is a definite aliquot part of the consideration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 107; Dec. Dig. — 75.]

5. TRUSTS — 95 — CONSTRUCTIVE TRUST — FRAUD.

Nor can he claim a constructive trust in the land, since such trust always results from fraud, either actual or constructive, and his consent to the settlement negated any fraud on his rights.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. — 95.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by S. O. M. Amason against H. M. Harton and others. From decree overruling demurrers to the bill, respondents appeal. Reversed and remanded.

The bill alleges the employment by Harton of orator as an attorney to advise him as to his rights against the other respondents to this cause, or some of them, and that Harton authorized the institution and prosecution of a certain suit in the chancery court of Jefferson county against all the respondents to this suit, together with one Lula B. Harton. said cause being numbered 5443, in said chancery court; (2) that orator and Harton, on April 15, 1910, entered into a certain written contract of that date, as to the terms of orator's employment with relation to said suit, and the fee he was to receive for the services rendered therein, a copy of which is attached and marked "Exhibit A." The bill then gives the history of the work done, and the appeals prosecuted from the decrees rendered. It is then alleged that while said last appeal was pending, as aforesaid, Harton, with orator's consent, entered into negotiations with defendants, or some of them, for a settlement of the litigation, and later orator was informed by the solicitors of record for respondent, and also by Harton, that the negotiations had resulted in an agreement for settlement between them, and later, in

May, 1915, an instrument, setting forth the terms of said agreement for settlement, was submitted to orator for his approval by counsel of record for respondent, which instrument already bore the signature of said Harton, as well as those of the several respondents, and your orator on, to wit, May 3, 1915, indorsed thereon the following words: "I hereby consent to the foregoing agreement of settlement." A copy of the agreement is made Exhibit B. Orator further shows that afterwards, and in furtherance of said settlement, the respondents Enslen, Johnson, and the Empire Realty Company, either separately or jointly, executed to defendant Windsor Realty & Trust Company deeds purporting to convey to such company all the property recited in said agreement of settlement, which respondents had obligated themselves therein to convey to Harton, or to the said Windsor Realty & Trust Company, as the said Harton should require, and the title to all of said property now appears by the record in the office of the judge of probate of Jefferson county, to remain in the said Windsor Realty & Trust Company. It is alleged, further, that Harton had refused to pay him for his services as counselor and solicitor under the contract; that complainant had never compounded with him for the same, and that the deeds to the property were executed to the said Windsor Realty & Trust Company without orator's consent; and that orator has never consented to it being conveyed by respondents to anybody, even to said Harton, before orator's fee for his services should have been paid or otherwise secured to said orator than by the statutory lien in favor of attorneys at law; and that the said Windsor Realty & Trust Company is chargeable with full knowledge that orator has not been paid or settled with for his said fees, because Harton is and has always been president of said corporation, and said corporation is, as orator verily believes, a mere volunteer to the title of said property. The bill was afterwards amended by alleging that the suit was for money, among other things, and the prayer was amended by praying in the alternative that the conveyance of the lands under the direction of defendant Harton to defendant Windsor Realty & Trust Company, before orator's claim was satisfied, was a fraud against orator, and that for that reason the said Windsor Realty & Trust Company holds title to said land as a trustee to satisfy the claims of orator as a creditor of defendant. The substance of the agreement sufficiently appears.

Stokely, Scrivner & Dominick, of Birmingham, for appellants. Henry Upson Sims, of Birmingham, for appellee.

McCLELLAN, J. The appellee, an attorney at law and solicitor in equity, filed this bill, against appellants and others, to have declared and enforced his right to compensation for services rendered by him under writ-

ten contract with his client (appellant) H. M. Harton, in litigation instituted by said Harton. The dominant purpose of the bill is that just stated. All other matters with respect to which relief is sought are but incidental to the major purpose of the bill. In the written contract between appellee and Harton the measure of appellee's compensation was fixed at a "sum of money equal to one-fifth the value of fifty shares of the capital stock, including all accrued dividends due and payable thereon, or that may become due and payable on the same, of the Ensley Realty Company, on the rendition of a final decree in said suit, * * * or upon the compromise and settlement of said suit, if the same should be compromised and settled without being prosecuted to a final decree," further providing a limitation on the compensation to \$10,000. The agreement did not purport to satisfy the appellee's charge for compensation out of the shares of stock of the corporation. The contract, *ex vi termini*, did not impose a charge upon the shares of stock to assure the payment of the appellee's compensation for professional services. The only effect of the allusion to the capital stock was to measure the amount of the appellee's compensation. The litigation and all related, assumed, or anticipated bases of claim or controversy were compromised and settled by all the parties concerned in the assertions of right or claim made by Harton; the formally executed written agreement to that end being exhibited with the bill. No final decree consistent with Harton's theories of his asserted claim or right was rendered. This agreement of compromise and adjustment was submitted to appellee, who, the bill avers, indorsed thereon his consent thereto in these words: "I hereby consent to the foregoing agreement of settlement." On the exhibit his indorsement is thus phrased: "I hereby approve the foregoing agreement of settlement." In the agreement of settlement no reference whatever was made to appellee's compensation for his services to Harton, or to any obligation Harton was under to appellee because of services rendered to Harton by appellee as Harton's professional representative.

It is averred in the amended bill that the professional services were rendered in cause numbered 5443, "which was a suit for money, among other things." In the agreement of compromise it was provided that cause numbered 5443, then pending in the Supreme Court on appeal by Harton from an adverse ruling on demurrer by the chancery court of Jefferson county, should be affirmed, that when affirmed the cause should be dismissed by the chancery court, and that such dismissal should have the effect of a final adjudication of said cause. This cause had been the subject of prolonged litigation. The appellee's services in that litigation are the basis of his claim for remuneration asserted in the present bill. In the fourth paragraph of the agreement of compromise the "parties of

the second part"—Harton being designated as the "party of the first part"—agreed "to convey or cause to be conveyed unto the said H. M. Harton, or, if he desires, unto the Windsor Realty & Trust Company," a corporation of which Harton was and is the president, certain real estate therein described. This engagement to convey was effected by deeds to the Windsor Realty & Trust Company. It is this real estate, with an exception noted in the bill, upon which appellee would have a lien for his remuneration declared, or upon which, in the hands of the company, he would have declared and enforced a trust for his remuneration. Knowledge of appellee's right to compensation for his services and of the fact that the Windsor Realty & Trust Company, through its president, knew of the refusal of Harton to compensate appellee for his professional services may, for the occasion, be assumed to be sufficiently averred in the bill.

[1] The conveyance to the Windsor Realty & Trust Company of the realty described in the agreement of compromise was obviously in accord with the provisions of the agreement therein set forth, an agreement the appellee himself in writing approved. No fraud upon the asserted right of the appellee could be predicated of this thus approved act of conveyance. There is no suggestion of anything that should or would avoid the agreement of compromise, so approved by the appellee. The bill's theory consists alone with the complete validity of the agreement of compromise. If the appellee had desired to guard his conceived right in the premises, he should have manifested his purpose in season before expressly approving in advance the conveyance of the property to either Harton or to the company. Presumptively, at least, the conveyance to the company was in accordance with Harton's desire, as stipulated for in the agreement of compromise.

[2] It is manifest that appellee neither had nor has any contractual lien upon the real estate described in the agreement of compromise for his remuneration for professional services rendered by him in the cause mentioned by him in his bill. Neither the averments of the bill nor the exhibits thereto, nor both together, import a purpose on the part of any one to create a contractual lien to assure appellee's remuneration.

[3] While an attorney at law or solicitor in chancery has a lien for his remuneration for professional services in that particular behalf upon a judgment or decree obtained for his client to the extent of his agreed or his reasonable compensation (*Higley v. White*, 102 Ala. 604, 15 South. 141), and a positive lien for his remuneration in that and other instances and circumstances described and defined in Code, § 3011, the law in this jurisdiction remains, in the respect to be stated, as it was before the enactment of the statute (Code, § 3011), viz., that an attorney or solicitor has no lien on real estate of

his client for his remuneration (*Higley v. White*, supra; *Kelly v. Horsely*, 147 Ala. 508, 41 South. 902). Before the statute, an attorney's or solicitor's lien on a judgment or decree for money was held to be a charge upon the proceeds derived from a sale of land to satisfy that money judgment or decree. *Higley v. White*, supra. No judgment or decree having been rendered in this instance, no lien of the character and effect last stated came into existence, unless it could be affirmed that the statutory lien upon suits (section 3011) extended to lands the title to which is vested or confirmed in the client, upon the consideration, in whole or in part, of a dismissal of the suit by the consent of the client and of the attorney, thereby applying the principle of *Higley v. White*, supra, as last stated. Whatever may be the ultimate construction of the statute in the respect indicated, it is quite clear in this instance that the agreement of the attorney to the dismissal by his client of the suit upon which he would now rest a claim to a statutory lien effected to extinguish the basis of any statutory lien that might once have existed upon the suit.

[4] The consideration for the conveyance of the land described in the compromise agreement was named in the compromise agreement, which, as has been stated, the appellee consented to and approved. The obligation of Harton to remunerate appellee for his professional services was not mentioned in the compromise agreement. In order to lay the foundation for a resulting trust, in favor of one who did not, at the time, pay all the purchase money or afford all the consideration, for a conveyance of real estate the title to which has been invested in another, it is essential that the partial payment should be of a "definite aliquot part of the consideration." *Bibb v. Hunter*, 79 Ala. 351, 361; *Allen v. Caylor*, 120 Ala. 251, 24 South. 512, 74 Am. St. Rep. 31; *Olcott v. Bynum*, 84 U. S. (17 Wall.) 44, 21 L. Ed. 570. Aside from anything else, it will be sufficient to say, in respect of the phase of the bill that would have a resulting trust in the land in question declared in favor of appellee for remuneration for his professional services, that the value of his services under his contract with Harton is so uncertain in amount as to forbid the creation of a resulting trust to his advantage. It does not appear from the bill that the value of his services, in any sense, was an aliquot part of the consideration inducing the conveyance of land by the parties of the second part to the compromise agreement.

[5] Since a constructive trust is ever the result of either actual or constructive fraud (3 Pom. § 1044; *Butts v. Cooper*, 152 Ala. 375, 385, 44 South. 616), it is clear that the bill under consideration does not state a case wherefrom it could be concluded that a constructive trust in favor of the appellee came into existence at any time. There is

in the bill no charge of actual fraud. Indeed, the approval of the agreement of compromise by the appellee negatives any notion of an imposition upon his rights as a result of the conveyance of the property to the Windsor Realty & Trust Company. The doing of that which one consents, without fraudulent inducement, may be done, cannot be pronounced a fraud upon his rights. The decree of the chancellor overruling the demurrer is laid in error. The bill is without equity. The decree is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

WESTERN UNION TELEGRAPH CO. v.
FAVISH. (6 Div. 139.)

(Supreme Court of Alabama. Feb. 3, 1916.)

1. TELEGRAPHS AND TELEPHONES ¶39 —
CHANGE IN TELEGRAM—NOMINAL DAMAGES
—LIABILITY.

Where a telegraph company changed the wording in a telegram so as to induce the addressee to believe that his wife instead of her father had been operated on, it was guilty of a breach of contract, rendering it liable at least to nominal damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 30, 34; Dec. Dig. ¶39.]

2. TELEGRAPHS AND TELEPHONES ¶36 —
TRANSMISSION OF TELEGRAMS — DUTY OF
COMPANY.

It is the duty of a telegraph company to exercise due care and skill to transmit and deliver telegraph messages with substantial accuracy.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 26, 31, 32; Dec. Dig. ¶36.]

3. TELEGRAPHS AND TELEPHONES ¶73(1) —
TRANSMISSION OF MESSAGE — ACTION FOR
DAMAGES—QUESTION FOR JURY.

In an action for damages due to a change in a telegram to plaintiff from his wife, reading "papa operated on," so that it read "have operated on," the court properly submitted to the jury whether plaintiff could reasonably have concluded from the message as delivered that his wife had been subjected to a surgical operation, especially where it appeared that she had not entirely recovered from an operation performed some time before.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. ¶73(1).]

4. TELEGRAPHS AND TELEPHONES ¶66(2) —
TRANSMISSION OF TELEGRAM — ACTION FOR
DAMAGES—EVIDENCE.

In such case, the evidence that the wife had not entirely recovered from an operation performed some time before was properly admitted.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 62; Dec. Dig. ¶66(2).]

5. TELEGRAPHS AND TELEPHONES ¶67(1) —
TRANSMISSION OF TELEGRAM—DAMAGES RE-
COVERABLE—TORT.

Where the addressee of a telegram, in consequence of a change in the wording thereof, rea-

sonably concludes that his wife instead of her father has been subjected to a surgical operation, the expense of a prompt journey undertaken by him to be with her, is a part of the damages recoverable under a count stating a cause of action in tort.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 64; Dec. Dig. ¶67(1).]

6. NEGLIGENCE ¶59 — PROXIMATE CAUSE —
CONTEMPLATION OF CONSEQUENCES.

A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow if they had occurred to his mind.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. ¶59.]

7. TELEGRAPHS AND TELEPHONES ¶67(5) —
TRANSMISSION OF TELEGRAM — CHANGE IN
WORDING—BREACH OF CONTRACT—CONTEM-
PLATED DAMAGES.

Where the addressee of a telegram was induced by a change therein to believe that his wife, instead of her father, had been subjected to a surgical operation, his action in promptly undertaking a trip so as to be with her was a consequence of the breach of the contract to correctly transmit the telegram which was within the contemplation of the contracting parties, even though the precise happenings which followed such breach might not have been foreseen.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 68; Dec. Dig. ¶67(5).]

8. TELEGRAPHS AND TELEPHONES ¶70(1) —
TRANSMISSION OF TELEGRAM — CHANGE IN
WORDING—DAMAGES RECOVERABLE.

In such addressee's action against the telegraph company for damages, wherein the cause of action was set forth in two counts, one *ex delicto*, the other *ex contractu*, the damages recoverable included not only the expense of the trip, but the cost of the message and the value of time lost by him in making the trip.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 72; Dec. Dig. ¶70(1).]

9. TELEGRAPHS AND TELEPHONES ¶27—CON-
TRACT TO TRANSMIT TELEGRAM — BREACH —
DAMAGES—WHAT LAW GOVERNS.

A contract made in Alabama to transmit a telegram and deliver same in Illinois, was presumably an Alabama contract, controlled, in respect to the consequence of its breach, by the laws of Alabama, and hence damages for mental distress unaccompanied by physical injury were recoverable, though they would not have been recoverable under the laws of Illinois.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 80; Dec. Dig. ¶27.]

10. DAMAGES ¶154—PLEADING—OBJECTIONS.

The question of the recoverability of claimed elements of damages should be raised by objection to the admission of evidence or to the instructions or by motion to strike, rather than by a plea.

[Ed. Note.—For other cases, see Damages, Dec. Dig. ¶154.]

11. CONTRACTS ¶2—WHAT LAW GOVERNS.

A contract is ordinarily governed as to its nature, obligation, validity, and interpretation by the law of the place where it is made, unless the parties have in view some other law or unless it is to be wholly performed in some other

place, in which case the law of the place of performance or the law which both parties had in mind must govern.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. ¶2.]

12. TORTS ¶2—MEASURE AND ELEMENTS OF RECOVERY—WHAT LAW GOVERNS.

The measure and elements of the recovery for tort is that prescribed by the law of the place where the tort is committed.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 2; Dec. Dig. ¶2.]

13. TRIAL ¶86—RECEPTION OF EVIDENCE—OBJECTIONS.

Where the petition in an action for damages from the incorrect transmission of a telegram, contained two counts, one *ex delicto*, the other *ex contractu*, and a deposition admissible under the former count but not under the latter was offered without any specification of its purpose, its exclusion on general objection was not ground for reversal; the rule being that where evidence admissible for one or more purposes is offered without restriction to the purpose to which it is admissible and the objection is general, the judgment will not be reversed whether the court sustains or overrules the objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 226; Dec. Dig. ¶86.]

14. TELEGRAPHS AND TELEPHONES ¶74(5)—TRANSMISSION OF TELEGRAM—ACTION FOR DAMAGES—INSTRUCTIONS.

Where the petitioner in an action for damages for the incorrect transmission of a telegram contained two counts, one *ex delicto*, the other *ex contractu*, and it appeared that damages for mental distress, though recoverable under the latter count could not be recovered under the other, error could not be predicated on the refusal of instructions which failed to recognize this distinction.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ¶74(5).]

On Rehearing.

15. APPEAL AND ERROR ¶1066—PREJUDICIAL ERROR—INSTRUCTIONS.

In an action for damages for the incorrect transmission of a telegram, in consequence of which plaintiff was led to believe that his wife instead of her father had been operated on, the giving of an instruction that plaintiff testified that he derived from the telegram that his wife had been operated on, invaded the province of the jury and required a reversal, where it appeared that plaintiff did not so testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ¶1066.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by E. W. Favish against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, p. 449, Acts of 1911. Reversed and remanded on rehearing.

Forney Johnston and W. R. C. Cocke, both of Birmingham, for appellant. Samuel B. Stern, of Birmingham, for appellee.

McCLELLAN, J. [1-4] The wife of the appellee (plaintiff below) transmitted by local telephone to an agent of the appellant at Birmingham, Ala., the following message ad-

ressed to the plaintiff at a certain street number in Chicago, Ill.:

"Reasons for not writing *papa* operated on Monday night. Doing as well as can be expected."

The only signature directed to be affixed to the message was the name Helen. Aside from a presently unimportant mistake in the initial letter of the surname of the addressee, the words of the message were understood and transcribed in the appellant's Birmingham office, and therefrom sent to its Chicago office, just as they were communicated by the wife through the telephone. After the message was received in an office of the appellant located in Chicago, and before the delivery of the message to the appellee, its words were changed to these:

"Reasons for not writing have (substituting the word *have* for *papa*) operated on Monday night. Doing as well as can be expected."

It is manifest that such a change in the words of the message wrought a breach of the contract and a negligent breach of duty; and that for either an action could be maintained by the party injured or aggrieved—the least damages awardable being nominal. It is the duty of such agencies to exercise due care and skill to transmit and deliver telegraphic messages with substantial accuracy. Joyce on Electricity, § 733. This duty and obligation was breached in this instance. If, as there was evidence tending to show, the message was sent by appellee's authorized agent, and the jury so concluded, the appellee was entitled to the general affirmative charge on that condition. So, the only questions necessary to be considered on this appeal relate to the matter of damages recoverable. On the evidence in this record, it must be held: The message having been communicated by telephone to a representative of the appellant in its Birmingham office, and there accepted by its agent for transmission and delivery, and the contract there and then made not having bound the plaintiff by any special stipulations or limitations that might have been competently incorporated in the contract, there is not in the case any basis for contentions that could only be predicated of special stipulations or limitations entering into the contract. The court below appropriately submitted to the jury the inquiry, raised by the wording of the message as it was delivered to the addressee in Chicago, whether it could have been reasonably concluded from the words of the message, as delivered to the appellee, that the person, indicated by the signature to the message, had been subjected to a surgical operation. Besides, there was evidence—in addition to the implications afforded by the words of the message as delivered to the appellee—to the effect that the appellee's wife had not entirely recovered from an operation performed some time before, thus, quite naturally it may have been

found by the jury, rendering more apt the adoption of the interpretation of the message which accorded with the possibility of a recurrence, during the husband's absence, of the necessity for another operation. There was no error in allowing evidence to the indicated effect; and there was no error in submitting the stated inquiry to the jury's determination.

The message was delivered to appellee about 6:30 p. m. He interpreted the message as referring to an operation performed on his wife, and within about two hours he had taken the train for Birmingham, where he arrived the next afternoon to find, as the original of the message stated, that an operation had been performed on his wife's father, and not on his wife.

[8, 9] The cause of action is set forth in two counts. The first count is *ex delicto*, for the breach of duty arising out of the relation and obligations made by the contract; and the second count is *ex contractu*, for the breach of the contract. *W. U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607. The elements of damages claimed in both the counts are substantially the same. They include expenses of the trip to and from Birmingham, from Chicago; loss of time from his business; mental pain and anguish; and the loss of the price paid for the transmission and the delivery of the message. So far as the first count, which is in tort, is concerned, it is clear that the recoverability of expenses claimed depends upon the response to this contingent inquiry; if the message as delivered to the addressee was found by the jury to be reasonably susceptible of the interpretation accorded it by the addressee, was the prompt trip of the appellee to Birmingham a proximate consequence of the negligently caused change in the wording of the message? The addressee had the right to assume that no breach of contractual obligation or negligent act or omission of the appellant had intervened to change the words of the message, and, if the words in the message, as delivered to the addressee, reasonably admitted of the interpretation given them by this addressee, our opinion is that a journey to Birmingham was of the damnifying consequences for which the appellant is responsible. The governing rule, in actions *ex delicto*, is thus stated in *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 249, 250, 26 South. 349, 354:

"The logical rule in this connection, the rule of common sense and human experience as well (if indeed there can be a difference between a logical doctrine and one of common sense and experience, as some authorities appear to hold), is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." *Briggs v. B. R. L. & P. Co.*, 188 Ala. 262, 66 South. 95.

It is the ordinary, the normal, man the law must contemplate when standards of conduct, or the probability of action, or the effect of a wrong, are to be considered. When an absent husband is advised, especially without previous warning, that his wife has been submitted to a surgical operation, it is most natural that he should, if practicable, immediately proceed to her bedside. The converse would be highly abnormal and unnatural. This generally known expression of a human characteristic or the probability of such action must enter into the inquiry stated. The message as delivered to the addressee (under the interpretation he put upon it) gave evidence of the fact of the performance of a surgical operation—a matter ever, unless fully explained, of serious import to those nearly related to the subject of the operation; and a natural normal consequence of such advice is to inflict mental distress on a husband. Under the established doctrine above quoted from the *Armstrong Case*, the range of responsibility and accountability of the negligent party is not restricted by the absence of knowledge of the negligent party that "Helen" was the appellee's wife, or the fact that the appellee would in fact, or would probably, proceed to Birmingham in consequence of the information the (erroneous) message bore to him, under his interpretation of its words. The consequences for which there is responsibility and accountability are such as would occur to the mind of a normal, prudent, and experienced man, advised of all the circumstances. If otherwise entitled to recover, the trip to and from Birmingham and the expenses thereof were of the consequences proximately resulting from the negligent change of the message, and the plaintiff was due to be reimbursed for the reasonable expenditure made by him on that account.

[7-10] Like considerations lead to the conclusion that the action of the appellee in going at once to Birmingham was a consequence of the breach of the contract (declared on in the second count) wrought by the change of the words of the message, and was a consequence within the contemplation of the parties in making the contract, even though the precise happenings which followed from the breach may not have been anticipated or foreseen. *W. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 643, 36 South. 517. The cost of the message and the value of the time lost by plaintiff in making the journey to and from Birmingham are likewise within the elements of recoverable damage under both counts, if the plaintiff was otherwise found to be entitled to recover. The contract for the transmission and delivery of this message was made in the state of Alabama and was to be partly performed in the state of Alabama and in the state of Illinois, as well as in other intervening states through which the lines of this telegraph company extended.

The complete performance of the contract could not be accomplished outside of the state of Illinois, any more than without partial service to that ultimate end in Alabama, and other intervening states. So the contract assigns itself to the class of contracts, the performance of which requires service or action in the state where the contract was made and in other states; all with the ultimate object of completed performance in a state other than that in which the contract was made. The appellant's theory was that since damages for mental suffering were not recoverable under the law prevailing in the state of Illinois, unless physical hurt or injury attended the wrong suffered—a condition not present in this instance—the appellee was not entitled to recover in the courts of Alabama for any mental distress occasioned by or resulting from the alteration made in the message. The question thus made presents the inquiry: By what law—that of Alabama or that of Illinois—is the right vel non of this plaintiff to recover damages for mental suffering, without physical hurt or injury, to be determined? The court below refused to the defendant the benefit in evidence of the testimony of a qualified practitioner of law in the state of Illinois. The purport of this testimony was to show that the established law of Illinois was as the stated theory of the defendant assumed it to be. A plea was interposed, addressed to both counts, undertaking to assert the same theory against the right of this plaintiff to recover any damages for mental distress. A plea is not the approved method of assailing the recoverability of claimed elements of damages. Objections to the admission of evidence or instructions to the jury, as well as motion to strike, are the recognized means to that end.

[11] "The general rule of law * * * is, that a contract is governed, as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of the place of performance, or the law which both parties had in view must govern." *Sou. Ry. Co. v. Harrison*, 119 Ala. 539, 544, 24 South. 552, 557 (43 L. R. A. 385, 72 Am. St. Rep. 936), and cases there cited. In the *Harrison* Case it was also soundly said:

"And the weight of authority is, that this rule requires a contract for the transportation of goods by a common carrier from one state or country to another to be governed by the law of the place where it is made and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or country."

The numerous decisions and texts cited by Chief Justice Brickell aptly support the rule announced; and particular reference may be made to Justice Gray's exhaustive opinion on the subject in *Liverpool Steam Co. v. Phoenix*

Ins. Co., 129 U. S. 397, 447-458, 9 Sup. Ct. 469, 32 L. Ed. 788. The decision of this court in *Sou. Ex. Co. v. Gibbs*, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 246, is opposed to the sound rule stated. *Sou. Ry. Co. v. Harrison*, supra, and other authorities. The court delivered no opinion in *W. U. T. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. The error in the *Gibbs* Case seems to have resulted from the misapprehension that the contract there under view was to be wholly performed in Alabama; whereas, it was made in New York, and was to be partially performed there and in intervening states, as well as in Alabama. This consideration effectually prevents the acceptance as authority of the quotation therein made from *Harrick v. Andrews*, 9 Port. 9, 26. The soundness of the cases of *Curtis v. D. L. & W. R. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271, and *Brown v. Camden R. R. Co.*, 83 Pa. 316—the authorities largely relied upon to support the view prevailing in our *Gibbs* Case—were reflected upon by the observations of Justice Gray in the opinion before cited. Certainly these two decisions, as well as the *Gibbs* Case, are not in harmony with the distinct weight and reasons of the authorities on the question. The editor's note to the *Gibbs* Case, 18 L. R. A. (N. S.) 874, may be consulted with profit. The Ohio court, in *Pittsburg Ry. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732, cited in the opinion in the *Gibbs* Case, accords with its doctrine. We have since only once recognized and applied the doctrine of the *Gibbs* Case, and that was in *W. U. Tel. Co. v. Fuel*, 165 Ala. 391, 396, 397, 51 South. 571, but, with the overruling of its predecessor, the *Fuel* Case must be taken as overruled to that extent. The contract involved in the *Gibbs* Case was single and indivisible, though to be partially performed in New York state, where made, and in Alabama, where completed performance could alone be accomplished.

"It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted as the footings upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country." * * * *Lloyd v. Guibert*, 1 Q. B. 122, 123; 6 B. & S. 100, 133.

There was nothing in the subject-matter or in the circumstances of the *Gibbs* Case to alter or to avert the prima facie presumption that the law of the contract was intended by the parties to be the law of the place where it was made. There being nothing in the subject-matter or in the circumstances involved in or pertaining to the contract to transmit and to deliver the message to this plaintiff, to alter or to avert the application or the effect of the presumption that the parties engaged in Alabama, with reference

to and regard for the laws of this state, it must be held that the contract was an Alabama contract, and was and is governed in respect of the consequences of its breach by the law of this state; and, in consequence, that in an action ex contractu for the breach of the contract, damages for mental distress, there being shown loss in estate, were of the elements of actual damages recoverable. So far as we are now advised, there is no federal enactment, touching interstate commerce, of which this message was a part, that exempts the contract in question from the stated operation and effect of our law where the breach thereof is the cause asserted.

[12-14] The first count, being ex delicto, is governed by a different principle, though with reference to it there is great conflict in the authorities. Our opinion is that the better rule is that stated by Justice Holmes in *Western U. Telegraph Co. v. Brown*, 234 U. S. 542, 547, 34 Sup. Ct. 955, 58 L. Ed. 1457. The cause of action in such cases is grounded in the breach of the obligation imposed by the law of the place where the tort is committed, and the measure and elements of the recovery for the wrong suffered is that prescribed by the law of the place where the tort is committed. The tortious conduct declared on in the first count occurred in the state of Illinois, where, under the circumstances disclosed by this record, damages for mental distress were not recoverable. The deposition offered to establish this state of the applicable law in Illinois was hence relevant to the issue tendered, in part, by that count. But the deposition was offered without any specification or restriction of its appropriate purpose to avert the recovery of damages for mental distress in consequence of the tortious conduct declared on in the first count. It was inadmissible under the issues tendered by the second count, which was only for the breach of the contract. So, the deposition was of the species of evidence admissible for some purposes and inadmissible for others. The objection was general, and the court sustained it. Where evidence—admissible for one or more purposes, within the issues raised by the pleadings—is offered without restriction or limitation to the purpose for which it is admissible, and the objection is general, the judgment will not be reversed, whether the court sustains or overrules the general objection. *Davis v. Tarver*, 65 Ala. 98; *Barfield v. Evans*, 187 Ala. 579, 65 South. 928; *Jones on Ev.* (2d Ed.) § 894, p. 1147; *Hurlburt v. Hall*, 39 Neb. 889, 58 N. W. 538; *Mine, etc., Co. v. Parke*, 107 Fed. 881, 47 C. C. A. 34. The distinction indicated was not observed in the framing of some of the special charges requested by and refused to the defendant. The case appears to have been tried without regard to the distinction. Error cannot be predicated on their refusal.

There was no error in instructing the jury

that a prima facie case was made out by the plaintiff by showing that the message accepted for transmission by the company was not correctly transmitted and delivered. *W. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 435, 25 South. 232, 82 Am. St. Rep. 89.

No reversible error appearing, the judgment must be affirmed.

Affirmed. All the Justices concur.

On Rehearing.

[15] Upon the single ground, to be stated, the application for rehearing must be granted; and for this error the judgment must be reversed and the cause remanded. In the oral charge the court said to the jury:

"Now, the plaintiff testified that he derived from that (i. e., the message delivered to him in Chicago) that his wife had been operated on."

The bill of exceptions purports to contain all of the evidence offered on the trial. According to this bill of exceptions, the plaintiff did not testify as the court told the jury; and in so incorrectly advising the jury upon a matter of evidence vital to the issue, the jury's province was invaded, and error to reverse was committed.

Reversed and remanded. All the Justices concur.

(138 La.)

No. 20456.

VILLAGE OF MOREAUVILLE v. BOYER.

(Supreme Court of Louisiana. Feb. 7, 1916.

Rehearing Denied March 6, 1916.)

(Syllabus by Editorial Staff.)

1. NAVIGABLE WATERS §43(2) — RIPARIAN RIGHTS — ROADS AND LEVES — ENCROACHMENT.

Although the owner of land abutting on a navigable bayou must leave a sufficient space for a road and a levee, he is under no obligation to remove buildings which encroach upon the road, but do not interfere seriously with traffic thereon, since Civ. Code, art. 862, provides that if buildings which cannot be destroyed without signal damage to the owner, encroach on public soil, but do not prevent its use, they may remain, but if rebuilt, the owner must relinquish the public land on which they stood.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 257; Dec. Dig. §43(2).]

2. MUNICIPAL CORPORATIONS §647 — STREETS — AUTHORITY OF COUNCIL.

Under Act No. 136 of 1898, authorizing incorporation of towns, and section 15 thereof, empowering their boards of aldermen to exercise full jurisdiction in laying out streets, when a public road along a navigable stream was included within the legal limits of a town, it became one of its streets, the aldermen had authority to lay it out, and Rev. St. § 3369, requiring roads to be laid out by a jury of freeholders appointed by the police jury, did not apply.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1420; Dec. Dig. §647.]

3. MUNICIPAL CORPORATIONS §655 — STREETS — ESTABLISHMENT — WIDTH — EVIDENCE.

Evidence that the traveled part of a public road in an incorporated town was but 12 to 15 feet, where there was in the record a photo-

graph showing a buggy, a two-horse carriage, a two-horse wagon, six horsemen, and one man on foot abreast in the 25-foot space, shows no imperative need for greater space and none could be taken.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ¶655.]

4. NAVIGABLE WATERS ¶41 — RIPARIAN RIGHTS—SHORES.

The servitude on the estate abutting a navigable bayou for the purpose of levee and road construction created by Civ. Code, art. 455, declaring the use of the banks of navigable streams to be public, does not require that space be also left for a sidewalk and adornment and embellishment of the way, nor for a drain.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 178, 246-252; Dec. Dig. ¶41.]

5. EMINENT DOMAIN ¶69 — RIPARIAN RIGHTS—SHORES—POWER OF LEGISLATURE.

The Legislature is without power to impose an additional servitude upon the land abutting a navigable bayou, but if land is desired to be taken in addition to that provided for in Rev. St. § 3371, requiring roads to be 25 feet wide, for the purpose of constructing a sidewalk or for beautification or adornment, it must be expropriated after compensation paid.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179; Dec. Dig. ¶69.]

6. MUNICIPAL CORPORATIONS ¶655—STREETS—ESTABLISHMENT—JURISDICTION.

The determination of the width of a public road belongs to the local authorities and not to the courts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ¶655.]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; A. J. Lafargue, Judge.

Action by the Village of Moreauville against Alonzo L. Boyer. Judgment for defendant, and plaintiff appeals. Affirmed.

Coco & Couvillon, of Marksville, for appellant. E. L. Lafargue, of Marksville, for appellee.

PROVOSTY, J. The village of Moreauville, on the bank of Bayou Des Glaisses, in the parish of Avoyelles, was incorporated in 1909, under the provisions of Act 136, p. 224, of 1898, known as the "Lawrason Act." It had not then the proportions of a metropolis, and much evidence has been taken in this case upon the point whether it has increased or decreased since. In order to muster the 250 inhabitants required by the statute for incorporation, its limits had to be extended two miles along the bayou. There are a church, a bank, a convent, a public school, a railroad station, three stores, a dago shop, and private residences. These last are mostly along the public road along the bank of the bayou. For streets there are the public road along the bayou, or rather along the levee which is on the bank of the bayou, and two streets perpendicular to it, connecting it with a street parallel to it some distance back, called Railroad avenue or Potato street.

The great flood of 1912 overflowed that country, and did great damage. After its subsidence, it was found necessary to build a new levee along the bayou bank, further back from the bank than the former one, and for obtaining the additional space required for that purpose the front proprietors had to move back such of their fences as the flood had left standing and such of their buildings as were in the way.

Defendant's property in the village has a frontage of 1700 feet on the bayou. When the site for the new levee was staked out, he inquired of the state engineer how much space would have to be left for a public road; and the engineer, basing himself doubtless, upon section 3371 of the Revised Statutes, which is the Act 56 of 1818, requiring public roads to be "at least twenty-five feet" wide, informed him that the space would have to be of that width; and he accordingly moved his fence and buildings back so as to allow that space. Two of the buildings near the road were, as we understand, far enough back already to allow of a space of 22 feet, and he did not move these, deeming that this space was not so narrow but that it could answer the purposes of a public road. His well also encroached somewhat upon this 25-foot space, and he built his fence around it, leaving a space of — feet between it and the foot of the levee.

The present suit is brought in enforcement of an ordinance of the board of aldermen of the village, requiring the front proprietor to leave an open space of 35 feet along the fronts. The allegation of the petition is that this width of 35 feet—

"is necessary to a proper construction and maintenance thereof [of the street or road] and to build and maintain sidewalks along same and to make proper drains and adorn and beautify it, if the authorities should so determine."

[1] Bayou Des Glaisses being a navigable stream, defendant recognizes that there is inherent in his title to the land, an obligation to leave a space along his front for a levee and public road; but he contends that he has fully satisfied that obligation by what he has already done, and that so far as concerns the buildings and the well, which though encroaching upon the 25 feet, do not do so to such an extent as to interfere seriously with the road, he is under no obligation to remove them.

This contention as to these encroaching works is unquestionably well founded. *C. C. 862; Mithoff v. Town of Carrollton*, 12 La. Ann. 185; *Sauter v. Town of Vidalia*, 11 La. 377, 34 South. 558.

[2] The defendant also challenges the authority of the board of aldermen over the matter of this road. He contends that this road could be laid only by a jury of freeholders under section 3369 of the Revised Statutes, and by order of the police jury of the parish of Avoyelles.

We do not agree with that view. The board of aldermen is by the said statute under which the town is incorporated authorized to exercise "full jurisdiction" in the laying out of streets.

When this public road was included within the legal limits of the village, it became one of the streets of the village, and the jurisdiction or public authority over it passed from the police jury, which has authority over the roads of the parish in general, to the board of aldermen, thus clothed specially with authority over the streets of the village.

[3, 4] The sole question must be as to the width of the space thus to be left open. In the case of *Mayor v. Maggioli*, 4 La. Ann. 73, this court said:

"The question as to the breadth of land which a municipal corporation has the right to require for the construction of a road and levee is, within certain limits, an administrative question, to be left to the discretion of local authorities."

In the case of *Dubose v. Levee Commissioners*, 11 La. Ann. 167, the court said:

"The quantity of land to be taken for road and levee purposes presents a question of police or administration to be decided by the local authorities, whose decision should not be revised by this tribunal except for the most cogent reasons, and where there has been manifest oppression or injustice."

In the case of *Cross v. Police Jury*, 7 Rob. 121, the court said:

"Proceedings of police juries, relative to public roads involving questions of police rather than of judicial character should be sustained unless manifestly unjust."

The ordinance calls for sufficient space for a public road and also for a sidewalk; and, as has been seen, the allegation of the petition is to the effect that the greater space is needed for a sidewalk, a drain, and for the sake of adornment and embellishment.

On the point of whether the space left open by defendant was not sufficient, much testimony was taken, consisting almost entirely of the opinions of the witnesses. If the concession were made that a greater number of opinions, and weightier, were expressed on the side of plaintiff, this we do not think would help much towards a proper decision of the case; for the question ought to depend upon facts and not upon the more or less biased opinions of witnesses.

The testimony shows that the traveled part of the public road along this bayou is barely 12 to 15 feet. In the record is a photograph, showing a buggy, a 2-horse carriage, a two-horse wagon, six horsemen and one man on foot abreast in the 25-foot space left open by defendant. This proves that the need for more space for a public road is not so very imperative. In fact, from the testimony as a whole we are much impressed that if the village were not taking this property gratis, but were to pay for it, the village fathers might entertain a different opinion of the necessities of the public in the premises. Be all that, however, as it may, the conclu-

sion we have reached is that the decided and positive preponderance of the testimony is that the 25 feet would be all that the public would need for a road, and that this additional space is for a sidewalk and perhaps for a drain; and we are of opinion that the servitude upon defendant's property does not call for space for a sidewalk, but only for a levee and road.

This servitude is not the same as that by which, according to article 455 of the Code, the banks of rivers are free to the public. It is a very much more onerous one, extending much further inland. That feature of it requiring space for a levee is peculiar to Louisiana. The public road feature is of European origin, and goes back, we believe, to the Romans. It had its birth in the necessity of there being a towage path along the banks of navigable and floatable water courses, Domat, vol. 2, liv. 2, tit. 8, § 2, art. 9, says that by law the public have a right to a towing path along the banks of navigable waters. For the purposes of this case, we need not go back further in the legal history of the statutory recognition of this servitude than the French Ordinance of 1669, referred to at page 123, 4 Mart. (O. S.), in the case of *Renthorp v. Bourg*, to the effect that:

"Owners of estates, bordering on navigable rivers, ought to leave along the banks a space, at least 24 feet wide, for a royal road and towing path."

In 1818 the Legislature of this state passed Act 56 of that year, now section 3371, R. S., enlarging to "at least 25 feet" the space thus required.

Acquaintance with the origin of this servitude enables us to judge better of its character. From a mere towing path it had grown into a royal road by the time of the settlement of Louisiana. The width then was 24 feet; and early in our statutory law this width was increased to 25 feet. The naming of that width serves to show what legally is considered to be a sufficient width in the absence of special circumstances calling for a greater. In the case at bar this greater width is being demanded for a sidewalk, and perhaps also in part for a drain. A drain is a necessary part of an earth road, and if more space than 25 feet is needed at that place for the proper drainage of the road, the plaintiff is entitled to take it. But we do not think the plaintiff is entitled to take more than what is needed for a public road; the servitude does not cover more than this. It does not cover additional space for a village sidewalk. The spirit and intention of our law in regard to the exercise of this servitude is expressed by this court in *Sauter v. Town of Vidalia*, 110 La. 386, 34 South. 561, as follows:

"Even where public necessity or exigencies require the sacrifice of private rights, the law-maker seeks to make the burden fall as lightly as possible, and to protect individuals in their property. In the enforcement of the right of eminent domain as to railroads and canals the

lawmaker declares (section 1486, Rev. Stat.) the 'expropriation shall in no case extend to graveyards, nor the dwelling house, yard, garden and other appurtenances thereof, unless the jury shall find, by their verdict, that the line of railroad or canal cannot be diverted from that proposed by the company without great public loss or inconvenience.'

[5] The defendant's property owes at this time the same servitude it owed before the incorporation of the village, no more. It owes the same servitude that the other property fronting on Bayou Des Glaisses outside of the limits of the village owes, no more. This servitude is due, not because the Legislature has said it is due, but because the debt is one inherent in the title to the property. The Legislature is powerless to establish servitudes where none already exist. To do so would constitute a taking, or damaging, of private property without compensation previously made, and would be violative of the Constitution. When this village was established, therefore, the servitude upon defendant's property continued to exist in the same state in which it was before. It was a servitude for a public road along this bayou, no more.

If, for instance, this village took on a sudden growth, and had need at this place, for the purposes of its commerce, of a space as wide as that which we see on the river front in New Orleans at the head of Canal street, this space could not be taken by virtue of this servitude, but would have to be regularly expropriated; and the Legislature would be powerless to authorize the taking of it without compensation previously made. In other words, the servitude is one of road, and of such works as are usual on the banks of navigable streams.

[6] The ordinance in question in this case does not undertake to fix the width for the road irrespective of the sidewalk; and the present suit is not simply for a public road, but for a space sufficient for a road and a sidewalk, without any fixing of the space needed for the road alone. In this condition of the record, it is not possible for this court to give plaintiff judgment for a road, since the function of fixing the width of the public road belongs to the local authorities and not to the courts. The conclusion reached by the trial court was that the plaintiff had to be nonsuited.

Judgment affirmed. Plaintiff to pay the costs of appeal.

(138 La.)

No. 21772.

STATE v. TUMINELLO.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW §1182—APPEAL—RECORD—SUFFICIENCY.

Where the transcript in a criminal case contains no bill of exception, and there has been no assignment of error, and no error is patent

upon the face of the record, the conviction and sentence will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Charles Tuminello was convicted of retailing intoxicating liquors without a license and appeals. Affirmed.

Scheen & Blanchard, of Shreveport, for appellant. R. J. Pleasant, Atty. Gen., Wm. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondebran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant, having been convicted of retailing intoxicating liquors without having previously obtained a license therefor from the police jury of the parish of Caddo, or the authorities of the city of Shreveport, and, having been sentenced to pay a fine exceeding \$300 and suffer certain imprisonment in the parish jail, prosecutes this appeal.

The transcript contains no bill of exception, there has been no assignment of error, and we find no error patent upon the face of the record. The conviction and sentence appealed from are therefore

Affirmed.

(138 La.)

No. 21776.

STATE v. MATASSA.

(Supreme Court of Louisiana. Feb. 21, 1916. Rehearing Denied March 20, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1104(3)—APPEAL—BILL OF EXCEPTIONS—ASSIGNMENT OF ERRORS—NECESSITY.

When the transcript of appeal in a criminal case does not contain a bill of exceptions or assignment of errors, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2776, 2886; Dec. Dig. § 1104(3).]

2. CRIMINAL LAW §1091(1) — APPEAL — "BILL OF EXCEPTIONS"—REQUISITES.

"A notation by the clerk of court in a criminal case that the defendant excepted and reserved a bill cannot be considered a 'bill of exceptions.'"

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2828-2830; Dec. Dig. § 1091(1).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Joe Matassa was convicted of crime, and appeals. Affirmed.

Scheen & Blanchard, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondebran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. [1] The record contains no bill of exceptions or assignment of errors on the face of the record.

[2] There is a motion for a new trial found in the record, which is unsworn to, and which was overruled; and the minutes recite that:

"Counsel for defendant excepts and reserves a bill."

But no bill of exceptions was filed.

"A notation by the clerk of court in a criminal case that the defendant excepted and reserved a bill cannot be considered a 'bill of exceptions.'" State v. Latino, 138 La. 14, 69 South. 857; State v. Miller, 138 La. 873, 70 South. 330, and authorities therein cited.

Judgment affirmed.

(138 La.)

No. 21777.

STATE v. MATASSA.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1134(4)—APPEAL—JURISDICTION.

This court, having no jurisdiction of questions of fact pertaining to the guilt or innocence of the defendant in a criminal prosecution, cannot reverse the ruling of the trial judge on a motion for a new trial, where the bill of exceptions does not present a distinct question of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2587, 2653, 3056, 3067-3071; Dec. Dig. \S 1134(4).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Joe Matassa was convicted of retailing intoxicating liquor, and appeals. Affirmed.

Scheen & Blanchard, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., Wm. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. The appellant was convicted of retailing intoxicating liquor without having a license.

The record does not contain a bill of exceptions nor an assignment of errors. A motion was made for a new trial in the district court on the ground that the state's witnesses were unworthy of belief, and that the verdict was therefore contrary to the law and the evidence; but the defendant did not reserve a bill of exceptions to the overruling of his motion. If he had excepted to the ruling, the bill would not present a question of law, but questions exclusively within the jurisdiction of the district court. The jurisdiction of this court, in criminal cases, extends only to questions of law.

In the brief filed on behalf of the appellant, complaints are made of proceedings of

which the transcript contains no record whatever and of which we cannot take notice.

The verdict and sentence appealed from are affirmed.

(138 La.)

No. 20667.

RED CROSS LUMBER CO. v. FRANK I. ABBOTT LUMBER CO.

(Supreme Court of Louisiana. Jan. 10, 1916. Rehearing Denied March 6, 1916.)

(Syllabus by the Court.)

1. ATTACHMENT \S 131—BOND—AMOUNT—INTEREST.

In an attachment suit, interest accrued up to the date of the filing of the suit and included in the prayer for judgment forms part of the plaintiff's claim, and the bond for attachment must be for a sum equal to such claim.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 361-364; Dec. Dig. \S 131.]

2. ATTACHMENT \S 138—BOND—INSUFFICIENCY IN AMOUNT—CURE BY REMITTITUR.

An attachment bond insufficient in amount cannot be made good by a subsequent remittitur of a part of plaintiff's claim.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 385-387; Dec. Dig. \S 138.]

3. ATTACHMENT \S 138—BOND—DEFICIENCY IN AMOUNT—MATERIALITY.

The rule de minimis has no application to a deficiency of \$17.10 in an attachment bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 385-387; Dec. Dig. \S 138.]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by the Red Cross Lumber Company against the Frank I. Abbott Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Borron & Wilbert, of Plaquemine, and Foster, Milling, Saal & Milling and Dart, Kernan & Dart, all of New Orleans, for appellant. Eldon S. Lazarus, of New Orleans, curator ad hoc, for appellee.

LAND, J. The plaintiff sued out an attachment against the nonresident defendant company, which was dissolved on motion of the curator ad hoc appointed to represent the absent defendant, on the ground that the attachment bond was not given for a sum equal to that which the plaintiff claims, as required by article 245 of the Code of Practice.

The plaintiff has appealed, and the case has been argued before this court with much earnestness, ingenuity, and ability.

[1, 2] The bond for the attachment is equal to the sum of the debts alleged to be due. The plaintiff prayed for judgment for \$7,260.05, with legal interest on \$1,448.95 from the 12th day of November, 1913, until paid, and on \$5,811.10 from judicial demand. A calculation shows that the interest accrued to the date of the filing of the suit amounts to \$17.10, for which no bond was given.

The question to be decided is whether such interest forms a part of the sum claimed by the plaintiff.

Article 245 of the Code of Practice of 1825 required that an attachment bond should be for a sum exceeding by one-half that which the plaintiff claims. In *Erwin v. Bank*, 12 Rob. 227, it was held that an attachment bond must be for a sum exceeding by one-half the whole amount due, inclusive of the interest which had accrued up to the date of the filing of the suit. In *Graham v. Burckhalter*, 2 La. Ann. 415, the court again held that an attachment bond for a sum exceeding by one-half the principal, exclusive of interest, is insufficient, and, further, that the defect could not be cured by subsequently furnishing bond for a sufficient amount. Both of these cases were reaffirmed in *Planters' Bank v. Byrne*, 3 La. Ann. 687.

In the case at bar, the affidavit, annexed to the petition, is "that all of the facts and allegations therein contained are true and correct."

The contention that the petition does not claim interest, ignores the prayer for judgment for interest, and the prayer for the maintenance of the writ of attachment, and the payment of "petitioner's claim, interest, and cost" by preference and priority out of the proceeds of the sale of the property attached and the writ which issued for principal and interest, and is solely based on the allegations of the petition, which are silent as to any claim or demand for interest. The allegations of the petition disclose that the sums sued for were due and unpaid at the date of the filing of the suit, and that one of them had been past due for some months, and the prayer fixes the maturity of the debt as of date November 12, 1913.

Under the laws of this state debts bear interest at the rate of 5 per cent. per annum from the time they become due. C. C. art. 1938; C. P. art. 554.

In *Daquin v. Colron*, 8 Mart. (N. S.) 608, it was held that where the interest is a legal consequence of the debt, a demand for the principal is a demand for the principal and interest, and that C. P. art. 533, refers to cases where interest has been stipulated. This decision was predicated on the rule that the pleader need not allege conclusions of law.

If C. P. arts. 157, 522, and 553 are applicable, then interest was expressly claimed in the prayer for judgment.

Plaintiff not only claimed interest, but swore it was due, as a part and portion of his claim. Plaintiff was required to state expressly and positively the amount which it claimed (C. P. art. 242), and was required to swear to the existence of the debt demanded by it in order to obtain the attachment (C. P. art. 243). The interest claimed was a part of the debt.

The cases of *Pope v. Hunter*, 13 La. 306,

Fellows Johnson & Co. v. Dickens, 5 La. Ann. 131, and *Hughes v. Mattes*, 104 La. 218, 28 South. 1006, have no application. In the first two cases the bonds were sufficient, as measured by the claims of the plaintiffs as set forth in the affidavit. In the last case the plaintiff limited his attachment to a certain amount.

Nearly two months after the attachment was sued out the plaintiff filed a motion for permission to remit the accrued interest prayed for by the plaintiff, on the ground that the allegations of the petition claimed no interest. This motion was properly overruled, because an attachment must stand or fall according to the state of facts existing at the time of its issuing, and cannot be cured by a subsequent event. *Todd v. Shouse*, 14 La. Ann. 428.

In *Graham v. Burckhalter*, 2 La. Ann. 415, the plaintiff moved for leave to amend by filing an additional bond. This motion was overruled and the attachment was dissolved. On appeal, the judgment was affirmed, the court saying, in part:

"The order granted in the present instance on an insufficient bond was void, and under it no attachment could legally issue. This radical defect, which vitiated the proceedings in their inception, could not be cured by subsequently furnishing an additional bond. A sufficient bond was a condition precedent to issuing the writ."

In *Planters' Bank v. Byrne*, 3 La. Ann. 687, where the attachment bond was insufficient in amount, the court said:

"This prerequisite must be strictly construed and rigidly enforced. The remedy by attachment is an extraordinary one, dispossessing the party of his property, before his indebtedness is judicially ascertained, upon the ex parte showing of his adversary. Hence it has been repeatedly held that, the legal prerequisites must be fully complied with, under the pain of nullity."

To permit a plaintiff to reinstate an illegal attachment by entering a remittitur, would be contrary to the uniform decisions of this court from the beginning of our jurisprudence.

It has been expressly held that subsequent pleadings increasing the claim of the plaintiff cannot affect the question of the legality of the attachment bond. *Pope v. Hunter*, 13 La. 306; *Fellows Johnson & Co. v. Dickens*, 5 La. Ann. 131. By a parity of reason, subsequent pleadings remitting a portion of the claim of the plaintiff cannot reinstate a void attachment bond.

[3] The rule "De minimis non curat lex" has been applied to an attachment bond where the deficiency was "less than \$1." *Bodet & Gueydan Brothers v. Jules Nibourel*, 25 La. Ann. 490. In another case, where the deficiency was \$57, the court refused to apply the rule de minimis, saying:

"Those who invoke process of this kind have been uniformly required to fulfill the minutest requirement. Even if the application of the rule was justifiable when the deficiency of the bond was less than \$1, such application is not a precedent to be followed in this case."

In *Pelletier v. State Nat. Bank*, 112 La. 564, 36 South. 592, the court held that even if the rule de minimis applies to appeal bonds, it cannot cure a deficiency of \$32.91 in a suspensive appeal bond of \$15,032.91. The court, among other cases, cited *State ex rel. Jorda v. Judge*, 29 La. Ann. 776, where the deficiency in the appeal bond was \$7.45, and the court said:

"The maxim de minimis does not apply."

On rehearing, the court, in the *Pelletier* Case, cited *Keenan v. Whitehead*, 15 La. Ann. 333, where the deficiency was less than \$20, and *Marchand v. Casanave*, 22 La. Ann. 626, where the deficiency was about \$10.

If the maxim de minimis is applicable to an attachment bond, it must be restricted to a deficiency too insignificant for consideration.

Judgment affirmed.

O'NIELL, J., dissents on refusal to grant rehearing.

(138 La.)

No. 21778.

STATE v. ABRAHAM.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW §101(4) — JURISDICTION — TRANSFER OF CAUSES.

When a criminal prosecution is commenced in a court having jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction; and, what the prosecuting attorney cannot do, directly, he should not do indirectly, as, by entering a nol. pros. in the court first seized of jurisdiction and lodging the same charge in the other court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 202; Dec. Dig. §101(4).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Charles Abraham was convicted of violating the liquor law, and appeals. Conviction and sentence annulled, and defendant discharged.

Scheen & Blanchard, of Shreveport, for appellant. R. J. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Goudran, of New Orleans, of counsel), for the State.

MONROE, O. J. Defendant, having been convicted of retailing intoxicating liquors without having previously obtained a license therefor from the police jury of the parish of Caddo, or the authorities of the city of Shreveport, and, having been sentenced to pay a fine exceeding \$300 and serve a certain term in the parish jail and "worked upon the public works of the parish," prosecutes this appeal.

The record discloses a plea to the jurisdiction of the court and a bill of exception to

the overruling of the same, from which, it appears, that the charge upon which defendant was convicted was first lodged in the "city court of the city of Shreveport." a tribunal, the jurisdiction of which with respect to such matters is concurrent with that of the district court, that issue was joined and the case set down for trial, and, that the district attorney thereupon entered a nolle prosequi, and renewed the prosecution, on the same charge, by indictment, in the district court, the reason alleged by defendant, in his plea to jurisdiction, being as follows:

"That the said case against defendant was one of a large number that had been made against various defendants on the testimony furnished by the same paid detectives and spotters, and that, after the lodging of the charges in said court, some of the cases were put on trial and the result thereof was that the witnesses upon whose testimony the state was depending, being paid detectives and negro spotters, were wholly discredited and it was shown that the said testimony * * * was wholly unworthy of belief, and after it was ascertained that no convictions could be had in said court upon the testimony of said spotters, then the district attorney entered nol. prosequi in all the cases then pending untried, and in this case, and it was only with the purpose of transferring said charges to the district court, and * * * only with that idea, that the charges were dismissed in that court."

The statement per curiam, in the bill of exception, reads:

"In so far as this case is concerned, the city court and the district court have concurrent jurisdiction; it is not permissible to transfer a misdemeanor from one court to another, the court where the same is originally lodged retaining jurisdiction until the final determination of that cause. The district attorney had the absolute right to enter a nol. pros., and, when that is done, that cause is finally determined; another cause may be instituted, based on the same state of facts, but it is not the same cause, or case, legally speaking. We do not think a prosecuting attorney should arbitrarily use the power of nol. pros.; still, he has been given that power and we know of no law preventing him from dismissing a misdemeanor charge in the city court and bringing same again in the district court even when the purpose of same is as set forth in the pleas to the jurisdiction of this court."

The identical question thus presented, arising out of the same circumstances, has just been considered by this court in the case of *State v. Mike Milano*, 71 South. 131 (No. 21770 of our docket), a rehearing in which is this day refused, and it is there held (quoting from the syllabus) as follows:

"When a criminal prosecution is commenced in a court having jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction; and, what the prosecuting attorney cannot do, directly, he should not do indirectly."

For the reasons assigned in the case thus referred to, therefore, it is ordered that the conviction and sentence herein appealed from be annulled, and the defendant discharged.

PROVOSTY, J., takes no part.

(138 La.)

No. 20227.

SALASSI et al. v. DOUGHERTY et al.
(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR \Leftrightarrow 805—**DISPOSITION OF CASE**—**ABANDONMENT OF APPEAL BY APPELLANT.**

Where appellants had filed no brief and made no appearance in the Supreme Court and had apparently abandoned the case, the judgment of the lower court would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1958, 1989; Dec. Dig. \Leftrightarrow 805.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Branot, Judge.

Suit by John P. Salassi and another against Mrs. Lillie McConnell Dougherty and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

T. Jones Cross, of Baton Rouge, for appellants. R., C. & S. Reid, of Amite, and Taylor & Porter, of Baton Rouge, for appellees.

PROVOSTY, J. This is one of a number of similar suits brought against the widow and heirs of Nolan Stewart Dougherty, and is controlled by the case of Cleneay et al. v. Dougherty, reported in 135 La. 346, 65 South. 485.

Appellants have apparently abandoned the case, as they have filed no brief and made no appearance in this court.

Therefore the judgment of the lower court is affirmed.

(138 La.)

No. 21765.

STATE v. BANKS.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW \Leftrightarrow 377—**EVIDENCE**—**CHARACTER OF ACCUSED.**

The only evidence of the good character of the defendant that is admissible in evidence in a criminal prosecution, where his credibility as a witness has not been attacked, is that which relates to the traits of character involved in the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. \Leftrightarrow 377.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Ed Banks was convicted of manslaughter, and appeals. Affirmed.

Purser & Magruder, of Amite, for appellant. R. G. Pleasant, Atty. Gen., and W. H. McClendon, Dist. Atty., of Amite (G. A. Goudran, of New Orleans, of counsel), for the State.

O'NIELL, J. The appellant was indicted and prosecuted for the crime of murder, was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for years. He and his concubine were the only witnesses to the killing, and their testimony did not conflict as to any of the details of the fatal difficulty. Having introduced testimony to prove his good reputation for peace and quiet in the community in which he lived, the defendant tendered a witness to prove that his reputation for truth and veracity was also good. The district attorney objected to the introduction of such testimony on the ground that no attempt had been made to impeach the credibility of the accused as a witness, and the district judge sustained the objection. The defendant's counsel reserved a bill of exceptions to the ruling, and, in support of his argument, refers us to the decision in *State v. Parker*, 7 La. Ann. 83.

In the case cited, the verdict convicting the defendant of manslaughter was set aside because the district judge excluded testimony to prove, on his trial for the murder of a woman, that the accused "was of a mild disposition, and one of the last men who would willingly shed a woman's blood; that he was a kind and affectionate husband and father, honest and industrious, of strict integrity and pure morals." That decision was cited with disapproval in *State v. Griggsby*, 117 La. 1051, 42 South. 497, where it was said that the court had merely held that such evidence was admissible only in so far as it was pertinent to the charge of murder. But the court then cited with approval the later decision in *State v. Bessa*, 115 La. 253, 38 South. 985, holding that the character, or reputation for honesty and industry, of a person accused of striking with intent to commit murder, bore so remotely upon the crime charged that the evidence of such traits was irrelevant and inadmissible. In *Griggsby's* case, the prosecution was for murder, and the defendant was convicted without capital punishment. The ruling of the trial judge, excluding evidence of the good character of the defendant for "honesty and trustworthiness," was affirmed. Therefore, in so far as the ruling in *State v. Parker* is in conflict with the two later decisions on the subject, the former decision must be considered, and is now, overruled. The authorities all agree that the only evidence of the good character of a person accused of a crime that is admissible in a criminal prosecution is that which relates to the traits of character involved in the crime charged. See Wharton's Criminal Law (7th Ed.) § 636; 12 Cyc. 413; Greenleaf, § 55; Wigmore on Evidence, vol. 1, § 59.

The verdict and sentence appealed from are affirmed.

(138 La.)

No. 21782.

STATE v. DEFATTA.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW — 982 — SENTENCE — ADMISSION OF EVIDENCE.

Under section 7, Act No. 74 of 1914, p. 192, and in order to place himself in a position to obtain the benefit of the provisions of that statute, authorizing suspension of sentence in certain cases, a defendant, charged with a misdemeanor, is entitled, after conviction, to introduce evidence showing that he had not theretofore been convicted of any felony or misdemeanor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. ¶ 982.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Frank Defatta was convicted of retailing intoxicating liquor without a license, and appeals. Sentence set aside.

Cal D. Hicks, of Shreveport, for appellant. R. J. Pleasant, Atty. Gen., Wm. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant was convicted of retailing intoxicating liquor without having previously obtained a license, and, after conviction, but before sentence, he moved the court to allow him to introduce testimony to show that he had never before been convicted of any offense; his purpose being to bring himself within the provisions of Act No. 74 of 1914, p. 191, entitled:

"An act to provide for the suspension of sentence in misdemeanor convictions and in certain cases of conviction of felony for first offenses," etc.

The motion was dismissed and a bill was reserved, which presents the only question that is brought up by the appeal.

Section 7, Act No. 74 of 1914 (page 192) reads in part as follows:

"Be it further enacted, etc., That, when there is a conviction of a misdemeanor in any court in this state, the judge may suspend sentence if he shall find that the defendant has never before been convicted of any felony or misdemeanor. The court shall permit testimony as to the general reputation of the defendant and as to whether the defendant has been convicted of a misdemeanor or felony, but such testimony shall be submitted only upon the request of the defendant."

The same section has been considered by this court in the cases of *State v. Fulco*, 136 La. 843, 67 South. 925, and *State v. Serio et al.*, 138 La. 678, 70 South. 609, and it was held in those cases that it was an error for the trial court to refuse to hear testimony such as that referred to in the bill now under consideration, even after sentence had been pronounced. In the instant case, the testimony was offered before sentence, and there seems to be little room for doubt that

the offer, as thus made, was within the contemplation of the law which defendant invokes.

It is therefore ordered that the sentence appealed from be set aside and that defendant be permitted to introduce evidence to show that he has not heretofore been convicted of any felony or misdemeanor.

(138 La.)

No. 20997.

LYNCH v. LYNCH.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by Editorial Staff.)

1. DIVORCE — 93(3) — SEPARATION FROM BED AND BOARD — PETITION — SUFFICIENCY.

In a wife's suit for separation from bed and board, a petition alleging that the husband almost incessantly cursed and abused the wife, calling her names too vulgar for repetition, and that from within 80 days after their marriage he began making overtures of love to persons of the other sex visiting his drug store, regardless of age or color, and continued these practices in the presence of the wife as long as she continued to live with him, stated a cause of action, though the petition did not give the dates of the acts complained of, nor the names of the women and girls to whom he made overtures of love.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 300, 304-307; Dec. Dig. ¶ 93(3).]

2. DIVORCE — 49(2) — SEPARATION FROM BED AND BOARD — DEFENSES — CONDONATION.

The wife's forbearance and patience in enduring such treatment for 4 years was not condonation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 172; Dec. Dig. ¶ 49(2).]

Monroe, C. J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by Mrs. Catherine Morere Lynch against Thomas Lynch. From a judgment sustaining an exception, plaintiff appeals. Judgment set aside, and case remanded.

Dart, Kernan & Dart, of New Orleans, for appellant. Charles I. Denechaud, of New Orleans, for appellee.

PROVOSTY, J. This being a suit in separation from bed and board, an exception of no cause of action has been sustained, and plaintiff has appealed.

[1] The petition alleges:

"That defendant continued almost incessantly and instantly to curse and abuse your petitioner, and call petitioner names too vulgar for repetition herein, and that said dates were so constant and numerous it would be impossible for petitioner to name any particular date, and that defendant continued to so abuse and curse petitioner and call her vile names for four years after said marriage in 1899.

"That within thirty days after petitioner's marriage to her said husband, Thomas J. Lynch, he began to make overtures of love with other ladies, and even with young girls and negro women, in the drug store owned by her said husband at Tulane avenue and Tonti street, whose names were unknown to petitioner, and

her said husband would be guilty of these offenses in the presence of your petitioner, and solely for the purpose of humiliating and degrading petitioner before the public.

"That her said husband continued these practices for four years immediately succeeding his marriage with petitioner, and petitioner realizing that at the end of four years that she could no longer endure such cruel and unusual punishment from an unnatural husband, was forced and compelled to leave and abandon her matrimonial domicile and return to live with her mother."

It is said these allegations are too vague and general, in that they do not give the dates of the several acts complained of, nor the names of the ladies, girls, and negro women to whom the defendant made overtures of love in his drug store. And it is said, further, that the fact that the plaintiff continued to live with defendant shows condonation.

[2] If the plaintiff can show that the defendant "almost incessantly cursed and abused her, calling her names too vulgar for repetition," and that from within 30 days after their marriage he began making overtures of love to the persons of the other sex who visited his drug store, regardless of age or color, and continued these practices in the presence of petitioner as long as she continued to live with him, the petition shows a cause of action, or else none ever did. Her forbearance and patience in enduring this treatment is not condonation. *Terrell v. Boardman*, 34 La. Ann. 301.

The judgment appealed from is set aside, and the case is remanded for trial according to law. Defendant to pay the costs of this appeal.

MONROE, C. J. I am of opinion that the petition does not sufficiently put the defendant on his defense, and that, as plaintiff failed to amend, the suit was properly dismissed.

(138 La.)

No. 21688.

THOMAS CUSACK CO. v. FORD.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by Editorial Staff.)

CORPORATIONS Ⓒ657(1)—**FOREIGN CORPORATIONS—CONTRACTS—VALIDITY.**

Const. art. 264, provides that no corporation shall do business in this state without having one or more known places of business and an authorized agent upon whom process may be served. Act No. 54 of 1904, § 1, as amended by Act No. 284 of 1908, as amended and re-enacted by Act No. 243 of 1912, provides that it shall be the duty of every foreign corporation, except insurance companies, doing business in this state, to file a written declaration with the secretary of state setting forth its domicile, places of business, and principal place of business within the state, and the names of its agents within the state upon whom process may be served. Act No. 54, 1904, § 2, provides that, whenever a foreign corporation shall do business of any nature in this state without complying with the require-

ments of section 1, it may be sued for any legal cause of action in any parish of the state, and that service of process in such suit may be made upon the secretary of state. *Held*, that these laws did not nullify or render unenforceable contracts made, but merely imposed penalties for noncompliance with the statute.

[Ed. Note.—For other cases, see *Corporations* Cent. Dig. §§ 2540, 2541, 2552, 2554; Dec. Dig. Ⓒ657(1).]

Certiorari on the relation of the Thomas Cusack Company, to review a judgment rendered for the defendant in an action by the relator against Frank B. Ford, doing business as Ford Brothers. Judgment set aside and case remanded.

Arthur A. Moreno, of New Orleans, for plaintiff. Theodore Cotonio, of New Orleans, for defendant.

PROVOSTY, J. Article 264 of the Constitution reads:

"No domestic or foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

Act 54, p. 133, of 1904, for carrying said article into effect, reads:

"That it shall be the duty of every foreign corporation doing any business in this state to file in the office of the secretary of state a written declaration setting forth and containing the place or locality of its domicile, the place or places in the state where it is doing business, and the name of its agent or agents or other officer in this state upon whom process may be served.

"Sec. 2. Be it further enacted, etc., that whenever any such corporation shall do any business of any nature whatever in this state without having complied with the requirements of section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served."

Section 1 of this act, as amended by Act 284, p. 423, of 1908, reads:

"That it shall be the duty of every foreign corporation doing business in this state to file in the office of the secretary of state a written declaration setting forth and containing the place or locality of its domicile, the place or places in the state where it is doing business, the place of its principal business establishment, and the name of its agent or agents or other officer in this state upon whom process may be served, provided, that no foreign corporation shall select as its agent or agents for service any person not residing in a parish where said corporation has an established business, and provided further, that service on said agent, whether personal or domiciliary shall constitute a valid service on said foreign corporation."

This act was amended and re-enacted by Act 243, p. 543, of 1912, so as to read:

"That it shall be the duty of every foreign corporation other than foreign insurance companies doing business in this state to file in the office of the secretary of state a written declaration setting forth and containing the place or locality of its domicile, the place or places in the state where it is doing business, the place of its principal business establishment, and the name of its agent or agents or other officer in the

state upon whom process may be served, provided, that no foreign corporation shall select as its agent or agents for service any person not residing in a parish where said corporation has an established business and, provided further that service on said agent whether personal or domiciliary shall constitute a valid service on said foreign corporation. Provided that every foreign insurance company doing business in this state shall appoint the secretary of state its agent upon whom all legal processes shall be served, and such service shall be legal and valid, as against such foreign insurance company."

The plaintiff company had not complied with these laws when it made the contract sued on with the defendant and when it brought this suit, and an exception was interposed to the effect that by reason of this noncompliance the contract was null and did not give rise to a cause of action. The exception was sustained by both of the lower courts, and the plaintiff has applied to this court for a review of the decision.

It was based, we are informed by defendant's brief, upon the decision of this court in the case of Southern Sawmill Co. v. American Hardwood Co., 115 La. 237, 38 South. 977, 112 Am. St. Rep. 267, and also upon the decision of the Supreme Court of the United States in the case of Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

The former of these cases involved simply the question of the sufficiency of citation of a foreign corporation, and hence in its facts has no analogy with the present case. True, the court said in it, arguendo, that articles 236 and 264 of the Constitution were "imperative," and that "foreign corporations should not be permitted to carry on business without precedent compliance with their requirement"; but it also said that "the statute has provided the remedy, which we do not think we should enlarge."

The other of these decisions is directly in point, for it arose under a constitutional provision expressed in exactly the same words as the one involved in this case, and under a statute practically similar, though somewhat stronger in its terms. Instead of merely providing, like the one in this case, that it shall be the duty of foreign corporations to comply with the requirements of the act before doing business, it provided that they shall do so "before they are authorized or permitted to do any business." The court said that, if the contract sued on was made in violation of a law of the state, it could not be enforced; but that what the state law inhibited was a course of business, or a continuing business, and not a mere isolated transaction like the one involved in the case.

But this same constitutional provision and this same statute came again before the court in this same connection in the case of Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, and the court there held the sanction of these laws was not the nullity, or

unenforceability, of the contract, but merely the penalties mentioned in the statute; that if the statute had intended that contracts entered into in the course of such business should be null, or unenforceable, it would have said so.

This last decision is, of course, controlling. The decision of the same court in Interstate Amusement Co. v. W. S. Albert, etc., 239 U. S. 560, 36 Sup. Ct. 168, 60 L. Ed. —, decided January 10, 1916, is not in point; it being based upon a statute entirely different in its terms. The only points there considered were as to whether the plaintiff in error's business was interstate or intrastate in character, and whether, if the former, the statute in question was not a violation of the "due process of law" and "equal protection clause" of the fourteenth amendment.

The decisions of the Court of Appeal and of the district court herein are therefore set aside, and this case is remanded to be proceeded with according to law; the defendant to pay the costs of this court and of the Court of Appeal.

(139 La.)

No. 20350.

THRASH et al. v. VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by the Court.)

RAILROADS \S 346(1) — OPERATION — ACCIDENTS AT CROSSINGS — BURDEN OF PROOF.

In an action for damages for the death of a child of tender age, who, while standing on a farm crossing, was run over and killed by a fast passenger train, the burden of proof is on the plaintiffs to show, with legal certainty, that the engineer of the train was negligent in not keeping a proper lookout, or in not stopping the train in time to avert the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1117; Dec. Dig. \S 346(1).]

Appeal from Third Judicial District Court, Parish of Bienville; W. C. Barnette, Judge.

Action by T. O. Thrash and another against the Vicksburg, Shreveport & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and suit dismissed.

Stubbs & Theus, of Monroe, for appellant. Reynolds & Williams, of Arcadia, and Wimberly, Reeves & Dormon, of Shreveport, for appellees.

LAND, J. Plaintiffs, the father and mother, sued for \$32,000 damages for the death of their son, nearly 3½ years of age, who on August 20, 1912, while standing on the railroad track at a private or farm crossing, was killed by a fast cannon ball passenger train of the defendant company.

Plaintiffs' statement of the case in their brief is as follows:

"The child was standing upon a public crossing, across the railroad track of the defendant

company, in plain view for at least 1,400 feet, looking from the east towards the west, the direction from which the train was coming.

"Defendant's answer is that the child was seen by the engineer immediately on rounding the curve, and that the engineer did everything possible to stop the train.

"From the time the engineer could see the child on the crossing, the train ran over 2,000 feet before it was brought to a standstill, approximately 1,400 feet before it hit the child. The child was knocked 76 feet down the track to one side."

"The maximum speed provided for this train was 32 miles an hour. Between no stations had it made more than 32 miles an hour on the day of the accident as shown by the official returns of the engineer as to the time made.

"The defendant further alleges that the child killed was suffering with hydrocephalus, and that this fact should minimize the damages, in fact should reduce them to an insignificant sum.

"Upon these issues the case was tried by a jury of competent men, residents of Bienville parish, La., and a verdict rendered in favor of plaintiffs for \$12,500. The defendant appealed, and the plaintiffs have answered the appeal and pray that the judgment be amended by allowing interest from the date of the judgment."

Defendant's statement of the case in its brief is as follows:

"During the noon hour of August 20, 1912, on a fair day, the plaintiffs permitted their afflicted child $3\frac{1}{2}$ years of age, to wander onto the track of the defendant at this farm crossing. There was no explanation of why the child was on the tracks, but we assume that, the house being only a short distance from the railroad, according to the statement of the plaintiff 300 steps, and the view being obstructed by a cornfield, while the father was resting and the mother engaged with the preparation of the noon meal, the unfortunate child wandered away without the knowledge of any one.

"Defendant's heavy cannon ball train, going west at the rate of speed from 40 to 52 miles per hour, at a safe distance from this farm crossing, gave the usual signal of its approach, viz., four blasts of the whistle. There was a considerable curve and a long cut just east of the crossing, and from the time that the child could be seen from the engine cab it was a downgrade of $\frac{8}{10}$ or 1 per cent., the maximum grade of the railroad, east of the city of Shreveport. The engineer was keeping a sharp lookout for the crossing and as soon as the engine turned the curve he discovered the child standing on or near the north rail of the track. The train was equipped with all modern appliances, and as soon as the presence of the unfortunate child was known, or could be known, the engineer sounded his alarm whistle, cut off his steam, applied his emergency brakes, sanded the tracks, and continued to sound the alarm whistle, but to no avail.

"The child, with his tender years and physical affliction, never appreciated the danger, and never moved. He was struck by the engine or pilot, carried along the railroad track some 30 or 40 feet, and rolled over the embankment; the rear cars of the train, notwithstanding the efforts of the engineer, cleared the crossing before it was brought to a standstill.

"Among other injuries received by the child, his skull was crushed, and he was unconscious and beyond the reach of pain from the moment he was struck until his death."

Counsel for the plaintiffs state in their brief:

"Our contention is that the engineer saw the little boy and knew his peril in ample time to have stopped the train before reaching the child, and that he negligently failed and neglected to do so. This point is the real gist of the case

and must be determined from the evidence."

The jurisdiction of facts makes it our duty to dict and judgment on record.

Defendant's statement is a fair narration of the facts of the train at the time of the accident. His testimony shows that on the curve, he saw the child standing thereon, and he immediately sounded the alarm whistle. He kept the train until within a few feet of the child, but the child moved from his position. He testified that at the time he could have stopped the train within about 1,200 feet in question his train was at a distance of 1,170 feet.

A civil engineer, with testimony that the child was on the crossing at a distance of 1,170 feet. The same witness, at the time the train was standing, made an actual measurement of the crossing was not visible at a distance of 1,170 feet. The witness testified that the child was not visible enough to admit that the child was on the crossing at the rapidly moving train might not have been at a distance of 1,170 feet.

The defendant's complaint by C. C. Meadows, one of the engineers, to a train, which ran over the crossing, had been stopped short of the crossing, shut off the emergency brakes, but the rear car of the train length beyond the crossing of Meadows is corroborated by the superintendent of the crossing and of another witness at the test.

The following questions were asked of Mr. Meadows:

"Q. Now then with a weight of this, with this that grade, running say at the top of the grade what distance is it possible to a standstill? A. Some 400 feet."

The same witness testified that the train, running at 30 to 40 miles an hour, on a level track, could be stopped at a distance of 900 feet; that the grade was about the maximum and such a grade would stop the train from 200 to 400 feet in advance.

Mr. Hearn, the supervisor, testified that a speed indicator he showed that, at the time the train came into view, it was traveling at 42 miles an hour, and

an hour when it reached the crossing. The intelligence and good faith of the three witnesses are not questioned.

Four engineers of long experience in running passenger locomotives corroborate the testimony of Meadows as to the distance in which the train could have been stopped on the occasion in question.

Stumpt, of the Kansas City Southern, said within from 1,250 to 1,400 feet, when the speed was from 40 to 46 miles an hour. The witness described several emergency stops which he had made, and stated that it would take from three to six seconds for an experienced engineer to detect an object on the track and to effectually apply the emergency brakes. The witness further stated that if the engineer was running 45 miles an hour, he would be going at the rate of 66 feet per second, and it would take him as much as five seconds to realize that it was necessary to set the brakes and to set them. The same witness testified that it would be impossible to stop a train within 1,170 feet under the conditions under which defendant's train was operated at the time of the accident.

Willis, of the Louisiana & Arkansas Railway Company, related three emergency stops he had made, and stated that on the occasion in question a stop within 1,170 feet was impossible. This witness said:

"There is no stop that can be figured with mathematical certainty until after the stop has been made, as the value of the coefficient friction is an uncertain quantity, but in the average operating condition this stop should be made in from 1,350 to 1,500 feet."

Jordan, of the Texas & Pacific, and Beau, of the Louisiana Railway & Navigation Company, testified to the same effect.

Plaintiffs' counsel asked the engineers called as witnesses on their side the following question:

"Q. From your practical experience as an engineer, in what distance could a train of seven cars, running from 35 to 40 miles an hour, be stopped, that was equipped with modern air brakes and sand, as it comes to the top of an ascending grade 3,000 feet in length, by the application of the emergency brake, the track being dry and all in first class condition?"

The question was answered by the respective witnesses, as follows:

J. L. Dalton: "380 to 500 feet."

A. McDermitt: "400 to 500."

T. F. Hamilton: "300 to 450."

L. O. Clyde: "300 to 450."

Thornton Howitt: "450 to 500."

Courtney Brice: "500 to 600."

W. C. Hanie: "Within 700 feet easily."

It is to be noted that the question calls for an average speed of $37\frac{1}{2}$ miles an hour, when the direct testimony of the engineer in charge of the train at the time of the accident calls for an average of $42\frac{1}{2}$ miles an hour. Nor does the question indicate the degree of the descending grade from the top.

None of the seven engineers except Hanie appear to have been experienced in running fast passenger trains or in making emergency

stops, and in fact three of them had never operated a passenger train.

Plaintiffs next introduced the scientific testimony of three witnesses to fix the distance within which the train in question could have stopped on the occasion of the accident.

Mr. Atkerson, professor of physics and electrical engineering, and dean of the College of Engineering, expressed the opinion that the train, at 40 miles an hour, could have been stopped within 400 feet, and at 45 miles an hour, within 510 feet. The witness, however, does not explain the process by which he reached his conclusion. Mr. Ramsey, mechanical engineer and superintendent of railroad tests, makes a distinction between a "high-speed" brake and a "quick-action" brake, and said that the train in question at 40 miles an hour could have been stopped with "high-speed" brake in 480 feet from point of application, and with "quick-action" brake in 600 feet. This witness stated that he had never worked as a locomotive engineer on any railroad.

Mr. Ramsey, and we presume, Mr. Atkerson also, figured from the "point of application," and did not include the distance traversed by the locomotive between the moment of the discovery of the object on the track and the application of the brakes. In the case at bar such distance may have been more than 300 feet.

Mr. Frank Bogart, superintendent mechanical engineering course, at Louisiana Industrial Institute, Ruston, La., in answer to a question similar to the one propounded to Mr. Ramsey, said that at 40 miles an hour the train could have been stopped within 197 $\frac{2}{100}$ feet, and at 45 miles an hour, within 250 $\frac{2}{100}$ feet, and at 50 miles an hour, within 309 feet.

This radical disagreement among the scientists impairs the force and effect of their testimony.

The question before the court is not one of science or mathematics, but whether Watts, the engineer of the defendant, was guilty of negligence in the operation of the train on the occasion in question.

Watts' testimony relieves him of the imputation of neglect, and the truth of his testimony is confirmed by the subsequent careful test made by Engineer Meadows under the direct supervision of Mr. Hearn, the superintendent of the company. The correctness of the test is supported by the positive testimony of four engineers of long experience in the passenger service, which is controverted by only one engineer of like experience.

In *Manning v. New Orleans Great Northern Ry. Co.*, 135 La. 11, 64 South, 925, a freight train, speeding at the rate of 20 or 25 miles an hour, ran over and killed a child, 26 months old, who was asleep on the track between the ties. In that case, the engineer

testified that he was keeping a lookout, and as soon as he saw that the object was a child, shut off steam, applied the emergency brakes, etc., but could not stop the train in time to avert the tragedy. An actual test showed that the child was not recognizable under the direction of the trainmaster, and the engineer testified that it would have taken about 1,000 feet to stop the train. This court said in part:

"We must view this case from the standpoint of Merritt, the engineer, who had not the slightest reason to anticipate that a child was sleeping on the track in front of him. * * * That the engineer should have seen the child in time to have prevented him from being shown by the evidence. The negligence, if any, was on the part of the custodians of the child. * * * The burden of proof was on the plaintiffs to prove * * * that Merritt, the engineer, was negligent. We are satisfied that they have failed to discharge that burden."

The judgment was reversed, and the suit was dismissed.

So we say in this case that the burden was on the plaintiffs to prove with legal certainty that Watts, as a careful and prudent engineer, should have stopped the train in time to have saved the life of the child on the crossing. Plaintiffs, primarily at fault for not looking after their child, have, in our judgment, failed to prove that its death was occasioned by the fault of the engineer. It is therefore ordered that the verdict and judgment below be avoided and reversed, and it is now ordered that plaintiffs' suit be dismissed, with costs.

(139 La.)

No. 20409.

LURIE v. TITCOMB.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 110—PLEA IN ABATEMENT—ADMISSIONS. A plea that the suit is premature is not an acknowledgment of the debt sued for.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 231-233; Dec. Dig. \S 110.]

2. ABATEMENT AND REVIVAL IN PLEADING. An exception or plea of prematurity cannot be considered, unless filed in limine litis, before an answer to the merits.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. \S 155, 176, 507-510; Dec. Dig. \S 84; Pleading, Cent. Dig. \S 212, 232.]

3. MASTER AND SERVANT \S 3(1)—DISCHARGE FROM EMPLOYMENT—RIGHT OF ACTION. When an employer and employé sign a tentative agreement to enter into a contract of employment, neither can be compelled to subscribe or agree to such terms or conditions as the employer writes the contract to suit himself and the employé also consents and agrees to without any good reason or excuse, and thereafter discharges the employé without any serious ground of complaint.

For other cases see same topic and KEY-NUMBER.

Appeal from Civil District Court, Paris of Orleans; Fred D. King, Judge. Action by Bernard Lurie against Charles C. Titcomb. From a judgment for plaintiff defendant appeals. Judgment annulled, and cause remanded for new trial.

Beauregard & Wright, of New Orleans, for appellant. Louis Randolph Hoover, of New Orleans, for appellee.

O'NIELL, J. The defendant has appealed from a judgment condemning him to pay the plaintiff \$2,013.14, the balance of a year's salary, on the finding that the plaintiff had discharged the defendant from his employment as foreman of a print shop, without any serious ground of complaint. The plaintiff annexed to and made a part of his petition the contract sued on, in the form of a letter from one H. D. Hamilton, which was accepted by the defendant, as follows, viz: "Please sign and return this to H. D. H., 258 Broadway."

"Charles Titcomb, Esq., P. O. Box 330, New Orleans, La.—Dear Sir: After interviewing Mr. Bernard Lurie, a practical printer with years' experience here in New York in printing plants, personally known to me, I offered him a position as superintendent of the Ruskin Press, subject to confirmation by you to pay his traveling expenses. I have two hundred (\$200.00) per month term of employment. Lurie reports that he has signed the contract."

"New York, August 26, 1912."

Mr. Hamilton, as

plaint, the latter has a cause of action for the unexpired term of the contract. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 2; Dec. Dig. \S 118.]

4. PLEADING \S 48—FORM OF ALLEGATIONS—NEGATIVE FACTS. Whatever facts must be proven to a suit on its merits must be alleged to be of a negative character. [Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 105, 106; Dec. Dig. \S 118.]

5. PLEADING \S 118—ANSWER—DEFENSE. To deny an allegation which, by the statute on which the suit is founded, the plaintiff was compelled to make in his special defense. [Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 243; Dec. Dig. \S 118.]

6. MASTER AND SERVANT \S 39(2)—DISCHARGE FROM EMPLOYMENT—ISSUES AND PROOF. In an action under Rev. Civ. Code, Art. 2749, giving an employer discharged without serious ground for complaint a right of action for his salary for the full term for which he was employed, where defendant denied the allegation of the petition that the discharge was without good and valid reason or cause, it was error to exclude his evidence offered to contradict plaintiff's allegation. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 12, 46; Dec. Dig. \S 118.]

which I suggest you let me inspect before its final execution.

"If this is satisfactory to you, kindly so indicate by signing both of these and returning them to me. I will then present them to him for signature when they will constitute a preliminary contract to be replaced by one to be drawn after his taking hold in N. O.

"Very truly yours,

"[Signed] H. D. Hamilton.

"I agree to the foregoing,

"[Signed] Chas. C. Titcomb.

"[Signed] Bernard Lurie.

"In presence of

"[Signed] Walter Halliday."

The plaintiff alleged that the written agreement or contract of employment was to be amplified by another contract to be entered into between him and the defendant after the plaintiff reported for work in New Orleans, which was to replace the contract of employment dated in New York, August 26, 1912. He alleged that the defendant paid his traveling expenses to New Orleans, and that he reported for work on the 17th of September, 1912; that on the following day the defendant had his attorneys to prepare a "substituting contract," which plaintiff was willing and ready to sign, but that the defendant put off signing it, on various pretexts, and finally, on the 20th of November, 1912, discharged plaintiff from his employment, without any good or valid reason or cause. He alleged that he was employed for a year, at the rate of \$200 a month; that it was the custom of the defendant to pay plaintiff on the 1st and 15th of each month; and that he was paid up to the 15th of November, 1912, \$386.86. He alleged that he was a practical printer of many years' experience, that he was competent to perform the duties for which he was employed, and gave his employer no serious cause for complaint.

Before answering the petition, the defendant filed an exception, alleging that the petition was vague and indefinite, and did not disclose a cause of action. The exception of vagueness was overruled, and the exception of no cause of action was referred to the merits, to which rulings the defendant reserved bills of exception; and, with reservation of his exceptions, he answered the petition. The pleadings were filed before the passage of the act No. 157 of 1912, requiring each allegation of a petition to be set forth in a separate paragraph and requiring the defendant to admit or deny each allegation separately; and the pleadings were not drafted in that form.

The defendant denied generally all of the allegations of the petition. He averred that, as the written agreement sued on was only a preliminary agreement, contemplating the signing of a contract of employment, which was never signed, there was no contract of employment. He averred that he had the right to refuse to sign a contract of employment; that he discharged the plaintiff for cause, as he had a right to do, with or with-

out a contract; and that, if he had signed the contract contemplated, he would have had the right to discharge the plaintiff, under the terms and conditions of the contract. He alleged that, when he discharged the plaintiff, he offered to pay him for the 5 days he had worked, and was yet willing and ready to pay him; but defendant denied the plaintiff's right to recover it in this suit on an alleged contract. After having filed the answer, the defendant filed what he called a peremptory exception, alleging that the suit was premature and should be dismissed. This plea was overruled.

On the trial, the document annexed to the petition was produced and the signatures were proven by the plaintiff, who was the first witness in the case. He then testified that he was a practical printer of more than 25 years' experience; that he came to New Orleans and commenced working for the defendant under the contract of employment on the 17th of September, 1912, and was discharged on the 20th of November of that year; that he had been paid on the 1st and 15th of each month, to and including the 15th day of the month in which he was discharged. He testified that he was discharged by a Mr. Bayhi; that he (plaintiff) had a conversation with the defendant the next day, and the latter gave no reason for the discharge, merely saying that "what Mr. Bayhi said went." Continuing to answer the questions propounded by his attorney, the plaintiff then testified that no objection had been made to the services he had rendered, and that the defendant had not given any reason at all for discharging him. His attorney then asked him:

"Had there been anything happening during the course of your employment that would give Mr. Titcomb a reason to discharge you?"

To which the plaintiff answered:

"Nothing serious."

Considering some explanation necessary, the attorney then asked:

"Well, what did happen after you came down here?"

To which he replied:

"After I came down here, we occasionally had a little talk about some spelling, the way things should be spelled in the office."

Here the defendant's counsel interrupted the answer, by objecting to the testimony as being irrelevant, unless the plaintiff assigned that (presumably meaning the complaint about the spelling) as a reason for his discharge. The court sustained the objection, on the ground that the defendant had not, in his answer, set forth any reason for the discharge. Observing that the defendant's objection had operated like a boomerang, the plaintiff's counsel acquiesced, with the remark that he considered his honor's ruling very good. The plaintiff then testified that he had been willing and ready at all times to sign the contract referred to in the preliminary agreement, and had asked the de-

fendant to sign it. He produced the unsigned document, which he said had been prepared by the defendant's attorneys, and it was filed in evidence, over the objection of the defendant's counsel. The plaintiff's counsel announced that he had completed the offering of his evidence, and the defendant's counsel then proceeded to cross-examine the plaintiff. When the defendant's counsel sought to have the plaintiff contradict his statement, that his discharge was "without any serious ground of complaint," by examining him as to his competency to do the work of a foreman of a printing establishment, the plaintiff's counsel urged the objection that the defendant had not alleged that he had discharged the plaintiff for incompetency. The objection was sustained, and, after the cross-examination had gone as far as the court's ruling would permit, the trial was continued from the 27th of March to the 10th of April. On the 7th of April, the defendant filed a supplemental answer, alleging that the plaintiff was utterly incompetent and had been guilty of insubordination. Judge Ellis, acting for Judge King, who was absent on leave, ordered the supplemental answer filed. The trial of the case was not resumed until the 24th of April. The defendant then offered testimony to prove the alleged incompetency of the plaintiff, which was again objected to by the plaintiff's counsel. When his attention was called to the supplemental answer, plaintiff's counsel objected to its allowance, on the ground that it was filed too late. To which the judge, addressing the defendant's counsel, responded:

"I think you are wrong, Mr. Wright. I shall overrule it."

Opinion.

[1, 2] There is no merit in the appellee's contention that the defendant's plea, that the plaintiff's suit was premature, was an acknowledgment of the debt sued for. The defendant had acknowledged, in his answer, that he owed the plaintiff for 5 days' work. The plea of prematurity might have referred to the demand for that amount. This exception, however, was properly overruled, because it was a dilatory exception, and such exceptions cannot be considered if filed after the exceptor has answered the petition. *C. P. 333; Pecquet v. Pecquet's Executor, 17 La. Ann. 204; Wiltz v. Rome, 18 La. Ann. 187; Penniston v. Jefferson, 18 La. Ann. 158; Mortee v. Edwards, 20 La. Ann. 237; Meaux v. Pittman, 35 La. Ann. 360.*

[3] The exception that the petition was vague and indefinite and did not disclose a cause of action should have been overruled. The allegations of the petition are not vague or indefinite. The plaintiff disclosed a cause of action by his allegations: That he was employed for the term of one year, at a salary of \$200 a month; that it was the custom of the defendant to pay on the 1st and

15th of each month; that the employment commenced on the 17th of September; and that he (plaintiff) was discharged on the 20th of November, without any serious ground of complaint, or, quoting the allegation, "without any good and valid reason or cause." If these allegations are true, the plaintiff is entitled to a judgment for some amount. It may be for only the 5 days' work which he had performed and for which he was not paid when he was discharged; or it may be for the remaining 15 days in the month of November, or for a month commencing on the 15th of November. These are questions to be determined after a trial of the case on its merits. The appellant contends that the document annexed to and made a part of the plaintiff's petition discloses that it was only a preliminary or tentative agreement, showing that the parties contemplated signing a contract of employment, and, that, in the absence of the contemplated written contract, there was no contract at all. In support of this contention, he refers us to the decisions in *Des Boulets v. Gravier, 1 Mart. (N. S.) 420; Bloeker v. Tillman, 4 La. 77; Laroussini v. Werlein, 48 La. Ann. 13, 18 South. 704, and Canal Co. v. Burgin, 106 La. 310, 30 South. 863.*

If the parties failed to agree upon the terms of the contract contemplated in their tentative or preliminary agreement, they could not be compelled to agree. But if, as is alleged by the plaintiff, the defendant had his own attorneys to prepare a substituting contract which suited the defendant and was submitted to and agreed to by the plaintiff, and if the defendant thereafter, as plaintiff alleges, "put off signing it, on various pretexts" (which we understand to mean without good reason), "and finally, on the 20th of November, 1912, discharged plaintiff from his employment, without any good or valid reason or cause," the plaintiff has a cause of action under the terms of article 2749 of the Revised Civil Code. Our opinion, therefore, is that the allegations of the petition and the document annexed thereto and made part thereof do disclose a cause of action, and that the exception of no cause of action should have been overruled.

[4-6] After a careful consideration of the ruling, excluding the evidence offered by the defendant to contradict the allegation and the testimony of the plaintiff, that his discharge was, in the language of the Code, "without any serious ground of complaint," or, in the language of the petition, "without any good and valid reason or cause," we are of the opinion that the court erred. The ruling was based upon the proposition that the defendant, in his answer, should have informed the plaintiff of the particular ground or grounds of complaint or cause or causes for his discharge. The defense was considered a special defense, like the plea of contributory negligence in an action for

damages arising *ex delicto*. We do not concur in that view. In order to set forth a cause of action, it was necessary for the plaintiff to allege in his petition, as he did allege substantially, and, in order to obtain judgment for the unearned salary, it was necessary for him to prove, as he testified substantially, that his discharge was without any serious ground for complaint on the part of his employer. Whatever facts must be proven to maintain a suit upon its merits must be alleged to set forth a cause of action, even though the allegations be of a negative character. Succession of Herber, 117 La. 239, 41 South. 559; Backburn v. La. Ry. & Nav. Co., 128 La. 327, 54 South. 865; Vinton Oil & Sulphur Co. v. Gray, 135 La. 1066, 66 South. 357.

The plaintiff is demanding a judgment for a sum of money, for which he gave no consideration whatever, only by virtue of the provisions of the Civil Code. Article 2749, R. C. C., provides:

"If, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived."

To deny an allegation which, by the terms of the statute, the plaintiff is compelled to make and sustain with his proof, cannot be considered a special defense. Undoubtedly, it would be only a fair and reasonable requirement for the trial judge to compel the defendant, in a suit like this, to specify the ground or grounds of complaint or cause or causes of the discharge, if the plaintiff should require such particulars in the defendant's pleading, before going to trial. In this case, no such demand was made by the plaintiff before the trial commenced. And, when the defendant supplemented his answer, by stating the grounds of complaint or causes for the discharge, the plaintiff objected to its consideration. In a case like this, it might well be presumed that the discharged employé was aware of the grounds of complaint or cause of his discharge. In this particular case, however, the plaintiff produced the unsigned contract of employment, which he testified he had had in his pocket for quite a long time, to the terms and conditions of which he sought to hold the defendant. The causes mentioned in the contract, for which the plaintiff might have been "summarily discharged," are "insubordination, intemperance and incompetency." If the plaintiff deemed it necessary or important for him to know whether the cause of his discharge, or ground of complaint, was insubordination, intemperance, or incompetency, or all of them, or some other complaint, his remedy was to demand that the defendant be more specific in his pleading.

For the reasons assigned, the judgment ap-

pealed from is annulled and set aside, and it is ordered that this case be remanded to the civil district court for a full trial in accordance with the views herein expressed, and particularly to hear evidence on the question of the alleged incompetency and insubordination, under the allegations of the supplemental answer.

(139 La.)

No. 20213.

STATE *ex rel.* ALBRITTON v. GRACE,
Register.

(Supreme Court of Louisiana. Oct. 18, 1915.
On Rehearing, March 20, 1916.)

(Syllabus by the Court.)

1. MANDAMUS \S 168(4) — PROCEDURE — EVIDENCE.

Where, in a proceeding by mandamus to compel the register of the State Land Office to recognize and relocate land warrants, issued in 1860, or "refund" warrants in lieu thereof, to an alleged assignee of the heirs of the original purchaser, alleged to be deceased, there is no proof of heirship, or of the existence, or devolution, of the warrants, at the death of the purchaser, and the warrants are neither produced nor accounted for, the proceeding is properly dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 374; Dec. Dig. \S 168(4).]

On Rehearing.

2. MANDAMUS \S 168(2) — PROCEDURE — BURDEN OF PROOF.

The heirship of relator's vendors being a necessary link in his chain of title to the land warrants in dispute, the burden is on him to prove with legal certainty that his vendors are the sole heirs of the original holders of the warrants.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 372; Dec. Dig. \S 168(2).]

3. APPEAL AND ERROR \S 1153 — DETERMINATION—DISMISSAL—INVOLUNTARY NONSUIT—GROUNDS.

A judgment of nonsuit should be entered, where it is probable that material evidence, not adduced on the trial, may hereafter be procured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4507-4512; Dec. Dig. \S 1153.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Mandamus by the State, on the relation of Alvin R. Albritton, against Fred J. Grace, Register. From a judgment for defendant, relator appeals. Judgment amended, and suit dismissed.

W. Carruth Jones, Alvin R. Albritton, and Justin C. Dasplé, all of Baton Rouge, for appellant. R. G. Pleasant, Atty. Gen. (G. A. Gondran, of New Orleans, of counsel), for appellee.

Statement of the Case.

MONROE, C. J. Relator has appealed from a judgment rejecting his application for a writ of mandamus, directing the register of the State Land Office to locate certain land warrants, or issue other warrants "in lieu" thereof, and locate the same on

land constituting the bed of Dolet Lake, in the parish of De Soto.

Paragraph 8 of the petition reads:

"Your relator shows that he is the true and lawful owner of the following described swamp land warrants, or certificates, issued, under authority of Act 247 of 1855, by the State of Louisiana, to John Laidlaw, and located, by the said Laidlaw, on July 2, 1860, on lands, the title to which was never vested in the state of Louisiana, to wit:

"Warrant No. 8922 N. S. H. for 128.50 acres.

"Warrant No. 8924 N. S. H. for 142.16 acres.

"Warrant No. 8930 N. S. H. for 271.23 acres.

"Warrant No. 8934 N. S. H. for 237.50 acres.

"Making a total of 779.39 acres."

Paragraph 8 of the answer reads:

"Defendant denies that relator is the true and lawful owner of the warrants described in paragraph 8 of relator's petition, issued, under authority of Act No. 247 of 1855, by the state of Louisiana, to John Laidlaw, but admits that said warrants were located by the said Laidlaw as averred in said paragraph 8."

Opinion.

[1] We find in the record what purports to be a copy of an act of procuration, executed by Mrs. Alexina Bryan Laycock, authorized by her husband, L. L. Laycock, before a notary public in Victoria county, Tex., which names Alexander D. Bryan as attorney in fact of Mrs. Laycock, for, and in her name and stead, to grant, bargain, and sell unto Alvin E. Albritton, or any other person, the "following described property, to wit, a certain lot of state land warrants, issued by the state of Louisiana to John Laidlaw and to the widow and heirs of John Laidlaw."

The instrument contains the recital that Mrs. Laycock, Eliza L. Laidlaw, and Alexander D. Bryan "are the sole and only heirs of the late John Laidlaw and his widow"; but, there is no further description of the warrants which Alexander D. Bryan is thus authorized to sell, nor is there any stronger evidence in the record than the ex parte and unsworn statement, thus made, that the persons so named are the heirs, and the only heirs, of John Laidlaw and his wife, nor any statement whatever, sworn or unsworn, that John Laidlaw and his wife owned any land warrants, when they, he, or she, died, or that their heirs ever came into possession of such warrants; and no such warrants were offered in evidence, or are to be found in the record, nor is their absence in any manner accounted for. There is another instrument copied in the record, purporting to have been executed by Alexander D. Bryan, for himself and Mrs. Laycock, and by Eliza L. Laidlaw, a feme sole, which also declares that the appearers are the heirs of John Laidlaw and his wife, and, further, that they sell and convey the warrants described in the petition to the relator, but there is, still, no proof of heirship, or of the existence or devolution of the warrants, upon the death of the original owner. We conclude, then, after having spent some time in the investi-

gation of the various issues that have been raised in the case, that relator must necessarily go out of court by reason of his failure to show that the warrants upon which he sues were owned by the original purchaser at the time of his death, and devolved upon his heirs; that his (relator's) immediate authors are the heirs of the original purchaser; or that the warrants were ever in their possession, or ever came into his (relator's) possession.

The judgment appealed from is therefore affirmed at the cost of the relator.

On Rehearing.

LAND, J. The answer denied that the relator was the owner of the warrants located by John Laidlaw, and that the relator was the heir or the legal representative of the said Laidlaw.

[2] On the trial, the relator offered in evidence a certain instrument signed by certain persons, claiming to be the sole heirs of John Laidlaw, purporting to sell, convey, and assign the said warrants to the relator. But the relator adduced no evidence to prove that his vendors were the heirs of said Laidlaw. The warrants were located by John Laidlaw in July, 1860. The right to relocate the warrants vested in his succession. The evidence does not show when John Laidlaw died, or who were his legal heirs, successors, or legal representatives.

[3] The relator, in his petition, claims ownership of the original warrants, but does not disclose the origin of his title. As land warrants are not negotiable instruments in favor of bearer, relator's possession of them is no evidence of legal title. As to the assignment of the warrants, the heirship of relator's vendors being a necessary link in his chain of title should have been proven with legal certainty. *Solari v. Barras*, 45 La. Ann. 1132, 13 South. 627. As the defect in the evidence may hereafter be supplied, we think that the judgment should be one of nonsuit.

It is therefore ordered that our former decree herein be reformed so as to read: The judgment appealed from is amended so as to dismiss this suit as in case of nonsuit, and as thus amended is affirmed; cost of appeal to be paid by plaintiff and appellant.

PROVOSTY, J., recused.

(189 La.)

No. 20404.

GLISSON v. BIGGIO et al.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

1. REMOVAL OF MUNICIPAL OFFICERS—CONSTITUTIONAL PROVISION.

Under article 222 of the Constitution, district attorneys are required to institute suits for the removal of municipal and other officers

"on the written request and information of twenty-five resident citizens and taxpayers," who are given the right to appeal both on the law and the facts, and who in case of the acquittal of the officer are made liable in solido for all costs of the suit.

2. MALICIOUS PROSECUTION \Leftrightarrow 47—ACTION—PLEADING.

A petition alleging that the plaintiff, a mayor of a certain town, had been prosecuted under article 222 of the Constitution on the written request and information of the defendants, and that, pending the trial, after the introduction of evidence, the suit had been discontinued on the motion of the district attorney, that the charges of malfeasance, misfeasance, corruption, etc., made by the defendants in their written request or petition to the district attorney were false and untrue, and were made by them without probable cause, and with the malicious intent to destroy plaintiff's reputation as an officer, and as a man and citizen, discloses a cause of action.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 91, 92, 96; Dec. Dig. \Leftrightarrow 47.]

8. LIBEL AND SLANDER \Leftrightarrow 38(1)—MALICIOUS PROSECUTION \Leftrightarrow 50—PRIVILEGED COMMUNICATIONS—PLEADING.

In this state a libelous allegation is not privileged unless founded on probable cause. In a suit for damages for a malicious prosecution the plaintiff is not required to allege specially that the defendants knew that the charges made by them were false. It suffices for the plaintiff to allege that the charges are false, made in malice, and without probable cause.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 117, 123; Dec. Dig. \Leftrightarrow 38(1); *Malicious Prosecution*, Cent. Dig. § 97; Dec. Dig. \Leftrightarrow 50.]

4. MALICIOUS PROSECUTION \Leftrightarrow 35(1)—RIGHT OF ACTION—TERMINATION OF PROSECUTION.

The dismissal or discontinuance by the state of an impeachment suit during the trial thereof is a termination of the prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-76; Dec. Dig. \Leftrightarrow 35(1).]

(Additional Syllabus by Editorial Staff.)

5. MALICIOUS PROSECUTION \Leftrightarrow 20—"PROBABLE CAUSE."

The term "probable cause," as used with reference to an action for malicious prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious man to believe that the accused is guilty of the offense with which he is charged.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 26-28; Dec. Dig. \Leftrightarrow 20.]

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Joseph B. Lancaster, Judge.

Action by J. E. Glisson against Charles Biggio and others. From a judgment for defendants on exceptions of no cause of action, plaintiff appeals. Reversed, exceptions overruled, and cause remanded.

Paul A. Sompayrac and William H. Byrnes, Jr., both of New Orleans, for appellant. Leonard C. Moise, of Covinton, for appellees.

LAND, J. Plaintiff, while mayor of the town of Abita Springs, parish of St. Tam-

many, was made defendant in a suit or proceeding instituted by the district attorney, under article 222 of the Constitution, to remove him from office. The suit was instituted on the written request and information of 29 citizens and taxpayers of the said town of Abita Springs, claiming to have knowledge of the fact that J. E. Glisson, Mayor, etc., had been guilty of nonfeasance and malfeasance in office, and favoritism, gross misconduct, and conduct unbecoming an officer.

The suit, during the trial thereof, was dismissed on the motion of the district attorney.

Thereafter the plaintiff instituted the present action against 22 of the signees of said written request to the district attorney to recover the sum of \$50,647 as damages for the malicious prosecution of said suit.

The defendants filed an exception of no cause of action, which was maintained by the lower court, and the suit was dismissed. Plaintiff has appealed.

[1, 2] The petition represents that all of the defendants did maliciously act together, conspire, and assist each other in an effort on their part to destroy the plaintiff as a private citizen and public official, to destroy his personal and business and official reputation, to humiliate him and his family, and to unjustly and without probable cause have him impeached as mayor of the town of Abita Springs.

The petition further represents that in aid of their said malicious purposes and conspiracy defendants did write or have written, sign, circulate, and cause to be circulated, and did utter and publish, a petition to the district attorney containing libelous, defamatory, and false charges against the plaintiff, as shown by copy annexed to his petition.

The petition then sets forth the charges contained in the said petition or request to the district attorney, and alleges:

"That in circulating and publishing, signing and seeking the signatures of other persons the defendants herein did maliciously make false, defamatory, and libelous charges against your plaintiff. And they intended to and did maliciously injure him before the public, and in the esteem of many citizens of the state of Louisiana who had known your plaintiff for many years."

The petition further represents that the defendants, in aid of and to further their aforesaid malicious purposes and conspiracy, presented their said petition to the district attorney, and on said petition, with the aid of private counsel employed by defendants for that purpose, the district attorney instituted suit against the plaintiff, and that in the petition aforesaid the district attorney, aided by private counsel employed by defendants, did make, without probable cause, unfounded, libelous, and malicious charges against your plaintiff; that the said allegations and charges, though probably not the fault of the district attorney, were founded on the misrepresentations of the defendants;

that said allegations were not only false and malicious, but damaging, as appears from the following quotation:

"That since the said J. E. Glisson has qualified as mayor, and on various occasions thereafter, he has been guilty of nonfeasance and malfeasance in office, of corruption, favoritism, of oppression in public office, of gross misconduct, conduct unbecoming an officer, and habitual drunkenness."

The petition represents that said petition also contained a charge that the plaintiff had unlawfully signed a warrant for \$50 on the town treasurer to pay a debt contracted by plaintiff for his own account.

The petition further represents that, when the removal suit was called for trial, defendants herein, who were plaintiffs in said suit, acting through their attorneys, placed certain witnesses on the stand, but they failed to sustain their charges and allegations, and after the trial had proceeded for one day and nearly a half the suit was dismissed by the district attorney.

The petition charges that in signing and circulating the said petition, and in presenting the same to the district attorney, and in causing him to institute the removal suit, and in undertaking to place witnesses on the stand, the defendants acted maliciously and without probable cause.

[4] The objection that the petition does not allege that the removal suit had been terminated by judgment on the merits is bad under our jurisprudence. See *Banken v. Locke*, 136 La. 157, 66 South. 763.

[3] The objection that the petition does not charge that the defendants knew that the charges made by them were false is without merit.

[5] The petition alleges the essential elements of want of probable cause, and malice. This is all the law requires as to the scienter of the defendants.

"Malice, as well as absence of probable cause, must be alleged; otherwise the declaration or complaint is bad on demurrer." 26 Cyc. 75.

"The term 'probable cause,' as used with reference to an action for malicious prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious man to believe that the person accused is guilty of the offense with which he is charged." *Banken v. Locke*, supra.

Hence the allegation that the defendants acted "without probable cause" necessarily implies that they had no reasonable ground of suspicion to warrant them in making the charges set forth in their petition.

We know of no case holding that the plaintiff, in a suit like this, is bound to allege specially that the defendants knew that the charges made by them were false. Plaintiff, under all the authorities, is only required to prove malice and the absence of probable cause for the prosecution. 1 *Hennen's Digest*, p. 823; 26 Cyc. 8. What plaintiff is not called upon to prove he is not required to al-

lege. The scienter of the defendant is the falsity of the charges is implied in the allegations that they were made in malice and without probable cause.

Counsel for defendants cites *W. R. Hathaway*, 122 La. 644, 48 S. R. A. (N. S.) 33, a suit for alleged libel contained in a business letter. In that case the plaintiff did not allege the publication of the letter, or that the statements therein were false and untrue, to the injury of the defendant.

Whether it is necessary in a suit for libel for plaintiff to allege that the defendant knew that the charges were false is not necessary for us to decide in this case.

Defendants further object to the removal suit presented by them to the district court. It was a privileged communication from *v. Joseph Schwartz Co.*, 116 La. 708, this court held that the rule that in a suit for libel the truth of the allegations the verity of matters alleged cannot be inquired into, but that the truth of the allegations is absolutely privileged under article 2315 of our Constitution. That a judicial allegation is not less founded on probable cause.

It is therefore ordered that the exception below be reversed, and it is no longer the defendants' exception of no cause shown is overruled, and that this cause be remanded to the district court for further proceedings according to law; defendant's costs of appeal and costs below included in the exception.

(139 La.)

No. 21164.

IBERVILLE BANK & TRADING CO. vs. J. E. DUPUY.

In re H. T. COTTAM & CO. (Supreme Court of Louisiana).
Rehearing Denied March 1, 1904.

(Syllabus by Editorial Board)

1. HOMESTEAD \S 166—WAIVER—MARGINAL REGISTRY—

A marginal inscription of a mortgage in favor of the plaintiff upon which a mortgage in favor of the defendant was recorded was not a registry.

[Ed. Note.—For other cases, see Cent. Dig. \S 330; Dec. Dig. \S 330.]

2. APPEAL AND ERROR \S 171—TO ALLEGE ERROR.

As an allegation of the registry of homestead was an allegation of fact and not of a conclusion of law, the intervenor, in its pleadings, admitted and conceded that the homestead was estopped to deny the registry.

[Ed. Note.—For other cases, see Error, Cent. Dig. \S 1088; Dec. Dig. \S 1088.]

3. HOMESTEAD \S 171—WAIVER—Waiver by the defendants of the plaintiff bank of the homestead

exemption on the property described in an act of mortgage, although referring to the particular act of mortgage for the purpose of identifying the homestead property, was general in its terms and referred to all debts to the plaintiff bank.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 338; Dec. Dig. ¶ 171.]

4. **HOMESTEAD** ¶ 175 — **WAIVER** — **NOTES** — **EQUITIES AND DEFENSES BETWEEN ORIGINAL PARTIES—RIGHTS OF A PURCHASER ON SECURED NOTE.**

Under Civ. Code, § 2645, providing that the sale or purchase of a credit must include everything which is an accessory to the same, as suretyship, privileges, and mortgages, where the plaintiff negotiated one of the secured notes under a mortgage, the note did not lose the benefit of a waiver of homestead executed in favor of the plaintiff by being transferred.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 341, 343; Dec. Dig. ¶ 175.]

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Jos. E. Le Blanc, Judge.

Suits by the Iberville Bank & Trust Company against P. A. Dupuy, in which H. T. Cottam & Co., Limited, filed a petition praying to be permitted to intervene. From a judgment in favor of the plaintiff, the interveners appeal. Affirmed.

J. Howell Pugh, of Plaquemine, and Dart, Kernan & Dart, of New Orleans, for appellants. Borron & Wilbert, of Plaquemine, for appellee.

PROVOSTY, J. In three separate suits filed at the same time against the defendant, Dupuy, the plaintiff bank foreclosed on three separate mortgages. In one of these suits the debt was also secured by vendor's privilege. The third opponent intervened in all three suits, alleging that it had a mortgage subsequent in registry to those of the plaintiff bank, but in favor of which the defendant and common debtor Dupuy had waived the homestead; and alleging in one of the suits that the debt sued on in it, due to the plaintiff bank, was entitled to be paid by preference out of the proceeds of the sale of the mortgaged property by reason of the fact that it bore the vendor's privilege against which the homestead could not be invoked; and alleging in another of the suits that the debt sued on in it, due to the plaintiff bank, was entitled to be paid by preference out of the proceeds of the foreclosure sale by reason of the fact that by a duly recorded waiver the common debtor Dupuy had waived the homestead in its favor; and alleging in the remaining suit, "that your petitioner as subrogee to the extent that said rights were not renounced by said P. A. Dupuy and his said wife in the special waiver recorded in the mortgage records of this parish on May 29, 1909," is entitled to be paid by preference out of the proceeds of the foreclosure sale.

The three suits were consolidated for trial, and were tried as one. In his reasons for

judgment, the trial judge dealt with but one question: Whether the recorded waiver of homestead in favor of the plaintiff bank was special to the debt in one of the suits, or was general to all debts that the debtor Dupuy might owe the said bank. He held that it was general, and directed that all three of the claims of the plaintiff bank be paid by preference—as well the one over which the opponent claimed a preference as the two which were conceded to have preference.

[1-3] In this court opponent argues that the said waiver in favor of the plaintiff bank was never recorded. As a matter of fact, so far as appears from the evidence, it was not, for the only inscription of it, so far as appears from the evidence, was in the margin of the page upon which one of the mortgages in favor of the plaintiff bank was recorded; and a marginal registry of this kind is, of course, no registry. But we agree with the plaintiff bank that the opponent having in its pleadings in the case, and by the whole course of the trial, admitted and conceded that the said waiver was recorded, cannot now on the appeal be allowed to contend that the said waiver was not recorded.

The learned counsel for opponent very properly say that the allegation of a conclusion of law does not estop; but we cannot agree with them in their contention that the allegation of the registry of this waiver was merely the allegation of a conclusion of law. We think it was the allegation of a matter of fact. The allegation and prayer of the petition for intervention in that one of the suits involving the debt to which the waiver was alleged to be special, read as follows:

"That said P. A. Dupuy and his said wife, Adelaide Dupuy, waived their homestead rights on the property described in the act of mortgage passed on the 24th day of May, 1909, before Frederic P. Wilbert, notary public, which was given to secure the note foreclosed on by said Iberville Bank & Trust Company, plaintiff in said executory proceedings, and said homestead waiver was recorded in the mortgage records of this parish of the 29th day of May, 1909.

"That said Iberville Bank & Trust Company as the first mortgagee on said seized property and as the subrogee of the homestead rights of said P. A. Dupuy is entitled to be paid first out of the proceeds of the sale of said property its claim of \$375, with interest at the rate of 8 per cent. per annum from November 25, 1912, until paid, and 10 per cent. on said principal and interest as attorney's fees, and all costs of said executory proceedings No. 1740 of the docket of this court; but your petitioner as the second mortgagee and as the subrogee to the homestead rights of said P. A. Dupuy to the extent that said rights were not waived in favor of said bank is entitled to exercise said P. A. Dupuy's homestead exemption on the property seized, and by virtue of said second mortgage and said homestead exemption petitioner is entitled to be paid the surplus of said proceeds, in preference to other creditors of said P. A. Dupuy.

"Wherefore, the premises, the annexed documents, and affidavits considered, petitioner prays that this, its petition of intervention and third opposition, may be allowed; that the Iberville Bank & Trust Company, the seizing creditor in

the executory proceedings entitled the Iberville Bank & Trust Company v. P. A. Dupuy, No. 1740, of the docket of this court be cited and served with a copy of this petition of intervention and third opposition, and that after due proceedings had there be judgment decreeing that said Iberville Bank & Trust Company be paid first out of the proceeds of the sale of the property seized by it in said executory proceedings to the extent of its claim, three hundred and seventy-five dollars (\$375.00), with interest at the rate of 8 per cent. per annum from November 25, 1912, until paid, and 10 per cent. on said principal and interest as attorney's fees, and all costs of said executory proceedings, as the first mortgagee and as the second mortgagee and as the subrogee to the homestead rights of said P. A. Dupuy to the extent that said rights were not waived in favor of said bank by said P. A. Dupuy, be permitted to exercise said homestead exemption on the property seized in said executory proceedings, and by virtue of said second mortgage and said homestead exemption petitioner be paid the surplus of said proceeds, in preference to other creditors of said P. A. Dupuy; and that the sheriff of the parish of Iberville be given due notice of the filing of this petition of intervention and third opposition and served with a copy of the same, and that he be directed to retain in his hands, subject to the further orders of this court, the proceeds of the sale of the property seized by virtue of the order of seizure and sale in the above-entitled executory proceedings."

The allegation and prayer of the petition for intervention in that one of the suits involving the debt over which opponent claimed a preference read as follows:

"That your petitioner as the subrogee to the homestead rights of said P. A. Dupuy to the extent that said rights were not renounced by said P. A. Dupuy and his said wife in the special waiver recorded in the mortgage records of this parish on May 29, 1909, is entitled to exercise said homestead exemption on the property seized in the above-entitled executory proceedings, and by virtue of said homestead exemption petitioner is entitled to be paid up to \$2,000 out of the proceeds of the sale of the property seized in said executory proceedings in preference to said Iberville Bank & Trust Company and in preference to other creditors of said P. A. Dupuy.

"Wherefore the premises and the annexed documents and affidavit considered, petitioner prays that this petition of intervention and third opposition may be allowed; that the Iberville Bank & Trust Company, the seizing creditor in the executory proceedings entitled Iberville Bank & Trust Company v. P. A. Dupuy, No. 1742 of the docket of this court, be cited and served with a copy of this petition, and that after due proceedings had that there be judgment decreeing that petitioner as the subrogee to the homestead rights of said P. A. Dupuy to the extent that said rights were not renounced by said homesteader in the special waiver recorded in the mortgage records of this parish on May 29, 1909, is entitled to exercise said homestead exemption on the property seized in the executory proceedings of Iberville Bank & Trust Company v. P. A. Dupuy, No. 1742 of the docket of this court, and decreeing that by virtue of said homestead exemption petitioner is entitled to be paid up to \$2,000 in preference to said Iberville Bank & Trust Company, out of the proceeds of the sale of the property in preference to other creditors of said P. A. Dupuy; and that the sheriff of the parish of Iberville be given due notice of the filing of this petition of intervention and third opposition and served with a copy of the same, and that he be directed to retain in his hands, subject to the further order of this court, the proceeds of the sale of the prop-

erty seized by virtue of the sale in the above-entitled proceedings."

The allegation of the petition in that one of the vendor's privilege read

"That as the property in said executory proceedings is the property of said Iberville Bank & Trust Company, herein, for the payment thereof, to which said does not apply, said Iberville Bank & Trust Company is entitled to be paid out of the proceeds of the sale of said property with interest, and costs, and as the subrogee to the homestead rights of said P. A. Dupuy to the extent that said rights were not specially waived in favor of said bank by said P. A. Dupuy, be permitted to exercise said homestead exemption on the property seized in the executory proceedings of said P. A. Dupuy, No. 1741, and by virtue of said petition petitioner is entitled to be paid out of the surplus of said proceeds up to the extent of its claim in preference to other creditors of said P. A. Dupuy."

Thus it is seen that the intervenor alleges that the above proceedings have been duly recorded, and that by virtue of said recordation the bank be paid by preference to the intervenor in one of the suits wherein the intervenor has conceded to the plaintiff bank, over the plaintiff bank, and the intervenor alleged and prayed only—

"to the extent that said rights were not renounced by said P. A. Dupuy in the special waiver recorded in the mortgage records of this parish of Iberville."

It is therefore evident that the intervenor did not raise by its plea the question of the recordation vel non of the mortgage, but, on the contrary, that the recordation, and the question of whether said waiver was general in its nature.

Counsel for intervenor alleged that the waiver was offered in evidence to it on the ground that it was to show that it had even been recorded in the recorder's office, and that objection from counsel for plaintiff in the manner of the recordation was gone into in the examination of the present case. The bank, who happened to be present in court and ex officio recorder, stated that and that this shows that the recordation vel non was not a question for trial in the lower court. The purpose of offering the waiver in evidence was simply in order to determine from it whether it was a special or general waiver. The said cross-examination with testimony which showed that it had been intended for the purpose of showing that the mortgage on which the intervenor claimed it had been recorded.

We shall therefore con-

this case to that question. The said waiver reads as follows:

"I, Adelaide Martinez, wife, of lawful age, of P. Antoine Dupuy, herein aided and authorized by my said husband, and I, P. A. Dupuy, individually, and to authorize my said wife, declare that we have waived and do by these presents waive and renounce in favor of the Iberville Bank & Trust Company, the homestead and all rights and exemptions of homestead that exist in our favor or in favor of either of us under the Constitution and laws of the state, on the property described in an act of mortgage passed before Frederic P. Wilbert, on the 24th day of May, 1909.

P. A. Dupuy.
"Adelaide Dupuy.

"Witnesses' Attest:

"Lawrence Dupuy,
"Joseph A. Grace."

This waiver is general in its terms, and therefore refers to all debts due to the plaintiff bank. True, it refers to a particular act of mortgage, but it does so only for the purpose of identifying the homestead property.

[4] The plaintiff bank negotiated one of the notes sued on to one Perez, and a few days before the foreclosure reacquired it from him. Perez before the retransfer of the note to the plaintiff bank had sought unsuccessfully to sell it to the intervenor; and the contention is made that at the time the waiver was executed in favor of the plaintiff bank, the bank had already transferred the note to Perez, and that therefore the waiver could have no application to it; and the further contention is made that even if the plaintiff bank was holder of the note at the date of the execution of the waiver, the note lost the benefit of the waiver by being transferred, and did not reacquire it on returning into the hands of the plaintiff bank.

We find from the evidence that the plaintiff bank was holder of the note at the date of the execution of the waiver; and we find, as a matter of law, that the note did not lose the benefit of this waiver by being transferred. In that sense see *Martin v. Gary*, 132 La. 246, 61 South. 218, which decision is based upon article 2645 of the Code.

Judgment affirmed.

(139 La.)

No. 21754.

SCHOOL BOARD OF CALDWELL PARISH
v. MEREDITH et al.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS — 2—
CONSTITUTIONAL LAW—ACADEMY—OBLIGATION OF CONTRACTS — BODY POLITIC AND CORPORATE.

An institution of learning, organized as a "body politic and corporate," and partially endowed by the state and by the United States government, is a quasi public corporation, and may be dissolved by an act of the Legislature, when provision is made for the protection of all of the contract rights of the defunct institution and its creditors; especially after such institu-

tion has actually ceased to exist for a long term of years, and there is no one authorized, under the charter, to take charge of the property donated to such institution for the special purpose of educating the people of a given locality within the state.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 2; Dec. Dig. — 2.]

(Additional Syllabus by Editorial Staff.)

2. CONSTITUTIONAL LAW — 43(1)—CONSTRUCTION OF CONSTITUTION—ESTOPPEL TO RAISE CONSTITUTIONAL QUESTION.

Trustees of an academy holding under Act No. 195 of 1880, reorganizing the academy, cannot assail the constitutionality of that act.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 41; Dec. Dig. — 43(1).]

3. SCHOOLS AND SCHOOL DISTRICTS — 2—PRIVATE ACADEMY—DISSOLUTION AND LIQUIDATION OF CORPORATION.

Where the charters of an academy do not provide for the dissolution of the corporation or the liquidation of its affairs, the board of trustees are without authority to provide for such dissolution or liquidation.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 2; Dec. Dig. — 2.]

Appeal from Thirtieth Judicial District Court, Parish of Caldwell; George Wear, Sr., Judge.

Application of the School Board of the Parish of Caldwell for the appointment of a judicial liquidator to the Pine Grove Academy, against J. J. Meredith and another, liquidators. From a judgment for defendants, plaintiff appeals. Reversed, defendants' exceptions overruled, and cause remanded.

S. L. Richey, Dist. Atty., of Jena, and A. A. Gunby, of Monroe, for appellant. Hundley & Hawthorn, of Alexandria, for appellee.

SOMMERVILLE, J. The Legislature, in 1838, in Act No. 76, p. 79, incorporated the Pine Grove Academy, in the parish of Caldwell. In the first section of the act 15 persons were named and constituted "a body corporate and politic" by the name and style of the trustees of the Pine Grove Academy; they were given perpetual succession; the power to sue and be sued; and all such other powers as were exercised and possessed by similar corporations in the state. In section 4, the trustees were given full authority to fill all vacancies that might be caused in their own body by death or otherwise. In section 2, it was provided that the board of trustees should select a board of directors, who were to have charge of the academy, which was evidently an educational institution, incorporated for the benefit of the people of Caldwell parish. In section 3, an appropriation was made to the academy by the state. Section 5 gave to the board of directors the right to fix the place of location of the academy, where it would be conducive to the interests of the citizens of the parish of Caldwell generally. Sections 6 and

7 provided for the incorporation of the trustees of the Providence Academy of Carroll parish, with similar rights and privileges accorded to the Pine Grove Academy, and provided for an annual appropriation by the state of \$1,000.

The right to acquire property was not given to these institutions under their respective charters; but, under the provisions of article 433 of the Civil Code, they might possess an estate, and have a common treasury for the purpose of depositing their money; and they were capable of receiving legacies and donations.

These, and other similar, institutions of learning, were the forerunners of the system of public education, which has become one of the functions of the government of the state. The public schools were first recognized in the Constitution of 1845; and provision was made for their support in article 135 of that instrument; and, in article 136, it was provided:

"All moneys arising from the sales which have been or may hereafter be made of any lands heretofore granted by the United States to this state, for the use of a seminary of learning, and from any kind of donation that may hereafter be made for that purpose, shall be and remain a perpetual fund, the interest of which, at six per cent. per annum, shall be appropriated to the support of a seminary of learning for the promotion of literature and the arts and sciences, and no law shall ever be made diverting said fund to any other use than to the establishment and improvement of said seminary of learning."

And in article 254 of the present Constitution the school funds of the state are composed, among other things, "of lands and other property heretofore or hereafter bequeathed, granted, or donated to the state for school purposes."

In the charter of the Pine Grove Academy no provision was made for the liquidation of the corporation, and that liquidation is the matter presented for consideration in this case.

[1] Under the law, as expounded in the Dartmouth College Case, 4 Wheat. 518, 715, 4 L. Ed. 629, a contract was entered into between the state of Louisiana and the Pine Grove Academy, the terms of which are embraced in the act of 1838. This contract is inviolable by the state.

But the defendants, in their brief, say:

"This academy flourished for a great many years, or until, by reason of shifting of population, it was found impossible to continue the school in the place in which it was originally located."

Evidently, the corporation ceased to actively exist, at some time prior to the year 1860; but the court does not pass upon that point at this time.

In the meantime, in addition to the appropriation made by the state of Louisiana, it appears that certain individuals, by the names of Hyams, Chew, McCoy, and Daniel W. Cox, owners of land in the Maison Rouge grant, donated, in or about the year 1839, between 5,000 and 6,000 acres of land in that grant

to the Pine Grove Academy. It appears that, in a suit between the United States and the claimants under the Maison Rouge grant, the Supreme Court of the United States declared the grant to be invalid. Thereafter the Congress of the United States, in chapter 161, July 29, 1854, passed "An act for the relief of the Pine Grove Academy, in Louisiana." And, in that act, the Congress confirmed the title of the Pine Grove Academy to the lands in question and directed that patents be issued to the trustees for said lands, after a legal survey, under the instructions of the surveyor general of Louisiana. 10 U. S. Stats. at Large, p. 802.

Some of the lands thus donated by the government of the United States to the Pine Grove Academy for educational purposes are the same as those sought to be recovered by the board of directors of the public schools of Caldwell parish from the Louisiana Central Lumber Company, and reported in the decision in the case in 136 La. 337, 67 South. 23. And, doubtless, the recovery of these same lands, perhaps with others, or the proceeds of lands, is the ultimate object of the present suit.

In incorporating the board of trustees of the Pine Grove Academy with perpetual succession, the Legislature constituted it "a body corporate and politic." It was an institution of learning, for the benefit of the people of Caldwell parish, the education of whom was recognized as a public duty. But, at that time, in 1838, the state had not formally assumed the obligation of educating the youths. It made donations to the Pine Grove Academy and other similar institutions, to assist them in this public work. And that is the reason, doubtless, for constituting the academy, or the trustees of the academy, "a body corporate and politic." It was charged with the performance of a public duty.

The term "body corporate and politic" is frequently used in connection with a municipality governed by a legislative act; and, we take it, the Legislature denominated the trustees of the Pine Grove Academy "a body corporate and politic," for the reason that it, too, was charged with corporate and political powers, restricted to the education of the people of Caldwell parish. The institution thus became a quasi public or political corporation, receiving a part of its endowment from the state treasury, and being charged with the obligation of educating the people of Caldwell parish.

"Bodies politic and corporate have been known to exist as far back at least as the time of Cicero, and Gaius traces them even to the laws of Solon of Athens, who lived some five hundred years before. Pothier's Pand. of Just. bk. 3, p. 109 (Paris Ed. 1823). These associated bodies, or communities of individuals with certain rights and privileges belonging to them by law in their aggregative capacity, were styled by the Romans 'collegium' and sometimes 'universitas,' as 'collegia tibicinum,' 'collegia aurificum,' 'collegia architectorum,' or society, cor-

poration, or community of flute players, goldsmiths, architects, etc. *Ib.*, bk. 20, p. 110."

And Lord Coke has defined "a body politic" as:

"A body to take in succession, formed as to its capacity by policy, and is therefore called by Littleton (sections 4, 13) a 'body politic.'"

"It is called a 'corporation' or 'body corporate,' because the persons are made into a body politic, and are of capacity to take, grant, etc., by a particular name." *Words & Phrases*, 820.

And in the case of *Augusta v. Augusta Water District*, 101 Me. 148, 63 Atl. 663, 664, a body politic and corporate, created for the sole purpose of performing one or more municipal functions, was held to be a quasi municipal corporation, and in common interpretation should be deemed a municipal corporation. 1 *Words & Phrases* (2d Series) p. 1052.

The Legislature of the state evidently acted upon the theory that the trustees of the Pine Grove Academy constituted a quasi public corporation, charged with special public duties; for, in 1860, after the corporation had apparently ceased to exist, by Act No. 195 of that year, p. 141, it reorganized the Pine Grove Academy, naming a new board of trustees; it transferred all the property of the old institution to the new one, and shortened the term of the existence of the new one to 25 years.

As the corporation had ceased to exist prior to 1860, and had not been judicially dissolved, the Legislature might have, under article 447 of the Civil Code, dissolved said body; providing in the act that individuals who had advanced money or had engaged their property on the face of the contract existing between the corporation and the state should be reimbursed all such advances, and by making full indemnity to such individuals, if there were any such. Or, the Legislature might have forfeited the charter of the institution, on the ground that it had abused its privileges, and had refused to accomplish the conditions on which such privileges were granted.

The record, as it is made up, does not disclose whether there were individual donors or not. The only donations mentioned were from the state treasury and lands granted by the United States government.

Nevertheless, the Legislature did not dissolve the corporation judicially, or forfeit the charter; but, as has just been stated, in 1860, the Legislature passed Act No. 195, entitled:

"An act to amend 'an act to incorporate the Pine Grove Academy, in the parish of Caldwell, and for other purposes.'"

This act reincorporated the Pine Grove Academy, again naming 15 trustees, some of whom were members of the first board, apparently. One of the members of the newly formed board bears the name of one of the defendants in this cause; and it would appear that he has been acting as a trustee of the institution by virtue of said act of 1860,

which act he and his codefendant now attack as being unconstitutional.

[2] Defendants claim that the act of 1860 violates the contract evidenced by the act of incorporation of 1838. But, if it should be hereafter shown that they hold authority as trustees of the academy under the act of 1860, they cannot be heard to assail the validity of the act.

In 1860, when the Legislature acted in the matter, the Pine Grove Academy had ceased to exist as an actual educational institution. The only reason which induced the Legislature to pass act 195 of 1860 was that the Pine Grove Academy had theretofore failed to accomplish the conditions upon which it had been given corporate life. It had closed its doors. It had not been dissolved; and the Legislature had certainly the right to reorganize that institution under a new charter, and give it new life, and, at the same time, vest in the new corporation the title to the property owned by the former institution, and which had been granted to it for the benefit of the people of Caldwell parish.

The condition of affairs in such case was quite different from those set forth in the *Dartmouth College Case*, where the college was a living corporation, exercising all the powers which had been conferred upon it, and holding the property donated by private individuals to it. The conditions are different from those existing in the case of *Montpelier Academy Trustees v. George et al.*, 14 La. 395, 33 Am. Dec. 585, which was also a going corporation, exercising all of its powers, and in the possession of the property donated specifically to it. In both of those cases it was held that the law protected the corporations in their contract rights, which were conferred upon them in their respective charters.

In the case of the Pine Grove Academy, the Legislature found a defunct corporation invested with property; and it found it necessary, or for the convenience of the public interest, that the corporation should be reorganized and re-established for the purpose of carrying out the original object of the corporation; and it acted, by amending the original act of incorporation, and by giving it life for an additional 25 years.

In thus acting, the state did not violate the contract rights of the corporation or of any individual who had donated property to the institution under its charter. It would appear that the only property held by the old corporation was the land donated to it by the national government for educational purposes; and the act of the Legislature sought, in 1860, to continue the use of that land for the object for which it was donated by the government. It did not seek to dispossess the board of trustees of the older institution, because they did not appear to have been holding or acting for the institution. At all events, the trustees did not at that time object to the action of the state, and it appears

that some of them were named as trustees in the act of 1860. And it would appear that, after the lapse of nearly 80 years, they and their successors are not now objecting. As was stated before, it rather appears that the defendants, who are objecting in this suit, were made trustees by the act of the Legislature of 1860.

It further appears that the Pine Grove Academy actually ceased to exist before the expiration of its charter, as fixed in the act of 1860; which would have been in the year 1885.

A few years ago, the board of directors of the public schools of Caldwell parish, in charge of the public education of the children of that parish, conceiving itself to be the custodian of the fund for such purpose in said parish, instituted suit against the Louisiana Central Lumber Company, which company held title to some of the property which formerly belonged to the Pine Grove Academy, for the recovery of those lands. It was held in that case that the plaintiff had no proprietary interest in the subject or object of the suit, no administrative authority in the premises, and no legislative authority or implied right to prosecute the suit; and the suit was dismissed. 136 La. 337, 87 South. 23.

Thereupon the board of school directors of Caldwell parish went to the Legislature, and under Act No. 24, E. S., 1915, p. 54, it was authorized to provoke a judicial liquidation of the property, funds, and affairs of the Pine Grove Academy. In that act it was declared that the Pine Grove Academy, incorporated in 1838, was reincorporated in 1860; that the new corporation was endowed with all the property belonging to the old corporation; that the charter thereof had been limited to 25 years; that the limitation had expired; that the corporation became legally defunct at the expiration of 25 years, and had actually ceased to exist long before that time; that no one was authorized or capacitated to represent or act for it after that time; and that its affairs had remained unliquidated and unsettled. It was further declared that there were no stockholders or creditors of the corporation; and "it being a matter of public and general interest that the wise, benevolent purposes of the original donors and Congress to aid and encourage the diffusion of public enlightenment and education by furnishing adequate remedy for the recovery, preservation and proper use of the property of the derelict corporation," the board of school directors of Caldwell parish was "granted the right of action to provoke a judicial liquidation of the affairs, funds and property of the late corporation known as the Pine Grove Academy of Caldwell parish," etc.

In the original charter of Pine Grove Academy, as well as in the charter reincorporating said academy, there was no provision made for liquidation. Act No. 24, E. S.,

1915, contains the first provision of law relative to the liquidation of said corporation. The Legislature was the only body competent to direct the liquidation.

After this act had been passed by the Legislature, three persons met, June 19, 1915, as a quorum of the board of directors of the Pine Grove Academy, and called a meeting of the board of trustees of the academy for June 21, 1915, for the purpose of deliberating upon the question as to whether or not the above-named corporation should be dissolved and its affairs liquidated, and for the purpose of electing the liquidators, if that course should be determined upon, and to transact such other business as might lawfully come before the meeting. On June 21, 1915, the same three persons met, who appeared to hold the proxies of three other persons, and held a meeting of the trustees. A resolution was adopted, declaring:

"That it is the sense of the board of trustees that the corporation, known as the Pine Grove Academy, be, and the same is hereby, dissolved."

"That the assets belonging to it be used and distributed for educational purposes, and for the benefit of the inhabitants of Caldwell parish, after deducting the expenses of dissolution, liquidation and distribution of the proceeds of said corporation. That in order to carry out the purposes of this resolution, J. J. Meredith and R. R. Redditt (the two defendants) be, and they hereby are elected as liquidators of said corporation with full power and authority to take charge of all the remaining assets belonging to the said corporation," etc.

The two persons thus named as liquidators were confirmed by the district judge.

Thereupon this suit was brought by the board of directors of the public schools of Caldwell parish. In its petition, it asks that J. J. Meredith and R. R. Redditt be cited, and, after due proceedings, that their appointment as liquidators of the academy be decreed to be absolutely null and void; and that the appointment of W. L. White, named by the plaintiff, be confirmed as liquidator of the academy.

The suit is a contest between two sets of liquidators of the corporation for control.

J. J. Meredith and R. R. Redditt, styling themselves as judicial liquidators, excepted to the petition of plaintiff on various grounds. Among them was as to the right of plaintiff to question the control or liquidation of the affairs of the Pine Grove Academy for any cause.

The exceptions were sustained, and the suit was dismissed.

[3] The two charters of the Pine Grove Academy do not provide for the dissolution of the corporation. Therefore the board of trustees, whether of the first or second corporation, were without authority to declare the corporation dissolved. Neither was there provision in either charter for the liquidation of the affairs of the corporation, and the board of trustees were therefore without authority to undertake the liquidation of it. As the corporation was a creature of the

Legislature, and as no contract rights under the several charters were violated by the Legislature, it (the Legislature) was the only one authorized to provide for, and to fix the manner of, the liquidation of this defunct corporation. There were certainly no stockholders to be consulted; and, if there are any individuals or persons who are creditors in any form of the Pine Grove Academy, their interests are not affected by the decision in this cause, as they are not parties thereto. The exceptions should have been overruled.

It is therefore ordered, adjudged, and decreed that the judgment herein rendered maintaining the exceptions filed by the defendants is annulled, avoided, and reversed; and it is now ordered that said exceptions are overruled, and that the trial of this case be proceeded with in accordance with law. Costs of appeal to be paid by defendants.

O'NIELL, J., concurs in the decree.

(139 La.)

No. 21784.

FRANEK v. BREWSTER et al.

In re JACOBS et al.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR §380 — APPEAL BONDS—SUFFICIENCY OF SURETIES.

Act No. 41 of 1894 authorizes certain corporations to become surety upon bonds required by law, and provides in section 6 that, if the secretary of state be satisfied that such a company is solvent and has the required cash capital and surplus assets in excess of its capital stock, outstanding debts, and premium reserve, and that it has complied in all respects with and is qualified under that act, he shall issue to it a certificate that it is authorized to become and be accepted as surety on all bonds required or permitted by law, and that such certificate shall be conclusive proof of its solvency and credit for all purposes and of its right to be so accepted as surety and its sufficiency as such. Act No. 71 of 1904 provides that surety companies doing business in the state shall deposit with the state treasurer in money or securities at least \$50,000, to be held subject to any claim, liens, or judgments against them in the state, or arising from any contract entered into in the state. Held that, where a fidelity and bonding company had duly qualified to do business, and held the certificate of the secretary of state to that effect at the time it signed an appeal bond, it continued to be a sufficient surety on such bond, notwithstanding its subsequent retirement from business in the state leaving a \$50,000 deposit in the hands of the treasurer for protecting such bonds as were outstanding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2023-2028; Dec. Dig. § 380.]

2. PRINCIPAL AND SURETY §54 — SURETY COMPANY—CERTIFICATE—APPEAL BONDS.

Under Act No. 41 of 1894, § 6, where a surety company executing an appeal bond had qualified to do business and held the certificate of the secretary of state to that effect, the court could not go behind the certificate and inquire into the charter powers of such company and the sufficiency of its paid-up capital.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. §54.]

Action by Joseph Franek against H. O. Brewster and others. An appeal by Thomas N. Jacobs and others from judgments against them was dismissed, and they apply for a writ of prohibition. Judgment dismissing appeal set aside, and appeal reinstated.

W. S. Lewis, of New Orleans, for applicants Jacobs and Interstate Trust & Banking Co. Theodore Cotonio, of New Orleans, for respondent Succession of Franek.

PROVOSTY, J. Pending an appeal in this case the surety on the appeal bond was, on a rule taken for that purpose, declared by the trial court to be insufficient, and the appeal was dismissed.

[1] The facts are that the surety on the bond, the Texas Fidelity & Bonding Company, had duly qualified under the provisions of Act No. 41, p. 45, of 1894 (held in *Moffet v. Koch*, 106 La. 371, 31 South. 40, and *Eichorn v. N. O. & O. Light & Power Co.*, 114 La. 714, 38 South. 526, 3 Ann. Cas. 98, to be constitutional) to do business in this state, and held the certificate of the secretary of state to that effect at the time it signed said bond, but that at the time the rule for testing the sufficiency of the surety was taken it had retired from business in this state, leaving a \$50,000 deposit in the hands of the treasurer of the state in accordance with the provisions of Act No. 71, p. 185, of 1904, for protecting such bonds subscribed by it as were outstanding. Under these circumstances the said surety continued to be sufficient.

[2] The learned counsel of the appellee would go behind the certificate of the secretary of state issued to said company for doing business in this state and inquire into the charter powers of said company and into the sufficiency of its paid-up capital. The door upon such inquiry is closed by express provision of section 6 of said Act No. 41 of 1894.

The judgment dismissing the appeal in this case is therefore set aside, and the appeal is hereby reinstated; the costs of the present proceeding to be paid by Frances Alfano, widow of Joseph Franek, individually for one half, and as administratrix of the succession of Joseph Franek for the other half.

(139 La.)

No. 20539.

DALBERNI et ux. v. NEW ORLEANS CAN CO.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)*(Syllabus by the Court.)*

1. QUESTIONS OF FACT.

Only questions of fact are involved in this case.

*(Additional Syllabus by Editorial Staff.)*2. MASTER AND SERVANT \Leftrightarrow 95—INJURIES TO SERVANT—EMPLOYMENT OF CHILD.

It was negligence to employ a child 16 years old in a can factory without requiring the certificate from the factory inspector provided for by Act No. 301 of 1908.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 141, 160; Dec. Dig. \Leftrightarrow 95.]3. MASTER AND SERVANT \Leftrightarrow 230(1)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an injury to a child 16 years old in a can factory was caused by her negligently permitting her foot to rest on the treadle of the machine she was operating, causing a die to descend on her thumb, she contributed towards the injury, barring recovery therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687, 691; Dec. Dig. \Leftrightarrow 230(1).]

Appeal from Civil District Court, Parish of Orleans; B. K. Skinner, Judge.

Action by Louis Dalberni and wife against the New Orleans Can Company. From a judgment for plaintiffs, defendant appeals. Reversed, and suit dismissed.

Dufour & Dufour and R. Bland Logan, all of New Orleans (George Janvier, of New Orleans, of counsel), for appellant. Prowell & Prowell, of New Orleans, for appellees.

SOMMERVILLE, J. Plaintiffs, the parents of a daughter almost 16 years of age, in the employ of the defendant company, sue the latter for \$5,200 in damages for the loss of the end of the thumb of her right hand. They allege that defendant employed their daughter without requiring the certificate from the factory inspector of the city of New Orleans provided for in Act No. 301 of 1908, p. 453, and that their child was injured through the fault and negligence of defendant, its agents and employees; that she was permitted, required, and ordered to operate what is known as an "ear machine" in the can factory, which was very dangerous to inexperienced persons; that the machine was old, dilapidated, and not properly safeguarded; and that she in no manner contributed towards the accident.

Defendant answered admitting the employment of the girl without having required a factory inspector's certificate, and pleaded contributory negligence.

There was judgment for plaintiffs in the sum of \$750, and defendant has appealed. Plaintiffs have asked for an increase in the amount of the judgment.

[1, 2] It was negligence on the part of defendant to have employed the child of plaintiffs without having required the certificate from the factory inspector, as is provided for in Act 301 of 1908, p. 453. *Darsam v. Kohlmann*, 123 La. 164, 48 South. 781.

Plaintiffs failed to prove that the "ear machine" of defendant by which their daughter was injured was a dangerous machine, or that it was old, dilapidated, or out of repair.

The machine was designed and used to put "ears" on tin cans in the course of their being manufactured; it is worked by a foot treadle; there is a flywheel, with three lugs; and by putting the foot on the treadle the trigger is taken from the clutch which projects into the flywheel, which causes the machine to act. The "ear" is held between the thumb and index finger of the operator, and placed in position on the can; the treadle is pressed down by the foot and a die is forced down and fastens the "ear" in place on the can. If the foot is not removed from the treadle the die will descend again; but if the foot is removed from the treadle the die will not descend, if the machine is in good order; and the evidence is certain that the machine which plaintiffs' daughter was operating at the time of the accident was in good order; although the operator testified it was not.

[3] The only conclusion from the testimony is that the daughter of plaintiffs negligently permitted her foot to rest on the treadle, and that the die descended on her thumb and injured it. In so doing, she contributed towards the damage, and plaintiffs cannot recover.

Plaintiffs' daughter had been permitted by one of her fellow servants to operate the "ear machine," without the consent of the foreman of defendant having been obtained, after she had been fully instructed how to operate it, and had been carefully cautioned about the use of the treadle, by said fellow servant. She and other girls had successfully operated it and similar machines, without damage to them, when they used the proper caution. The machine does not appear to have been a dangerous machine to one who had been instructed how to use it, even though such person was a child 16 years of age.

It is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of defendant, dismissing plaintiffs' suit, at their cost in both courts.

(139 La.)

No. 21636.

Succession of LEFORT.

SERIO et al. v. TRAINOR et al.

(Supreme Court of Louisiana. Feb. 7, 1916.
On Petition for Rehearing, March
6, 1916.)

(Syllabus by the Court.)

On Motion to Dismiss.

1. STIPULATIONS \S 14(1)—CONSTRUCTION—MOTION FOR NEW TRIAL—WAIVER.

Where all parties to a suit enter into an agreement, which is entered upon the minutes of the court, to the effect that the judge may decide the case in chambers, during the vacation of the court, "and shall grant an order of appeal, both suspensive and devolutive, to either party, fixing the return day and bond for either appeal, to have the same effect as if done in open court," and the judgment is rendered, the order of appeal granted, and the appeal lodged in this court in accordance therewith, such appeal will not be dismissed on the ground that it was taken prematurely and before the expiration of the delay within which, ordinarily, a motion for new trial may be filed, the terms of the agreement authorizing the presumption that the right to file such motion was intended to be waived.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24, 28; Dec. Dig. \S 14(1).]

2. EXECUTORS AND ADMINISTRATORS \S 20(10), 35(19)—SUCCESSION—APPOINTMENT OR REMOVAL—"ADMINISTRATORS OF SUCCESSION."

Executors, whether testamentary or dative, are included within the meaning of the comprehensive language, "or other administrators of successions," as used in article 1059 of the Code of Practice, and judgments appointing or removing them become provisionally executory when rendered, and are not subject to suspension by appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 102-104, 250; Dec. Dig. \S 20(10), 35(19).]

On the Merits.

3. WILLS \S 295 — PROBATE PROCEEDINGS — CONTEST—EVIDENCE.

The article of the Civil Code (1855) applies to the probate of a testament which is not opposed. But a different rule obtains when the probate of the testament is opposed ab initio on the ground that it is a fraud and a forgery. In such a case the denial of the genuineness of the testament removes the contest from the domain of article 1855 of the Code, and it presents an issue which must be determined under the rules which govern all contests involving the genuineness of a signature which is denied. Under such an issue the doors of justice are opened wide for the introduction of any legal evidence in accordance with all the forms which prevail in all contested facts or cases. The textual provisions of Civ. Code, art. 2245, and Code Prac. art. 325, recognize the mode of testing signatures by a comparison of writing or by experts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 685-689; Dec. Dig. \S 295.]

4. APPEAL AND ERROR \S 970—TRIAL \S 68—DISCRETIONARY RULING — REOPENING OF CASE.

After all parties to a suit have announced that the testimony is closed, no party has a legal right to introduce further evidence; but the privilege of doing so may be granted by the court in its discretion and in furtherance of justice. The judgment of the court refusing to admit further evidence will not be reversed by

this court unless it is manifestly erroneous and productive of injustice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. \S 970; Trial, Cent. Dig. §§ 158-163; Dec. Dig. \S 68.]

5. WILLS \S 302(2)—CONTEST—SIGNATURE OF TESTATOR—EVIDENCE—PROBATIVE EFFECT.

The declaration of two credible witnesses who attest that they recognize a testament as being entirely written, dated, and signed in the testator's handwriting, corroborated by the testimony of an expert in handwriting, and by the recitals of the will, and by other various extraneous facts, will prevail over the testimony of two witnesses, who swear that a part of the date was not written by the testator, unsupported by any other circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 701, 713; Dec. Dig. \S 302(2).]

6. WILLS \S 179, 183—POSTERIOR TESTAMENT—CONFLICTING PROVISIONS—CONSTRUCTION.

When a posterior testament does not expressly revoke a prior one, both must be executed, unless the last will tacitly revokes the first as a whole. When they conflict only in part, the provisions of the last will must prevail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457, 461; Dec. Dig. \S 179, 183.]

7. EXECUTORS AND ADMINISTRATORS \S 14—SUCCESSION—APPOINTMENT.

When a testator appoints as executor "the priest of his church," without naming him, the court will interpret his testament to mean the person who will be the priest at the time of the testator's death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 29-31, 42; Dec. Dig. \S 14.]

Provosty and Land, JJ., dissenting.

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Thomas M. Milling, Judge.

In the matter of the application of Sam Serio and others, to probate the will offered by them as the last will and testament of Miss F. C. Lefort, deceased, with opposition thereto of Mrs. Carrie Sawyer Kramer and others. From the judgment, Sam Serio and others appeal. Affirmed in part, and reversed in part.

L. O. Pecot, of Franklin, for appellant Trainor. Charles I. Denechaud, of New Orleans, Paul Kramer, of Franklin, and Foster, Milling, Saal & Milling, of New Orleans, for appellants Blenk and Serio. Charles I. Denechaud, of New Orleans, and Paul Kramer, of Franklin, for appellee Rousseau. McCloskey & Benedict, of New Orleans, and Borah, Himel & Bloch, of Franklin, for appellee O'Niell. Caffery, Quintero & Brumby, of Franklin, for appellees Kramer and Sawyer. H. D. Smith, of Franklin, curator ad hoc, for infant appellee.

On Motion to Dismiss Appeal.

MONROE, O. J. In December, 1914, Rev. James H. Trainor, a Catholic priest, formerly in charge of the church at Franklin, presented to the district court an instrument, purporting to be the last olographic will, execut-

ed in 1910, of Caroline Lefort, who had departed this life on November 29, 1914, which will contained, among others, the following disposition, to wit:

"I bequeath to the priest of this church the sum of two thousand dollars and appoint him executor of this will, without bond."

The instrument was admitted to probate as the last will of Miss Lefort, the petitioner was confirmed as testamentary executor, and the taking of an inventory was ordered. In the discharge of that function, the notary discovered, among the papers in the residence of the decedent, another instrument, purporting to be an olographic will, executed in 1913, which contains, among others, the following provision, to wit:

"I appoint the pastor of this church administrator, without bond."

At the date of the death of the decedent, Rev. J. H. Trainor had ceased to be the pastor of the Catholic church at Franklin, and had been succeeded by Rev. J. J. Rousseau, and that gentleman, together with Sam Serio, Rt. Rev. Jas. H. Blenk, the Church of the Assumption, and Mrs. Caroline Levy, persons who are named in the instrument so described, presented that instrument to the court as the last will of the decedent, and prayed that it be so recognized; that Rev. J. J. Rousseau be confirmed as executor, and that the other petitioners be recognized as legatees. They further prayed, in the alternative, that, should the court hold the instrument first presented to be the last will of the decedent, it should set aside its order confirming Rev. J. H. Trainor, as executor, and substitute, in his place, Rev. J. J. Rousseau, as the then pastor of the church to which both of the instruments are conceded to refer. A litigation then ensued between the legatees named in the two instruments, respectively, and the former and present pastor, and the case was submitted for adjudication in June, 1915, after which, on July 16, the following entry was made upon the minutes of the court, to wit:

"In the suit of Sam Serio et al., it was agreed by and between counsel for plaintiffs and defendants that this case shall be decided in chambers, during vacation, if the court sees fit so to do, and shall grant an order of appeal, both suspensive and devolutive, to either party, fixing the return day and bond for either appeal. All to have the same effect as if done in open court."

On July 27th (during the vacation) the court handed down its opinion and decree, rejecting the demand for the recognition of the document last presented as the will of the decedent, but setting aside the order confirming Rev. J. H. Trainor as executor of the instrument first presented, and recognizing and confirming the Rev. J. J. Rousseau in that position; and, there was an order, made at the same time, granting "to any plaintiff or defendant" an appeal, both suspensive and devolutive, returnable to this court on or before September 20th on the furnishing of a

bond in the sum of \$250. The parties cast—that is to say, Rev. J. H. Trainor, Sam Serio, Rt. Rev. J. H. Blenk, and the Church of the Assumption—availed themselves of the order so made, and lodged their appeal in this court on September 15th, and, thereafter, on September 18th, Rev. J. J. Rousseau filed the motion, which we are now to consider, to dismiss the appeals, on the ground that they were taken prematurely and before the expiration of the delay for the filing of motions for new trial, and as to the appeal of Rev. J. H. Trainor, in so far as it operates suspensively on the further ground that he was not entitled to a suspensive appeal. That gentleman has filed an answer to the motion, to which he attaches a copy of the minutes of the district court, of September 21st, showing that, upon that day, the court overruled a motion for new trial which had been filed, on July 29th, in behalf of Sam Serio, Rt. Rev. James H. Blenk, Archbishop of New Orleans, the Church of the Assumption, Rev. J. J. Rousseau, and Mrs. Caroline Levy, the reasons assigned by the judge for the ruling so made being that he had rendered the judgment in vacation and granted the appeals in conformity to the agreement of all parties, entered upon the minutes of the court on July 16th, and that he did not consider that the matter of the motion for new trial was any longer within his jurisdiction.

[1] The proceedings on the motion for new trial took place after the transcript of appeal had been lodged in this court, and are not before us for consideration, but the agreement as to the rendition of the judgment and the granting of the appeals is to be found in the transcript; and, as the action of the trial judge was in strict conformity thereto, we are of opinion that the motion to dismiss the appeals, as premature, is without merit. It is, of course, possible that the mover herein, in becoming a party to the agreement, made a mental reservation, to the effect that the judge should grant the appeal only after the litigants should have exercised their right to apply for a new trial, but there is no intimation of such reservation in the entry upon the minutes, and the mover seems to stand alone in claiming that advantage, since the judge and all the other litigants have interpreted the entry to mean what the language imports, viz., that, in agreeing that the judgment should be handed down and appeals granted, during vacation the parties in interest waived the right to move for a new trial, the reservation or exercise of which right would necessarily have carried the case over until the next term of the court.

[2] The further ground relied on for the dismissal of the appeal of Rev. J. H. Trainor, in so far as it operates suspensively, is founded upon articles 580 and 1059 of the Code of Practice, which provides that certain judgments shall be executed provision-

ally although appeals may have been taken therefrom.

These articles declare that:

"Art. 580. * * * Such judgments relate: To the nomination of tutors and curators of minors, of persons absent or interdicted, and of vacant successions. 2. To the appointment of syndics of creditors, when the court orders that they shall administer provisionally."

"Art. 1059. When an appeal is made from a judgment appointing or removing a tutor or curator of a minor, interdicted or absent person, or of a vacant succession of absent heirs, or other administrators of successions, such appeal shall not suspend the execution of the judgment, but it shall have effect provisionally, until the appeal be decided."

It will be observed that the judgments referred to in article 580 are those which relate to the "nomination," or "appointment" of the officers mentioned, and that judgments appointing syndics are included only when the court orders that the appointees shall administer provisionally. Article 1059, on the other hand, makes provision in regard to appeals from judgments—

"appointing or removing a tutor or curator of a minor, interdicted or absent persons, or a vacant succession of absent heirs, or other administrators of successions."

And it can hardly be claimed that an executor, whether testamentary or dative, is not included within the meaning of the comprehensive language, "or other administrators of successions" as thus used.

It was so held, in effect, in *State ex rel. Commagere v. Judge*, 22 La. Ann. 116, where a dative executrix was denied a suspensive appeal from a judgment of removal, and in *Succession of Townsend*, 37 La. Ann. 409, where this court said:

"The judgment removing Sykes as executor became final the moment it was signed. It belongs to that class of judgments from which no suspensive appeal lies, and which are executory at once."

It is therefore ordered that the motion to dismiss be overruled, save in so far as it relates to the appeal of Rev. J. H. Trainor, as to which it is sustained to the extent that said appeal is held not to suspend the execution of the judgment appealed from.

O'NIELL, J., takes no part.

PER CURIAM. Since the foregoing opinion and decree were prepared, Rev. James H. Trainor has departed this life, and his heirs have made themselves parties to the appeal. The opinion and decree, on the merits of the appeal, this day handed down, hold, however, that Rev. J. J. Rousseau is the legally nominated testamentary executor; and, as Rev. James H. Trainor was otherwise interested in the appeal, we find no reason for making any change in this opinion and decree.

On the Merits.

In this case, his honor, Mr. Justice O'NIELL, being recused, and their honors being evenly divided in opinion as to the

proper determination to be made of the issues involved, Judge CHARLES F. CLAIBORNE, of the Court of Appeal for the parish of Orleans, having been called upon by previous order of this court to sit in the case, pronounced the judgment of the court therein, in words and figures, as follows, to wit:

CLAIBORNE, Judge ad hoc. On December 1, 1914, Rev. James H. Trainor, a resident of the parish of Orleans filed a petition in the district court of the parish of St. Mary, in which he alleged that Miss Caroline Lefort, a resident of said parish, died on November 29, 1914; that she left an olographic testament, dated Franklin, La., May 26, 1909, by which she constituted a number of legatees, and in which is the following clause, among others:

"I bequeath to the priest of this church the sum of two thousand dollars and I appoint him executor of this will without bond."

Petitioner further alleged that he was the priest of the Catholic church at Franklin on May 26, 1909, date of the will, which was the church of the deceased, and that he was the executor appointed by said testament; that he accepted the trust and desired to be confirmed as executor. He prayed for the probate, registry, and execution of the testament, and to be confirmed as executor thereof.

After due proof of the testament, its execution was ordered by decree rendered December 1, 1914, and petitioner James H. Trainor, was confirmed testamentary executor, and letters as such issued to him, and an inventory was ordered taken.

As a part of the proceedings in taking the inventory, the notary made the following report:

"In addition to the above personally I found in one of the drawers of the armoire in the upstairs bedroom certain papers, three in number, contained in an envelope, marked:

'Rev. Father to be opened

three days after

My last will 1913-1913'

—which I have marked with my paraph as follows: 'Documents found in effects of Miss Caroline Lefort.'

"[Signed] C. J. Boatner, Notary Public."

On January 23, 1915, Sam Serio, the Most Reverend James H. Blenk, Archbishop of New Orleans, the Church of Assumption, Rev. J. J. Rousseau, and Widow Camille Levy filed a petition in which, after reciting all the facts related above, they alleged:

That the document found by the notary and mentioned in his inventory and dated "May 26, 1913," and signed "F. C. Lefort," is entirely written, dated, and signed by the deceased, Frances Caroline Lefort, and is her last will and testament, and has the effect of revoking, and in fact does revoke, the will of May 16, 1909, heretofore probated.

That said testament of May 26, 1913, appoints "the pastor of this church administrator," and that Rev. J. J. Rousseau is now, and was at the time of the death of Miss

Lefort, the pastor of the church at Franklin, and that therefore the said Rousseau is the person appointed executor of said testament.

That petitioners are named as legatees by said testament of May 26, 1913, and they present the same for probate and execution.

They further aver, in the alternative, that should the court decide that the first will of May 26, 1909, is the last testament of the deceased, there is error in that portion of the decree, confirming Rev. J. H. Trainor, executor, for the reason that he was not the priest of the church at Franklin at the time of the death of the testatrix, but that one of the petitioners, namely, Rev. J. J. Rousseau, was the priest of said church at the time of the death of Miss Lefort, and that he should be decreed to be the person appointed by the testatrix as executor and confirmed as such.

They prayed that Rev. Jas. H. Trainor and the legatees under the first will of 1909 be cited in order that it might be decreed contradictorily with them: (1) That the document dated May 26, 1913, be decreed to be the testament of the deceased, Miss Lefort, and that it be probated and ordered executed; and (2) that Rev. J. J. Rousseau be confirmed as executor thereof in place of Rev. Trainor; and (3) that the decree, ordering the probate and execution of the will of 1909 and confirming Rev. James H. Trainor as executor thereof, be revoked and set aside; and (4) in the alternative, and in case said testament of 1909 be maintained, that the order confirming James H. Trainor executor be revoked, and that Rev. J. J. Rousseau be confirmed executor, and that letters as such issue to him.

The document mentioned above is dated in the following manner: "Franklin May 26 19 ." The "6" in the "26" is not made perfectly. After the "19" follow two figures which at first sight appear to be "08" It looks as if the figures "13" had been previously traced in smaller figures under the "08" but not very distinctly to the naked eye, or that the figures "08" had been overcharged, or surcharged, or superimposed over the figures "13." It seems as if an attempt had been made to erase the figures "13" or "08," for they are both soiled and blurred, especially the "0." Then follow in distinct characters the figures "1913."

The defendants, in their answer, interposed the plea of no cause or no right of action. But as this plea is inseparably connected with the merits, we shall treat the two together. Besides, the defendants proceeded to the trial of the case on the merits without asking for a separate judgment on the exception. It is now too late. *Doullut v. Smith*, 117 La. 491, 41 South. 913; *Ashbey v. Ashbey*, 41 La. Ann. 138, 5 South. 546; *Tupery v. Edmondson*, 32 La. Ann. 1146. But we are of the opinion that the petition does disclose a cause of action, and that the judge below acted correctly in overruling the ob-

jection to the introduction of evidence based on that exception.

The defendants answered, asserting the validity of all the proceedings probating the will of 1909 and confirming Rev. J. H. Trainor executor.

Further, they denied that the document presented by plaintiffs is dated May 26, 1913, but they admitted that all that appears thereon is in the handwriting of the decedent, except the figures "1913," which appear at the extreme right-hand top corner of said document which they allege, are not in her handwriting, and were not made by her; that even if the document is a valid testament, it would not have the effect of revoking the testament of 1909; they admit that Rev. J. J. Rousseau was pastor of the Catholic church of Franklin about the time of the death of the testatrix, and that Rev. J. H. Trainor was not the pastor at that time.

They further aver that the document offered for probate by plaintiffs as the testament of deceased is absolutely null, void, and of no effect for the following reasons, viz.:

First. That said document is without date.

Second. That if it has any date, it is that of 1908.

Third. That if said document ever was a testament that it has been revoked.

Fourth. That it is interlined, erased, changed, and mutilated, and is uncertain, obscure, meaningless, and does not contain any bequest to any one except Mrs. Levy, and that it is impossible of effect as a testament.

They pray that plaintiffs' demand be rejected; and, in the alternative, in case the document propounded by the plaintiffs be probated as a testament, that it be decreed to be dated in the year 1908, and in all events, that the defendants be recognized as legatees under the testament of 1909.

On motion of defendants the case was fixed for trial on the merits for February 23, 1915, then postponed to March 2d, when it was tried during two days.

The plaintiffs put upon the witness stand an expert in handwriting to prove that the figures "13" were in the handwriting of the testatrix, and that the figures "08" had been written over these figures by a strange hand, and that the figures "1913" were in the handwriting of the testatrix. The defendants objected to this testimony on the ground that a will cannot be proved by expert testimony. The objection was overruled and the testimony admitted.

The expert was also asked whether, in his judgment, the figures "08," which he had stated to have been superimposed or written over the figures "13," had been written by the same party that wrote the figures "13." The objection was made that there was no allegation of erasure or addition, and that the question was a contradiction of the pleadings and took the defendants by surprise. These objections were also overruled.

The case was fixed for argument for May 1, 1915. On April 29th the defendants filed a petition to reopen the case, on the ground that the court, over their objection, had permitted E. A. O'Sullivan, the expert, to testify that the document annexed to plaintiffs' petition was dated May 26, 1913, and that the figures "08" were not in the handwriting of the testatrix, but had been placed there by some other person, although the plaintiffs had alleged that said instrument was entirely written, dated, and signed by the testatrix, and had not charged that the figures "08" were forged or added by the hand of another person; that they were taken by surprise by such ruling, and were not prepared to offer expert testimony in contradiction; that they are now prepared to prove by the testimony of Prof. L. C. Spencer, of New Orleans, an expert in handwriting, that the figures "1913" in said testament are not in the same handwriting as the body of said instrument and were not written by the same person, and that the figures "08," under the figures purporting to be "13," are in the same handwriting as the body of the instrument; that the figures "13" were written over the figures "08" by the same person who wrote the figures "1913." To this petition is annexed the affidavit of L. C. Spencer that he will swear to all the allegations of the petition.

On May 10th the court refused to reopen the case, and ordered the affidavit of L. C. Spencer to be stricken from the record.

On May 13th, the defendants filed an application for a rehearing of their petition to reopen the case on the ground that they had discovered new evidence, consisting of the testimony of Benjamin Ory, another expert in handwriting, who would swear that the figures "1913" were not in the same handwriting as the body of the instrument. This application was also supported by the affidavit of Benjamin Ory.

The court also refused this application. Defendants reserved bills of exception to both rulings.

The district judge refused to probate the will of 1913, on the ground that the date of the month was uncertain; that he could not determine what was the figure after May 2; that it might be an "0" or a "6," or something else, and, therefore, declared that the document presented was not an olographic testament under the law of Louisiana. But the judge decided that although Rev. J. H. Trainor was the priest of Franklin at the time of the date of the will (1909), Rev. J. J. Rousseau was the priest at the time of the death of the testatrix, and that he, Rousseau, was the party intended as executor by the will, and he confirmed him and revoked the appointment of Rev. Trainor.

Sam Serio, the most Reverend James H. Blenk, the Church of Assumption, and Rev. James H. Trainor have appealed.

The appellees have answered the appeal, praying that the judgment be affirmed in so far as it decrees that the document of 1913, presented by the plaintiffs, is not a testament, and reversed in so far as it recognizes Rev. J. J. Rousseau as executor.

The issues therefore are:

First. Did the court err in permitting an expert in handwriting to testify in support of plaintiffs' allegation that the figures "1913" were written by the testatrix, and that the figures "08" had been written over the figures "13" by a strange hand, and that the "13" was in the hand of the testatrix?

Second. Did the court err in refusing to reopen the case?

Third. Were the figures "1913" written by the testatrix?

Fourth. Did the testament of 1913 revoke the one of 1909?

Fifth. Whom did the testatrix intend to appoint as executor, the priest who was officiating at the date of her will, or the one who was acting on the date of her death?

[§] I. Up to the year 1896, when Act No. 119 was passed amending article Civil Code 1655 (1648) the law read:

"The olographic testament * * * must be acknowledged and proved by the declaration of two credible persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime."

In the interpretation of that article, the Supreme Court has repeatedly decided that, in cases of controversy concerning the genuineness of a will, the testimony of experts in handwriting was admissible to prove that the writing on the document propounded as a will was or was not in the handwriting of the testator. In the case of the Succession of Gaines, 38 La. Ann. 123, 128, the Supreme Court said:

"We understand that rule [C. C. 1655] to apply to the probate of a will which is not opposed, as a part of the mortuary proceedings. * * * But a different rule applies when the probate of the will is opposed ab initio, on the ground that it is a fraud and a forgery. In such a case the denial of the genuineness of the will removes the contest from the domain of article 1655 of the Code, and it presents an issue which must be determined under the rules which govern all contests involving the genuineness of a signature which is denied, and in such a case the burden of proof is on the party who relies on the genuineness of the proffered signature. C. C. 2245. C. P. 325. Under such an issue the doors of justice are opened for the introduction of legal evidence, under all the forms which prevail in all contested facts or cases; and the textual provisions of the law recognize the mode of testing signatures by a comparison of the writing. [Plique & Le Beau v. Labranche] 9 La. 559; [Sophie v. Duplessis] 2 La. Ann. 724; [Aubert v. Aubert] 6 La. Ann. 104; [Pena v. Cities of New Orleans & Baltimore] 13 La. Ann. 86 [71 Am. Dec. 506]; Succession of McDonogh] 18 La. Ann. 419."

In the case just quoted of the Succession of Gaines, experts in handwriting were imported from New York to obtain their opin-

ion. In reference to experts the court continues, on page 133 of 38 La. Ann.:

"In this connection, it is contended by counsel for Mrs. Evans that comparisons of handwritings with each other and expert testimony on the same subject find little favor under the laws of Louisiana, and are very often precarious and dangerous. * * * Counsel are mistaken in the proposition that such modes of verifying signatures have but little force in Louisiana. Both modes are recommended by the very text of our law. C. C. 2245. C. P. 325."

C. C. 2245 (2241) reads:

"If the party disavow the signature, * * * it must be proved by witnesses or comparison as in other cases."

C. P. 325:

"If the defendant deny his signature in his answer or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature either by witnesses who have seen the defendant sign the act or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts or by a comparison of the writing, as established by the Civil Code."

In *Succession of Stewart*, 51 La. Ann. 1553, 26 South. 460, the Supreme Court was controlled, in its opinion, by the testimony of experts.

It will thus be seen that there are also three methods of proving handwriting in cases of wills, viz.:

First, by witnesses who have seen the party write the document;

Second, by witnesses who know the writing for having often seen the party write and sign; and

Third, by comparison of handwriting and experts. *Ticknor v. Calhoun*, 29 La. Ann. 279; *Succession of Leonard*, 21 La. Ann. 524; *Plicque & Le Beau v. Labranche*, 9 La. 562; *Succession of Morvant*, 45 La. Ann. 212, 12 South. 349.

The ruling in *Succession of Gaines*, 38 La. Ann. 123, was merely an affirmation of previous opinions in *Moses Fox v. Succession of McDonogh*, 18 La. Ann. 419, 444, *Succession of Roth*, 31 La. Ann. 315, 320, and *Succession of Clark*, 11 La. Ann. 124, 127.

But Act 119 of 1896, p. 168, has eliminated from C. C. 1655 the phrase "as having often seen him write and sign during his lifetime," and broadened the field from which the witnesses may gather their knowledge of the handwriting of the deceased.

The defendants have quoted in support of their objection a large number of French authors; but they can have but little influence in the decision of this question from the fact that the Code Napoleon contains no article corresponding with the articles of our Civil Code 1655 and 2245 and C. P. 325.

We are equally of the opinion that the court below was right in overruling defendants' objections, and permitting the plaintiffs to show that the figures "08" were not in the handwriting of the testatrix. It did not contradict their pleadings. They alleged

that the document found by the notary was dated May 26, 1913, that it contained the olographic testament of the deceased, and was entirely written, dated, and signed in the handwriting of the deceased, meaning that part which composed the will. They did not allege that the "08" was in the handwriting of the deceased; it was the defendants who claimed that the will should be decreed to be dated in the year "1908." To defeat that allegation, plaintiffs had a clear right to show that the figures "08" were not in the handwriting of the deceased, and had been added by the hand of another, and therefore formed no part of the will. C. C. 1589 (1582).

[4] II. Nor do we think that the court erred in refusing to reopen the case for the purpose of hearing the testimony of the two experts in handwriting mentioned by the defendants, and in ordering the affidavits of these two experts to be stricken from the record.

The case had evidently been closed, since defendants moved to have it reopened. In such cases the Code of Practice provides:

"Art. 484. After all incidental questions shall have been decided, and both parties have produced their respective evidence, the argument commences; no witness then can be heard, nor proof introduced except with the consent of all the parties."

This article has been interpreted to mean that, after all parties have announced that the testimony is closed, neither party has a legal right to introduce further evidence, but that the privilege of doing so may be granted by the court in its discretion and in furtherance of justice. The judgment of the court refusing to admit further evidence will not be reversed by this court unless it is manifestly erroneous and productive of injustice. See *Vicksburg Liquor & Tobacco Co. v. Jefferies*, 45 La. Ann. 621, 632, 12 South. 743, *State v. Chandler*, 36 La. Ann. 177, and *School Board of Union Parish v. Trimble*, 33 La. Ann. 1073, 1079.

In *Parker v. Ricks*, 114 La. 942, 947, 38 South. 687, 688, presenting many points of resemblance with this case, this court said, in passing on a motion to reopen the case to offer further evidence:

"After a case has been submitted and months have elapsed, a party to the suit has no right to reopen it to introduce new evidence. There remained nothing to do save to decide the case" (quoting many authorities).

We think this case comes under the rulings made in the above cases.

On January 23d, plaintiffs filed their petition for the probate of the 1913 will. On February 13th, the defendants filed their answer, in which they averred that the figures "1913" were not in the handwriting of the decedent and were not made by her, and that the will was dated 1908. These two allegations presented the pivotal point of the case. On motion of the defendants the trial

of the case was fixed for February 23d. It was postponed to March 2d, when it was tried during two days. The plaintiffs offered the expert on handwriting as a witness to prove the genuineness of the figures "1913." Defendants objected, and over their objections, the expert was examined by plaintiffs and cross-examined by defendants. He swore that the figures "1913" were genuine, and that the figures "08" were not written by the testatrix. Defendants then offered two witnesses, who testified that the "1913" were not in the handwriting of the testatrix. On April 7th defendants moved to submit without argument. Notwithstanding plaintiffs' objection, the argument was fixed for May 1st. On April 29th, nearly two months after the trial, defendants filed the motion to reopen the case, and for permission to offer as witnesses two experts who would swear that the figures "1913" were not written by the testatrix, on the ground that they were taken by surprise by the ruling of the court admitting the testimony of the plaintiffs' expert. Defendants knew that the turning point in the case was the genuineness vel non of the figures "08" and "1913," for they had raised the point themselves. If their attorneys were taken by surprise by the ruling of the court, although it was in line with the well-established jurisprudence of the state, the time to express it was on the trial of the case, on March 2d. There must be an end to litigation.

Of course the affidavits annexed to the motion to reopen were all ex parte and inadmissible. Besides, if a witness could not be heard, neither could affidavits nor any other evidence.

[8] III. Were the figures "1913" written by the testatrix?

This is a question to be determined by a preponderance of the evidence, and by the will itself as it appears to us.

It is proven and admitted that the rest of the date, and the body of the will, and the signature, are all in the handwriting of the testatrix. Therefore it is easy to presume, and without much corroborating evidence, that the date also is in the handwriting of the testatrix.

Two witnesses for plaintiffs testify that the figures "1913" are in her handwriting, viz.: (1) Sam Serio, who was her tenant for 13 years, who saw her write his rent receipts and was acquainted with her handwriting; (2) Mrs. Caroline Levy, who was one of the witnesses to the probate of the will of 1909, who knew the deceased for 22 years, and who lived with her in her home on several occasions, and who had seen her write and sign her name and who knew her handwriting. Both witnesses are legatees under the will.

On the other hand, the defendants introduce two witnesses: (1) Charles A. O'Neill,

judge of the district court for the parish of St. Mary since November, 1908, and judge of the Supreme Court of this State since April, 1914, a legatee under the wills of 1909 and 1913, and a defendant in this suit, testifies that the document is in the handwriting of deceased with the exception of this "1913" which, he has no doubt, was not written by her. He has known the deceased all his life, has been her lawyer since 1893, and even after his ascent to the bench was her advisor, and has often seen her write and knows her handwriting.

(2) Mrs. Carrie Kramer, also a legatee under the will of 1909 and a defendant in this suit, swears that the document is in the handwriting of the testatrix except the figures "1913," which are not in her handwriting. She has lived with the deceased since 1908, and has seen her write often and is familiar with her handwriting.

The opinion of all these four witnesses would be entitled to more authority if they were testifying as to the "handwriting" of the deceased; but it loses weight when applied to mere figures.

The solution of the question whether the testatrix wrote the figures "1913" would present more difficulties were the testimony of these four witnesses the only evidence in the case. But the testimony of plaintiffs' two witnesses is corroborated by the will, by surrounding circumstances, and by the expert, E. A. O'Sullivan. He testifies, without hesitation, that the figures "1913" were written by the testatrix. His testimony exhibits careful and skillful examinations and intelligent explanations that carry great conviction. His own testimony is corroborated by several other salient facts. The envelope in which the testament was found, and which is admitted to be in the handwriting of the deceased, has the following superscription: "My last will 1913—1913."

The date of the will is "May 26 1913—1913," thus repeating the 1913. It is true that the figures "08" are written over the figures "13" in the first line; but the evidence is that these figures "08" were written by a strange hand, and we believe it. The paper upon which the will is written was lined by Miss Marion in 1910 or afterwards. She recognized it. The figures "1913" are again found at the end of the will, again covered by the figures "08," and again in the second line after the figures 1913 in a sort of codicil. If the will of 1909 had been her last will, the testatrix would have added her codicil to that will and not to the will of 1913. Besides, the testatrix by her will of 1913 omits to mention her brother, to whom she had left the usufruct of all her property by the will of 1909, and who died in 1909. She says, concerning him: "In remembrance of Mr. Serio's kindness to my brother in his illness," etc. The evidence is that Mr. Serio

became acquainted with the testatrix's brother only in his last illness, which was in July, 1909. Again Judge O'Niell testifies that the testatrix never showed him the 1913 will, and never spoke to him about it, and that he heard of it only after the death of the testatrix. We may explain that circumstance from the fact that "Mr." O'Niell, who had been the attorney and advisor of the testatrix, became "Judge" O'Niell in 1908, and from that time the testatrix had fewer facilities for consulting him.

All these circumstances are a corroboration of the plaintiffs' witnesses, and establish to our satisfaction that the figures 1913 were written by the testatrix.

We cannot adopt the views of the district judge in holding that the figure on the right of the figure 2 in the date "May 26" is uncertain, and may be an "0" or a "6" or something else. There was no attack upon the will upon that ground. The only part of the date attacked in explicit terms was the year "1913." Nevertheless the unanimous testimony is that the will was dated May "26," and it appears so to us very evidently. Mrs. Carrie Kramer, a contestant of the will, testifies that the date "May 26" is written by the testatrix. Mrs. Caroline Levy, tendering the will, says that "May 26" is in the handwriting of the testatrix. E. A. O'Sullivan, the expert, gives it as his opinion that the figure is a "6." The effect produced upon us is that the pen caught in the paper as the testatrix was closing the end of the figure "6." The testatrix was over 80 years of age, her sight was weak, her orthography reveals a lack of school education; her chirography is not of the best, and evidences the hesitation, trembling, and nervous effects of age. While the "6" is not perfect, there is no suggestion, and certainly no testimony, that it is not a "6," or that it is, or that it resembles, any other numeral. As this court said in *Succession of Stewart*, 51 La. Ann. 1559, 26 South. 460, 462:

"No one has assumed to say, as a witness, that it was not 1896, although the figure '6' is not clearly written."

In that case the court said the question of "surcharge" or "writing over" was a question of fact.

[6] IV. Does the testament of 1913 revoke in its entirety the one of 1909?

Article 1691 (1684) provides:

"The revocation of testaments by the act of the testator is express or tacit, general or particular. It is express when the testator has formally declared in writing that he revokes his testament, or that he revokes such a legacy or a particular disposition. It is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will. It is general when all the dispositions of a testament are revoked. It is particular when it falls on some of the dispositions only, without touching the rest."

It does not follow that because a testator has made two wills, the first is revoked.

C. C. 1693 (1686):

"Posterior testaments, which do not, in an express manner, revoke the prior ones, annul in the latter only such of the dispositions there contained as are incompatible with the new ones, or contrary to them, or entirely different."

C. C. 1723 (1716):

"When a person has ordered two things, which are contradictory, that which is last written is presumed to be the will of the testator, in which he has persevered, and a derogation to what has before been written to the contrary."

There is no clause in the will of 1913 revoking, in an express manner, the will of 1909 or any of its provisions, or any previous will or legacy; if there is any revocation it must therefore be tacit or resulting from some disposition in the will of 1913 incompatible with the will of 1909 supposing a change of will.

We find no general dispositions in the will of 1913 incompatible with the will of 1909; both make a series of particular legacies with the exception of the will of 1909, which donates "the remaining cash and property at the disposal of the Archbishop for charitable purposes." Some of these particular legacies are not very clear to one not familiar with the properties of the deceased. Of course, if any legacy contained in the will of 1909 is contrary to, or incompatible, or irreconcilable with, those contained in the will of 1913, the legacies contained in the will of 1909 are to that extent revoked.

"When posterior testaments do not expressly revoke prior ones, they must all be executed, unless the last tacitly revoke the first." *Succession of Mercer*, 28 La. Ann. 564.

"It is true that when the testator leaves two wills, the clauses of the first which are contrary to or incompatible with those of the last are considered as having been revoked; and, for the purpose of ascertaining any such changes of intention, the two are to be considered as distinct, and as having been executed at different dates. But when the intentions of the testator have been ascertained by setting aside these clauses, which, under the application of this rule are to be annulled, the remaining dispositions are to be considered as forming parts of one will, which it becomes the duty of the executors to execute as such." *Succession of Fisk*, 3 La. Ann. 705, 706.

"Where a posterior testament contains no disposition from which a change of intention in the testator, with regard to a legacy in a prior will, can be presumed, the legacy will not be revoked." *City v. Fisk*, 2 La. Ann. 78; *Lyon v. Fisk*, 1 La. Ann. 444, 455.

"Two wills made at different times may stand together in all the parts in which they are not inconsistent. But where they conflict the provisions in the last one will prevail." *Tournoir v. Tournoir*, 12 La. 19.

"Where a prior will gave certain specific (particular) legacies, and the subsequent one made the testamentary executor universal legatee, without any mention of particular legacies and without any revocatory clause, held, that the subsequent will did not revoke the particular legacies in the first, by omitting them and instituting a universal legatee; but that the executor is bound to pay them." *Sarce v. Dunoyer*, 11 La. 220.

See, also, *Succession of Bobb*, 42 La. Ann. 40, 7 South. 60; C. N. 1036-2 Dalloz, Codes

Annotés Nos. 41, 42, p. 751, Code Nap. 1036, p. 754, No. 114 et seq., and numerous French commentators quoted.

[7] V. In both wills the testatrix appoints the pastor or priest of the Church of Franklin executor, without naming him. We believe she intended to appoint the person who would fill the position of priest at the time his services as executor would be required. If she intended to appoint the priest who officiated at the time she made her two wills she would have said who are "now" the priest at Franklin, or she would have named them, as she was well acquainted with them both. "A donation mortis causa," says C. O. 1469 (1455), "is an act to take effect, when the donor shall no longer exist." When, therefore, the testator named an executor, she looked to the future. When her testament took effect J. J. Rousseau was the priest at Franklin.

The article of the Civil Code, 1721 (1714), provides that a disposition couched in the future tense refers to the time of the death of the testator. Certainly the appointment of an executor looks to the future, to the very time of the death of the testator. A will speaks as of the death of the testator. Succession of Marks, 35 La. Ann. 1054; Thomas v. Blair, 111 La. 678, 684, 35 South. 811; 40 Cyc. 1424. It is just as if the testatrix had said that she appointed for executor of her will the person who would be the priest at Franklin at the time of her death. The trust was conferred upon the officer, and not upon the individual. McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952; Appeal of Seibert (Pa.) 6 Atl. 105.

In Succession of Allen, 48 La. Ann. 1046, 1047, 20 South. 193, 197 [55 Am. St. Rep. 295], this court said:

"The will speaks from the death of the testator, that being the point of time at which it becomes operative (21 Conn. 560, 516), unless the language used, such as the word 'now,' or a verb in the present tense which requires it to be taken at the time it is used. 1 Jarman, Wills, 318. But it will receive the former interpretation if it can reasonably be made to bear it. Cox, Ch. 384."

In the Succession of Burnside, 35 La. Ann. 708, 717, a legacy of all the testator's property, though couched in the present tense, was interpreted to mean all the property the testator owned at the date of his will, and would own in the future at the time of his death.

In Succession of Marks, 35 La. Ann. 1054, this court said:

"A will speaks as of the death of the testator, and conveys all the property owned by him at that time, unless a contrary intention manifestly appears."

Affirmed in Succession of Blakemore, 43 La. Ann. 846, 850, 9 South. 496.

An executor has been compared to the mandatory or agent of the deceased at death. The will reads:

"I bequeath to the priest of this church the sum of two thousand dollars and I appoint him executor of this will without bond."

"For the care of our lot in the cemetery and for having masses said for the family and the most neglected souls in purgatory one thousand dollars."

This money legacy was doubtless intended by the testatrix as a remuneration for the services to be rendered by the executor, for taking care of the tomb, and for saying masses for the family. If that supposition is correct, why should the testatrix appoint as executor, or leave a legacy to, a priest in office at the date of her will, who might not be so at her death, or who might not be the executor of her will, and thus never be her mandatory, or agent after death? Her legacies were for pious purposes, and only the priest of the parish at the time of her death could be her mandatory to carry out her wishes. The testatrix appointed as her executor "the priest of the parish." How could Father Trainor pretend to be the man intended by the testatrix, since he was not the priest of the parish at her death?

For these reasons, we are of the opinion that Rev. J. J. Rousseau is entitled to the appointment of testamentary executor.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it revokes and sets aside the decree appointing Rev. J. H. Trainor as executor herein, and in so far as it confirms Rev. J. J. Rousseau as such executor and orders letters to issue to him as such on his complying with the requirements of the law.

It is further ordered that said judgment be reversed, avoided, and annulled in so far as it refuses to probate the will of the deceased dated May 26, 1913, and it is now ordered that the document presented by the plaintiffs herein, and dated May 26, 1913, be decreed to be the olographic last will and testament of the deceased, Frances Caroline Lefort, and to have been duly probated according to law, and that it be registered and executed according to law, without prejudice to the will of 1909, unless the dispositions contained in the will of 1909 are contrary to, irreconcilable and incompatible with, those contained in the will of 1913.

It is further ordered that the succession pay all costs.

LAND, J., dissents.

PROVOSTY, J. (dissenting). On several law points essential to a decision in this case, the views of two of the justices and of the justice ad hoc are opposed to those of two of the other justices, which are being advocated by Justice O'NIELL as a litigant. If the three latter justices adhere to their

a known numeral without adding to it in order to make an 0, or suppressing something in order to make a 6. And it will be observed that there are two year dates.

The plaintiffs alleged in their petition that this will was entirely written, dated, and signed by the testatrix; and that the date was May 26, 1913. They made it a part of their petition, and prayed that it be probated as being of that date.

The law being that a will whereof the date is uncertain is null, and that where a document is annexed to and made part of a petition it controls the petition, and the date of this will appearing to be uncertain, owing to the double year date and the illegibility of the scrawl following the figure "2" in the date line, the defendants filed an exception of no cause of action, contending that because of the uncertainty in the date this will was null and could not be probated.

This plea is disposed of in the opinion handed down by the majority of the court, in these words:

"The defendants, in their answer, interposed the plea of no cause or right of action. But as this plea is inseparably connected with the merits, we shall treat the two together. Besides, the defendants proceeded to the trial of the case on the merits without asking for a separate judgment on the exception. It is now too late. *Doullut v. Pierce*, 117 La. 491, 41 South. 913; *Succession of Stewart*, 41 La. Ann. 133, 6 South. 587; *Tupery v. Edmondson*, 32 La. Ann. 1146. But we are of the opinion that the petition does show a cause of action, and that the judge below acted correctly in overruling the objection to the introduction of evidence based on that exception."

The statements that the defendant pleaded this exception in their answer, and that they proceeded to trial without asking for a separate judgment upon it, and the intimation that the trial judge overruled it, are true only with a qualification.

The facts in connection with the first of these statements are that this plea and the answer were on the same piece of paper, and therefore were filed at the same time, but that the plea was first pleaded as an exception, and that after having thus pleaded, the defendant proceeded as follows:

"Respondents, under benefit of said exception, and only in the event same be overruled, answer the plaintiff's petition, as follows."

Then followed the answer. It will be observed, therefore, that the answer was filed "only in the event" the exception of no cause of action was overruled. So that, the statement that the exception of no cause of action was "interposed in the answer" is true only to this extent: That it was written on the same piece of paper and filed at the same time; that this filing of a plea, with reserve and subject to the condition of another plea being overruled, is admissible in our practice; and that in such a case the filing of the second plea does not waive the first, will be abundantly shown by the authorities hereinafter cited.

The facts in connection with the statement

that defendant did not require a separate judgment to be rendered on this exception are as follows: After the document containing both of these pleas had been filed, the case was fixed for trial; and it came to trial. The first evidence sought to be offered by plaintiff was the testimony of a witness to show the circumstances under which the will was found. The witness was asked to state these circumstances, and defendant made the objection that the testimony was not admissible because the petition showed no cause of action; and in making this objection counsel added that it was being made—

"to stand to all evidence of all kinds and character tending to support the petition, without the necessity of reurging same."

The court ruled that the petition "does disclose a cause of action;" and overruled the objection; and the counsel for defendants reserved a bill of exception to the ruling. Next the envelope in which the will was contained was offered in evidence, and the same objection and the same ruling was made. And so, in like manner, when, next, the will itself was offered. For his said ruling the judge assigned no reason; but in his reasons for final judgment in the case he gives the reason, as follows:

"That objection was overruled for the reason that the petition alleged that the document was written, dated and signed by Caroline Lefort."

That no further ruling upon this exception than this was necessary under our practice in order that the benefit of the exception of no cause of action should not be lost will be abundantly shown by the authorities hereinafter cited.

The facts in connection with the statement that the trial judge overruled the exception of no cause of action, are as follows: He overruled it, as just seen, when passing upon the admissibility of the evidence; but he sustained it when he came to render final judgment. He rested his final judgment on the fact that the scrawl following the figure "2" in the date line was of uncertain meaning; and hence that the date of the will was uncertain and the will was in consequence null, and could not be probated. His reasons for judgment are in the record. I quote from them:

"In last analysis the court must decide from the document itself whether or not it is written, dated and signed by the testatrix."

And again:

"A close examination of the law and a thorough reading of all the decisions of our court on the subject of wills convinces the court that in this state an olographic will must have a certain determined date, and that this date can only be ascertained from the will itself, and cannot be supplied by parol evidence or by the opinion of an expert."

It is true that in his elaborate reasons for judgment the judge reviewed the evidence; but the above is the conclusion he finally came to, namely, that this scrawl was meaningless, and that thereby the will was ren-

dered null by reason of uncertainty in its date, and that the meaning of this scrawl had to be ascertained from an inspection of the will, and not be derived from the mouth of some witness. Thereby he found that the will was, upon its face, uncertain in date, and in so doing sustained the exception of no cause of action, for that exception is founded upon that proposition, and upon nothing else.

By an answer filed in this court the defendants renewed their exception of no cause of action, and prayed that the court dispose of it before proceeding to consider the case upon the evidence.

Under the circumstances here stated, which are the exact facts of the case as taken from the record, the first question which arises is whether the defendants have waived their said exception, or are still entitled to have it passed on as an exception; in other words, whether in our practice an exception of no cause of action is waived if it is written on the same paper as the answer, and if the exceptor does not require it to be fixed for trial and passed on before the case comes up for trial on the merits, even though the benefit of it is reserved, and the answer is filed only conditionally, "In the event the exception is overruled," and though on the trial objection is consistently made throughout to all evidence on the ground that the petition shows no cause of action.

I shall show hereinafter by an abundance of citations that in such a case the exception is not waived.

In the majority opinion it is said:

"As this plea is inseparably connected with the merits, we shall treat the two together."

And, again, it is said:

"We are of opinion that the petition does disclose a cause of action, and that the judge below acted correctly in overruling the objection to the introduction of evidence based on that exception."

What is, or can be, meant by an exception of no cause of action being inseparably connected with the merits I frankly confess I do not know. I do not see how it is possible for the two to be even distantly connected, let alone inseparably. It seems to me that, from their very nature, it is impossible for them to be connected at all, since the sole object and purpose of an exception of no cause of action or demurrer—the only function it can possibly perform, the only use it can possibly be of—is to dispense the defendants from having to plead to the merits; still more, to save the parties from having to try the case on the merits. By this exception the defendant says to the plaintiff: Granting every allegation of fact contained in your petition to be true you have no case. After the defendant has thus admitted of record that every allegation of fact made in plaintiff's petition is true, of what earthly use could evidence be? The evidence could only show that these allega-

tions were true. To introduce evidence after such an admission has been made of record would be simply a useless consumption of time.

So far as the referring of such an exception to the merits and trying it with the merits is concerned, I do not see what on earth is possibly to be accomplished by it, except to put the litigants to a great deal of useless trouble; for, unless waived, it will have to be disposed of sooner or later on the face of the petition, irrespective altogether of what evidence may have been introduced. When a judge thus refers an exception of no cause of action to the merits, he practically says to the litigants: I will not pass on this exception at present, but will require the defendant to plead to the merits, and will hear all the evidence, and then I will disregard entirely the plea to the merits and the evidence and will pass on the exception of no cause of action just as I should have done at first.

Of course, if the defendant waives the plea expressly in his answer, or impliedly waives it by making, without reserve, allegations that supply what is lacking in the petition in order that there should be a cause of action, or by allowing evidence inadmissible under the pleadings to go in without objection, thereby enlarging the pleadings—then, the referring of the exception to the merits would have been of some use; but if the reference to the merits is resorted to in the hope that the defendant will thus voluntarily abandon his exception, or will unintentionally lose it by failing to reserve the benefit of it, or by failing to make objection to evidence, all I have to say is that by such a course the judge does an injustice to the litigant, who is entitled to the full benefit of his exception.

It being certain, as certain as anything in the jurisprudence of a state can be, that a document upon which a petition is based and which is annexed to and made part of it controls it, and that an exception of no cause of action must be disposed of on the face of the petition and of the documents annexed to and made part of it; that an exception of no cause of action is not waived or the benefit of it lost, when the answer is filed only with reserve of it and only in the event it is overruled, and not otherwise, and all evidence in support of the petition is duly objected to on the ground that it shows no cause of action (all of which propositions will be abundantly sustained by citations of authority hereinafter); and the record showing that the circumstances here detailed, under which an exception of no cause of action is not to be considered as waived or the benefit of it lost, are the very ones of this case—I pass to the question whether this will is not on its face uncertain in date.

The majority opinion says:

"It is true that the figures '08' are written over the figures '13' in the first (date) line; but

the evidence is that these figures '08' were written by a strange hand."

And the opinion proceeds to refer to various circumstances shown by the evidence, from which the conclusion would have to be reached that the proper date of the will is 1913 and not 1908.

But with all due deference, the evidence has nothing to do with an exception of no cause of action. If a will bears two year dates, its date is uncertain, and there is an end to discussion. And that this will bears two year dates is patent to any one who has eyes; and the majority opinion admits it, but says that the evidence shows which one is the true date.

On the strength of the evidence the majority opinion reaches the conclusion that the "08" was not written by the testatrix, but by a strange hand. The evidence convinces Justice LAND and me to the contrary; but the exception of no cause of action has to be disposed of without regard to the evidence, on the face of the petition and of the documents annexed. Now, on the face of the petition and of the will what is the situation? It is that a will is presented with an unintelligible day date and a double year date, with absolutely not a word said in regard to the two year dates not being in the handwriting of the testatrix; but, on the contrary, with an allegation that the instrument is entirely written by her. Nay, more, the allegation is made in the petition that this will was found among "the effects of the decedent," with no intimation of a stranger having had access to it, thus giving ground for inference that no one has tampered with it.

Very true, by these allegations, the plaintiffs possibly did not intend to admit that this "08" was in the handwriting of the testatrix; but, whatever was their intention in that regard, they certainly made these allegations, and made them without qualification or reserve. These allegations, like every other allegation in a pleading, have to be taken for what they are, and not for what they may have been intended to be. If the plaintiffs intended that the said allegations should not cover the "08," nothing could have been easier than for them to have qualified them in that respect. They cannot be allowed to say that while they alleged positively that the document was "entirely written, dated, and signed" by the testatrix, they did not so intend, but intended that a part of it was not in the handwriting of the testatrix, but was in "a strange hand," or, in other words, was a fraudulent surcharge, or forgery. It would be a strange interpretation of a pleading—by which an affirmative allegation should be construed into a negative one—an allegation that a document is entirely in the handwriting of the testatrix into one that part is a forgery. Such a construction would be not liberal merely, but reformative. The rule is just the other way

—a pleading is construed strongly against the pleader. And in support of that assertion I shall hereinafter quote authorities.

Let the plaintiff, however, be given the benefit of their not having alleged that this "08" is in the handwriting of the testatrix, and they are no better off; for the will is part of the petition, and shows this double date, and there is no allegation that this "08" is a forgery.

A pleading which presents a will dated 1908-1913, and alleges that the document is entirely written, dated and signed by the testator, and at the same time alleges that it is dated "1913," does not import that the 1908 is a forgery, but it imports that a will bearing these two dates is to be taken, as a matter of law, to bear the date 1913. If a pleading simply presents a double dated will, and alleges one of the dates to be the true date, the forgery of the other date might be implied, provided such implication would not be against the settled rules of pleading, as it would be. But, irrespective of the rules of pleading in the matter, such an implication becomes impossible when there is an affirmative and positive allegation that the will is entirely written, dated, and signed by the testator.

From an inspection of the petition and of this will forming part of it, no one can deduce that this "08" is a forgery; and, in fact, no one pretends that such a deduction can be made; the contention of the plaintiffs in that connection, as taken from their brief, being as follows:

"The position of the proponents of this will is that the testatrix wrote this will and dated it May 26, 1913. Some person interested in destroying the validity of this will discovered the same and superimposed the figures '08' on the figures '13' following the first '19.' * * * The testatrix discovered the alteration in the date at the top and bottom of the will when she revoked the attempted codicil in favor of Judge O'NIELL on December 8, 1913, and then wrote the figures '1913' to the right of the altered figures in the date line, so that there could be no mistake as to the date of the year in which she had written the will."

Not a word of all this private history is alleged in the petition, and no one claims to be so lynx-eyed as to be able to read or decipher all this from the face of the will. The majority opinion declares that it found these facts, or inferred them, from the evidence. But, as every one knows, the evidence is not to be considered in passing upon an exception of no cause of action. Accordingly, therefore, to what the plaintiffs themselves declare their case to be, this case is not set forth in the petition, and does not appear from a reading of the petition and the will annexed.

The will is alleged in the petition to have been found among the effects of the decedent, and in a sealed envelope bearing a superscription in her handwriting. This, of itself, is almost tantamount to an allegation of its being genuine in its entirety, for would

the testatrix have thus sealed and superscribed a will of which one of the dates had been forged by a strange hand? Again, this allegation of the will having been found among her effects gives rise to a strong inference that it never left her immediate custody; that no stranger had access to it; and, hence that this "08" was written by herself.

Again, fraud and forgery are never presumed, but must be alleged and proved; and a will is presumed to be genuine until the contrary is alleged and proved. Authorities to that effect are cited hereinafter.

This forgery having to be established in order that the will should have a fixed date and be valid and probatable, and this fact having to be established by proof, it was necessary to allege it in order that the petition should show a cause of action. Authorities will be cited hereinafter in support of the proposition that facts necessary to be proved, in order that a cause of action should appear, must be alleged, even though negative in character. And no authorities can be found contra.

The majority opinion says:

"We are equally of the opinion that the court below was right in overruling defendants' objections and permitting the plaintiffs to show that the figures '08' were not in the handwriting of the testatrix. It did not contradict their pleadings. They alleged that the document found by the notary was dated May 28, 1913, that it contained the olographic testament of the deceased, and was entirely written, dated, and signed in the handwriting of the deceased, meaning that part which composed the will. They did not allege that the '08' was in the handwriting of the deceased."

It is here said that the evidence offered by the plaintiffs did not contradict their pleadings. But the question raised by the exception of no cause of action (upon which the objection was based) was not as to whether the evidence contradicted the pleadings, but as to whether there was any allegation in the petition which justified the introduction of the evidence; on the familiar principle that what is not alleged cannot be proved. It was whether the plaintiffs could offer evidence that the "08" was not in the handwriting of the testatrix but was a forgery, when they had made no such allegation.

The majority opinion says that by the allegation that the will annexed to and made part of the petition was entirely "written, dated and signed by the testatrix," the plaintiffs meant "that part which composed the will." I do not know upon what legal principle of pleading it can be said that a document alleged to be "entirely" written by a person, means that the document is only "in part" so written. The rule for the construction of pleadings is that they must be construed strictly against the pleader; but here, with all due deference, the opposite is done. Nay, the construction is more than liberal; it is reformative. The supposed intended

"meaning," is taken in opposition to the express allegation.

The learned trial judge, although the will forming part of the petition and controlling it was null on its face, because of uncertainty in date, as he subsequently found, was of opinion that the petition showed a cause of action because it alleged that the will was entirely written, dated, and signed by the testatrix.

He lost sight of the fact that the facts alleged in a pleading, or appearing from documents annexed to it, control the legal deductions which the pleader draws therefrom, and not vice versa. In this case the fact which appeared on the face of the petition (taking the will to be a part of it and controlling it) was that the alleged will was uncertain in date, and was therefore null, and that therefore the petition was asking the probate of a will null on its face, and, such being the case, that it showed no cause of action, since a will, null on its face, is not entitled to probate. A pleader cannot present for probate a will null on its face, and show a cause of action by simply alleging that it is valid. He cannot present for probate an olographic will with an uncertain date, and therefore null, and show a cause of action by alleging that it has a date that is certain, and that it is therefore valid. If a person suing upon a promissory note alleges that, while the consideration of the note has failed as between the maker and the payee, he himself is entitled to recover upon it, for the reason that he acquired it in good faith before maturity for valuable consideration, and that it is a negotiable instrument, and makes the note a part of his petition, the note will control the petition; and, if for any reason it appears on its face not to be a negotiable instrument, the petition will have failed to show a cause of action. In other words, the allegation of the inferences of fact, or conclusions of law, drawn by the pleader from the facts which appear from the petition and the documents annexed to and made part of it, do not control, but the facts control; and if upon these facts there is no cause of action, the petition shows none, no matter what allegations may be made as to what inference of fact or legal conclusions are to be drawn from them. I will hereinafter give the authorities on the point that the allegation of a conclusion of law cannot be made to serve for an allegation of fact. In this case the allegation of fact necessary to be made in order that the petition with the will annexed might show a cause of action was that the "08" was a forgery, or was not in the handwriting of the testatrix.

I think this court is bound to sustain this exception of no cause of action. Either that, or else adopt the rule that unless an exception of that kind, founded on law and going to the dismissal of the suit, is disposed of in

limine by a separate judgment, it drops out of the case.

I proceed now to give the authorities in support of the several legal propositions hereinbefore advanced.

First. That a will whereof the date is uncertain is null.

The French courts and commentators, interpreting article 970 of the Code Napoleon, corresponding with article 1588 of our Civil Code, declaring that the date, written by the testator, is a sacramental requirement of an olographic testament, have declared unanimously that, if the date appearing on the face of the instrument is uncertain or doubtful, the instrument can have no effect as a testament, whether the uncertainty arises from the fact that the handwriting cannot be deciphered by the court with certainty, or from the fact that the date has been changed or written over, surchargé.

Carpentier & Du Saint, *vo. Testament*, No. 478:

"Although the date is not tied down to any sacramental form of expression, at least must it be certain in order that it may answer. Uncertainty in the date is equivalent to no date at all, and renders the will null.

"No. 479. Thus when a month has only 30 days and the will is dated the 31st of that month, the date must be held to be incomplete, for want of any indication of the time.

"No. 480. Thus, again, a will, bearing an alternative date, the 26th or 27th of July, 1886, which two terms mutually exclude each other, and do not allow the precise day on which the will was made to be determined, is null as if there were no date; unless, indeed, it be possible to supply the date from elements derived from the will itself.

"No. 481. The date is again uncertain if, for instance, it is surcharged (meaning written over) in such way that it cannot be read, or that the judges remain undecided between two dates equally apparent."

Baudry-Lacantinerie & Colin, *Donations and Testaments*, vol. 2, No. 1960:

"Hitherto, we have spoken only of the inexact date. The same principles are applicable to the incomplete date, for example, as to the date indicating the month and the year, but not the day, of the confection of the will. They apply equally to the uncertain date; for example, that which has been written over (surchargé) in such manner that it shows two dates.

"An incomplete date, or an uncertain date, as clearly fails to comply with the form prescribed by article 970, Code Civil, as does an incorrect date.

"The testament bearing an incomplete or uncertain date is therefore null and void, for the same reason as a testament not dated or bearing a date which is not correct."

"No. 1956. Moreover, it is necessary that the testament furnish the means of establishing its exact date, and not merely the approximate time of its confection; for example, that it was made between two certain dates—*de telle date à telle date*."

After citing cases where it was held that the context of the instrument did not furnish the exact date, the author continues:

"In all of these cases, this was not proven by the recitals of the testament. It then failed, since it did not furnish the means of correcting, with absolute certainty, the uncertain date which it bore."

Demolombe, *Donations and Testaments*, vol. 21:

"No. 85. Is an uncertain date sufficient? Evidently, no. The date is, as we have said, the precise indication of the day, the month, and the year of the making of the will, so that the date which leaves uncertainty as to any one of these three elements does not indicate it in a precise manner. Hence such date is not sufficient, or rather it is not a date in the sense of article 970.

"A testament was written in an interval between two years, which occurred between the date of an authentic act of lease made by the testator and the marriage of his daughter. But, in which of these two years? The testator did not say. Hence it was not dated as to its year. Therefore it was null.

"No. 85. Would the preceding solution be applicable in a case in which the uncertainty of the date bore only on the day; there being no uncertainty as to the month and the year? Suppose the testament is dated, for instance, as of the month of March, 1863, but the letters or figures which express the day are made in such a manner, or written over in such fashion, that you cannot know whether it is the 6th or 10th, the 17th or 27th. Or, again, suppose the testament states that it is written on Monday, March 17, 1863, and the 17th of March was, on the contrary, a Tuesday. Is such a testament dated? * * * We think that the mention of the day is as essential an element of the date as is that of the month or of the year. For what is the day on which the testament was written,—Monday? No; since it is dated the 17th, which was Tuesday. The 17th? No; since it is dated Monday, which was the 16th. Then that date does not indicate the day on which the testament was written. It is the same as if the doubt could not be resolved between the two days, the 6th and the 10th, the 17th and 27th. * * * So, we do not contend that the uncertain indication of the date cannot be remedied, and we would even say that, so far as the enunciation of the testament itself comes to its aid, one could rectify an error when it would only be the remedying of some absent mindedness or inadvertence. But this we do insist upon: That that which was not subject to be rectified from the testament is equivalent to the absence of a date.

"No. 93. When it is proven that inexactness or irregularity of the date is only an inadvertence of the testator, it can be rectified. But, for this, two conditions are absolutely necessary. That is: First, rectification must be made by the aid of the testament itself, and from the testament only, not otherwise, and not by extraneous evidence; second, that it [the certainty of date] results not in conjecture or in a simple presumption, which would be no more admissible than any other extrinsic evidence of the precise date.

"It is true, these enunciations are not subject to any sacramental form; and it is from this that the right is derived to repair the indication of the date which is incomplete or inexact. But it is necessary, always, that it be the testament itself which furnishes the evidence of the exact date, which the law demands."

Troplong, *Donations and Testaments*:

"No. 1482. If the date is uncertain, there is no doubt that the testament is null; for, *Idem est non esse et non apparere*. A writing over a date, which would prevent the seeing of the true figures, would produce, on this point, an uncertainty, which would cause its nullity."

"No. 1489. We have said, in passing, that omissions, errors, and inadvertences can be supplied or rectified by proof found in the instrument itself. This is fundamental in such cases. Presumptions arising aliunde have no force. Evidence can only be admitted which the instrument furnishes in its context. *Ex propriis*

verbis testamenti,' said Menochius, 'ex verbis scriptis in testamento, non extrinsecus.' There is no doctrine more certain, or more proper to maintain."

Merlin, Repertoire, vo. Testament, vol. 2, par. 1, art. 6:

"No. 9. Does the uncertainty of the date of a will vitiate it? Yes, without doubt. The object of the law, in requiring the date to a testament, is to fix the exact time of its confectio. But this object cannot be carried out by an uncertain date. There is therefore no difference between an uncertain date and an omitted date."

Fusler-Herman, article 970, C. N.:

"No. 88. The date of an olographic will is an essential, of which the law demands the observance under pain of nullity. Therefore it is impossible to substitute for the omission of the date considerations taken from the intentions of the testator.

"The olographic will is null equally when the date is uncertain; the uncertainty of date being equivalent to an absence of date.

"No. 93. Equally null is a will of which the date is uncertain. Uncertainty in the date is equivalent to no date."

Citing a long list of authorities, none contra.

In *Fuentes v. Gaines*, 25 La. Ann. 85, at page 107, where a last will was sought to be probated, and the nearest the witnesses could come to fixing its date was "July, 1913," the court, said:

"It is essential, therefore, to specify the day, month and year to give a date to a testament, in the sense of article 1588 of the Civil Code. It is insisted, however, that the said witnesses state 'that the will was dated'—that is true; but to hold that such a declaration in regard to a lost testament is sufficient would be to substitute the opinions or judgments of the witnesses for that of the court."

In *Heffner v. Heffner*, 48 La. Ann. 1088, 20 South. 281, where the day was omitted from the date, the court annulled the will.

In *Succession of Robertson*, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672, where the figures "189" in the year date "1892" were printed, and not written, the court annulled the will.

In *Succession of Swanson*, 131 La. 53, 58 South. 1030, and *Id.*, 132 La. 606, 61 South. 685, where the testator had torn up the will and then sought to reconstruct it by pasting the pieces together, but had repasted them so imperfectly that the court could not be positive from an inspection of the document whether what appeared between the figures "19" and the figure "1" in the year date was an "0," the court annulled the will.

In *Succession of Armant*, 43 La. Ann. 310, 9 South. 50, 26 Am. St. Rep. 183, where the will was not signed, but began, "This is the testament of Aglas Armant," in the handwriting of the testatrix, the court annulled it, for defect in form.

In *Succession of Poland*, 137 La. 219, 68 South. 415, where the will began, "The will of Ellen E. Poland I make this my will and testament to my nephew" etc., in the handwriting of the testatrix, but was not otherwise signed, the court annulled it, for defect of form, although contained in a sealed envelope bearing the superscription, "The will

of Ellen E. Poland," in the handwriting of the testatrix.

In the *Armant Case*, supra, the court said: "The question is not whether she intended this * * * to be her will, but whether it is a will clothed with the forms."

Second. That a document upon which a petition is founded and which is annexed to and made part of, the petition controls it.

In *Lewy v. Wilkinson*, 135 La. 105, 64 South. 1003, in a suit on notes, where the petition alleged that the debtor was bound as surety; but where the note annexed to and made part, showed, when viewed in the light of the Negotiable Instruments Act, that the debtor's liability was as indorser, the court said:

"True it contains also the allegation that the defendant obligated himself as surety; but the notes show differently; and it is well settled that documents annexed to a petition control the averments of the petition founded upon them."

The court did not deem it necessary to cite authority in support of that familiar principle. See *Jordy v. Salmen Brick & Lumber Co.*, 121 La. 460, 46 South. 572; *Bagley v. Bourque*, 107 La. 399, 31 South. 860. In fact, see the Digests.

Third. That an exception of no cause of action, written on the same piece of paper as the answer, and filed at the same time as the answer, and on which the exceptor has not asked for a separate trial and judgment in limine, is not waived or lost, if the benefit of it is reserved in the answer, and the answer is filed only conditionally, "in the event the exception is overruled," and thereafter on the trial all evidence in support of the petition is objected to on the ground that the petition does not show a cause of action; and especially so if on the appeal the exceptor files an answer asking that the exception be passed on separately from the merits.

On this proposition it must be admitted that our jurisprudence, beginning with *Lafon's Executors v. Riviere*, 1 Mart. (N. S.) 130, where the court said that:

"Dilatory pleas cannot be received, when the party * * * has waived them by suffering the suit to proceed almost to a termination on its merits"

—was rather vague until in the case of *Clafin Co. v. Feibelman Co.*, 44 La. Ann. 518, 10 South. 862, the court made the clear distinction, in the present connection, between pleas merely declinatory or dilatory, and those peremptory, as, for instance, that of no cause of action.

The court there said:

"The appellant claims that, by referring their exception to the merits and by going to trial on the merits without requiring the court to pass on the exception, defendant must be held to have waived the exception. He relies on the following authorities: *Mix v. Creditors*, 39 La. Ann. 624 [2 South. 391]; *Boone v. Carroll*, 35 La. Ann. 284; *Chaffe v. Ludeling*, 34 La. Ann. 966; *Francis v. Lavine*, 26 La. Ann. 312. Reference to them will show that they apply only to dilatory or declinatory exceptions, the effect of which is only to retard, or change,

the form of the action. The exception here is not of that character. It is, by its terms, an exception to the 'cause of action.' * * * It was never waived by defendant, was entirely susceptible of being referred to and tried with the merits as part of them, and, in point of fact, the judgment, though it does not mention the exception, is obviously based upon it."

This last sentence fits the present case like a glove.

In *Martin v. McMasters*, 14 La. 422, where an exception of no cause of action had been tried with the merits and the trial judge had passed on the merits without passing on the exception, the court said:

"The defendant's exception was one of those which are called peremptory of the suit, but not of the action. If it prevail, it did not impair the action, id est, the right of bringing another suit. * * * But it destroyed or abated the suit, * * * leaving him at liberty to pursue his remedy in another suit. The defendant, therefore, had an incontestible right to have his exception considered, independently of any other matter of defense. The Code of Practice, art. 336, expressly requires the defendant to plead in his answer 'all the dilatory or peremptory exceptions on which he intends to rely,' except as relates to declinatory exceptions. This is done under a * * * protestando that they are not to be used if the exceptions which are peremptory of the suit prevail. In this case, the protestando is express, 'if the court should decide that said plaintiff has a cause of action.' This leads us to an examination of the first exception."

And the court proceeded to sustain the exception and to dismiss the suit, though the case had been tried on the merits. The analogy between that case and the present one is too striking to escape attention.

Another case strikingly analogous is *Fletcher v. Dunbar*, 21 La. Ann. 150. The court there said:

"The defendants prefaced their answer by a peremptory exception that the plaintiff's petition disclosed no cause of action, * * * and with a protestando proceeded to plead to the merits. The case was fixed on the merits, and the judge a quo gave judgment sustaining the exception. * * *

"It is urged by plaintiff that by going to trial upon the merits the defendants waived their peremptory exception, and the judge a quo had no right to consider and maintain it after the trial.

"This view may be correct when the exception is to matters of form, but it is incorrect when applied to such an exception as the one now before us. *Martin v. McMasters*, 14 La. 422."

In *McWilliams v. Gulf States Land & Improvement Co.*, 111 La. 198, 35 South. 514, this court, dealing with an exception of no cause of action, said: "It is not waived by going to trial on the merits." And the court cited *Fletcher v. Dunbar*, supra.

In *Bell v. Globe Lumber Co.*, 107 La. 725, at page 733, 31 South. 994, at page 997, the court said:

"Whilst it is true that the exception of 'no cause of action' is not waived by going to trial on the merits, nevertheless it may be rendered ineffective if the defendant, without objecting, permits the petition to be amended in such a manner as to supply the omission at which it is aimed; and so, if, upon the trial upon the merits, the defendant, without objecting, per-

mits evidence to be introduced tending to establish facts which, if alleged, would have disclosed a cause of action, he allows the ground upon which his exception is based to be taken from under it, since he thereby, in effect, allows the petition to be amended."

In the case at bar, the defendants did carefully and consistently object throughout.

In *Rogers v. Southern Fiber Co.*, 119 La. 714, 44 South. 442, 121 Am. St. Rep. 537, where an exception of no cause of action had been referred to the merits, the trial court gave plaintiff judgment. On appeal this court sustained the exception and dismissed the suit. The court said:

"The case must first be dealt with on this exception of no cause of action; that is to say, without consideration of the evidence in question, which came into the case only on the trial on the merits."

For holding that the exception of no cause of action was waived the majority opinion cites three cases: *Tupery v. Edmondson*, 32 La. Ann. 1146, *Ashbey v. Ashbey*, 41 La. Ann. 138, 5 South. 546, and *Doullut v. Smith*, 117 La. 491, 41 South. 913.

The first of these cases involved a declinatory exception, and is, of course, not in point.

In the second, *Ashbey v. Ashbey*, the defendant had pleaded 10 exceptions, some merely dilatory and some peremptory, but "promiscuously mingled," to use the expression of the court, and without any reserve, and had gone to trial on the merits. One of these exceptions was want of proper parties defendant. The court held that these exceptions had been waived by going to trial on the merits; but it then proceeded to sustain one of them—that of want of proper parties—and to dismiss the suit. The case is of very little authority, if any, since no one doubts that by answering to the merits without reserve of exceptions, and proceeding to trial without making objections to evidence, the defendant waives the exception and practically consents that the case be tried on the facts proved on the trial. Besides, this 41st Annual case antedates the 44th Annual case, supra, and if it could be considered of any authority, would have to be held to have been overruled by it and by the later cases, cited above, and by others not deemed necessary to be cited. The case of *Doullut v. Smith*, 117 La. 491, 41 South. 913, far from sustaining the proposition in support of which it is cited by the majority opinion, is to the very contrary, as shown by the syllabus, which reads:

"Where an exception of no cause of action is tried with the merits in the district court, without objection on the part of the defendant, who obtains judgment on the merits, and prays for no amendment on the appeal, the appellate court properly hears the case, as it was heard in the district court on the merits."

There can be no doubt of the correctness of that doctrine, but it is inapplicable to the case at bar, where the defendant reserved the benefit of the exception and consistently

at the very first step in the trial and throughout interposed objection, and prayed on the appeal that the exception of no cause of action be passed on and sustained.

Fourth. That an exception of no cause of action must be disposed of on the face of the petition and of the documents made part of it.

This proposition results from the very nature of an exception of no cause of action, and hence citation of authorities cannot be necessary in support of it. If any were necessary, the citation under the proposition just disposed of could serve as such. Also *Nalle v. Baird*, 30 La. Ann. 1148.

Fifth. That all facts necessary for making out a cause of action must be alleged, even though negative in character.

In *Succession of Herber*, 117 La. 239, 41 South. 559, the plaintiff attacked a will on the ground that the beneficiary was a minister of the gospel and had attended the decedent during her last illness. This was a good ground, provided there was no consanguinity between the decedent and the legatee. The court held that because of not having alleged this negative fact of no consanguinity the petition showed no cause of action. The case is particularly analogous with the one at bar from the fact that there, as here, the cause of action was founded upon a violation of law not alleged; there, the making of a prohibited donation; here, a forgery. The court said in that connection:

"The presumption of the law is * * * in favor of good conduct, and, although it may involve the necessity of alleging and proving a negative, those who rely upon the unlawful acts of others as a basis of their recovery must allege and prove them."

And in support of this the court cited *Cross on Pleading*, p. 116, and *Hicks v. Martin*, 9 Mart. (O. S.) 47, 13 Ann. Dec. 304.

The learned counsel for plaintiffs admitted in argument, in answer to a question propounded by myself, that unless this "08" was proved to be a forgery, the will was null, as bearing two dates, and being therefore uncertain in date. This forgery, therefore, should have been alleged.

In *Vinton Oil Co. v. Gray*, 135 La. 1049, at page 1066, 66 South. 357, at page 363, the court said:

"An allegation material to a cause, whether affirmative or negative, must be made."

And, there again, the court said that this was particularly true where this negative involved a breach of duty. In the case at bar it involves a forgery, a grave crime.

In *Lynch v. American Brewing Co.*, 127 La. 848, 54 South. 123, the plaintiff, suing for injuries received on the premises of defendant, failed to allege that he was not a trespasser thereon; and an exception of no cause of action was sustained for the absence of this negative allegation.

For the rule that negative facts upon which a cause of action depends must be

pleaded, see *Cross on Pleading*, p. 93, and cases there cited.

Sixth. That the allegation of an inference or of a conclusion of law cannot serve for the allegation of a fact necessary to be alleged.

In *State v. Hackley, Hume & Joyce*, 124 La. 864, 50 South. 772, the court held that the allegation that the defendants, in purchasing the property in question, had done so in bad faith could not be made to serve in place of the necessary allegation that they had acted with notice of the defects in the title. The court in that case went fully into the distinction between the allegation of a necessary fact and the allegation of a conclusion of law. Many illustrative cases are there cited. In the case at bar the allegation that the will is valid cannot be made to take the place of the necessary allegation that the "08" is a forgery. In that case the court said that the allegation that the defendants had acted in bad faith was "merely the legal opinion of the person who drafted the petition." So I say in this case, the allegation that the will bears a fixed and certain date, when on the face of it it bears a double, and therefore an uncertain, date, is "merely the legal opinion of the person who drafted the petition." The court, in that case made a remark strikingly applicable to the present case. It said:

"But if, in any case, the facts necessary to support the cause of action, when unalleged, will be eked out from a legal conclusion that is alleged, it will not be done in a case where the facts to be deduced would involve moral turpitude."

In the case at bar they would involve a high crime.

Seventh. That pleadings are construed against the pleader.

In *Breaux Bridge Lumber Co. v. Hebert*, 121 La. 189, 46 South. 206, the court said:

"Pleadings are construed against the pleader. The pleader is presumed to have made his pleadings as strong as he could" (citing 4 E. of Pd. & Prac. 746).

In the *Southern Reporter Digest*, vol. 4, vo. *Pleading*, § 34a, the rule is stated, "A pleading is to be construed most strongly against the pleader," and in support of this about 25 cases are cited.

Eighth. That fraud and crime are not to be presumed, but that the contrary is to be assumed until positive allegation and proof is made to the contrary.

This proposition being axiomatic (*Civil Code*, art. 1848) and known to every one, I will not cite authority in support of the proposition in its general aspect, but only in its application to wills.

Coin-De Lisle, Donations and Testaments, art. 970, C. N. No. 21, says:

"The natural presumption is that the erasures are the work of the testator, even when the will has been in the possession of a third person, for fraud is never presumed."

Erasures are presumed to have been made by the testator. Fuzier-Herman, Code Civil Annote, art. 970, No. 57.

Until those who wish to avail themselves of the will have proved the contrary. No. 58.

So much for the exception of no cause of action. I pass now to the question of the uncertainty resulting from the fact that the figure "2" in the date line is not followed by a known numeral, but by an unmeaning scrawl. Of course, if the court, looking at this scrawl, can come to the conclusion that it is a "6" or an "0," then the day date becomes certain. But Justice LAND and I cannot see how this scrawl, resembling a capital "G," can be made into an "0" without adding something to it, nor into a "6" without taking away something from it, and we do not see what authority the court has to do this. By a will being written the Code means that it shall be expressed in the conventional letters and figures for putting thought on paper. If lines are made which do not correspond with these conventional forms, the consequence is that the will is not written. If the court cannot read what is on the paper, but must guess at it, then it is not reading but guesswork. The writing may be bad, but it must not be so bad as to be illegible or unintelligible to the persons to whom under the law appertains the function of carrying the will into execution. If the writing is not legible and intelligible, the will is null.

If the court cannot know by an inspection of it what the meaning is, the court cannot call upon some witness for this information; for then it would be the witness, and not the writing, that would be expressing the will of the testator.

Therefore, in this case, if the court can, on inspection of this scrawl following the numeral 2 in the date line, resembling a G, but not resembling any known numeral, know what numeral it is, then, well and good; but if the court cannot have this information from the will itself, then the date is uncertain and the will is null; for this scrawl was evidently intended by the testatrix to constitute a part of the date.

There can be no objection to the court's being assisted by experts to this extent; that experts may be allowed to furnish indications whereby the court may be enabled to see what it might not be able to see without such aid; but, in last analysis, it is the court who must be able to see, and all the expert can be allowed to do is to assist the court in seeing.

The court cannot, in place of what it can thus see after having received all the help the experts can give, accept the mere statement of the expert as to what, in the opinion of the expert, the scrawl means, for then it would be the expert, and not the writing, that would be furnishing the date.

I do not wish to be understood as saying

that expert evidence cannot be admitted on the question of the genuineness vel non of the writing, nor that the experts in handwriting cannot be allowed to furnish the court with indicia derived from the handwriting of the testatrix by which the court may be enabled to ascertain the meaning of this scrawl—what I say is that if after all these indicia have been furnished to the court, the court is not enabled by them to be positive as to the meaning of this scrawl, then the scrawl is meaningless; that the meaning which the court cannot derive from the writing cannot be derived from the mouth of an expert.

From Troplong, Donations and Testaments, No. 1489:

"We said a while ago that the omissions, errors, inadvertences, may be supplied or rectified from evidences drawn from the will itself. This is fundamental in this matter. All inferences coming from the outside have no force; none are admitted but such as are furnished by the testament in its context. 'Ex propriis verbis testamenti,' says Menochius, 'ex verbis scriptis in testamento non extrinsecus.' There is no doctrine more certain than this; none more useful in adhering to."

To allow an expert to point out to the court signs contained in the will itself by which the court may decipher what would otherwise be unintelligible is one thing. To allow the expert to tell the court something which he says that he can see, but which he cannot enable the court to see for itself, is quite another thing. In the latter case it would be the expert who would be dating the will and not the court who would be reading the writing. From the brief of defendants, I take this striking illustration:

"Suppose that, instead of making a capital 'G' after the figure '2' in the date line of this document, Miss Lefort had made a capital 'X,' 'Y,' or 'Z.' Would it be permissible for an expert witness to testify that Miss Lefort intended to make the figure '6,' or some other figure, instead of the letter 'X,' 'Y,' or 'Z' appearing on the instrument? Evidently, no."

So that, I repeat, if from indicia which the expert furnishes to the court the court is enabled to see for itself that this capital "G" is a "6," well and good. But if the court cannot see it for itself, the expert cannot be allowed to testify that he can see it, and that it is the figure "6." He can no more be allowed to do this in a case where the scrawl bears some resemblance to the figure "6" than he could be allowed to do it in a case where it bore none, as if the scrawl resembled more an "X," a "Y," or a "Z" than it did a "G."

Colin-De Lisle, Donations and Testaments, art. 970, No. 16, citing a list of authorities, says:

"An olographic testament will be valid although containing abbreviations and ciphers. Ciphers are conventional characters which have, like letters, a meaning of their own and known to everybody; and abbreviations composed of characters in common use are, as a general thing, easily understood; for we do not mean to speak of hieroglyphics, or of shorthand signs, of which the value is uncertain, and which would require a translation."

In the Succession of Stewart, 51 La. Ann. 1553, 26 South. 460, it is not clear from the statement of the case whether the court based its judgment upon what the expert, Mr. Molse, had said as to what one of the figures in the date was, or based it upon the indicia which the expert was able to furnish, upon which he himself based his opinion, and upon which the court, judging for itself, was enabled to come to a conclusion. At all events, the case is not authoritative in the present discussion, since the testimony was not objected to, and the court was not called upon to rule upon its admissibility, and did not do so, but, at best, simply considered it after it had been admitted without objection.

To me the proposition appears to be a plain one, that if the court cannot see for itself the meaning of a scrawl, but accepts what the expert out of the profundity of his occult knowledge says it is, nothing is to prevent the expert from palming off upon the court any cock and bull story that may strike his fancy as being the meaning of the will. For if one scrawl may be thus blindly accepted on trust, so may another; and if a short, so a long; if a figure essential to a date, so a word, or a sentence, a paragraph or a page, or, in fact, the whole will, like a pig in a poke. The dividing line is not in the quantity of the testimony that may be thus given, but in the kind. If the expert may be allowed to tell the court that a scrawl, which is a capital "G" if anything, is the figure "6," so he may tell the court that another scrawl means "John Smith," and another means "all the property of the testator"; in other words, if he may out of the informal, meaningless lines furnished by the will make out a "6," so he may out of the other informal, meaningless lines make out the whole will. The idea of the testator would not, then, have been conveyed simply through the medium of the writing, as the law contemplates and sacramentally requires, but through the medium of the expert. Out of his mouth will the testament have come, not out of the point of the pen of the testator.

There is nothing opposed to my present contention in the several cases cited in the majority opinion, saving alone that in the Succession of Stewart it is possible that such testimony was considered, it having been admitted in evidence without objection. I proceed to review the cases cited in the majority opinion. They are: Succession of Gaines, 38 La. Ann. 123; Plicque & Le Beau v. Labranche, 9 La. 559; Sophie v. Duplessis, 2 La. Ann. 726; Aubert v. Aubert, 6 La. Ann. 104; Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506; Fox v. Succession of McDonogh, 18 La. Ann. 419; Succession of Stewart, 51 La. Ann. 1553, 26 South. 460; Ticknor v. Calhoun, 29 La. Ann. 279; Succession of Leonard, 21 La. Ann. 524; Suc-

cession of Morvant, 45 La. Ann. 212, 12 South. 349; Succession of Roth, 31 La. Ann. 315; and Succession of Clark, 11 La. Ann. 124.

In Succession of Gaines, 38 La. Ann. 123, the question was as to the genuineness of the writing, not as to its meaning.

So it was in Plicque v. Labranche, 9 La. 559, which was a suit on a promissory note.

In Sophie v. Duplessis, 2 La. Ann. 726, no question arose, except as to whether the will was in proper form.

Aubert v. Aubert, 6 La. Ann. 104, has no application whatever, and was evidently cited in error.

In Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506, the question was simply as to the genuineness of the will.

In Fox v. Succession of McDonogh, 18 La. Ann. 419, the question was one simply of forgery vel non.

Ticknor v. Calhoun, 29 La. Ann. 279, involved nothing but the genuineness of the signature to a promise to pay money.

And so in Succession of Leonard, 21 La. Ann. 524.

And so Succession of Morvant, 45 La. Ann. 212, 12 South. 349, involved only the question of the genuineness of the will.

And so in Succession of Roth, 31 La. Ann. 315.

Succession of Clark, 11 La. Ann. 124, and what was practically the same case appearing under the title of Fuentes v. Gaines, 25 La. Ann. 86, involved only the sufficiency of the proof of a lost will.

III. On the question of whether the "1913" is in the handwriting of the testatrix, or the "08," I do not know that I have a positive opinion. There are some general considerations, however, which suggest themselves to me, and which it might be well that I mention here.

In the first place, if it be true, as contended by learned counsel for plaintiffs in the extract transcribed hereinabove from their brief, that the testatrix discovered the alteration of the original date of the will, and that she added the second "1913" for the purpose of correcting this alteration and making the date certain, then, I say, she failed of her purpose; and the will is null.

The law in that regard is well settled in France, and would have to be adopted under our Code for the same reasons which were there found to be conclusive. I will not dwell at length upon them, but will content myself with some extracts from *Coin-De Lisle on Donations & Testaments*, art. 970:

"No. 11. The will must be written by the hand of the testator in its entirety, and would be null if it contained some words of another's hand, even although these words should not affect the meaning of the will. * * * This jurisprudence is strict, but it is in conformity with the law. * * *

"No. 12. It is the same when the will contains marginal notes and cross-references by a strange hand, if they have been approved by the testator either expressly or tacitly, as if he has closed

and sealed the will after these marginal notes had been made. He knew that his will could be valid only in case it was entirely written by him. Consequently, in preserving a writing partly in a strange hand, he knew that the document was not a legal expression of last will, and, legally speaking, he could not have intended that it should be regarded as such.

"No. 13. But the additions by a strange hand which form no part of the will would not vitiate it; otherwise, any third person into whose possession the will should come might destroy its validity by interlining something in it. However, this would be true only in case these additions did not come to the knowledge of the testator."

In the case at bar the learned counsel say that the date inserted by a strange hand did come to the knowledge of the testatrix.

In the second place, it strikes me that this theory of some stranger having changed the date of a will which, so far as appears, never left the custody of the testatrix; and that he or she did so in the hope that the testatrix would not discover the alteration; and that the testatrix, when she did discover it, made no mention of the fact to anybody, and, instead of making a new will, or even drawing a line across the altered date, simply contented herself with adding new figures on the side of the alterations—is built upon the purest surmise and is far-fetched in the extreme.

The much greater probability, to my mind, is that the testatrix superimposed this "08" herself.

If any conjectures are to be indulged in, why not the one that perhaps she thought that the will earlier in date would prevail, and that she made this alteration in order that this last will should prevail over the first.

This would leave the second "1913" unexplained; but the latter "1913" does not appear to me to be in her handwriting.

Another point upon which I cannot agree with the majority opinion is as to the interpretation of the following clause:

"I bequeath to the priest of this church the sum of two thousand dollars and I appoint him executor of this will without bond."

Father Trainor was "the priest of this church" at the time of the making of the will, and Father Rousseau was "the priest of this church" at the time of the death of the testatrix. To which one of these two has this clause reference?

An express article of the Code covers the point. Articles 1721 and 1722 of the Code provide:

"Art. 1721. A disposition, couched in the future tense, refers to the time of the death of the testator.

"Art. 1722. A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will."

The said clause "expresses no time, past or future," therefore it "refers to the time of the making of the will."

There is no getting out of this, unless plain English has lost its meaning, or the Code its authority.

This article 1722 was adopted for the very

purpose of settling the question of whether a clause like this one "expressing no time, past or future," refers "to the time of the making of the will," or "to the time of the death of the testator." The court should not ignore it, as the majority opinion has done.

The argumentation on this point in the majority opinion could be met by counter argumentation; but of what use is argumentation in the presence of an express statute, plainly worded, which has been passed for the very purpose of settling the question.

In dissenting, I base myself mainly on the refusal to sustain the exception of no cause of action.

On Petition for Rehearing.

CLAIBORNE, Judge ad hoc. In their application for a rehearing the defendants charge, with much vehemence, that they had filed an exception of no cause of action, that they were entitled to a judgment upon it and that we failed to pass upon it. We were under the impression that we had done so; for, while we expressed the opinion that after the defendants had caused the case to be fixed upon the merits, and after they had gone into the trial of the case upon the merits it was too late for them to ask for a separate judgment upon the exception, we passed upon it, and expressly stated that we thought the petition did set forth a cause of action, and that the judge a quo was right in overruling the exception. If the defendants mean that we did not give sufficient reasons for our conclusion, we thought we had done so in disposing of the case on the merits. But they are not wanting, and we shall add them to the reasons already given.

Defendants pitch their case upon the proposition set forth on page 31 of their brief for a rehearing in these words:

"Hence the only question presented by the exception of no cause of action is this: Must the olographic testament speak for itself and express its date with certainty and precision upon its face, or may an uncertainty or doubt as to the date, appearing on the face of the instrument, be removed by testimony as to when the document was or must have been written?"

We are all agreed upon the proposition that an uncertain date is equivalent to no date, and that a document with no date, or with an uncertain date, cannot be a valid will. But the question at once arises, What is an uncertain date?

There is a physical difference between a document without a date and one with an uncertain date. There is a legal difference between supplying a missing date, or any part of it, by facts outside of the will, and establishing certainty concerning an ambiguity or uncertainty or doubt in an existing date. The former cannot be done, because it is of the essence of the validity of a will that it be dated "by the hand of the testator" (C. C. 1588 [1581]), and it cannot be "dated" in any other way. But there is no law that

prevents the courts from hearing testimony and entertaining evidence to throw light upon an obscure date, and remove all doubt, uncertainty, or ambiguity concerning it. 'Reason dictates it, and justice demands it, in order that the right accorded by law to make a will shall be protected, and not defeated by technicalities. Any evidence, recognized by law and not expressly prohibited by statute, calculated to convince the court and establish the certainty of the date, should be admitted and heard. The whole question resolves itself into a matter of proof. If the uncertain date can be made certain by other parts of the will or by any other means, it ceases to be uncertain and becomes certain and valid. "Id certum est quod certum reddi potest." If the evidence fails in its object, and the date remains uncertain, then the document wants the requisites of the law, and it is not a will. An uncertain date is therefore a date which cannot be made certain. The Code provides (C. C. 1714 [1707] to 1716 [1709]) that in case of an ambiguity or obscurity in the description of a legatee, or in the intention of the testator, or in the object bequeathed, testimony shall be heard to remove the ambiguity and establish certainty in the name of the legatee, the thing bequeathed, or the intention, in order that the will of the deceased shall be executed. Why should not an uncertainty in the date of a will be corrected by the same reason and by the same evidence? We believe that such a course is authorized by the opinions in the Successions of McDonogh, 18 La. Ann. 419, and Gaines, 38 La. Ann. 123, and other authorities quoted in our original opinion. Those decisions submit all wills attacked for nullity to all such proof as prevail in all contested facts or cases. It is an elementary rule of evidence that a writing in which there is no ambiguity cannot be interpreted by parol; but that an ambiguity in any of its parts, as to names, identity of parties, meaning of words, quantity, extent, or nature of thing sold or leased, consideration, value, may be removed by any evidence known to the law. 1 H. D. vo. Evidence, XV (3).

We have examined many French commentators on article 970 of the Code Napoleon, and we do not understand that they conflict with our views on the question of elucidation of uncertainties in the date of wills. Of course the date, as well as the dispositions, of the will must appear from the will. "Ex ipsomet testamento non allunde, non extrinsecus." But they agree that an erroneous or an uncertain date, like ambiguities in dispositions, may be corrected or made certain by other parts of the will, or by recitations and circumstances appearing upon the face of the will, which may be corroborated by other facts and circumstances outside of the will.

According to them, a will may be dated on the anniversary of any religious, matrimonial,

or family event, the date of which may be ascertained by extraneous evidence; such as the anniversary of the birth of Washington, Easter Sunday, anniversary of the marriage of the testator, or of the birth of his child. 7 Aubry & Rau, p. 103, No. 2; 10 Baudry-Lacantinerie, p. 51, Nos. 1933, 1934; 21 Demol. (4 Don. et Test.) No. 83, p. 77; 9 Duranton, p. 29, No. 30; 16 Dalloz, Rep. de Leg. p. 757, Nos. 2654, 5, 6; Fuzier-Herman on C. N. 970, p. 656, Nos. 116, 117; 1 Grenier, No. 228 bis. p. 486; 13 Laurent, Nos. 194, 199; 33 Merlin, Rep. p. 352; 5 Toullier, No. 365, p. 342; 3 Troplong, p. 46, No. 1482.

They go further and say that a correct date may be substituted for a wrong date written upon the will, when it is the result of an error shown by the language of the will which may be corroborated by proof outside of the will.

We read in 10 Baudry, p. 61, § 1957:

"Whenever the material conditions of the testament or its declaration furnish elements sufficient to rectify or complete the date that is upon it, courts may fortify and corroborate them by facts or documents taken outside of the will. Authors and decisions agree to acknowledge this"—quoting 7 Aubry & Rau, p. 104, § 668; 21 Demol. (4 Don. et Test.) No. 83, pp. 79, 80, 90, 93, 98; 13 Laurent, No. 199, and the authors quoted in Fuzier-Herman on article 970, Nos. 233, 234, and 278, and decisions of the Court of Cassation. See, also, same Baudry, p. 77, § 1969.

To which we desire to add the following: 5 Toullier, No. 362, pp. 333, 335; 9 Duranton, 35, 36, 39; 33 Merlin, Rep. vo. Testament, § II, p. 1, art. 6, note 10, pp. 356, 365; 16 Dalloz, Rep. Leg. p. 760, No. 2664 and note 1, No. 2668 and note 3, No. 2690 and note Nos. 2692, 2693.

In 21 Demolombe, p. 90, § 98:

"Much more! nothing would prevent the judges from having recourse to the proof drawn outside of the will, in order to determine the true meaning of the statements which would go to rectify the date. This rectification, indeed, would not cease to result from the intrinsic statements of the will, since the extrinsic facts would have been appreciated only with the object of clearing up the statements themselves."

And on page 32, § 37, of the same author:

"Our conclusion is very exact, in so far as it expresses this idea that it is the testament alone which can create the dispositions, and that it is always within the testament that the substance must be found. But our conclusion would become, on the contrary, altogether false, if any one pretended to deduce from it that it is not allowed to have recourse to any extrinsic proof in order to interpret the dispositions; and to draw out more clearly from the obscure terms of the testament the clauses in which the substance is confined."

22 Demolombe, p. 217, § 253:

"Testimonial proof and presumptions are, on the contrary, according to us, admissible to establish by whom the erasure or cancellations have been made, because there is no question of establishing a legal mode of revocation; we are then in presence of a fact, and it is in the search of that fact and of the circumstances which may furnish the explanation of it, that the judges have to provide for," etc. 10 Baudry-Lacantinerie, No. 2787, p. 386; 14 Laurent, §

242, p. 267; 2 Dalloz, *Odes Ann.* on article C. N. 1036, p. 758, Nos. 218, 223, 228.

2 Fuzier-Herman, p. 668, No. 278:

"In order to rectify a false date, the judges may, nevertheless, in the same manner as to establish that it is false, corroborate the proofs drawn from the testament by facts extrinsic from the act by considering their relations to the testament and as a means of appreciating their bearing. In other words, the indications, already conclusive by themselves, furnished by the testament can always be completed by other documents." Authorities.

No. 279:

"Thus, in case there is doubt concerning the true date of an olographic will, the judges may, in order to determine the date, take into consideration documents taken outside of the testament itself; such, for example, as an act of superscription written upon the envelope of the will, although such an act is foreign to the legal form of olographic testaments." Authorities.

In 16 Dalloz Rep. de Leg. p. 760, No. 2664, we read:

"We shall see further on (Nos. 2682 et seq.) what courts can do to rectify a false date. If instead of a false date, the case is one of a doubtful date, for instance by reason of the bad handwriting of the testator, the judges should be guided first by an examination of the act by itself, by invoking in case of necessity, the experience of experts. They are not forbidden to add to this verification the assistance of the external circumstances which might assist them to fix the veritable date."

Note 1 to this section contains the reasons for judgment in a case reported in 24 Journal du Pallas (1831-1832) p. 1646, entitled *Corras v. Frouin*, the court said:

"Considering that this testament, registered at Blaze on January 20, 1811, the original of which was placed under the eyes of the court, has been entirely written, dated, and signed by the hand of the testatrix; that therefore, and on this first proposition, there can be no cause to declare it null for a pretended absence of date; considering that the only difficulty which is raised relative to the veritable date of said testament consists in that, according to Mr. and Miss Corras, it is dated March 5, 1811, while according to Mr. Frouin, it is dated May 5th of said year; considering, in relation to this difficulty, that by an inspection of the will in question there can be no doubt that it is dated May 5, 1811, and not of March 5th: that the letter 'I' which terminates the word which indicates the month of May, although it is preceded immediately by an ill-formed letter which may as well be taken for an 'I' as for an 'R,' does not prevent recognizing that the act is dated in the month of May, and not in the month of March, 1811; considering that what completely operates a conviction in this regard, is that the act of superscription which exists on the paper which has served as a cover to said testament, which act is also entirely written, dated, and signed by the hand of the testator, contains, in very legible writing, the date of May 5, 1811, and that we cannot read in it that of March 5th; that in truth, the above-mentioned superscription is altogether outside of the rules prescribed by law concerning the form of olographic testaments, but that, the case being solely to arrive at a thorough knowledge of the date of such a testament, the existence of an act of superscription, such as the one which is produced in this case, cannot be other than of the greatest influence, at least in this sense that said act must necessarily serve to read and to fix with precision the veritable date of the testament to which it refers—from all of which it evidently fol-

lows that the olographic will of M. D. must have all its effect in favor of Pierre Frouin, her universal legatee, as being of May 5, 1811."

Sec. 2668:

"It is also in pursuance of this principle that it is allowed to take a time more or less long to make a testament that it has been decided that an olographic testament is valid, although the date was not affixed by the testator at the same moment as the making of the will, and that, after a first date erased there is found a posterior date."

Where a testament was dated thus: "Made in Bordeaux this May 20, 1818, I say 1829," the testament was held dated "1829," because the will gave the testator's age, and because:

"Hence it follows that the indication of the year '1818' is rectified by the will itself, but that the testator has removed all doubts by these expressions: 'I say 1829,' following the indication of the year 1818." Same Dalloz, p. 768, No. 2690, note 2.

A familiar example given by all French authors by which a date may be ascertained are the dates of the stamped paper upon which the testament has been written, established by the water lines on the paper.

It does not follow that because a date has been overcharged or surcharged, or other figures superimposed upon it, it destroys the date, or makes it fatally uncertain.

The law in relation to overcharge and erasures is the same. 10 Baudry, § 1910, p. —. "Overcharges written by the testator are valid." 7 Aubry, p. 105, § 668.

16 Dalloz puts it thus, in same volume, p. 759, No. 2661:

"Would the date become uncertain by the mere fact that it would present surcharges? Surcharges, in the date, would annul a notarial testament; but it is not the case with olographic testaments, concerning which we must admit a distinction. If the date is surcharged in such a manner as to indicate two different days, two different years, so that we cannot see what is the veritable date, the uncertainty will carry with it the nullity of the will. If the surcharge permits one to read distinctly the date surcharged, the act must, according to us, remain valid." Authorities.

See, also, 10 Baudry-Lacantinerie, p. 52, No. 1936, p. 362, No. 1960; 21 Demol. (4 Don. et Test.) Nos. 86, 131, 139; 5 Toull. No. 367, p. 342; 13 Laurent, § 190, p. 202; 9 Donation Nos. 28, 29, 37-3. Trop. No. 1474-1482; 33 Merlin, p. 356, No. IX; 1 Grenier on Donations, p. 501, No. 228 (Sept.) 228 bis. p. 486.

We think we have sufficiently shown that the nullity of the will of the deceased did not result from the possible uncertainty of the date of the will propounded, but that the date could be made certain in the manner we have indicated hereinabove. It follows that the exception of no cause of action filed by the defendants was not well founded in law, and was properly overruled.

In line with all these authorities we consulted and examined the will before us. We noticed the lines drawn across the paper upon which it was written which a witness swore had been drawn by her subsequent to 1908; we gave due weight to the date "1913," written by the testatrix upon

the envelope containing her will; we read the enunciations contained in the will itself and the testimony corroborating them; we studied the figures composing the dates, and the testimony of the expert in relation thereto, and then formed our own conclusions in accordance with what we believed was the law and the evidence in the case.

We are satisfied that the figure in the right of the figure "2" is a "6" and not a "G," because persons are presumed to use numerals and not letters in completing a date, and that the figure is really a "6."

Our observation has led us to conclude with the expert that the figures "08" were superimposed upon the figures "13." If we assume, with the plaintiffs, that they were so overcharged by the hand of another, they must be considered as not written. If, as argued by the defendants, they were written by the testatrix, then they must be considered as erasures. As such, they have not been approved by the testatrix, and they must be considered as not made. C. C. 1589 (1582). This leaves the figures "13" under them in full force and effect.

But if we are mistaken in these conclusions, and if the surcharge still leaves the year of the date uncertain as to which was written first or last, or which was surcharged, then the figures "1913," which we believe to be in the handwriting of the deceased, immediately following, remove the uncertainty and fix the date as of that year. A testament is a law unto the courts, and their duty is to interpret it in the sense in which it can have effect, rather than in that in which it can have none. C. C. 1713 (1706).

An examination of the brief on behalf of the heirs of Rev. James H. Trainor has not changed our opinion in respect to his claims. We do not think that this case comes under the operation of article 1573 (1566) C. C., quoted by his learned counsel. By applying the provisions of article C. C. 1721 (1714) to the will, we indicated that we did not think that article C. C. 1722 (1715) governed the case as he argued.

For these reasons, the rehearing is refused.

(139 La.)

No. 20577.

SANDER et al. v. NEW ORLEANS & N. E.
R. CO. et al.

(Supreme Court of Louisiana. Feb. 21, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by the Court.)

JUDGMENT \S 570(1, 11) — CONCLUSIVENESS —
JUDGMENTS CONCLUSIVE — DISMISSAL.

Res judicata cannot be predicated on the dismissal of a suit, as in case of nonsuit, or on a dismissal based on the omission of essential allegations in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028, 1036, 1039, 1165; Dec. Dig. \S 570(1, 11).]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. Barbara Sander and others against the New Orleans & Northeastern Railroad Company and others. From a judgment for defendants, plaintiffs appeal. Reversed, defendants' exceptions overruled, and cause remanded.

Sanders, Brian & Sanders, of New Orleans, for appellants. James Wilkinson and Hall, Monroe & Lemann, all of New Orleans, for appellees.

LAND, J. This action is a sequel to a former suit between the same parties, involving the same lot of ground, which on an exception of misjoinder was dismissed by a judgment reading as follows:

"It is ordered, adjudged, and decreed that there be judgment in favor of board of commissioners of the New Orleans levee district and the New Orleans & Northeastern Railroad Company sustaining their exceptions of misjoinder and dismissing the demands of Mr. and Mrs. John Jassen, at their costs, without prejudice to their right of action, separately against said defendants, as in case of nonsuit."

In that suit the plaintiffs represented that they owned a certain lot of ground forming the corner of Press and North Peters streets, measuring 23' 5" 4" front on North Peters street, by a depth of 96' 5" on one side, and of 96' on the other; that in the early part of the year 1911 the levee board wrongfully and illegally entered upon said property, and constructed a levee upon the portion of said lot fronting on North Peters street, occupying the space of about one-half of said lot; that about October, 1911, the railroad company trespassed and entered forcibly upon, and appropriated to its own use, the remaining part of said lot and the brick foundation and pillars of a former building thereon which had been destroyed by fire.

Plaintiff prayed for judgment against the defendants in solido for \$8,650, with interest from judicial demand, and costs.

On the face of the petition in that case the two alleged trespasses, committed at different times, by different parties, and on different portions of the lot, had no connection whatever with each other.

The present suit is based on the same alleged acts of trespass, coupled with allegations of combination and conspiracy between the two defendants to deprive the plaintiffs of their property. In the present suit plaintiffs' claims for loss of rentals and for taxes paid are increased. There is an additional demand of \$2,000 for exemplary damages. Plaintiffs alleged that the property was not needed for levee purposes, and the levee board made no attempt to buy or to come to an agreement as to the value of said property. See section 5, Act No. 79 of 1898.

The defendants filed exceptions of no cause of action, misjoinder of parties, and res judicata, which were maintained, and there was judgment rejecting the demand of the plaintiffs with costs.

In his reasons for judgment the judge said: "The court has not been requested to reserve the right of the plaintiffs, if any they have, to sue the defendants separately or render a judgment of nonsuit, and therefore has not considered this question, and has not done so."

Plaintiffs have appealed from the judgment.

Res Judicata.

Plaintiffs contend that the dismissal of the first suit having been "as in case of nonsuit," the judgment therefore does not constitute res judicata.

Plaintiffs further contend that the exception of misjoinder in the first suit was based on the absence of allegations that the defendants had acted with a common understanding and common purpose, or had conspired together to illegally deprive them of their property, and that, these essential allegations having been supplied in the petition in the present suit, a different cause of action has been presented.

Plaintiffs cite Succession of Herber, 119 La. 1064, 44 South. 888, where it was held, as thus expressed in the syllabus:

"It is well settled that, if a plaintiff fails on demurrer in a first action from the omission of an essential allegation in his declaration which is fully supplied in a second suit, the judgment on the demurrer in the first suit is not a bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause as disclosed in the second declarations were not heard and determined in the first action."

In that case the doctrine thus announced was applied to a petition to annul a bequest to a minister who attended the deceased during her last illness which omitted the essential allegation that he "was not related by consanguinity to the deceased." The court cited Hart & Co. v. Bowie, 34 La. Ann. 325; Gould v. Railroad, 91 U. S. 526, 23 L. Ed. 416; Wells on Res Adjudicata and Stare Decisis, §§ 13, 18; Id., p. 370 et seq., §§ 446, 447.

We do not perceive that any of the cases cited by defendants overrule the Herber Case, supra, which we think is decisive of the plea of res adjudicata. It may be that plaintiffs may fail to substantiate their allegation of combination and conspiracy, but they have a right to be heard on that issue as against the defendants, alleged to be cotrespassers on their property.

On the face of the petition in this suit, all the exceptions should have been overruled.

It is therefore ordered that the judgment below be reversed, and it is now ordered that all the exceptions filed herein by the defendants be overruled, and that this cause be

remanded for further proceedings according to law; costs of appeal to be paid by defendants.

MONROE, C. J., takes no part.

(139 La.)

No. 21764.

STATE v. MCGUIRE.

(Supreme Court of Louisiana. Feb. 7, 1916.
Rehearing Denied March 20, 1916.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \S 223(5)—CRIMINAL PROSECUTION—ISSUES AND PROOF.

Under an indictment charging defendant with having sold intoxicating liquors without a license on February 7, 1914, which was a Saturday, the testimony of a witness that the offense charged was on Friday, between the 1st and 15th of February, 1914, is responsive, and is properly admitted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 273; Dec. Dig. \S 223(5); Indictment and Information, Cent. Dig. § 548.]

2. INTOXICATING LIQUORS \S 223(5)—CRIMINAL PROSECUTION—ISSUES AND PROOF.

The testimony was as to the offense charged in the indictment, of which the defendant was fully informed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 273; Dec. Dig. \S 223(5); Indictment and Information, Cent. Dig. § 548.]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Tom McGuire was convicted of selling liquor without a license, and appeals. Affirmed.

Blackman, Overton & Dawkins, of Alexandria, for appellant. R. G. Pleasant, Atty. Gen., John R. Hunter, Dist. Atty., of Alexandria (C. L. Whitehead, of Alexandria, and G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Defendant was charged with having sold spirituous and intoxicating liquors, at retail, without first having obtained a license to do so from the police jury of Rapides parish, or any town or municipal authority thereof, on or about the 7th day of February, 1914. He called for a bill of particulars, and the district attorney answered:

"That it is specifically charged that the said McGuire did, on the 7th day of February, 1914, at a dance given at the home of the said McGuire, sell three pints of whisky to one John Whaley."

There was judgment in favor of plaintiff, and defendant has appealed.

There is but one bill of exceptions in the record, and it states that:

"The state put upon the witness stand only one witness, to wit, John Whaley, who testified that he bought from the accused, Tom McGuire, three pints of whisky at the home of the accused, about five miles from the town of Glenmora, in the parish of Rapides and state of Louisiana; that this purchase occurred between the 1st and 15th of February, according to the best of witness' recollection, and likewise according

to his recollection, it occurred on February 7, 1914; but witness testified under cross-examination that he did know positively and beyond any doubt that it occurred on a Friday night, at 10 o'clock, in the month of February, 1914; that he knew positively that it did occur at 10 o'clock on Friday, in the month of February, 1914, and that it did not occur on any other week day; and thereupon counsel for defendant objected to the testimony on the ground that defendant is wholly taken by surprise by such evidence; that the proof is not responsive to the indictment or the bill of particulars, it having been set forth in both indictment and bill of particulars that the said offense, occurred on February 7, 1914, which February 7, 1914, was on a Saturday and not on a Friday; and that said testimony was wholly at variance with the date set forth in the indictment and the bill of particulars."

[1, 2] There is but one offense set out in the indictment: The selling of spirituous and intoxicating liquors without first having obtained a license, on or about the 7th day of February, 1914; or, as more specifically stated in the bill of particulars, "on the 7th day of February, 1914." And the evidence offered by the state was as to that one offense, and that was entirely responsive to the indictment and bill of particulars. The testimony for the state was not as to two or more offenses, as was the case in *State v. Green*, 127 La. 830, 54 South. 45, or as was the case in *State v. Ryan*, 131 La. 1054, 60 South. 681, or as was the case in *State v. Elliott & Randall*, 138 La. 457, 70 South. 473.

If the indictment had read that defendant "on Friday, the 7th day of February, 1914, did sell intoxicating liquors," etc., the indictment would have been sufficient under the law, although the 7th day of February was not on Friday, and the time was stated imperfectly, or the date was impossible; for section 1063 of the Revised Statutes provides that:

"No indictment for any offense shall be held insufficient for * * * omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened," etc.

Friday, the 7th day of February, 1914, was an impossible time, as Saturday was the 7th day of February, 1914.

But it has been repeatedly held that time is not of the essence of the offense of selling intoxicating liquors without a license; and all evidence as to the particular offense charged was admissible on the trial of the case.

Defendant was fully informed that the offense with which he was charged was the selling of three pints of whisky to one John Whaley at a dance given at the home of the defendant on the 7th day of February, 1914. In disposing of the same point in the case of *State v. Doucet*, 138 La. 180, 66 South. 772, the court say:

"Fabius Guillory, to whom accused was charged with having sold the whisky, was the only witness for the state. He could not fix the date of the transaction, but he knew that it was after the 1st of January, when Ville Platte became dry territory, and before the date of the finding of the indictment. Accused objected to his testimony, on the ground that it did not correspond with the bill of particulars, which fixed specifically the 20th of January, and that 'he could not be expected to properly meet it.'"

"This contention would lead to the conclusion that, unless the witnesses for the state in a case of this kind can fix the exact date when the liquor was sold, the accused cannot be prosecuted. Discussion of the point can hardly be necessary."

And, in this case, John Whaley, the only witness for the state, testified that defendant sold to him three pints of whisky, at the residence of said defendant, on a Friday night, between the 1st and 15th of February, 1914. He could not fix the exact date of the transaction, but he knew that it was on a Friday night between the 1st and 15th of February, and at a dance given at the home of the defendant. The testimony was entirely responsive to the charge.

In the case of *State v. Gremillion*, 137 La. 291, 68 South. 615, where defendant was charged with having sold intoxicating liquors without a license "on or about the 20th of July, A. D. 1914," and the bill of particulars was couched in the same language, the court say:

"The date of the sale was not material to the issues in the case. The date was fixed on or about the 20th day of July, 1914, and the indictment was returned into court on November 11, 1914, within the prescriptive term. The date fixed in the indictment was sufficient to fully inform the defendant of the particular offense he was to be tried for, and the time of its commission, so that he might make proper defense."

Several authorities are cited in that opinion.

Judgment affirmed.

O'NEILL, J., concurs in the decree.

(139 La.)

No. 21775.

STATE v. COURIS.

(Supreme Court of Louisiana. March 6, 1916.)

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Tony Couris was convicted of a public offense, and he appeals. Verdict and sentence annulled, and defendant ordered discharged.

Scheen & Blanchard, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. For the reasons assigned in the recent case of *State of Louisiana v. Mike Milano* (No. 21770) 71 South. 131, the verdict and sentence appealed from are annulled, and it is ordered that the defendant be discharged.

PROVOSTY, J., takes no part.

(139 La.)

No. 20375.

SCHAFFTER v. IRWIN et al.

(Supreme Court of Louisiana, Feb. 21, 1916.
On Application for Rehearing,
March 20, 1916.)

*(Syllabus by the Court.)***1. BILLS AND NOTES §494—ACTIONS—BURDEN OF PROOF.**

In a suit upon an obligation absolute in character and free from taint on its face, where the defense of the indorser on the note is that the transaction was contra bonos mores, against public policy, and amounts to a suppression of a commission of a felony, the burden of proof is upon the person making the allegations.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. §494.]

*(Additional Syllabus by Editorial Staff.)***2. BILLS AND NOTES §226—ACCOMMODATION INDORSEMENT—CONSIDERATION.**

The credit given to the maker of a note is consideration sufficient to bind an accommodation indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 534-541; Dec. Dig. §226.]

3. BILLS AND NOTES §525—ACTIONS—EVIDENCE.

In a suit against an accommodation indorser of a note, evidence held insufficient to sustain allegations that the plaintiff knew that the notes were forged or fraudulently issued, that the transaction was contra bonos mores, against public policy, and amounted to a suppression by plaintiff of the commission of a felony by the maker of the notes, and that plaintiff conspired and confederated with the maker to obtain from defendant his indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. §525.]

On Application for Rehearing.

4. BILLS AND NOTES §478 — ACTIONS — PLEADING—"CONSPIRE AND CONFEDERATE."

In an allegation that the holder of a note conspired and confederated with the maker to obtain defendant's indorsement, the word "conspire," associated with "confederate," does not necessarily connote an evil intention.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1522, 1523; Dec. Dig. §478.]

For other definitions, see Words and Phrases, First and Second Series, Conspire.]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Florian Schaffter against Michael Irwin and another. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Hall, Monroe & Lemann and Watts K. Leverich, all of New Orleans, for appellant. McCloskey & Benedict, of New Orleans, for appellees.

SOMMERVILLE, J. Plaintiff sues defendants, Michael Irwin and James J. Woulfe, upon obligations absolute in character and free from taint on their faces. They are two promissory notes for \$5,000 each, with 8 per cent. per annum interest from date

March 4, 1911, drawn by James J. Woulfe to his own order, and indorsed by himself and Michael Irwin, payable in 9 and 18 months, respectively, after date.

Woulfe is a bankrupt, and made no appearance in the case, except as a witness for Irwin.

Michael Irwin answered, denying that the notes were issued for valuable considerations, and alleged that said notes—

"were had and obtained by the said Florian Schaffter, the petitioner, and the said James J. Woulfe to secure said Florian Schaffter in the payment of certain alleged mortgage notes, forming a previous transaction between said Woulfe and said Schaffter, and which mortgage notes, as a fact, were forged, or, in the alternative, fraudulently issued, a fact which was to the knowledge of said Schaffter and said Woulfe, but not to your respondent's knowledge at the time that your respondent indorsed the notes herein sued upon; that there was no legal consideration given by the maker, or received by the holder, for the notes herein sued upon; that the transaction was contra bonos mores, against public policy, and amounts to a suppression by said Schaffter of a commission of a felony by said Woulfe, for the purpose of reimbursing himself, Schaffter, through the indorsement of Mr. Irwin; and respondent is, and was, an innocent third party in the matter, knew nothing whatever of the forgery of the notes of which the present notes sued on were intended to secure payment; that the said Florian Schaffter conspired and confederated with the said Woulfe to obtain from respondent his indorsement of the notes sued upon for the above purposes, in violation of the laws of this state, and contrary to rules of public order; and that said Schaffter is without cause or right of action in the premises."

There was judgment in favor of defendant Michael Irwin, dismissing plaintiff's suit, and the latter has appealed.

The record shows that between 1906 and 1911 Schaffter had bought mortgage paper from Woulfe to the extent of about \$31,000; that in February, 1911, Schaffter became suspicious of Woulfe's dealings with him, and demanded an explanation from him of the various transactions which had taken place between them. Woulfe admitted to Schaffter at that time that about \$15,000 of the notes bought by him (Schaffter) were bad, or not good; and, upon being pressed for a settlement, Woulfe offered three personal notes for \$5,000 each, two to be indorsed by Michael Irwin, and the third by Edward Irwin. The offer was accepted by Schaffter after he had investigated the financial standing of the Irwins. The three notes, indorsed as agreed upon, where afterwards delivered to Schaffter; and this suit is upon the two notes indorsed by Michael Irwin.

[2] There was consideration for the notes as between the maker, Woulfe, and the holder, the plaintiff. The latter had given to the former \$31,000 in cash for negotiable paper which Woulfe had represented to him to be genuine, and afterwards admitted that \$15,000 of the paper was bad. Woulfe clearly owed the money to plaintiff; and this is all that was necessary to bind the indorser,

Michael Irwin. The paper indorsed is in every respect valid and binding between the holder and maker; the notes having been given to plaintiff before maturity. The value of the paper was not less by the fact that the indorser signed as an accommodation indorser, for whatever accommodation there was was between the maker and the indorser. Evidently the purpose was security, which the plaintiff desired, and which the maker obtained; and, though without pecuniary consideration as to the indorser, it is binding upon him. The credit given to the maker is consideration sufficient to bind the indorser. Paper thus indorsed in the hands of the creditor is binding. *Bank of Morgan City v. Herwig*, 121 La. 513, 46 South. 611.

[1, 3] Defendant has failed to prove the allegation in his answer that Schaffter knew that the mortgage notes held by him, and which Woulfe admitted to be bad, "were, as a fact, forged, or, in the alternative, fraudulently issued," or "that the transaction was contra bonos mores, against public policy, and amounts to a suppression by said Schaffter of the commission of a felony by said Woulfe," and "that the said Florian Schaffter conspired and confederated with the said Woulfe to obtain from your respondent his indorsements upon the notes herein sued upon for the above purposes, in violation of the laws of this state."

The evidence in the record shows that the plaintiff, Schaffter, was not acquainted with the defendant Michael Irwin, and had never seen him up to the day of the trial of the cause in the district court; that the offer of Woulfe to give his individual note, with a responsible indorser, for the indebtedness due by him to Schaffter was voluntarily made by Woulfe, and accepted by Schaffter, after he had investigated the standing of the Irwins, who had been offered by Woulfe as the indorsers on the proposed notes.

The evidence further shows that Woulfe did not admit to Schaffter, at the time that he offered to settle with him, that \$15,000 worth of the notes held by Schaffter were forged. Woulfe stated to Schaffter that the notes were bad; and Schaffter verified that statement to the extent that some of the notes held by him had never been recorded, while the inscriptions of others had been canceled without his knowledge or consent, and partial payments had been made on others. Mr. Schaffter testified on the point as follows:

"We went to see Mr. Woulfe and asked him to show us the acts representing the notes that were not recorded. Mr. Woulfe looked over his acts for a few moments, and did not find them. In a few moments he came to us, and said, 'Those notes are not good, but I wish to make them good—I shall pay them; I am going to make them good.' "We met him another time, and we went over the mortgages, and he told us that a number of them were bad, and that a number were good. * * * At no time was the word 'forgery' mentioned, or even suspected."

Some of the notes—

"had been paid, but not canceled, and some of them had had payments on account, but the payments had not been entered on the backs of the notes. That is the way that the notes were accounted bad. * * * He offered, without us paying anything, or having a chance to say a word, he said: 'I am going to make those notes good,' and he offered, first, * * * a life insurance policy, which I declined; he offered personal notes, which we accepted, with proper indorsements. I did not know the gentlemen who indorsed the notes; had never seen them to this day, and don't know them. * * * He did not tell me that they (the notes which Woulfe admitted were not good) were forgeries."

The testimony of Mr. Schaffter on this point is not contradicted; and it is quite conclusive that plaintiff did not know that Woulfe had committed the crime of forgery, or that he had fraudulently issued the notes which he admitted to be bad; and it follows that Schaffter did not suppress a felony committed by Woulfe, or compound one.

Schaffter did not threaten Woulfe with criminal prosecution. When questioned on the matter, he testified:

"I proceeded to get what I could to protect myself, to get securities; I wanted something in place of the notes. I did not want those notes. * * * I was very anxious to get my money, but I had been most carefully warned by my lawyer that there was to be no promise of immunity, or threats of exposure; to be very particular about it. I was very particular about that. * * * We were not to suppress anything; we were to say nothing."

Schaffter's testimony on this point is corroborated by Woulfe, a witness for defendant, who said:

"Mr. Schaffter said that he did not want, or desire, to prosecute me; that he did not desire that; that all he wanted was his money, and suggested then that I furnish them with some security. * * * I offered him the indorsement of Mr. Irwin on these personal promissory notes. * * * Subsequently, I gave him another promissory note of mine; I think I made that payable two years after date, dated in the same part, or latter part, of March, or a while later than the present notes in suit, indorsed by Edward Irwin, for \$5,000."

It does not appear that there was any threat on the part of the plaintiff to prosecute Woulfe criminally, or any intimation, if defendant Irwin would assist Woulfe, that he would not do so. Plaintiff certainly had the right to demand the debt due to him by Woulfe, and if it was not paid, to demand security for the payment thereof.

Defendant Irwin has not alleged error or fraud; and he has not shown that any error was caused by the plaintiff, or that he participated in any fraud.

It is argued that the law makes no distinction between a promise not to prosecute and the silent acquiescence in a crime, to enforce a civil payment; and section 856 of the Revised Statutes, which reads as follows, is referred to:

"If any person having knowledge of the commission of any crime punishable with death, or imprisonment at hard labor, shall conceal and not disclose it to some committing magistrate

or district attorney, on conviction he shall be fined not exceeding three hundred dollars, and imprisoned at hard labor or otherwise not exceeding twelve months, at the discretion of the court."

The evidence in the record is positive that the plaintiff did not know that the crime of forgery had been committed by Woulfe at the time Woulfe settled with him by giving to him the notes sued on. Therefore he did not conceal or suppress a crime. Plaintiff testified that he did not know of the forgeries committed by Woulfe for two years after the settlement had been made between them; and at that time Woulfe was being prosecuted by the state.

The testimony of plaintiff and his attorney, as well as that of Woulfe, witness for the defendant, is positive that no felony was compounded.

The notes sued upon were given for valid considerations, and the indorsements thereon by Michael Irwin, although an accommodation indorser, are binding upon him.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of plaintiff and against Michael Irwin in the sum of \$10,000, with 8 per cent. per annum interest on \$5,000 from December 4, 1911; and the same interest on \$5,000 from September 4, 1912, with costs in both courts.

MONROE, C. J., takes no part.

On Application for Rehearing.

PER CURIAM. Woulfe proposed to Schaffter to furnish the indorsement of Irwin, and Schaffter accepted the proposition. What took place between Woulfe and Irwin, Schaffter did not know. Irwin was a stranger to him, whom he met for the first time in his life on the day of the trial of this suit. The only participation of Schaffter in the obtaining of this indorsement, either in person or by his attorney, was that when Irwin came to Woulfe's office to give the indorsement, his (Schaffter's) attorney was present, and wrote the note that was to be indorsed.

[4] Reading defendant's answer in the light of these facts, with which the attorneys who prepared it must be assumed to have been acquainted, and construing it most strongly against the pleader, as must be done, since the pleader must be assumed to have stated his case as strongly as the circumstances would allow him to do, there is no allegation that Schaffter participated in any deception practiced by Woulfe upon Irwin, if any such there really was intended to be, even by Woulfe. There is no allegation that Schaffter knew that Irwin was uninformed of the circumstances which were leading to the furnishing of the indorsement by Woulfe. True, there is an allegation that he conspired and confederated with Woulfe to obtain this

indorsement, but in ordinary parlance, the verb "conspire," especially when associated with "confederate," does not necessarily connote an evil intention. Two persons may "conspire and confederate" to do good, in the ordinary, untechnical sense, of the word "conspire" as thus used. Assuredly, as found in an indictment, or in the petition of a damage suit in tort, the allegation that the defendant had conspired with another to commit the crime or the tort would import a guilty knowledge; but the reason is that in such a case the act in question involves in its very nature a guilty knowledge, and, hence to charge the act is to charge a guilty knowledge, and, by the same token, to charge that one conspired to do it is to charge guilty knowledge in the person so doing. But the obtaining of the indorsement in question in this case could involve deceit or wrong only if Irwin were not informed of the circumstances of the matter. Hence the allegation that Schaffter conspired and confederated with Woulfe to obtain this indorsement, when not accompanied by an allegation of Schaffter's having known of Irwin's ignorance of the circumstances, does not necessarily import guilt on the part of Schaffter. And, reading this answer in the light of the facts as subsequently developed on the trial, it is evident that the pleader did not make the specific allegation of guilty knowledge on the part of Schaffter simply because he knew he could not truthfully make it; that in confining himself to the vague allegation of conspiracy and confederation he was simply sailing as closely to the wind as was consistently possible.

Counsel insist that the court erred in finding that Schaffter did not know that a crime had been committed by Woulfe; but granting, for argument's sake, that Schaffter had this knowledge, the consideration of the note given by Woulfe and indorsed by defendant, and upon which the present suit is based, was not, as the learned counsel for defendant suppose and argue, the compounding or suppressing of this crime, but was the debt which Woulfe owed Schaffter. Woulfe owed this debt, and gave his note for it, and defendant indorsed this note. Conceding, for the sake of argument, that Schaffter failed in his civic duty of imparting to the officers charged with the administration of the criminal laws that a crime had been committed, and thereby committed a crime, this would not preclude him from recovering upon a note given for a debt which Woulfe owed him independently altogether of the alleged compounding of the felony, upon which suit might have been brought and judgment obtained. The fact that Woulfe, in giving this note, had done so in the hope and expectation, and even on the assurance, that Schaffter would not report him to the officers of justice would not have changed the legal situation, according to the following decision,

where the cases on this point are reviewed, and which is authoritative. *Yowell & Williams v. Walker*, 118 La. 28, 42 South. 635. Rehearing denied.

MONROE, C. J., takes no part. O'NIELL, J., dissents.

(139 La.)

No. 21575.

HAYNES et al. v. POLICE JURY OF
OUACHITA PARISH et al.

(Supreme Court of Louisiana. March 6, 1916.)

(Syllabus by the Court.)

1. TAXATION \S 468 — ASSESSMENT — CORRECTION — DUTY OF BOARD OF REVIEWERS.

The revenue statutes (Act 170 of 1898 and Act 63 of 1906) were enacted in the interest of the state as well as of the taxpayers, and, while they confer no authority upon a police jury, sitting as a board of reviewers, to reduce an assessment where the taxpayer has not complained of it, and has estopped himself to complain, they impose the mandatory duty upon such board to take the initiative in the interest of the state, and "to carefully examine and scrutinize every assessment" roll with a view of determining whether the valuations extended thereon are correct or incorrect, and, if they are too high, and the taxpayers have made complaint as the law provides, to reduce them, in justice to the taxpayers, and, if they are too low, to increase them, in justice to the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 837; Dec. Dig. \S 468.]

2. COUNTIES \S 113(6) — PARISHES — CONTRACTS — POWER OF POLICE JURY.

The contention that the effect of a contract whereby a police jury employs a person who is experienced in the estimating of timber and of land areas to aid it, when sitting as a board of reviewers, in discharging its function of reviewing and correcting the valuations extended by the assessors upon the assessment rolls, is merely to employ assistants to the assessors, is not well founded. The purpose of such a contract may well be, and is in this case, to provide the board of reviewers with information which they do not possess and which is absolutely necessary to enable them to review the work of the assessors.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 174, 180; Dec. Dig. \S 113(6).]

3. TAXATION \S 485(2) — ASSESSMENTS — CORRECTION.

To discharge intelligently the functions of levying the taxes necessary to defray the expenses of their respective parishes, and, when sitting as a board of reviewers, of reviewing the assessments made by the assessors for the purposes of taxation, the police juries must be informed, from some source, of the value of the standing timber, timbered land, and denuded and open land, subject to taxation, and we know of no law which denies them the right to obtain such information from other sources than through the assessors and the taxpayers.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 862; Dec. Dig. \S 485(2).]

4. COUNTIES \S 113(1) — PARISHES — POWER OF POLICE JURY.

Though an assessor, whose duties and compensation are fixed by law, may not without special authority increase the expense of his office, it does not follow that a police jury, charged with the administration of the affairs of a parish, is without authority to incur the expense

necessary to the performance of a mandatory duty in connection with such administration.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 174, 176; Dec. Dig. \S 113(1).]

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben C. Dawkins, Judge.

Action by Green B. Haynes and others against the Police Jury of Ouachita Parish and another. From a judgment for plaintiffs, defendants appeal. Judgment set aside, and suit dismissed.

Sandel & Clarke and Henry D. Briggs, all of Monroe, for appellant Bryant. Fred M. Odom, Dist. Atty., of Bastrop, for appellant Police Jury. Stubbs, Russell & Theus, of Monroe, for appellees.

Statement of the Case.

MONROE, C. J. Plaintiffs, who are three citizens and taxpayers of the parish of Ouachita, having obtained judgment annulling and enjoining the further execution of a certain contract entered into between the defendant police jury of that parish and John T. Bryant, the latter prosecutes this appeal. The contract reads as follows:

"Contract.

"State of Louisiana, Parish of Ouachita.

"Be it known and remembered that this contract, made and entered into on this 13th day of November, 1914, by and between the police jury, * * * herein represented by O. P. Stack, president, and Victor C. Barringer and G. W. Phillips, duly authorized herein and hereto by a resolution of said police jury, * * * dated and adopted on the 11th day of November, 1914, which said resolution is hereto attached and made part hereof, and J. T. Bryant, a resident of said parish and state, party of the second part, witnesseth:

"That whereas, the police jury * * * is informed and believes that there is a large amount of real property in the parish * * * which is not properly classified and is not properly assessed for taxation, and does not bear its just proportion of taxes; and whereas, it is to the interest of the police jury * * * that all real property in said parish * * * subject to parish taxation should be properly described and assessed according to law, and that all real property in said parish * * * should bear its just proportion of taxation:

"Now, therefore, it is fully agreed and understood by and between the said parties hereto as follows, to wit:

"(1) That the police jury of the parish of Ouachita, party of the first part, does hereby employ the said J. T. Bryant, party of the second part, to examine all the real property assessed for taxation in the parish of Ouachita subject to taxation by the said parish, * * * and ascertain its condition and value, so that said property shall be properly classified and properly assessed according to law for taxation.

"(2) That as compensation for his service in examining said property and ascertaining its condition and value for proper classification and assessment according to law the said J. T. Bryant shall receive and shall be paid by the police jury * * * an amount equal to one-half ($\frac{1}{2}$) of the taxes collected by the police jury * * * for the year 1915 in excess of and over and above the amount collected by the police jury * * * on the real property assessed for

taxation in the parish * * * and subject to parish taxation for the year 1914.

"(3) That all compensation due the said J. T. Bryant under the conditions of the contract, as above set forth, shall be due and payable on the 1st day of January, 1916, or as collected."

It is alleged that the contract is ultra vires of the police jury, that the stipulated compensation is merely an addition to the commissions and fees of the parish assessor, who is entitled to the only compensation authorized by law for the work thereby contemplated, and that they (plaintiffs), being citizens and taxpayers, are entitled to bring this suit. Defendants, after an exception of prematurity, which was overruled, filed an answer, alleging the validity of the contract, and further as follows:

"That, while said petitioners are citizens and taxpayers, * * * they are employed by and represent the owners of large bodies of land and timber lands and timber holdings in said parish and state, and your respondents are informed and believe that the returns made by various holders of said lands and timber and timber holdings to the assessor of the parish * * * are not in accordance with the facts and at a much less value than their real value, and that there are large bodies of land which are well timbered that are returned as denuded lands, and that there are large quantities of timber lands returned as containing so many thousand feet of timber, when, in truth and in fact, they contain larger quantities of timber, and should be assessed at a different classification from that which is returned, and that neither the assessor of the parish nor any member of the police jury is a timber estimator competent to estimate the timber, and that it is absolutely essential for the proper assessment and collection of the taxes in the parish * * * that all the real property therein should be properly assessed for taxation according to its value, and that all timber should be assessed according to its stumpage and its value, and that the value can only be ascertained by ascertaining the stumpage, and that said John T. Bryant is an expert estimator, and can, and will, furnish the police jury with the information necessary to properly assess said land and timber."

"Respondents further show that they are informed and believe that there is a much larger acreage of open land in the parish of Ouachita than is shown on the assessment rolls assessed as woodland, or as denuded land, which should be assessed as cultivated and farm lands, and that neither the assessor of the parish * * * and no [nor any] member of the police jury * * * is competent to run the lines and estimate the acreage of cultivated lands belonging to the different owners with any degree of accuracy, and that the said John T. Bryant is capable of running those lines and estimating the acreage of open and cultivated land, and that he will furnish the assessor of the parish * * * and the police jury * * * with the information necessary for the proper assessment of the open and cultivated lands in the parish of Ouachita. * * *"

When the case was called for trial, counsel for plaintiffs offered in evidence copies of the resolution and contract which they attack, to which offer counsel for defendants objected, on the ground that the petition discloses no cause of action, which objection was made general and was overruled.

Defendants' counsel then offered testimony to show that the nominal plaintiffs really represent the owners of large timber hold-

ings in the parish; offered the assessments of certain sawmills, lumber and timber concerns, and estimates of their timber holdings; offered to prove that no member of the police jury was competent to make such estimates, and that the defendant Bryant had employed assistants and had performed a large portion of the contract, that the assessor was incompetent to make such estimates, and had not had the timber in the parish estimated nor the cultivated lands surveyed, and that defendant Bryant was competent to do that work. To which offers it was objected that the evidence was irrelevant, and that the sole questions before the court were whether the police jury had authority to enter into the contract, and whether a citizen and taxpayer has a standing in court, regardless of the amount of taxes paid by him, to prevent an illegal disposition of public funds.

Opinion.

[1] The trial judge, after citing certain provisions of the law and certain decisions of this court bearing upon the general powers of police juries, and quoting the two first paragraphs of section 2 of Act 63 of 1906, p. 97, which section amends and re-enacts section 24 of Act 170 of 1898, p. 359, expresses the views upon which he has based the judgment appealed from as follows (quoting his opinion in part):

"This is the only law of the state which authorizes the police juries to deal with matters of assessment, and their powers on the subject are necessarily derived therefrom. This law seems to contemplate that each taxpayer shall furnish the assessor a list of his property, with valuations thereon, with authority in the latter to add to and increase valuations according to his best judgment, and, on failure of the property owner to furnish such list and values, the assessor shall make up the same himself from information obtained by him through the sources and means provided in the statute. In the event of disagreement between the taxpayer and assessor, the latter shall make up a duplicate list, with values as contended by the former, which shall be sworn to by the taxpayer, and submit it, with his own, to the board of review. Section 20, Act 170 of 1898.

"While the duties imposed upon the police juries as boards of review by the various statutes defining said duties appear to be somewhat general as to the examination and valuation of property placed upon the tax rolls by assessors, the Supreme Court of Louisiana has held that their power to change valuations placed thereon by the assessors is limited to instances in which there is a controversy or contest. *Union Oil Co. v. Campbell*, 48 La. Ann. 1350, 20 South. 1007; *Police Jury of Concordia Parish v. Campbell, Assessor*, 117 La. 75, 41 South. 358. * * *

"If the powers of the board be limited to the determination of issues thus raised, as would appear from the authorities cited, could it anticipate such a condition in advance of an issue so raised, and provide itself with evidence thereon by the employment of experts at the expense of the parish? * * *

"The statute points out the manner in which the board shall determine the values of property on the assessment lists, and to that end are directed to carefully examine and scrutinize the assessment list as prepared and filed by the assessor and to compare each individual assess-

ment with the others, considering the values placed on same, and, after hearing evidence concerning same, determine if said valuations are equitable and just and in accord with the requirements of the Constitution.' * * *

"The effect of the contract is nothing more or less than the employment of an assistant to the assessor, and, as will be seen from the authorities cited, when the law provides an officer upon whom such duties are imposed, the county or parish is without authority to vest those duties in other persons at the expense of the public."

For a better understanding of the question here at issue we reproduce in full section 24 of Act 170 of 1898, as amended and re-enacted by Act 63 of 1906, p. 97, § 2, as follows, to wit:

(1) "Sec. 24. Be it further enacted," etc.: "That the said board of reviewers shall meet on the first Monday in July of each and every year, or as soon thereafter as possible, and the several assessors throughout the state, parish of Orleans excepted, shall lay before the said board all of said lists of property with the estimate [d] [actual] cash value thereof extended and listed and valued by the said assessor as aforesaid, together with the list and valuation, made under oath as aforesaid, of those property owners who believe the assessor's valuation to be in excess of, and, beyond the actual cash value of the personal or real property therein enumerated, and the said board shall proceed at once to determine the issue involved, and their decision shall be final."

(2) "It shall be the duty of the board of review, as constituted by this act, and they are hereby directed, to carefully examine and scrutinize the assessment list as prepared and filed by the assessor and to compare each individual item assessment with the others, considering the values placed on the same, and after hearing evidence concerning same determine if said valuations are equitable and just and in accord with the requirements of the Constitution, and either approve or disapprove the said assessment list. If the said list be approved by the reviewers, then said assessment list or roll shall be final. Should the reviewers disapprove the roll or any item * * * thereon, it shall be the duty of the reviewers to note said items and to declare and make known the value which, in their opinion, should be correctly listed upon the roll, in lieu of the amount there named by the assessor for assessment for purposes of taxation, and notify the assessors of such disagreement, with reason for the same, and, if after considering the said difference, with reasons thereof, the assessor should concur in such valuation, then the assessor shall make the assessment placed upon the individual item on the roll conform to the valuation agreed upon by the board of reviewers and concurred in by him. If there be no concurrence as to the valuation for purposes of taxation between the assessor and the reviewers, then and in that case the valuation (as filed by the board of reviewers) shall remain as final, unless otherwise ordered and adjudged by the courts, as provided by this act." (Italics by the court.)

(3) "It shall be the duty of the board of review, as constituted by this act, to hear any and all taxpayers who desire to contest the correctness of the valuation placed by the assessor upon the property listed for assessment, owned, controlled, or held by him, and to determine as to the correctness or incorrectness of such contest. And if said claim for relief be approved by the reviewers, then they shall proceed to notify the assessor of such erroneous assessment, and propose correction of the same in the manner prescribed in the foregoing portion of this section."

(4) "Provided, however, if said claim for relief be not approved by the reviewers, the claim-

ant may bring action for relief before the district court, which court will hear and determine said suit in accord with the law governing the case."

(5) "That, in all suits for reduction of assessments, the judge is hereby directed to hear and try such cases without delay, and in chambers, if necessary, without cost to the reviewers or the assessor. It is hereby made the duty of the assessor and he shall bring suit, when necessary, to protect the interest of the state, and he shall also have the right of appeal, and such proceedings shall be without cost to him or the state. Any taxpayer shall have the right to appear before the board of reviewers and call in question any assessment on the roll if he considers such assessment too low, and any taxpayer shall have the right to appeal from the decision of the assessor or board of reviewers, to the courts at his own cost."

(6) "No valuation made by the assessors shall be increased by the board of reviewers unless the taxpayer is served with notice to appear before said board, within five days, and show cause why such increased assessment should not be made."

(7) "Such summons shall be signed by the president of the board, service therein and return made in the manner now provided by law in the case of ordinary subpoenas."

In the same connection, we think it pertinent to call attention to sections 14 and 26 of Act 170 of 1898, which read:

"Sec. 14. * * * That it shall be the duty of each taxpayer, parish of Orleans excepted, to fill out a list of his property in accordance with the form provided in section 17 of this act; and he shall make oath thereto before the tax assessor, or any officer authorized by law to administer oaths, and return the same to the assessor before the first of May of each and every year, and any refusal, neglect, or failure from any cause whatsoever, to comply with this provision of this act shall act as estopping the taxpayer from contesting the correctness of the assessment list filed by the assessor. * * *

"Sec. 26. * * * That all taxpayers in the parish of Orleans shall have the right to appear before a standing committee, * * * and, in the parishes, before the board of reviewers, as provided for in this act, during the sessions of said board, and be heard concerning the descriptions of the property listed and the valuation of the same as assessed; and the board of reviewers, having the claim for relief of the taxpayer, shall either approve or disapprove the petition, as provided in section 24, and, if disapproved, then, the taxpayers shall have the right of testing the correctness of their assessments, before courts of justice in any procedure which the Constitution and laws may permit; but the action to test such correctness shall be instituted on or before the first day of November of the year in which the assessment is made. * * *

For convenience of reference, we have numbered the paragraphs in section 24, as above quoted, though they bear no numbers, as published, and it will be observed that paragraphs 1, 3, and 4 provide for cases in which the assessor has placed one valuation upon property and the owner has placed another, and that they require the assessor, upon the complaint of the taxpayer, to lay both before the board, and the board to proceed at once to determine the issue involved; that paragraph 5 makes it the duty of the assessor to bring suit "when necessary to protect the interest of the state," and gives him the right of appeal in such cases without cost to him or the state, and (last clause)

confers upon "any taxpayer" the right to call in question any assessment on the roll if he considers such assessment too low; and that paragraphs 2, 6, and 7, in mandatory language, make it the duty of the board "to carefully examine and scrutinize the assessment list, * * * compare each individual item assessment with the others, * * * and, after hearing evidence concerning same," determine whether the "valuations are equitable and just and in accord with the requirements of the Constitution," and provided (paragraph 6) that "no valuation made by the assessor shall be increased unless the taxpayer is served with notice to appear before said board, within five days and show cause why such increased assessment should not be made," the summonses in such cases (paragraph 7) to be signed by the president of the board, and returns made "in the manner now provided by law in the case of ordinary subpoenas." It will further be observed that, under sections 14 and 26, the taxpayer is estopped to contest his assessment before the board of reviewers unless he shall have made the return of his property as required by section 17, and has no standing to contest it in court, unless he shall first have presented his petition to the board of reviewers and it shall have been disapproved by the board, and even in that case cannot be heard in court unless he institutes his suit before the 1st of November of the year in which the assessment complained of was made.

All of which propositions have been affirmed by the decisions of this court. *Liquidating Commissioners v. Marrero*, 106 La. 130, 30 South. 305; *Construction Co. v. Tax Collector*, 108 La. 435, 32 South. 899, 58 L. R. A. 349; *Lisso & Bro. v. Police Jury*, 127 La. 292, 53 South. 566, 31 L. R. A. (N. S.) 1141.

Upon the other hand, if the power of the board of reviewers to make any change in the valuation of property assessed for taxation is "limited" (as our Brother of the district court seems to think that the court has decided) "to instances in which there is a controversy or contest" initiated by the taxpayer, it is quite evident that no increase of assessment is likely to be brought about, and that the public fisc will be the sufferer.

It is, however, as clear, we think, as language can make it, that the law which we have quoted was enacted in the interest of the state as well as of the taxpayer, and that, while the board has no authority to reduce an assessment in a case where the taxpayer has not complained and has estopped himself to complain of it, the mandatory duty is imposed upon the board to take the initiative, in the interest of the state, and, "in the language of the law," to carefully examine and scrutinize the assessment list, as prepared and filed by the assessor, and compare each individual item assessment

with the others, considering the value placed on the same, and after [notice to the taxpayer and] hearing evidence concerning the same, determine if said valuations are equitable and just [to the state] and in accord with the requirements of the Constitution." The cases of the *Union Oil Co. v. Campbell*, 48 La. Ann. 1350, 20 South. 1007, and *Police Jury v. Campbell*, 117 La. 75, 41 South. 358, relied on as supporting the judgment appealed from were both decided before Act 63 of 1908 became a law, and the case first mentioned before the passage of Act 170 of 1898, and in each case it appeared that the board of reviewers was asserting a right to reduce an assessment or assessments of which the taxpayer had made no complaint, and, for aught that appeared, was estopped to complain.

We are therefore of opinion that it is the plain, mandatory duty of a board of reviewers to scrutinize every assessment roll, with a view of determining whether the valuations extended therein are correct or incorrect, and, if they are too high, and the taxpayers have made complaints as the law provides, to reduce them, in justice to the taxpayers, and, if they are too low to increase them, in justice to the state.

[2, 3] But, even if that were not the law, and the board of reviewers had no authority and was under no obligation to change any valuation upon an assessment roll, save at the instance of the owner of the property, it seems entirely clear to us that the law intends that it should act independently of the assessor, whose valuations it would be called on (in such case) to reduce, and hence we conclude that it was an error in the trial court to hold "that the effect of the contract is nothing more or less than an employment of an assistant to the assessor." The purpose and effect of the contract was to provide the board of reviewers with information which they did not possess and which was absolutely essential to enable them intelligently to discharge their function of reviewing the valuations of the assessors.

In *State v. Addison*, 134 La. 642, 64 South. 497, defendant was charged with receiving a bribe, as a police juror, for keeping the police jury from letting any contract for the estimating of the timber in Vernon parish, and it was argued in his behalf that there was no law authorizing such contract, and therefore, whatever may have been his acts, they were not within the purview of his duty as a police juror. Dealing first with the question of the legality of the contract, it was said by this court:

"The police juries are authorized by law 'to lay such taxes as they may judge necessary to defray the expenses of their respective parishes' (R. S. § 2743), and they are also constituted boards of reviewers, with power to review the action of the assessors upon the complaint of the taxpayers in particular cases (Act No. 170 of 1898, §§ 23 and 24). To discharge intelligently either of the functions mentioned, they must be

informed from some source of the values of the property which is subject to the jurisdiction thus conferred upon them, and we find no law which denies them the right to obtain such information elsewhere than from the assessors or the taxpayers."

The opinion then further holds, in effect, that the question of the legality of the contract which defendant was charged with receiving a bribe to prevent the letting of had no bearing upon the question of his guilt or innocence of the offense charged. The statement in the quotation as to the powers of the board of reviewers was not intended to be limitative (as no question of that kind was presented), but merely as illustrating the argument that the members of the board could not be expected to confine themselves to interested sources in seeking the information necessary to the discharge of their functions.

And so we say here. If the board of reviewers of Ouachita parish is to take its information from the assessors, whose valuations it is required to review, it will be no better qualified to correct their valuations than they are to make them; and, if it is to take the valuations of the taxpayers, the state would save some expense by dispensing with the assessors and the boards alike, and accepting the returns of the taxpayers in the first instance.

[4] The argument that, because an assessor—an officer whose duties and compensation are fixed by law—may not without special authority increase the expense of his office, a police jury, charged with the administration of the affairs of a parish, is without authority to incur the expense necessary to the performance of a mandatory duty in connection with such administration, is without merit. Upon the whole we are of opinion that plaintiffs allege no sufficient reasons for annulling the contract here in question, and that the court a quo erred in giving judgment to that effect. It is therefore ordered that the judgment appealed from be avoided and set aside, and that plaintiffs' demand be rejected, and this suit dismissed at their cost in both courts.

(139 La.)

No. 21479.

CITY OF NEW ORLEANS v. LE BLANC.

(Supreme Court of Louisiana. Nov. 29, 1915.
On Rehearing, March 20, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §80(3) — EXECUTIVE POWER—MUNICIPAL CORPORATIONS — BOND AND SECURITY REQUIRED.

Articles 16 and 17 of the state Constitution provide for the distribution of the powers of government to the three departments, and prohibit the exercise, by one department, of powers belonging to either of the others, except in instances expressly directed or permitted by the Constitution; and article 3042 of the Civil Code, as amended and re-enacted by Act No. 225

of 1908, contains certain provisions in regard to the character of the surety to be offered by "the debtor obliged to furnish security," and in regard to the jurisdiction of the courts with respect to sureties in certain cases, but those constitutional and statutory provisions have no application to the case of a person who is not a "debtor," in the sense in which that word is used in the statute, but who merely desires to enter into a contract with, or obtain a concession from, a municipal corporation, and they do not deprive the corporation of the right to determine for itself, within the limits of other statutes, the character of bond and security that it will require, or make that question a judicial one.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 145; Dec. Dig. §80(3).

For other definitions, see Words and Phrases, First and Second Series, Debtor.]

2. CONSTITUTIONAL LAW §81 — MUNICIPAL CORPORATIONS §661(1)—POWERS—USE AND MAINTENANCE OF STREETS—POLICE POWER.

The Constitution of the state vests all of the legislative power in the General Assembly, which grant includes all of the police power; and the General Assembly has vested in the city of New Orleans so much of the police power as is required by that corporation for the discharge of its functions, including the power to enact and enforce all ordinances necessary for the protection of the lives and property, the preservation of the health, and the promotion of the comfort, convenience, and general welfare of its inhabitants, and including the power to regulate the use of the streets and to maintain them in a safe condition.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. §81; Municipal Corporations, Cent. Dig. §§ 1432, 1434; Dec. Dig. §661(1).]

3. MUNICIPAL CORPORATIONS §703(1), 755(1) —USE OF STREETS—REGULATION—PERSONAL INJURIES—LIABILITY.

The obligation rests upon the city of New Orleans (as upon other municipal corporations) to keep its streets in a safe condition, and, if a person sustains injury by reason of a neglected bridge, or an unguarded excavation or obstruction, in a public street, the city is liable therefor in damages; and, though the courts have not, thus far, held municipal corporations liable for injuries resulting from the use of the streets by vehicles driven by steam or electricity, the obligation rests upon them to guard the public from that danger, as well as from any other that may threaten; and particularly is that true with respect to such vehicles when engaged in business as common carriers, a business affected with a public interest, and therefore peculiarly within the domain of the police power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509, 1587, 1589, 1590; Dec. Dig. §703(1), 755(1).]

4. CONSTITUTIONAL LAW §209, 211, 212 — POLICE LAW—"EQUAL PROTECTION OF THE LAW"—CLASSIFICATION.

Where a state statute, purporting to have been enacted in the exercise of the police power, operates a denial, to persons within the jurisdiction of the state, of the "equal protection of the law," it contravenes the Fourteenth Amendment to the Constitution of the United States, and must be declared void. But:

"(1) The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify, in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and is therefore purely arbitrary.

"(2) A classification having some reasonable

basis does not offend against that clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality.

"(3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts, at the time the law was enacted, must be assumed.

"(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is, essentially, arbitrary."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 684, 705; Dec. Dig. ☞ 206, 211, 212.]

For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Law.]

5. MUNICIPAL CORPORATIONS ☞63(2)—ORDINANCE ENACTED UNDER GENERAL AUTHORITY—REASONABLENESS—SCOPE OF INQUIRY.

In the matter of municipal ordinances, enacted pursuant to general, as contradistinguished from special, authority, the courts will go farther, and inquire whether they are reasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378; Dec. Dig. ☞63(2).]

6. MUNICIPAL CORPORATIONS ☞642(4)—ORDINANCE REGULATING JITNEYS—CONDITIONS NECESSITATING ENACTMENT—PRESUMPTION.

In the absence of evidence to the contrary, we must assume the existence of conditions which required the enactment, and its application to the jitney business, of the ordinance under which defendant was convicted, and which prohibits the carrying on of the business of transporting passengers, on indicated routes, through the streets of New Orleans, for uniform fares, in vehicles, whether operated on rails or otherwise, until the person assuming to carry on such business shall have first filed with the commissioner of public safety an indemnity bond in the sum of \$5,000, for each and every such vehicle, so used and employed, such bond to be executed by a surety company, authorized to transact business in this state, and conditioned that any person who may sustain damage to person or property as the result of the fault of the person conducting such business, or his agents, or employees, shall have his right of action on said bond as fully as though it were made directly in his favor; said bond to be approved by the commission council (save in so far as the law makes unnecessary the approval of a surety company, which has complied with the law applicable to such companies), and to be maintained at the original amount of \$5,000.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1415; Dec. Dig. ☞642(4).]

Land and O'Niell, JJ., dissenting on rehearing.

Appeal from Recorder's Court of New Orleans; J. J. Fogarty, Recorder.

Hoa Le Blanc was convicted of violating an ordinance of the City of New Orleans, and appeals. Affirmed on rehearing.

C. C. Friedrichs and Harold A. Moise, both of New Orleans, for appellant. Edgar M. Cahn and Nathan Feltel, both of New Orleans, amici curiae, for New Orleans Motor Car Ass'n. John J. Reilley, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellee.

PROVOSTY, J. The CHIEF JUSTICE has prepared an opinion in this case, in which Justice SOMMERVILLE concurs in full, and from which Justices LAND and O'NIELL dissent. Justice PROVOSTY concurs in said opinion, except in so far as will be hereinafter stated. Said opinion is as follows:

Defendant prosecutes this appeal from a conviction and sentence upon a charge of violating Ordinance No. 2346, Commission Council Series, by operating a "jitney," in contravention of the provisions of section 2 of that ordinance, which reads:

"That no person, firm, association of persons, or corporation shall be permitted to conduct and carry on the business of transporting passengers on indicated routes and for a uniform fare, whether the said transportation be in vehicles operated on rails or otherwise, or be permitted to use and employ in the conduct and carrying on of such business any such vehicle until he shall have first filed with the commissioner of public safety * * * an indemnity bond in the sum of \$5,000 for each and every such vehicle so used and employed; the said indemnity bond, or bonds, to be executed by a surety company or companies duly authorized to do business in the state of Louisiana, payable to the city of New Orleans, and shall contain stipulation that any person, or persons, who may sustain damage to his, or their, person or property, as the result of the fault of the person, firm, association of persons, or corporation conducting such business, or of his, or their, agents, servants, or employees, he, or they, shall have his, or their, right of action on said indemnity bond, as fully and to the same extent as if said bond was made and executed directly in favor of the claimant for such damages. The said indemnity bond, or bonds, shall be submitted to, and shall be first approved by, the commission council. The amount of said bond (to wit, \$5,000 for each vehicle operated as aforesaid) shall always be maintained at that figure and shall not be void upon first recovery, but shall be actional against from time to time until the full amount thereof is exhausted, and, in the event that the amount thereof shall have been reduced by payment for damages, under the terms of said bond and these provisions, the person, firm, association of persons, or corporation, conducting the business as carriers of passengers aforesaid, shall furnish an additional bond for the amount so paid, so that, at all times, a bond, or bonds, of indemnity for the entire sum of \$5,000 shall be carried, on each and every vehicle used, employed and operated in the business aforesaid; provided, however, that the provisions of this section shall be operative from and after the 15th day of May, 1915."

To the charge so preferred, defendant demurred, on the grounds (which are here stated, as we understand them, though not in the precise order in which they appear in the demurrer), to wit:

(1) That, in adopting the section quoted, upon its first offering, the commission council of New Orleans violated section 10 of the city charter; (2) that said section contravenes articles 16 and 17 of the state Constitution, in attempting to confer upon the commission council the power to interpret, and determine the question of the sufficiency vel non of the bond thereby required, which is a judicial function; (3) that the business of operating a "jitney" in the streets of New Orleans, not having been subjected, by the Constitution, to the police power, cannot be subjected, to that power by the city council, and that the council is without authority, in the attempted exercise of such power, to create a misdemeanor and provide a penalty therefor, such authority being vested by article 159 of the

Constitution in the General Assembly; (4) that the requirement of an indemnity bond, as contained in the section in question, is not a competent exercise of the police power, but is arbitrary, discriminatory, unreasonable, confiscatory, impossible of fulfillment, tantamount to a prohibition against the carrying on, by a particular class of citizens, of a legitimate business, recognized by law, and hence is ultra vires of the commission council and in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and of the second and sixth articles of the Constitution of this state.

Defendant introduced a number of witnesses, who testified that the surety companies doing business in New Orleans, or a number of them, had declined, or were unwilling, to become parties to bonds such as that required by the ordinance, unless they were furnished with collateral security to the full amount of the bond and paid a premium of \$50 in each case. And defendant testified that he had tendered to the city authorities a policy of indemnity insurance, which a casualty insurance company was willing to issue, in his favor, but which was not transferable. Being asked why he did not furnish the bond required by the ordinance, he replied: "Because I never had \$5,000. Q. And you couldn't get it? A. No, sir." He also testifies that he had complied with other requirements of the ordinance, and he produced a city license for carrying on the business of "auto transfer," and a state license for the business of "jitney mobile," for each of which he had paid \$30 for the year 1915. The record is entirely barren of evidence as to the character of the business thus designated, or its relation to any other business, activity, or condition. There is, however, some testimony from which it may be inferred that it is carried on by means of secondhand automobiles which are bought at a low price, and which carry passengers, at low fares, on routes, selected by the operators, which have fixed termini.

1. The ground of demurrer first above stated has not been referred to in the argument, oral or written, of defendant's counsel, and is considered to have been abandoned.

[1] 2. Articles 16 and 17 of the state Constitution provide for the distribution of the powers of government to the three departments, and prohibit the exercise, by one department, of powers belonging to either of the others, except in the instances expressly directed or permitted by the Constitution. Article 3042 of the Civil Code, as amended and re-enacted by Act 225 of 1908, reads:

"Article 3042. The debtor obliged to furnish security must offer either a surety company authorized to do business in the state of Louisiana, or a person able to contract, who has property liable to seizure within the state of sufficient value to answer for the amount of the obligation, and who is domiciled in the parish where the security is to be given.

"Whenever it shall be made to appear to the satisfaction of the judge having jurisdiction thereof that any person who has been appointed to discharge the duties of administrator, executor, tutor, curator, or any fiduciary trust whatever, is unable to give security in the parish, the judge shall have power to order that sureties residing in any other parish be received.

"Where surety is tendered of persons residing out of the parish, the judge alone shall pass on the sufficiency thereof, and shall require such proof as he may deem necessary.

"All actions on bonds against the sureties aforesaid may be instituted in the court having original jurisdiction of the subject-matter: and the parties thereto, when legally cited, shall be subject to the jurisdiction of such court."

It is quite evident that the jurisdiction, thus conferred on the "judge," relates to bonds required by law in matters already within the cognizance of such judge, and that the lawmak-

er does not intend to restrict the liberty of contract between individuals in the matter of the giving and accepting of conventional bonds.

A person who merely desires to enter into a contract with, or to obtain a concession from, a municipal corporation, in a case in which the corporation requires a bond, does not, thereby, become the "debtor" of the corporation, even though that word be interpreted in its broadest sense, and there is nothing in the statute which deprives the corporation of the right to determine for itself the character of bond and security that it will require, or that makes the determination of that question a judicial one.

[2] 3. The fact that the Constitution has not, in terms, subjected the business of operating a "jitney" to the dominion of the police power is not surprising, since that business seems to have originated since our latest Constitution was adopted. But all the Constitutions that we have had have vested in the General Assembly (all of) "the legislative power of the state," which grant has included all of the police power, and the General Assembly has vested in the city of New Orleans so much of that power as is required by that corporation for the discharge of its functions, including the power to enact and enforce all ordinances necessary for the protection of the lives and property, for the preservation of the health, and for the promotion of the comfort, convenience, and general welfare of its inhabitants, and including, specifically, the power to regulate the use of the streets and maintain them in a safe condition.

That it was competent for the General Assembly to make such grant is beyond question, the consensus of the jurisprudence upon that subject being stated as follows:

"The municipality, as a governmental agency, must, of course, have such measure of the power [referring to the police power] as is necessary to enable it to perform its governmental functions and also those municipal functions which are necessarily and inseparably incident to its existence as a corporation. * * * After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power and therefore nondelegable, the doctrine is firmly established and now well recognized that the Legislature may, expressly or by implication, delegate to municipal corporations the lawful exercise of police power within their boundaries. The measure of the power thus conferred is subject to the legislative discretion." 28 Cyc. 693.

[3, 4] 4. The remaining question is whether the particular enactment here attacked is within such limitations as are imposed upon the exercise of the police power, or, by transgressing those limitations, authorizes the intervention of the courts; and, in that connection, it becomes necessary to inquire more particularly into the terms of the grant under which the power has been exercised.

The Constitution of the state contains the provision:

"Art. 319. The electors of the city of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose the public officers, who shall be charged with the exercise of the police power and with the administration of the affairs of said corporation in whole or in part."

Conceding, for present purposes, that the term "police power" as so used, means such police power as may be conferred upon the city by the General Assembly, we turn to the legislative charter of the city, being Act 159 of 1912, and find the following, among other, provisions, pertinent to our inquiry, to wit:

"Section 1. * * * (d) The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intent thereof [hereof] that the specifications of particular powers by any

other provision of this charter shall never be construed as impairing the effect of the general grant of powers hereby bestowed;

"(e) The city shall also have all powers, privileges and functions which by or pursuant to the Constitution of this state, have been, or could be, granted to or exercised by any city. * * *

"Sec. 6. The commission council shall have the power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper:

"1. To preserve the peace and good order of the city. * * *

"2. To suppress all nuisances. * * *

"3. To open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks.

"4. To keep the streets and crossings and bridges and canals and ditches clean and in repair. * * *

"5. To light the streets, wharves and landings and public squares. * * *

"Sec. 8. The commission council shall also have power: * * *

"12. To authorize the use of the streets for railroads operated by horse, electricity, steam or motive power, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turntable, to compel them to keep conductors on their cars and compel all such companies to keep in repair the street, bridges and crossings through or over which their cars run.

"13. To establish jails, houses of refuge, reformation and correction and to make regulation for their government; to construct, maintain and operate belt railroads and other public utilities; and to exercise general police power in the city of New Orleans. * * *

"Sec. 28. Every ordinance purporting to grant to any person, corporation, association or firm any privilege to use or occupy any part of any street, public place * * * in connection with the conduct of any private business, shall, after having been introduced in the commission council, be advertised in full in the official journal, daily, for two weeks, and shall then be considered and passed or rejected * * * in the manner provided for other ordinances. No privilege of any kind for the use of any part of any street, public place or public property in connection with the conduct of any private business, except such as are incidental, appertaining to or necessarily connected with grants of the character referred to in section 29, now existing or hereafter to be made, shall be granted by the commission council except on adequate consideration fixed in the ordinance granting the privilege payable, at the discretion of the * * * council, either in cash before said privilege is exercised, or in installments to be paid in advance at dates to be fixed by the ordinance."

Section 29 refers to grants for:

"The lighting of streets or public places, the lease of public markets or the establishment of markets or other utilities to become public on terms, the operation of ferries, the removal or disposal of garbage, the construction and operations of street railroads or purporting to award a contract covering the performance or discharge of any public duty or function. * * *

It would be impossible to express more emphatically, than by the language thus used, the intention to confer upon the city all the power that it is competent for the General Assembly to confer upon any municipal corporation. But, even though the accomplishment should be held to fall short of the intention, it is clear that the power and obligation are conferred and imposed to maintain the streets and so regulate their use as to secure the safety and convenience of the public, to whom, alone, they belong. As far back as 1810—before the adoption of the Constitution under which Louisiana was admitted into the Union—in the suit of Daublin v. May-

or, 1 Mart. (O. S.) 185, plaintiff complained that the city authorities had demolished a house that he had built and had driven him from the premises. Defendants admitted the demolition, but justified it on the ground that the house had been built in a public street, in violation of a city ordinance. Plaintiff's counsel cited the laws of Spain (then in force), to the effect that, "if the corporation of any city are disseised of any of their land, they shall bring suit therefor, and if they use force to regain possession, they shall forfeit their title to the premises." In deciding the question so presented, Martin, J., said:

"The ordinance of the corporation is not repugnant to the Constitution of the United States nor to any of the laws of the territory. The Spanish laws quoted by the plaintiff's counsel relate only to lands belonging to the corporation as their private property. Streets are not the property of any one; they belong to the whole community. They are not the property of the corporation, for if they were the corporation could exclude the whole world from the use of them. On the contrary, the use of them belongs to the whole world" (citing 3 Partida and Commentary of Gregorio Lopez, and Roman Law, Dig. lib. 43, tit. 10).

In *Kennedy v. Phelps*, 10 La. Ann. 227 (decided in 1855), the question presented was as to the validity of an ordinance of the then city of Lafayette, under which the street commissioner threatened to close, as a public nuisance, certain premises used by plaintiff for the curing of hides. In sustaining the ordinance, this court quoted from the decision of the Supreme Court of Massachusetts, in the case of *Baker v. City of Boston*, 12 Pick. (9 Mass.) 193, 22 Am. Dec. 421, as follows:

"It has not been denied, nor it cannot be, that the mayor and aldermen are clothed with legislative powers and prerogatives to a certain extent, and that they are fully empowered to adopt measures of police, for the purpose of preserving the health and promoting the comfort, convenience, and general welfare of the inhabitants within the city. Among these powers no one is more important than that for the preservation of the public health. It is not only the right, but the imperative duty, of the city government to watch over the health of the citizens, and to remove every nuisance, so far as they may be able, which may endanger it."

To which this court added:

"The police powers, thus generally recognized as essential to municipal government, have been expressly conceded to the city of New Orleans, * * * as they are, by implication, to the late city of Lafayette," etc.

In *Richmond, F. & P. R. R. Co. v. City of Richmond*, 96 U. S. 521, 24 L. Ed. 734, it appeared that the plaintiff company had been incorporated in 1834, with authority to build a railroad "from some point within the corporation of Richmond, to be approved by the common council," etc., and to place thereon "all machines, wagons, vehicles, carriages, and teams of any description whatsoever"; that locomotives were, at that time, in use in Virginia, and that the city of Richmond was a municipal corporation, having power "to make and establish such by-laws, rules, and ordinances, not contrary to the Constitution or laws of the commonwealth, as shall * * * be thought necessary for the good ordering and government of such persons as shall from time to time reside within the limits of said city or corporation, or shall be concerned in interest therein."

It further appears that, the road having been located within the city limits, the company placed locomotives thereon, after which there were different negotiations and transactions between the company and the city, followed, in 1870, by an amendment to the city charter, authorizing the city to exclude engines and cars, provided no contract was thereby violated, and, followed, in 1873, by an ordinance, prohibiting

the use of steam cars upon a certain part of Broad street, which prohibition having been disregarded by the company, the city proceeded, before a police justice, for the recovery of the penalty, and the company, by way of defense, attacked the ordinance, as unconstitutional, on the grounds that it impaired the obligations of a contract, deprived it of its property without due process of law, and denied it the equal protection of the laws. The case was taken to the Supreme Court of the United States, and it was there held that the ordinance impaired no contract obligations, after which, the opinion proceeds as follows:

"It remains only to consider whether the ordinance complained of is a legitimate exercise of the power of a city government. It certainly comes within the express authority conferred by the amendment to the city charter, adopted in 1870; and that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable police regulations; and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. *Donnahey v. State*, 8 Smedes & M. (Miss.) 649; *Whitson v. City of Franklin*, 34 Ind. 392.

"Such prohibitions clearly rest upon the maxim 'Sic utere tuo ut alienum non lædas,' which lies at the foundation of the police power; and it was not seriously contended upon the argument that they did not come within the legitimate scope of municipal government, in the absence of legislative restriction upon the powers of the municipality to that effect. It is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the council."

In *Tilton et al. v. Railroad Company*, 35 La. Ann. 1062, it appeared that, in 1876, defendant had been granted, by the city of New Orleans, the right to operate its cars on the neutral ground on Canal street, between Basin and Carondelet; that the grant was renewed in 1883; that plaintiffs, as owners of abutting property, obtained an injunction against the exercise of the right; and that they appealed from a judgment dissolving the injunction and rejecting their demands.

This court, after a careful consideration of the question of the authority of the city to make the grant, in view of the character of the neutral ground, reached the conclusion that the authority existed, but, finding that it did not include the right to use steam cars, amended the judgment appealed from in that respect, and perpetually enjoined the defendant from using such cars.

Many years before, in the case of *Brown et al. v. Duplessis and City of New Orleans*, 14 La. Ann. 842, it appeared that the city of New Orleans had offered for sale the right of way for the establishment of a railroad in its streets, the cars to be drawn by horses or mules, and that the adjudication had been arrested by an injunction, sued out by plaintiffs, on the ground that the power to make it was not vested in the city, but in the General Assembly.

The court quoted the following provision in the then city charter, as conferring the power, to wit:

"The mayor and * * * council shall have full power and authority to make and pass such by-laws * * * as are necessary and proper, and are not contrary to the Constitution * * * of the United States or this state: First, * * *. Second, to regulate and make improvements to the streets, public squares, wharves and other property. * * *. Twelfth, to make regulations for the proper government of carts, drays, carriages, omnibuses, and other vehicles of every description, which run in the

streets, or anywhere within the limits of the city, and to determine through what streets the same shall pass."

In the course of its opinion, the court said, in substance, that if the city had thought proper to lay tracks through the streets, for the use of those who might choose to operate their own horse or mule drawn cars thereon, no one could have complained, as that would have afforded but another, and not exclusive, mode of using the streets, from which it was deduced that, as it did not suit the public coffers to lay the rails, it was competent for the city to sell that right, with the privilege of operating cars upon the rails according to a tariff fixed by the council.

In 1879, the right of way thus referred to (with additions, no doubt) was sold by the city for \$630,000, in cash; and in *State ex rel. Gas-light Co. v. Mayor and Council*, 32 La. Ann. 270, it was held that, such right being "property" within the meaning of Act 30 of 1876, the proceeds should be included in the budget for 1880 and devoted to the payment of registered judgments.

In the cases thus cited, therefore, it appears that persons desiring to conduct the business of carriers of passengers in the streets of New Orleans were required, and were willing, to pay heavily for that privilege, in addition to which the streets in which they were to operate were determined contradictorily with the city, they were required to pay the expense of laying the tracks for the use of their vehicles, and, it may be added, as a matter within the cognizance of this court, in most, if not all, cases, they were required to assume a burden with reference to the maintenance of the streets in which they operated. The question has always been, not whether the city had the power to deny such privilege, for no one, until now, has ever asserted a right to it, but whether it had authority to grant it.

The defendant now before the court and others similarly situated claim the privilege as of right. They propose to operate their vehicles, not upon rails, laid at their expense, in streets maintained in part by them, but upon asphalt, laid at the expense of the city, in streets selected by them, but maintained by the city.

It may be here stated that, after this prosecution was instituted in the recorder's court, defendant (with an associate) obtained an injunction from a court of civil jurisdiction to restrain the city from further proceeding and from instituting other prosecutions, on the ground that he had a property right in the use of the street for the purposes of his business; but this court, upon the city's application for prohibition, held that he had no such right and that the civil court was without jurisdiction in the premises, saying (among other things):

"The streets of the towns and cities in Louisiana being among the things that are 'public' and 'for the common use,' no individual can have a property right in such use for the purposes of his private business, unless, speaking generally, that business being in the nature of a public service or convenience, such as would authorize the grant, the right has been granted by the state, which alone has the power to make or authorize it, or by the particular city or town, acting under the authority of the state, and in such case the right can be exercised only in accordance with the conditions of the grant; that is to say, an individual seeking, but not possessing, a right of that kind, may accept the grant, with the conditions imposed by the offer, in which case he becomes bound by the conditions, or he may refuse to accept the conditions, in which case there is no grant, and without the grant so offered, or some other, from the authority competent to make it, he can never acquire the right to make use of a street as his place of business." *Le Blanc v. City of New Orleans*, 138 La. 243, 70 South. 212.

The contention, however, is, that the business

in which defendant is engaged is a legitimate one, "recognized under the laws of the state," and that the condition which the city has imposed upon it is arbitrary, discriminatory, unreasonable, etc., as would be a similar condition imposed upon the owner of a private vehicle, or of a public hack, or taxicab, and the case of *State v. Von Sachs et al.*, 45 La. Ann. 1418, 14 South. 249, is cited as authority for the proposition that the city council is without authority to require a person conducting a legitimate business to give bond for the faithful discharge of the duties connected therewith, and to answer in damages to those who may be injured through their dealings with him.

Without entering into any critical analysis of the *Von Sachs* Case, it is sufficient, for present purposes, to say that *Von Sachs* was engaged in the business of "labor agent," conducted, as I assume, upon his own premises, with which the city had no more concern than with the thousands of other premises, occupied or used by its citizens, and that the court, without considering, and apparently without having its attention called to, the question whether the business of labor agent is one affecting the public interest, held (whether correctly or incorrectly) that it was to be regarded as a business authorized by the Legislature, and subject to no conditions other than those imposed by the Legislature. The business of the defendant now before the court is, however, conducted upon the streets of New Orleans, and the law not only authorizes the city to regulate the use of the streets, but imposes upon it the obligation of maintaining them in a safe condition for public use, so that, if there be in a street a neglected bridge, excavation, or obstruction, and a person thereby sustains injury, or loses his life, the city may be, and has often been, held to respond in damages. *Dillon, Mun. Cor.* (4th Ed.) pp. 887, 1203, 1284; *Buswell, Personal Injuries*, §§ 52, 167; *McCormack v. Robin & City of N. O.*, 128 La. 594, 52 South. 779, 139 Am. St. Rep. 549, and authorities there cited. It may be that the courts have not, thus far, felt authorized to hold municipal corporations liable in damages for personal injuries or loss of life resulting from neglect to safeguard their streets against improper use by persons operating vehicles thereon, though we have a statute which makes them liable for the loss of property, injured or destroyed by mobs; but the moral obligation is the same in such cases as in those in which the legal obligation is also recognized and enforced, and it seems clear that the corporations should be, and are, authorized to protect themselves against a default in the one case as in the other, and that is particularly true where, as in this instance, the operation of vehicles on the streets is a business which affects the public interest, and is therefore peculiarly within the dominion of the police power of the corporation.

"Municipal regulations of the use of the streets by a street railroad are an exercise of the police power of the city, and will be upheld if reasonable." 28 Cyc. 727, 728. * * *

"The municipal regulation of vehicles of all sorts, commonly used within the corporate limits, is a valid exercise of the police power, not inherent, but granted to the corporation. * * * The city may prescribe what style of vehicles shall be used for public passenger service, but not for private use; what streets they must travel, if regular lines; and where hacks must stand; whether the driver may leave them, and what mark of distinction he shall wear. It may also prohibit fast driving, but not slow driving; may require a license for each vehicle; and may assess a penalty against a public conveyance for refusal to carry a passenger." *Id.* 731, 732.

From another publication of high character, we excerpt the following:

"It may be said, however, that a common car-

rier of passengers is one who undertakes for hire to carry all persons indifferently, so long as there is room and there is no legal excuse for refusing. A public common carrier is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and, for reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and must submit to reasonable regulations. Under the definition thus given, steam railroads are common carriers of passengers as to those accepted by them as such, as are street railways, steamboats, and steamships engaged in passenger traffic, and proprietors of ferries, stage-coaches, and hackney coaches." 4 R. C. L. 1000.

And, according to the same definition, "jitneys" are also common carriers.

We quote again from another volume of the same publication:

"It is laid down as a fundamental principle that persons or corporations engaged in business in which the public have an interest or use may be regulated by statute." 6 R. C. L. p. 224. * * *

"No one would venture to question the general proposition that a corporation whose property is devoted to a public use, as is that of a carrier, is subject to reasonable regulation by the state." *Id.* 482. * * *

As it is not to be deduced, from the doctrine that a street railroad may be regulated through the exercise of the police power by a state or municipality, that a company promoting such road may establish it, at will, in any street of any city, and operate it by any power that it may find convenient or profitable, neither is it to be deduced from the doctrine that an individual who is engaged in business as a common carrier is subject to such regulation that he may select any street in any municipality for the conduct of his business, without regard to the views of those to whom the law has intrusted the administration of the affairs of such municipality, for it is in them, and not in him, that the law has vested the power and discretion to determine the manner in which the streets shall be administered, in order that they may be most safely and conveniently used by the whole mass of the people to whom they belong.

Defendant assumes the position that he is engaged in a legitimate business, recognized by law, and, though his counsel have referred us to no law which recognizes it, other than that which recognizes common carriers in general, we concede that the business of carrying passengers for hire is legitimate, but so is that of a baker, and yet it cannot lawfully be conducted in a public street, save with the consent of the city authorities, and agreeably to the requirements of section 28 of Act 159 of 1912, which declares that "no privilege of any kind for the use of any part of a street, * * * in connection with the conduct of any private business, except such as are * * * connected with grants of the character referred to in section 29 * * * shall be granted, * * * except on adequate compensation," etc., and neither the business of baking bread nor that of operating jitneys is referred to in section 29, unless such reference be included in the language, "Every ordinance * * * purporting to award a contract covering the performance or discharge of any public duty or function," and defendant sets up no such contract.

In considering whether the ordinance here in question deprives defendant of any right guaranteed by either the state or federal Constitution, we leave the Fourth and Fifth Amendments to the federal Constitution out of the case, as it is well settled that the first 10 amendments to that instrument relate only to powers exercised by the federal government. Articles

2 and 6 of the state Constitution contain, substantially, the same guaranty, of life, liberty, and property, and of due process of law, as the Fourteenth Amendment to the federal Constitution. It is generally conceded that the police power is a necessary attribute of every civilized government, is inherent in the states of the American Union, was not surrendered by them upon the establishment of that Union, and that the Fourteenth Amendment to the federal Constitution was not intended to interfere with its proper exercise by the states, and so it may be said of the second and third articles of the state Constitution with respect to the state of Louisiana. Upon the other hand, it is also well settled that, to deny a citizen the rights guaranteed by the Fourteenth Amendment is not a competent or proper exercise of the police power, and hence that no state can deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws. The views of the Supreme Court of the United States upon the proposition thus stated have been expressed as follows, in a case in which a municipal corporation, acting under a general, constitutional, and special, statutory, grant of authority, delimited certain territory within which gasworks might be established, and, after the plaintiff (who was also plaintiff in error) had acquired property and begun the establishment of such works, passed an amendatory ordinance prohibiting their erection to wit:

"The Supreme Court of California, as may be gathered from its opinion in this case, based its decision upon the proposition that, as the exercise of the right to control the location and erection of gasworks is within the power conferred by the Legislature upon the city, the act of the municipality in question cannot be reviewed, because so to do would be a substitution of the judgment of the court for that of the council upon a matter left within the exclusive control of the legislative body. To support this conclusion, a citation is made from the opinion of this court in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, to the effect that the Legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power. The observations of Mr. Chief Justice Waite, in that connection, had reference to the facts of the particular case, and were certainly not intended to declare the right of either the Legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution, under the guise of exercising the police powers reserved to the states. It may be admitted that every intendment is made in favor of the lawful exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business to make contracts, or to use and enjoy property. * * *

The opinion includes an excerpt from the opinion in *Lawton v. Steele*, 152 U. S. 133-137, 14 Sup. Ct. 499, 38 L. Ed. 385, containing the following:

"In other words, its [the Legislature's] determination as to what is a proper exercise of its police powers is not * * * conclusive, but

is subject to the supervision of the courts." And, from the opinion in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, as follows:

"The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

And from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 22 Sup. Ct. 431, 439 [46 L. Ed. 679], containing the following:

"The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety, but if, by their necessary operation, its regulations looking to either of those ends, amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Somewhat further along, the opinion proceeds: "It is always a judicial question if any particular regulation of such right [referring to the "constitutional right of the citizen to pursue any trade, business or vocation" which, in itself, is recognized as innocent and useful to the community] is a valid exercise of police power, though the authority of the courts to declare such regulations invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power and infringes upon rights guaranteed by the Constitution."

Applying the doctrine thus announced by it to the case under consideration, the court found that the plaintiff had acquired property under an ordinance which authorized the erection thereon of gasworks, and (though conceding that the police power of the municipality was a continuing power, and that conditions, thereafter arising, might have justified its exercise to prohibit such erection) that no such conditions had arisen, and held that the prohibiting ordinance, subsequently adopted, operated to divest a vested right, protected by the Constitution, saying:

"Being the owner of the land and having partially erected the works the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law. * * * Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance is not a question necessary to be determined in this case, but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

The same high court has said, in a more recent case, concerning a contention that a particular classification operated to deny a litigant before it the equal protection of the laws:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: (1) The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would

sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 377, Ann. Cas. 1912C, 160. The defendant in the case at bar has not carried the burden to which the language thus quoted refers, and I can, readily, and, as I think, reasonably, conceive a state of facts which would sustain the classification contained in the ordinance which he attacks, though it excludes taxicabs and private vehicles.

There are authorities to the effect that: "When an act has a real and substantial relation to the police power, then, no matter how unreasonable or unwise the measure itself may be, it is not for the courts to avoid or vacate it on constitutional grounds." 6 R. O. L. p. 243.

[5, 6] I am of opinion that the real and substantial relation of the ordinance here in question to the police power of the city is sufficiently obvious, but I concede that, the grant of power under which it was enacted being general, rather than specific, the reasonableness of its provisions may be open to inquiry. I begin that inquiry, however, by assuming the existence of conditions requiring the enactment of such an ordinance, and there is no evidence in this record which rebuts that presumption. To the contrary, defendant has referred to no case, and I know of none, in which it has been held, or even pretended, that an individual or corporation could engage in the business in which he is engaged, upon the streets of a town or city, without complying with conditions imposed by the governing authorities, and the reasonableness of such conditions should be determined as well, to say the least, with reference to the purpose intended to be accomplished, as to the convenience, or the ability to comply, of the person upon whom they are imposed. I infer, from the evidence introduced on his behalf, that defendant is without means, and that he is engaged in operating a secondhand vehicle, impelled by steam, explosive gas, or electricity, and capable of moving at a very high rate of speed, in which he carries passengers over a route, established by himself, through the streets, from one fixed terminus to another, for a very low fare, all of which suggests to the mind the possibility of an accident, whereby some man, woman, or child, dependent, perhaps, upon his, or her, daily efforts for a livelihood, and making that ordinary use of the streets for which they are mainly intended, may be killed or permanently disabled. I am not informed by the record whether there are a hundred such jitneys in operation or a thousand, or at what speed, or upon what streets they travel, or whether danger of the accident suggested is imminent or remote, or whether all the jitney operators, together, could satisfy a verdict or judgment for the damages resulting from one such accident. Those are matters which may be within the knowledge of the city council, and it is to be presumed that it was upon the basis of such knowledge that they concluded that it would be reasonable for them, as administrators of the streets, responsible for their safety, and as representing the mass of the inhabitants, to require from each jitney operator a bond of indemnity for loss or injury that he may inflict upon them in the course of the extraordinary use that he is making of the common property. Considering the requirement from that point of view, it seems not unreasonable, since \$5,000 would hardly cover the loss which may result from a single accident, and a cheap, secondhand, machine, operated cheaply, in order to make profit from cheap fares, may reasonably be expected to meet with accidents. And, considering the matter from that point of view, it appears to me to be immaterial wheth-

er the operator can give the required bond or not; for, if he be without money to pay the damages that he may inflict, and without credit to enable him to secure the possible sufferers against such damages, it is, I think, within the police power of the city authorities to declare that he shall not operate his machine. There may be persons desiring to operate jitneys who are unable to pay for a license, as there are, at times, persons desiring to suspend the execution of final judgments, who are unable to give the required bonds, but the requirements of the license and the bond are not unreasonable on that account. There may be auctioneers and notaries who think the bond requirement a hardship, but we have heard no complaint from them, and have good reason to think the requirement a reasonable one.

A late writer on the subject of police power says:

"Somewhat related to the requirement of a license is a bond or deposit to secure the faithful compliance with police regulations and the satisfaction of liabilities that may arise from their violation, or to serve as an indemnity bond for persons who have suffered by the fraudulent conduct of the business. As a subsidiary measure of police control, it appears to be permissible, wherever a license may be required, but it is resorted to less frequently. A bond is required, not uncommonly, of liquor sellers and of auctioneers; deposits are sometimes required of peddlers, itinerant merchants, of persons advertising bankrupt sales; above all, of all persons or corporations engaged in the quasi public business of banking, insurance, or warehousing." *Freund on Police Power*, § 40, page 36.

The courts of several of the other states have had occasion to consider the questions here in issue, and have decided that laws and ordinances, similar to the ordinance involved in this case deny no rights secured by the Constitution. *Green v. San Antonio* (Tex. Civ. App.) 178 S. W. 6; *Ex parte Sullivan* (Tex. Cr. App.) 178 S. W. 537; *State ex rel. Ryals v. City of Memphis* (Tenn.) 179 S. W. 631; *Memphis Street Railway Co. v. Rapid Transit Co.* (Tenn.) 179 S. W. 635; *Ex parte Cardinal* (Cal.) 150 Pac. 348 [L. R. A. 1915F, 850]; *State v. Howell*, 85 Wash. 294, 147 Pac. 1159; *Ex parte Dickey* (W. Va.) 85 S. E. 781 [L. R. A. 1915F, 840].

Justice PROVOSTY cannot concur in the view that the jitneys are not entitled, as matter of right, to use the streets, but are dependent for doing so upon the consent of the municipal authorities. The streets belong to the public; and the jitneys, as part of the public, have the right to use them. The city of New Orleans possesses all the powers of the Legislature in the premises; but the Legislature itself is powerless to interdict the use of the streets to vehicles such as commonly, in every city the world over, use them. As well might it attempt to interdict the use to pedestrians. Such a statute would be, in effect, depriving these pedestrians of liberty and property without due process of law. Perhaps the situation might be different if the state or the city, were not the mere agent, or trustee, of the public for the administration of the streets; but were owner of the fee, or, in other words, had the perfect ownership of the space occupied by the streets; though, even then, the abutting property owners on the street would be, in a measure, deprived of their property if the use of the street were not left free to all; but the state or city pos-

sesses no such ownership, and can do no more than exercise whatever control over the streets is consistent with the use to which they are destined. Perhaps when automobiles first appeared they might have been excluded from the streets as being too dangerous to be allowed to travel thereon. But the time has passed when this might have been done. Their use upon the streets is now an established thing; and as well might the attempt now be made to exclude horse-drawn vehicles as to exclude these self-moving ones. No good legal ground could be found by any particular city to deny to these vehicles the use of its streets when every other city the world over allows such use as a matter of course.

And the fact that these jitneys use the streets for carrying on a private business brings no change in the legal situation. That is what streets are for, to be used in carrying on private business. Everything animate and inanimate, that moves upon them may, to some extent, be said to be using them for carrying on a private business. The express companies and the breweries and the cotton presses and the wholesale grocers, all with their ponderous vehicles, use them for carrying on a private business, and they do so as a matter of right; and it is a right of which the Legislature would be powerless to deprive them. So long as in using the street they do not interfere with the like use of it by others, they are entitled so to use it, not as a privilege accorded to them by the city, but as a right, a right which they possess as part of the public which owns the street of which the city is merely the administrator.

As such administrator, the city is vested with full authority and power to make all needful rules and regulations; but under the guise of a mere rule and regulation it cannot impose a condition which in an indirect way will operate as an interdiction. If the circumstances are such that either from the nature of certain vehicles or from the common and usual manner of operating them, the public safety is endangered so that the public welfare demands their being regulated, the right and duty on the part of the municipal authorities to regulate them becomes clear. But they cannot prohibit, neither directly nor indirectly.

What the particular mode of regulation shall be is a matter necessarily very largely, if not entirely, within the discretion of those charged with the duty of regulation. If in their opinion the public safety requires that a bond shall be given conditioned as prescribed in the ordinance in question in this case, such a regulation has nothing unreasonable in itself; and might well be, in fact, the only regulation suitable to the case; in other words, that would likely prove effective. It is not for the judges of the courts to say that they know better than the municipal

authorities what particular kind of regulation the exigency of any particular case calls for.

But inhibition is not allowable under guise of regulation; and a regulation which in its practical operation has the effect of an interdiction is an interdiction. While the giving of a bond may be required, this bond cannot be required to be signed by a particular surety, if so be that that particular surety will not sign it. All that can be required is that it be signed by good and solvent surety. For instance, if vehicles of a certain class are prohibited from using the streets without furnishing a bond signed by a specified bank, and this bank refuses to sign the bond, this would be tantamount to a prohibition to use the streets. In the case at bar, the bond is not required to be signed by a specified bank, but it is required to be signed by certain companies which refuse to do so, so that the case stands just as it would do if, instead of these companies, a specified bank were required to be the surety. Good bond may be required, but without specification of who the surety shall be.

The companies will sign the bond if collateral security in a like amount be deposited either in cash, or by means of first mortgage upon property exceeding in value by 40 per cent. the amount of the bond; and it is suggested that, since the bond may be obtained on these conditions, the requirement to give it does not operate as a prohibition. But manifestly it does, since the condition is so onerous that it is practically prohibitive. A condition imposed upon the city railways company to deposit \$5,000 in cash, or to give a first mortgage in that amount upon property exceeding the mortgage in value by 40 per cent., for each one of its cars, for permission to operate them, would put that company out of business at once. As a matter of fact, the imposition of such a condition would put the jitneys out of business.

While the automobile engaged in the jitney business is an ordinary automobile, yet, by reason of the business it is engaged in, it forms a class by itself. To deny this is to deny a fact patent to everybody. This business would seem to be the logical outcome of the combination of cheap automobiles and asphalted pavements. Everybody knows that the carrying on of this business is not the ordinary use of an automobile. Until very lately this business was unheard of, unthought of. It manifested itself suddenly like a crop of mushrooms after a rain. Its coming into existence was an event in municipal life, heralded as such by all the newspapers of the country. It shows itself as a formidable competitor of the street railway; in fact, looms up as a menace to the continued existence of that system of urban transportation as at present conducted. The singling of it out for special regulation if in the judgment of the city authorities special regula-

tion is called for in the interest of the safety and convenience of the rest of the public, is entirely justified.

Summing up the foregoing, the streets belong to the public; pedestrians are entitled to use them, and so are such vehicles as customarily do so, and not as a privilege accorded to them *ex gratia* by the city, but as a matter of right, they being part of the public. Automobiles, by custom prevalent the world over, use the streets of cities like other vehicles, and therefore have the same right to do so as pedestrians, carriages, and wagons; but by reason of their mode of locomotion, their bulk and weight, and their possible speed and quickness of movement, their operation upon the streets presents special dangers to the rest of the public using the streets, and this furnishes a legal basis, or justification, for special regulation. The jitneys are automobiles, and therefore are entitled to use the streets as matter of right, but they are automobiles used in a peculiar way, which sets them apart in a class by themselves, a fact well recognized the country over. And if, owing to this special use, special regulation is necessary for the safety and convenience of the other users of the street, such special regulation is justified, and the question of what it shall consist of is a matter within the discretion of the municipal authorities, with which the courts have no right to interfere in the absence of clear abuse. Prohibition, however, is not regulation, and if, under the guise of a regulation, a measure be in fact a prohibition, it transcends the municipal power. Such regulation may consist in the requirement of a bond conditioned like the one provided for by the ordinance in this case, provided this bond be not made prohibitive in its nature, either by being made too large in amount or by being unnecessarily restricted as to the sureties who may sign it.

Another point in the case is that the ordinance provides that the bond in question, even though signed by one or more of the surety companies, shall still be subject to the approval of the commission council. Acts 41 of 1894, and 71 of 1904, provide that said companies may not do business in the state without having obtained a certificate from the secretary of state, and that:

"Such certificate shall be conclusive proof of its solvency and credit for all purposes and of its right to be accepted as such sole surety and its sufficiency as such."

If by the expression "approval by the commission council" is meant approval as to the sufficiency of one of the surety companies as surety, the said provision is equivalent to a reserve by the commission council of the right to reject a bond which by statutory law is declared good and sufficient, and the reserve of this right would be tantamount to a reserve of the right to refuse to allow certain jitneys to operate, while allowing others to do so. Such a provision would be clearly illegal.

But it is to be assumed that by the said provision the said ordinance meant nothing of that kind, but simply that the commission council reserved to itself the right to see to it that the bond was duly signed by one of the surety companies, and in all other respects conformed with the requirements of the ordinance.

Three of the Justices concur on the following decree:

It is ordered, adjudged, and decreed that the judgment herein be, and the same is, set aside, and that the demurrer be sustained, the accused ordered to be discharged without day.

The CHIEF JUSTICE adheres to the views expressed in the opinion prepared by him, and respectfully dissents from those upon which the decree now handed down is based, as also from the decree. LAND and O'NIELL, JJ., concur in decree, and hand down reasons. SOMMERVILLE, J., dissents.

LAND, J. (concurring in the decree). The ordinance in question requires that an indemnity bond in the sum of \$5,000, executed by a surety company, duly authorized to do business in the state of Louisiana, payable to the city of New Orleans, and first approved by the commission council, shall be furnished as a prerequisite, by any person, firm, association, or corporation, engaging—

"in the business of transporting passengers on indicated routes and for an uniform fare, whether the said transportation be in vehicles operated on rails or otherwise."

The ordinance further provides that such bond shall contain a stipulation that any person or persons who may sustain damage to his, or their, person or property, as the result of the fault of the person, firm, association, or corporation conducting such business, shall have his or their right of action on said indemnity bond, as fully and to the same extent as if the bond was made and executed directly in favor of the claimant for such damages.

In this state the right of action to recover damages for personal injuries is derived from article 2315 of the Civil Code, reading:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

The commission council has, in effect, amended that article by requiring a bond of indemnity from the class of persons described in said ordinance, on the assumption that such persons may, in the conduct of their business, injure the property or persons of others, by their fault or negligence.

Legislation as to civil liability for offenses or torts appertains to the state, and I know of no law of this state that confers coordinate power on the city of New Orleans to enact similar legislation.

The ordinance in question, moreover, discriminates against the class of persons described therein, as it does not require a like

indemnity bond from any other class of carriers of passengers within the city limits.

The discrimination is unreasonable because it is based on an arbitrary distinction. If the purpose be to indemnify persons injured by passenger vehicles, why restrict the benefit of the security to persons injured by the class of vehicles described in the ordinance? What connection is there between the route pursued and the fare charged, and the injury of third persons through the fault of the operator of the vehicle?

It is said that the ordinance is directed against the "jitneys," or motor vehicles, which operate on certain streets in competition with electric cars. No such purpose is indicated on the face of the ordinance, which applies to street cars and other vehicles transporting passengers "on indicated routes and for a uniform fare." The power to regulate a business in itself lawful does not include the power to prohibit, as in this case, by requirements impossible of performance by the average man engaged in the business of operating motor vehicles for hire. See *State v. Police Jury*, 116 La. 767, 41 South. 85.

I, therefore, concur in the decree.

O'NIELL, J. My concurrence in the opinion that section 2 of Ordinance No. 2346 of the commission council of the city of New Orleans is unconstitutional is founded upon the following reasons:

Although the Fourteenth Amendment permits the exercise of a very wide discretion on the part of municipal authorities, it forbids an arbitrary or unreasonable discrimination. If I could conceive of a state of facts that could justify the classification of the persons and the definition of the business intended to be affected and regulated by this ordinance, I would assume that such facts existed when the ordinance was enacted. But I cannot imagine any valid reason for the classification of, and discrimination against persons, firms, associations of persons and corporations conducting or carrying on the business of transporting passengers "on indicated routes and for a uniform fare." This definition includes only those who are engaged in the street railway and jitney business, and excludes those engaged in the business of carrying passengers in vehicles which do not travel on indicated routes, such as taxicabs.

I assume—what everybody knows—that every person, firm, or corporation engaged in the business of carrying passengers charges a uniform fare. It may not be a "jitney" or other fixed charge for each passenger regardless of distance, but the rate of fare must be uniform, or there would be no business. Therefore all persons, firms, corporations, and associations engaged in the business of transporting passengers in this city are included in the class defined in this ordinance, except those who do not operate on indicated routes.

The police power supposed to be exercised by this ordinance pertains to the public safety, not public health nor morals. And there is no possible reason of public safety for discriminating against those engaged in the business of carrying passengers on indicated routes. On the contrary, there might be less, but cannot be more, danger to the public from a vehicle traveling on a known or indicated route than if the same vehicle were operated in the same manner, but on an unknown or irregular route.

Municipalities have almost unlimited authority to regulate public carriers on the public thoroughfares. They may limit the speed of the vehicles, the fare to be charged, the streets that may be traveled, etc. But they cannot, arbitrarily or without any valid reason, define a certain class of persons, engaged as others are engaged in a legitimate use of the streets, and impose harsh regulations upon them alone.

Assuming that the expression "uniform fare" in this ordinance means the same fare for each passenger, regardless of distance, the only two features or characteristics selected by the framers of this ordinance to define jitney mobiles are the only two features or characteristics in which they resemble street cars; that is, they charge a uniform fare and travel on designated routes. But these features or characteristics, charging a uniform fare and traveling on a designated route, do not make the jitneys more dangerous to the public than similar vehicles traveling on unknown or irregular routes and charging an uniform fare.

No reason has been suggested for requiring the city railways company to furnish bonds to secure the public for whatever injuries are inflicted on persons or property. The only reason why they are required by this ordinance to furnish such bonds is that their business resembles the jitney business, or the jitney business resembles theirs, in this: That they both transport passengers on indicated routes and for a uniform fare. These features of the business, however, do not, for any reason of public safety, justify taking the jitneys out of the class of other automobiles that are as dangerous as jitneys, and putting the jitneys and street cars in a class to themselves.

Under the police power, the commission council of this city can impose any fair and impartial regulation or restriction upon public carriers using the streets. It can regulate any private business on the public streets. And it can make any reasonable classification of the persons or business to be regulated, but a pretense of consideration for public safety does not justify an arbitrary discrimination.

On Rehearing.

MONROE, C. J. After further consideration of the issues involved in this case, a majority of the members of the court are

of opinion that the conviction and sentence appealed from should be affirmed, Mr. Justice SOMMERVILLE and the CHIEF JUSTICE for the reasons heretofore assigned in the dissenting opinion handed down by the CHIEF JUSTICE, and Mr. Justice PROVOSTY for the same reasons, with certain qualification, to be stated by him in concurring in the decree which is now to be entered.

It is therefore ordered that the conviction and sentence herein appealed from be now affirmed.

PROVOSTY, J. (concurring). I adhere to the views heretofore expressed by me, except that, having become convinced that the allowing of individual sureties would be impractical as an administrative measure, I concur in the decree this day handed down by the CHIEF JUSTICE.

LAND and O'NIELL, JJ., dissent for the reasons assigned in their respective opinions on file.

GUICE et al. v. ILLINOIS CENT. R. CO.
et al. (No. 17308.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. INJUNCTION ⇨26(4)—GROUNDS—PREVENTING MULTIPLICITY OF SUITS.

Each of several railroads had the right to separately invoke the aid of a court of equity to prevent a multitude of suits against it for a statutory penalty, where the alleged wrongful conduct on its part was continuing in its nature, and had already resulted in the bringing of three suits at law against each of them, and might result in the bringing of other suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 31; Dec. Dig. ⇨26(4).]

2. EQUITY ⇨149—JOINDER—PARTIES AND INTERESTS.

In such case all of the railroads could join as complainants in one suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. ⇨149.]

3. RAILROADS ⇨232—PASSENGERS—BULLETIN BOARDS—STATUTE.

Under Code 1906, § 4857, requiring every railroad to keep conspicuously placed in each reception room or depot a bulletin board showing the time of arrival and departure of passenger trains and the delay of any train under penalty of \$50 for each failure, recoverable by suit instituted by any citizen, defendant railroads, all using the same passenger station in the city of Jackson, two of which had no terminal therein, but whose trains passed through, and the other of which made Jackson the terminal of two branches which scheduled the arrival and departure of their trains on a bulletin board on which a separate column was set apart for each road with a sufficient number of lines in each column to bulletin each of its passenger trains, showing the name of the railroad, north and south bound trains, the time due, and whether late, sufficiently complied with the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 746; Dec. Dig. ⇨232.]

Appeal from Chancery Court, Hinds County; P. Z. Jones, Chancellor.

Bill for an injunction by the Illinois Central Railroad Company and others against D. R. Guice and others. Motion to dissolve the preliminary injunction overruled, and defendants appeal. Affirmed and remanded.

The Illinois Central, the Yazoo & Mississippi Valley, and the Alabama & Vicksburg Railroad Companies all use the same passenger station in the city of Jackson. The tracks and trains of the Illinois Central and the Alabama & Vicksburg Companies pass through the city of Jackson; neither having a terminal of its road in that city. Jackson, however, is the northern terminal of the Natchez branch, and the southern terminal of the Yazoo branch, of the Yazoo & Mississippi Valley Railroad. Some time prior to the filing of the bill in the court below appellant Guice instituted three suits against each of appellee companies, two against each being before one, and the other before another, justice of the peace, claiming the penalty provided for the violation of section 4857, Code Miss. 1906. After the institution of these suits appellees filed their bill in the court below praying for an injunction restraining appellant Guice, his agents and attorneys, from prosecuting these suits at law.

It appears from allegations of the bill, which are admitted by the answer to be true, that the bulletin board upon which appellees schedule the arrival and departure of their trains is made out in the following manner:

Name of Railroad	
Passenger Trains	
[Date.]	
South.	
No. ———	Late Due ——— M.
North.	
No. ———	Late Due ——— M.

A separate column is set apart on this board for each road, and there is a sufficient number of lines in each column to bulletin each of the road's passenger trains. The trains of the Illinois Central and Alabama & Vicksburg Railroads are all through trains, departing from Jackson always within a few minutes after arrival thereat, in no case, according to the allegations of the bill, remaining more than five minutes. As before stated, Jackson is the terminal of the trains of the Yazoo & Mississippi Valley Railroad. All trains of the Natchez branch thereof going south necessarily depart from Jackson, and all going north necessarily end their journey there; and all trains going north on the Yazoo branch thereof necessarily depart therefrom, and those going south necessarily end their journey there. After the word

"Due" on this bulletin board is written the time of the arrival of trains on the Illinois Central and Alabama & Vicksburg Railroads, and of the north-bound trains on the Natchez branch, and south-bound trains on the Yazoo branch, of the Yazoo & Mississippi Valley Railroad, and the time of the departure of the north-bound trains of the Yazoo branch, and of the south-bound trains on the Natchez branch, of the Yazoo & Mississippi Valley Railroad.

A motion was made in the court below by appellants to dissolve the preliminary injunction granted, which motion was by the court overruled, and this appeal granted to settle the principles of the case.

Greaves, Potter & Hallam, of Jackson, for appellants. R. H. & J. H. Thompson, Mayes & Mayes, and F. M. West, all of Jackson, for appellees.

SMITH, C. J. (after stating the facts as above). The two grounds upon which it is sought to obtain a reversal of the decree of the court below are: First, that the court below was without jurisdiction of this cause; and, second, that the time of arrival and departure of passenger trains does not definitely appear from this bulletin board.

[1, 2] Each of these appellees had the right to separately invoke the aid of a court of equity in order to prevent the bringing against it of a multitude of suits by appellant Gulce, for the reason that the wrongful conduct on their part, of which he complains, is "continuing in its nature," has already resulted in the bringing by him against each of them of three suits at law, and may result in the bringing by him of others. *Railroad Co. v. Garrison*, 81 Miss. 257, 32 South. 906, 95 Am. St. Rep. 469; *Telephone Co. v. Williamson*, 101 Miss. 1, 57 South. 559. This being true, all of appellees could join as complainants in one suit. *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Telephone Co. v. Williamson*, supra.

[3] Under the facts in this case, we think appellees substantially complied with the statute here in question in noting the arrival and departure of their trains.

Affirmed and remanded.

WOODMEN OF THE WORLD v. COPLIN. (No. 17462.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

INTEREST § 39(2)—RECOVERY—TIME.

In a suit to recover the amount of an insurance certificate, and for certain money expended by plaintiff at the request of the defendant's agent some time before February 11, 1910, the part of the verdict allowing plaintiff \$100 as expenses should bear interest only from that date.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 84, 86; Dec. Dig. § 39(2).]

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

Suit by J. Solomon Coplin against the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed on remittitur; otherwise, reversed and remanded.

Geo. T. Mitchell, of Tupelo, Miss., for appellant. Paine & Paine, of Aberdeen, for appellee.

SYKES, J. This suit was instituted in the circuit court of Monroe county by the appellee against the appellant, to recover the amount of an insurance certificate upon the life of the brother of appellee, payable to the appellee. This is the second time this case has been before this court. We find that no errors were committed in the trial of the case in the court below, except the giving of the first instruction for the plaintiff, which instructed the jury that if they found for the plaintiff, the form of their verdict will be:

"We, the jury, find for the plaintiff in the sum of ——— dollars, with six per cent. interest on same from the 17th day of August, 1909, to this date."

In addition to asking for a recovery on the insurance policy, the appellee also sued the appellant for certain moneys expended by him at the instance and request of the agent of the appellant, amounting to about \$150. So far as we can ascertain from the record, this money was spent some time in February, before February 11, 1909. The maximum amount which the plaintiff could recover under the policy of insurance was \$878. The jury returned a verdict for \$978, said verdict thereby showing upon its face that the jury intended giving plaintiff \$100 as expenses incurred by him, as above mentioned. It was proper for the court to instruct the jury that this amount of insurance money should bear interest from August 17, 1909, at 6 per cent., but this expense money should have borne interest from February 11, 1910.

If appellee will remit the interest on this \$100 from August 17, 1909, till February 11, 1910, the case will be affirmed; otherwise, it will be reversed and remanded.

BANK OF LAUDERDALE et al. v. COLE et al. (No. 17408.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. APPEAL AND ERROR § 1009(3)—SCOPE OF REVIEW—CONFLICT IN EVIDENCE.

The chancellor's finding resolving a conflict in the evidence is not subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. § 1009(3).]

2. ALTERATION OF INSTRUMENTS § 5(2) — "MATERIAL ALTERATION"—CONSIDERATION.

An alteration of a promissory note enlarging the scope thereof as a means of evidence is material, so that a note given for value received is materially altered by the insertion of words

indicating that it was given as purchase price of land, thereby raising a vendor's lien upon the land.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 21-27; Dec. Dig. ¶5(2).

For other definitions, see *Words and Phrases*, First and Second Series, *Material Alteration*.]

3. ALTERATION OF INSTRUMENTS ¶23—INTENT—EFFECT.

Where a material alteration is made in a note after delivery to the payee, with evidence of fraudulent intent, the original payee and his assignee can recover neither on the note nor on the original indebtedness.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 192-207; Dec. Dig. ¶23.]

4. ALTERATION OF INSTRUMENTS ¶11(1) — MATERIAL ALTERATION—FRAUD.

In order that the makers of a note may avail themselves of a material alteration, it must appear that it was made with fraudulent intent.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 57-60, 66, 67, 72-76; Dec. Dig. ¶11(1).]

5. ALTERATION OF INSTRUMENTS ¶25 — FRAUD—PLEADING.

Although the answer fails to allege specifically that a material alteration of a promissory note was made with fraudulent intent, it sufficiently alleges such intent where it discloses that the alteration was made for the purpose of enabling the payees to establish a vendor's lien on property, in violation of an agreement waiving the lien.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 216-229; Dec. Dig. ¶25.]

Appeal from Chancery Court, Wayne County; T. A. Wood, Chancellor.

Action by the Bank of Lauderdale and others against Mrs. Ruby E. Cole and others. Judgment dismissing the bill generally as to plaintiff E. F. Ballard and without prejudice as to plaintiff R. W. Fagan, and plaintiffs Bank of Lauderdale and E. F. Ballard appeal. Affirmed.

On the 25th day of January, 1908, E. F. Ballard and R. W. Fagan sold to appellee W. J. Cole certain real property, executing a deed thereto at Cole's request to his wife, Mrs. Ruby E. Cole, one of the appellees herein. The consideration expressed in the agreement was \$4,000, but the deed contained no recital indicating whether this consideration had been paid. The real consideration was \$2,000 in stock, par value, of the Waynesboro Brick & Manufacturing Company, and two notes of \$1,000 each, due one in two and the other in three years from the dates thereof. The note first to mature was delivered by Ballard, after its indorsement by himself and Fagan, to the appellee Bank of Lauderdale, and upon its maturity, being presented to Cole for payment, he declined so to do; whereupon this suit was instituted upon both notes by the bank, Ballard, and Fagan against W. J. and Mrs. Ruby E. Cole, praying that said notes be decreed to be a lien on the property conveyed by

Ballard and Fagan to Mrs. Cole, and that it be sold to satisfy such lien. Appellees by their answer alleged that the vendor's lien had been expressly waived by Ballard and Cole at the time the land was purchased, and that in addition thereto the notes had been materially altered after their execution and without appellees' consent. The cause came on to be heard on bill, answer, and proof; and a decree was entered adjudging that the notes had been materially altered by Ballard without the consent of appellees, but also without the knowledge or consent of Fagan. The bill was dismissed generally in so far as it was predicated upon the note held by Ballard, and without prejudice as to Fagan. The reason the bill was dismissed without prejudice as to Fagan was that the note owned by him had not matured when the suit was instituted, and consequently was held by the court below to have been prematurely brought. From this decree an appeal was prosecuted by the bank and by Ballard, Fagan accepting the decree, and not appealing therefrom. Cole, by his evidence, admitted the execution of the notes, but stated that he declined to purchase the land unless Ballard and Fagan would waive any lien thereon securing the notes, which they expressly agreed to do, accepting as security therefor a number of shares of stock in the Waynesboro Brick & Manufacturing Company; that the note first to mature when signed by him read as follows:

"No. ——. Waynesboro, Miss., Jan. 25th, 1908. On or before two years after date, I, we, or either of us promise to pay to the order of E. F. Ballard and R. W. Fagan, Due ——. One thousand and no/100 \$1,000.00 dollars, for value received, with interest at the rate of 8% per annum after date until paid. And in event default is made in the payment of this note at maturity and it is placed in the hands of an atty. for collection or suit is brought on the same, then an additional amount of 10% on the principal and interest of this note shall be added to the same as atty's fees. All signers to this note are principals. Negotiable and payable at the Bank of Waynesboro, Waynesboro, Miss. Address, City. W. J. Cole."

The second note contains identical language, except that it was to mature in three instead of two years after date.

Cole further testified that after the execution thereof, and without his knowledge or consent, these notes were altered by inserting in each between the words, "All signers of this note are principals," and the words, "Negotiable and payable at," etc., the following:

"This note given for the purchase money for the following described property situated in the town of Waynesboro, Miss.: Lot A in block No. 3, fronting 120 feet on Chickasahay street and extending back at right angles with said street 250 feet, also the east half of lot B in said block 3, fronting on Carr street and courthouse square 87½ feet parallel and adjoining to the back line of said Lot A."

This description of the property is identical with that contained in the deed to the land executed by Ballard and Fagan.

According to the evidence of appellants, this was not true, but, on the contrary, it was expressly agreed that purchase-money notes should be executed, secured by a vendor's lien on this land, and that the statement in the notes that they were given for the purchase money of the land therein described was written therein prior to the time of the signing thereof, with the knowledge and consent of Cole; that while a number of shares of stock in the Waynesboro Brick & Manufacturing Company were assigned to Ballard and Fagan as security for these notes, this was done, not because of any waiver of the vendor's lien, but for the reason that they wanted Cole to insure the house on the land payable to them as their interest might appear; this he did not wish to do, but gave them the shares, and they accepted this stock in lieu of such a policy.

S. A. Witherspoon, of Meridian, for appellants. Baskin & Wilbourn, of Meridian, for appellees.

SMITH, C. J. (after stating the facts as above). [1] The chancellor's finding that these notes had been altered was made on conflicting evidence, and therefore is not open for review here.

[2] The notes as originally executed appeared simply to have been given for value received; as altered, the consideration therefor appears to have been the conveyance of certain land therein described, thereby becoming evidence of appellants' claim that they were secured by a vendor's lien on the land, and the rule is that an alteration which enlarges the scope of an instrument as a means of evidence is material. *Schmidt v. Quinzel*, 55 N. J. Eq. 792, 38 Atl. 665; *Craighead v. McLoney*, 99 Pa. 211; *Low v. Argrove*, 30 Ga. 129; *Kalteyer v. Mitchell*, 110 S. W. 462; *Richardson v. Fellner*, 9 Okl. 513, 60 Pac. 270; *Knit v. Williams*, 10 East, 431, 103 Reprint, 839.

[3] On the evidence, if these alterations were in fact made, and the chancellor so found, they were manifestly made for the purpose of evidencing the existence of a vendor's lien which in fact had been waived, and were therefore made with a fraudulent intent, from which it necessarily follows that appellants, Bank of Lauderdale and Ballard, can recover neither on the note sued on by them nor on the original indebtedness for which it was given. 2 C. J. p. 182, § 17; 2 *Daniel on Negotiable Instruments* (5th Ed.) 431; *Warder v. Willyard*, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Bank v. Dent*, 102 Miss. 463, 59 South. 805.

[4, 5] It is true that the alteration of these notes, in order to be availed of by appellees, must have been made with a fraudulent intent, and also, as pointed out by counsel for

appellant, that appellees' answer does not specifically charge that these notes were "fraudulently" altered, but it does contain allegations which, if true, disclose that the alteration was made for the purpose of enabling the payees in the notes to establish a vendor's lien upon the property sold by them to appellees in violation of the agreement made at the time of the sale, thereby sufficiently disclosing the fraudulent intent.

Affirmed.

SYKES v. ARMSTRONG. (No. 17389.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. INSURANCE — 783, 785—MUTUAL BENEFIT INSURANCE—RIGHT OF BENEFICIARY.

The beneficiary in a mutual benefit policy has no vested interest in it during the life of the insured, but has only an inchoate imperfect right until the death of the insured, so that the proceeds were no part of the estate of the beneficiary of the insured, who had predeceased him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1943, 1949, 1974; Dec. Dig. — 783, 785.]

2. EXECUTORS AND ADMINISTRATORS — 46 — EXPENSES OF ADMINISTRATION — INTEREST ON INSURANCE POLICY.

In such case the costs of the administration of the estate of the named beneficiary were not payable out of the insurance fund in the hands of her administrator, who was also the administrator of the estate of the insured.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 297; Dec. Dig. — 46.]

3. INSURANCE — 785—MUTUAL BENEFIT INSURANCE—BENEFITS—PROVISIONS OF CHARTER AND BY-LAWS.

Under a provision in the constitution and by-laws of a mutual benefit order declaring its purpose to be to provide a fund to be paid to the widows, orphans, etc., of deceased members, liberally construed so as to effect the stated purpose, the proceeds, after the death of the beneficiary named in the policy, and when there was no other named beneficiary, would go to the widow, orphans, etc., of the insured in the amounts that they would have inherited from the deceased in case of his intestacy, as if it was a part of his estate, to be distributed by his administrator as a trust fund for the benefit of a surviving wife and children, subject, however, to the costs of the administration of the insured's estate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1943, 1974; Dec. Dig. — 785.]

4. INSURANCE — 785—BENEFITS—LAPSE.

In no case where there are any of the class living who are designated as probable beneficiaries in a policy of a benefit association does the insurance entirely lapse or become uncollectible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1943, 1974; Dec. Dig. — 785.]

Appeal from Chancery Court, Monroe County; J. Q. Robins, Chancellor.

Clara E. Sykes excepted to the final accounts of James D. Armstrong, administrator of the estate of Alice Sykes, deceased, and also of the estate of W. M. Sykes, deceased. Decree for the administrator overruling ex-

ceptions, and the exceptor appeals. Affirmed in part and reversed in part.

Paine & Paine, of Aberdeen, for appellant.
Chas. L. Tubb, of Amory, for appellee.

SYKES, J. This is an appeal from the decrees of the chancery court of Monroe county overruling exceptions of appellant to final accounts of the administrator, first, of the estate of Alice Sykes, deceased, and, second, of the estate of W. M. Sykes, deceased. W. M. (or Bill) Sykes at the time of his death held a policy of insurance in the Odd Fellows' Benefit Association of the District of Mississippi, payable to "Mrs. Alice Sykes, the wife of Bill Sykes, of Lodge 4028 at his death (if financial in the O. F. B. A.)," etc. The beneficiary, Alice Sykes, predeceased W. M. Sykes, leaving surviving her three children as the fruits of this marriage. W. M. Sykes at the time of his death was married to Clara Sykes, and left surviving him his wife, Clara, and his three children by his first wife, Alice Sykes. After W. M. (or Bill) Sykes' death, letters of administration were taken out by J. D. Armstrong as administrator, first, of the estate of Alice Sykes, and, second, of the estate of W. M. (or Bill) Sykes. The insurance order paid the amount due under the policy to the said Armstrong as administrator of the estate of Alice Sykes. This controversy arises over the question of who is entitled to the proceeds of this insurance policy. The appellant, Clara E. Sykes, claims that she is entitled to the entire amount, basing her claim on section 2 of the constitution and by-laws of the order, which reads as follows:

"Purpose. Sec. 2. To provide a fund to be paid to the widow, orphan or legal representatives of deceased Odd Fellows and inmates of the household of Ruth within the jurisdiction of the District Lodge and Household under said jurisdiction."

Appellant claims that by virtue of the above section of the constitution it is provided that in case there is a lapse of the named beneficiary, or, if there be no beneficiary designated, the proceeds of the policy go to one of those designated in section 2, that these beneficiaries are named disjunctively in said section, and that the meaning of same is that the proceeds should go, first, to the widow, or, in case there be no widow, then to the orphan, or, if there be no orphan, then to the legal representatives. The administrator of the estate of Alice Sykes claimed this amount as belonging to said estate, or, if mistaken in that, then he claimed that he was entitled to administer the same as administrator of the estate of William Sykes.

[1] The learned chancellor in the court below held that it was no part of the estate of Alice Sykes, and ordered Armstrong, administrator of Alice Sykes' estate, to turn the same over to Armstrong, administrator of the estate of W. M. Sykes. In this he was

correct. It is well settled in this state, as well as in a majority of states, that the beneficiary in a mutual benefit policy like this one has no vested interest in same during the life of the insured. In the case of Carson v. Bank, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596, this court says:

"It is settled that the right of a beneficiary of a benevolent society, like this of the Knights of Pythias, is inchoate, imperfect, and ambulatory until the death of the member holding the endowment certificate." Rollins v. McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260.

In the case of the Masonic Mutual Relief Association v. Mary McAuley et al., 2 Mackey (D. C.) 79, in passing upon this proposition, the court said:

"We think, therefore, the meaning of the language used by the husband in designating the beneficiary was that the benefits of this provision were to go to his wife only in case she survived him; and, as she did not survive her husband, the provision falls to the ground so far as she is concerned, and the claims of her representatives are out of the question."

[2] The learned chancellor, however, ordered the costs of the administration of the estate of Alice Sykes to be paid out of this insurance fund. In this respect alone he committed error.

[3] The principal contention in the case is that of appellant that she is entitled to the entire amount of this fund, and that it should not be equally divided among her and the children of W. M. (or Bill) Sykes, as was done under the decree of the court below. There are some cases holding according to this contention of appellant. It is our opinion, however, that this policy is too vague and uncertain to be construed in this way. This is a negro mutual benefit insurance society. As was stated by this court in the case of Shelton v. Minnis, 65 South. 115:

"It seems to us that in determining who is entitled to receive the benefits of mutual benefit associations, wherein the money contributed by its members provides the fund from which the benefits are paid, we should give a liberal construction to the by-laws of the association so as to effect the purposes of the parties to the contract."

Again, in the case of Grand Lodge, etc., v. Harris, in 68 South. 76, in delivering the opinion of the court, Judge Cook aptly said:

"In all of these cases the courts enforced the laws of the order as the law of the case, and held that the legal beneficiary was entitled to the fund."

Applying these liberal rules of construction, it is our opinion that the constitution and by-laws of this order simply mean that when the beneficiary named under the policy is dead, or, when there is no named beneficiary in the policy, then the proceeds of the same go to the widow, orphan, or legal representative; that the named beneficiaries take under the policy the amount they would inherit from the decedent in case of his intestacy, as if it was a part of his estate. We approve

of the reasoning and decision in the case of *Bishop, Administratrix, v. Grand Lodge of the Empire Order of Mutual Aid of the State of New York*, 112 N. Y. 627, 20 N. E. 562, which is a case very much like the case at bar, and in which the same contention was made as is made here by the appellant. The opinion of the court was delivered by Justice Peckham. On page 634 of 112 N. Y., on page 565 of 20 N. E., the court in part says:

"It is true the act and the constitution fail to state which it shall be in case no direction is given, whether it shall be the family, the heirs, or legal representatives; but we think this expression should be construed with reference to the general purpose of the corporation, and, having such purpose in view, we think it was really meant, and that it should be held to include these who would take such property as in cases of intestacy."

Again on page 636 of 112 N. Y., on page 566 of 20 N. E., the opinion says:

"In deciding here that, in the absence of the certificate, the beneficiary fund would go to those who by the general laws of the state would take the money, we do not mean that the money would go as a part of the estate of the deceased, subject to the payment of his debts; but it would be a special fund, subject to the exemption provided for in the act of incorporation, and not to be liable for the payment of the debts of the decedent or to be taken on any process for the payment of such debts. We also think the plaintiff had sufficient interest in the fund to sustain this action in her capacity as administratrix."

Under this authority it is our opinion that the administrator of the estate of Bill Sykes had a right to distribute this fund as a trust fund for the benefit of the wife and children. That the same did not form any part of the estate of the deceased, Bill Sykes. The fund, however, is subject to the costs of the administration of the estate of William Sykes as was adjudged by the chancellor. In conclusion we therefore say that we cannot agree with the learned counsel for the appellant in their position that the living wife is entitled to the entire proceeds of this policy. The laws and constitution are not sufficiently plain for this construction. This being true, we adopt the liberal rule that those named in the constitution and by-laws as being parties for whom this fund is provided, where the beneficiary has lapsed, as in this case and where no other beneficiary has been designated, are by the terms of the constitution and by-laws entitled to share in the proceeds of same to the same extent that they would share in the estate of the decedent.

[4] We further hold that in no case where there are any of the class living who are designated as probable beneficiaries in the policy does the insurance entirely lapse or that it is uncollectible. The decree of the lower court is affirmed except as to the payment of the costs of the Alice Sykes' estate, which part of the decree is reversed.

Affirmed in part and reversed in part.

A. K. McINNIS LUMBER CO. v. RATHER.
(No. 17840.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. ASSIGNMENTS — 24(2), 121—CONSTRUCTION — CLAIM FOR PERSONAL INJURY.

An assignment, whereby in consideration of legal services rendered and to be rendered by his attorneys, plaintiff assigned to them a one-half interest in his cause of action against his employer for a personal injury, based upon the amount recovered by suit or compromise, and providing that no compromise should be made unless mutually agreed upon by the parties, was not an agreement to pay a contingent fee of one-half of the amount recovered, but was a valid assignment of a half interest in the cause of action, upon which suit might be maintained in the name of the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 43, 200-205; Dec. Dig. 24(2), 121.]

2. ASSIGNMENTS — 92 — JUDGMENT — 683 — SETTLEMENT—RES ADJUDICATA.

After notice to the employer of an employee's assignment of a part interest in his claim for personal injury, the assignee was not bound by any settlement by the employer with the assignor without his consent; nor, ordinarily, by judgment to which he was not a party, recovered by the assignor on the cause of action assigned.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 158; Dec. Dig. 92; Judgment, Cent. Dig. § 1206; Dec. Dig. 683.]

3. ACTION — 53(2)—ASSIGNMENTS — 120— ACTION BY ASSIGNOR—PARTIES—SPLITTING CAUSE OF ACTION.

Under Code 1906, § 717, providing that the assignee of any chose in action may sue for and recover thereon in his own name if the assignment be in writing, the assignee of part of an employee's claim for personal injury was a proper party to the employee's suit against the employer; and, to prevent the cause of action from being split, was a necessary party thereto.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 566-592; Dec. Dig. 53(2); Assignments, Cent. Dig. §§ 213-219; Dec. Dig. 120.]

4. PARTIES — 80(1, 2)—NONJOINDER OF PARTY PLAINTIFF—FORM OF OBJECTION.

A nonjoinder of a party who should have been joined as a party plaintiff, not apparent on the face of the declaration, can be availed of by plea in abatement or by nonsuit, if it appears from the evidence at the trial.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123, 126-128, 130, 131; Dec. Dig. 80(1, 2).]

5. PARTIES — 96(1)—NONJOINDER OF PARTIES PLAINTIFF—WAIVER.

A defendant may waive the nonjoinder of parties plaintiff as a ground for defeating the action, and take advantage of it at the trial to the extent of limiting the plaintiff's recovery to a proportionate part of the damages suffered.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 170; Dec. Dig. 96(1).]

6. PARTIES — 80(1)—NONJOINDER OF PARTIES PLAINTIFF—OBJECTION.

Defendant, to avail himself of a nonjoinder of parties plaintiff as a ground for defeating the action, must comply with Code 1906, § 722, providing that such nonjoinder shall not be objected to at the trial unless defendant give written

notice thereof in his plea, stating the name of the party alleged to be omitted.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123, 126-128, 130, 131; Dec. Dig. § 80(1).]

7. PARTIES § 80(4)—NONJOINDER OF PARTIES PLAINTIFF—EVIDENCE.

A defendant, in order to introduce under the general issue, evidence of the nonjoinder of a party plaintiff and thereby avail of it as limiting the amount of recovery, must comply with Code 1906, § 744, relating to proof under the general issue of any affirmative matter in avoidance and requiring notice thereof in writing to be filed with the plea.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 124, 126-128, 130, 131; Dec. Dig. § 80(4).]

8. PLEADING § 352—MOTION TO STRIKE.

In an action by an employe on a claim for personal injury, his motion to strike out the notice accompanying the plea of the general issue to the effect that he had assigned a part interest in his cause of action to certain persons, not parties plaintiff, should have been overruled, as where an improper notice is attached to the general issue, the proper mode of avoiding the special matter proposed to be proved under it is to object to the evidence when offered on the ground that it is not pertinent or relevant to the issues to be tried, and as the evidence which defendant proposed to introduce at the trial was competent if it wished the recovery to be limited to a proportionate part of the damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1078-1091, 1125; Dec. Dig. § 352.]

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action by John Rather against the A. K. McInnis Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

U. B. Parker, of Wiggins, for appellant. Pack & Collins, of Laurel, for appellee.

SMITH, C. J. This is an appeal from a judgment awarding appellee damages for an injury received by him while in appellant's employ and by reason of its alleged negligence.

Before pleading to the declaration, appellant requested the court by motion to abate the suit, for the reason that:

"Pack & Collins, attorneys at law of Laurel, Mississippi, are necessary parties thereto in that on the 3d day of October, 1913, and before the filing of this suit, John Rather, the plaintiff herein, made, executed, and delivered to them an assignment of one-half interest in and to his cause of action against the defendant company, as is shown by a copy of said assignment filed and marked 'Exhibit A.'"

To this motion a demurrer was interposed and sustained.

With its plea of the general issue, appellant gave notice that it would offer at the trial evidence tending to show:

"That on the 3d day of October, 1913, John Rather made an assignment to Pack & Collins, attorneys of record herein, of a one-half interest in his cause of action against the defendant herein, which said assignment was in writing and signed by said John Rather and acknowledged before R. F. Cook, a notary public of

Hinds county, state of Mississippi, a copy of which assignment is filed herewith and marked 'Exhibit A,' to this notice," etc.

Appellee then, by motion, requested the court to strike this notice from the pleadings, which motion was by the court sustained.

The assignment referred to in the motion and notice reads as follows:

"In consideration of legal services rendered, and to be rendered, by Pack & Collins, attorneys at law, of Laurel, Mississippi, I hereby assign, transfer and set over to my said attorneys a one-half interest in a certain cause of action which I have against the McInnis Lumber Company, of Overt, Mississippi, for a personal injury received on September 1, 1913, at its sawmill while working as an employe of said company. It is understood and agreed that my said attorneys are to receive one-half of whatever is recovered from said defendant, either by suit or compromise. It is further agreed that no compromise of said matter shall be made unless the same is mutually agreed upon by the parties to this agreement.

"Witness my signature on this the 3d day of October, 1913. [Signed] John Rather."

[1] Counsel for appellee are in error in stating that this instrument is merely an agreement by appellee to pay them a contingent fee of one-half of the amount which they might recover for him from appellant, for it is a valid assignment of a half interest in appellee's cause of action, upon which a suit can be maintained in the name of the assignees. Wells v. Railway Co., 96 Miss. 191, 50 South. 628, 27 L. R. A. (N. S.) 404.

[2] After notice of an assignment of this character, to the person causing the damage, the assignee is not bound by any settlement made by such person with the assignor without his consent (Wells v. Railway Co., supra), nor, ordinarily, by a judgment to which he is not a party, recovered by the assignor on the cause of action assigned.

[3] Since these assignees hold a valid written assignment of a half interest in the cause of action sued on, they are, under section 717, Mississippi Code 1906, proper parties to the suit; and in order to prevent the cause of action from being split, resulting in appellant being harrassed by more than one suit, they are necessary parties thereto.

[4, 5] A nonjoinder of a person who should have been joined as a plaintiff, not apparent on the face of the declaration, can be availed of by a plea in abatement or by nonsuit, if it appears from the evidence at the trial. Halsey v. Norton, 45 Miss. 705, 7 Am. Rep. 745. A defendant, if he so desires, may waive the nonjoinder as a ground for defeating the action, and "take advantage of it at the trial to the extent of limiting the plaintiff's recovery to a proportionate part of the damages suffered." 15 Enc. Plead. & Prac. 568; Puterbaugh's Pleading & Practice, Common Law (8th Ed.) 51.

[6, 7] In order to avail of a nonjoinder at the trial, as a ground for defeating the action, section 722, Mississippi Code 1906, must

be complied with; and in order for a defendant to introduce under the general issue evidence of the nonjoinder of a plaintiff, and thereby avail of it as a ground for limiting the amount of recovery, section 744, Mississippi Code 1906, must be complied with.

[8] The motion to abate the action raised no issue, and could not have been sustained by the court; but the motion to strike out the notice accompanying the plea should have been overruled, for two reasons: First, "where an improper notice is attached to the general issue, the proper mode of avoiding the special matter proposed to be proved under it is to object to the evidence when offered, on the ground that it is not pertinent or relevant to the issues to be tried" (Wren v. Hoffman, 41 Miss. 616; Railroad Co. v. Wallace, 50 Miss. 244); and, second, the evidence which appellant proposed to introduce at the trial was competent in order that, if appellant so desired, the recovery might be limited to a proportionate part of the damages suffered.

The judgment of the court below must therefore be reversed, irrespective of whether or not this notice was sufficient compliance with section 722 of the Code in order to enable appellant to avail of the nonjoinder as a ground for defeating the action, as to which we express no opinion.

Section 718, and the second sentence of section 717, of the Code, are not here involved, the assignment having been executed before the suit was instituted.

Reversed and remanded.

MASONIC BENEFIT ASS'N OF STRINGER GRAND LODGE OF MISSISSIPPI v. DOTSON. (No. 17442.)

(Supreme Court of Mississippi, Division A. March 27, 1916.)

INSURANCE — §811—MUTUAL BENEFIT INSURANCE — STATUS — "LIFE INSURANCE COMPANY."

Under Code 1906, § 2598, declaring all corporations, associations, partnerships, or individuals doing business in the state under any charter, contract, agreement, or statute of any state involving the payment of money or other things of value to families or representatives of policy and certificate holders or members, conditioned on the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments for annuities, or who shall employ agents to solicit such business, shall be deemed life insurance companies, and be subject to the laws governing such companies, a fraternal benefit association is a "life insurance company," so that it may be sued in the county in which the beneficiary resides, under the express provision of sections 687 and 709.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1992; Dec. Dig. §811.]

For other definitions, see Words and Phrases, First and Second Series, Life Insurance Company.]

Appeal from Chancery Court, Leflore County; M. E. Denton, Chancellor.

Suit by the Masonic Benefit Association of Stringer Grand Lodge of the State of Mississippi against Eliza Dotson, for injunction to annul a former decree against complainant on behalf of defendant. Decree for defendant, and complainant appeals. Affirmed.

Lomax & Tyson, of Greenwood, for appellant. S. R. Coleman, of Greenwood, and R. H. & J. H. Thompson, of Jackson, for appellee.

HOLDEN, J. This is an appeal from a decree of the chancery court of Leflore county. The appellee obtained a decree for \$696.15 against the appellant upon a policy of insurance on the life of her husband, and this was a suit by injunction to annul this decree. The chancellor denied relief and dissolved the injunction; hence this appeal.

The chief complaint made here by appellant is that it was not an insurance company, and that it was not sued in the county of its domicile and residence, Bolivar county, but was sued in Leflore county, where the beneficiary in the life insurance policy resided. Legal summons was sent and served upon the appellant in Bolivar county, and upon this service the decree was rendered. Section 2598, Code of 1906, defines life insurance companies. Under this section we have no hesitation in saying that the appellant here is a life insurance company. Under section 709, Code of 1906:

"Actions against insurance companies may be brought in any county in which a loss may occur, or, if on a life policy, in the county in which the beneficiary resides, and process may be sent to any county to be served as directed by law."

Section 687, Code of 1906, provides that the above section shall apply to chancery courts as well as to circuit courts. Therefore we conclude, first, that the appellant here is a life insurance company; second, that it may be sued in the chancery court of the county in which the beneficiary resides.

There are no other points in the case that deserve consideration.

Affirmed.

CORINTH BANK & TRUST CO. v. WALLACE et al. (No. 17473.)

(Supreme Court of Mississippi, Division A. March 27, 1916.)

1. MORTGAGES — §167—PRIORITIES—LEASES—ASSIGNMENTS.

As a lease contract for a portion of a building which reserved a fixed rate was assignable at common law, Code 1906, §§ 2877, 2878, 4001, simply enlarging the rights of the assignee, have no effect on the question whether the lessor's mortgage was charged with notice of an assignment of an unrecorded lease.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 382, 390, 391; Dec. Dig. §167.]

2. MORTGAGES \Leftrightarrow 169—ASSIGNMENT OF LEASE — CONSTRUCTIVE NOTICE — WHAT CONSTITUTES.

Where the lessor of premises was manager and president of a bank in which the lessee had a deposit and the rents were charged to the lessee monthly by the bank, such fact was not notice to the lessee that the lease had been assigned to the bank; hence the lessor's mortgage was not charged with notice of the assignment, even though it be deemed to have constructive notice of facts within the knowledge of the lessee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 386-388; Dec. Dig. \Leftrightarrow 169.]

3. MORTGAGES \Leftrightarrow 169 — LIEN—CONSTRUCTIVE NOTICE—WHAT CONSTITUTES.

Code 1906, § 2763, provides that an estate for a term of more than one year in lands shall not be conveyed from one to another unless the conveyance be declared by writing signed and delivered. Section 2787 provides that all conveyances of lands, whether made for passing an estate of freehold or inheritance, or for a term of years, shall be void unless acknowledged or proved and lodged with the clerk of the chancery court of the proper county to be recorded, while section 4775, declares that no action shall be brought to charge any party upon a contract for the sale of land, tenements, or hereditaments, or the making of any lease, for a longer term than one year, unless the promise or agreement be in writing. A lease for three years was not recorded, though the tenant was in possession. After assigning the lease, the landlord mortgaged the premises. *Held*, that the mortgagee who took for value and without notice was not chargeable with an unrecorded assignment of the lease.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 386-388; Dec. Dig. \Leftrightarrow 169.]

Appeal from Chancery Court, Alcorn County; J. Q. Robins, Chancellor.

Bill of interpleader by Charles H. Gish, against the Corinth Bank & Trust Company and W. F. Wallace. From a decree in favor of defendant Wallace, the Bank appeals. Reversed, and decree rendered for appellant.

Thos. H. Johnston and W. J. Lamb, both of Corinth, for appellant. Young & Young, of Corinth, for appellee.

SYKES, J. This is an appeal from a decree of the chancery court of Alcorn county upon an agreed statement of facts which is, in substance, as follows: On June 14, 1906, the complainant, Charles H. Gish, and one J. W. Taylor entered into a written lease contract whereby said J. W. Taylor leased to Charles H. Gish, for a consideration of \$1,200 per annum, the south half of the first floor of a brick building known as the Opera House building in the city of Corinth, Miss., said lease beginning the 1st day of September, 1906, and to end on the 1st day of September, 1911, with the option in the said Gish of renewing the lease for an additional three years. This lease was duly signed by the lessor and lessee, but was neither acknowledged nor recorded in the chancery clerk's office in Alcorn county. On the 29th day of April, 1907, J. W. Taylor, the owner of said Opera House building borrowed from the Corinth Bank & Trust Company \$25,000, for

which he gave his note and executed a trust deed upon the lots on which said Opera House building was located, which trust deed was duly filed for record and recorded in trust deed book in the chancery clerk's office in Alcorn county. It is agreed that Taylor was the owner of the lots and building, both at the time he executed this trust deed and at the time he executed the lease to the said Gish. It is further agreed that the trustee in the deed of trust, on the 22d day of June, 1908, sold the property under the terms of said trust deed, and that the Corinth Bank & Trust Company became the purchaser of said property, and that the trustee executed deed to same on the 24th day of June, 1908, which deed was promptly and duly recorded in the chancery clerk's office in accordance with law; that the said bank immediately went into possession of the property so purchased; that the lessee Gish is occupying and using the property leased to him under the lease and has been in possession of it since the execution of same; that the said bank is collecting rent from all of the tenants in said building except the said Gish, who has declined to pay rent to said bank. It is further agreed that the said lease was never recorded in the chancery clerk's office of Alcorn county; also that the Corinth Bank & Trust Company had no notice of the lease contract, or knew of its existence, until some time after the execution of the note and deed of trust to it by the said Taylor. It is further agreed that the said bank knew that Gish was in possession of and occupying the said house and premises on the day and date that the said trust deed was executed and on the day of the sale by the said trustee. It is further agreed that on the day the lease contract was signed the said J. W. Taylor assigned said lease contract to the Tishomingo Savings Institution in the following manner, as is stated by the said J. W. Taylor:

"I, on the same date, assigned the lease to the Tishomingo Savings Institution by entering the same on the note register of the Tishomingo Savings Institution, and they belong to the bank when they are entered on the said register. I was entitled to a credit on my individual account in said bank for the assignment of this lease, but I was never given any credit for the same."

It is also agreed that J. W. Taylor was president and general manager of the Tishomingo Savings Institution, and that he owned the principal amount of the capital stock of said institution and that both he and the institution are insolvent. The agreement further shows that Gish had a deposit account with the said Tishomingo Savings Institution, and that the installments or rent as the same matured were charged each month against the said Gish's account in the bank. The agreement further shows that on December 10, 1907, J. W. Taylor and the Tishomingo Savings Institution assigned in writ-

ing the said lease contract of Gish to W. F. Wallace. It is further agreed that after the assignment of the lease contract to the said Wallace, Gish has been paying the monthly rental as the same matured to the said Wallace until the sale and purchase of said property by the Corinth Bank & Trust Company. The Corinth Bank & Trust Company and the said Wallace are both claiming that the rents be paid them by the said Gish. Under this statement of facts Gish filed his bill in the chancery court of Alcorn county, praying that the court decree to whom he shall pay these rents, and making the bank and Wallace defendants. Both defendants filed their answers, each claiming the rent under said contract. The learned chancellor entered a decree in favor of W. F. Wallace, from which decree the Corinth Bank & Trust Company prosecute this appeal.

It is the contention of the appellant that the possession of the tenant Gish was notice to the Corinth Bank & Trust Company: First, of the terms of the lease of Taylor to Gish; and, second, of its having been assigned by Taylor. Appellant admits that the possession of the tenant Gish is constructive notice of the lease or tenancy and of its terms, but denies that it is notice of the assignment of same.

[1] Appellee contends that since the lease is assignable under sections 2877, 2878, and 4001 of the Code of 1906, it would be a delusion and a snare for the courts to hold that a mortgagee does not have notice of this assignment at the time of the execution of the mortgage. A lease contract of this character, however, was assignable under the common law before the enactment of the statutes referred to by counsel for appellee. These statutes simply enlarge and broaden the rights of the assignee of the lease under them under certain circumstances which are not involved in this case. Consequently, these sections have nothing to do with the determining of the case at bar.

[2, 3] Section 2763 of the Code of 1906 provides that an estate for a term of more than one year in lands shall not be conveyed from one to another unless the conveyance be declared by writing signed and delivered. Section 4775 provides that an action shall not be brought whereby to charge a defendant or other party upon any contract for the sale of land, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year, unless the promise or agreement be in writing, etc. Section 2787 of the Code provides that all conveyances of lands, whether made for passing an estate of freehold or inheritance, or for a term of years, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county to be recorded, etc.; but the same as between the parties and

their heirs, and as to all subsequent purchasers with notice or without valuable consideration, shall nevertheless be valid and binding. An examination of the above sections shows that it is the general scheme and purpose of our law, relating to contracts with reference to lands, that they should be recorded in order to give notice to all parties dealing with these lands; that if they are not recorded, then no one is bound by any agreement not filed for record unless he has actual knowledge or constructive notice of the same. It is also the law that the evidence relating to constructive notice must be positive. In this case this notice is attempted to be fastened upon the appellant because of the possession of the tenant Gish.

It is to be remembered, however, that the contract of lease was made between J. W. Taylor and Gish, and, at best for the appellee, appellant is only charged in this case with the terms and conditions of the lease, namely, that Gish had leased the building at a certain stated price for a period of years from J. W. Taylor. It was not incumbent upon the appellant, however, to make any inquiry whatever save as to the terms of the lease. In fact, the record is absolutely silent that Gish himself had notice of the assignment of the lease. The agreed statement of facts shows that J. W. Taylor, the lessor, was the manager and president of the Tishomingo Savings Institution, and that Gish had a deposit in this bank, and that the rents were charged to him monthly by the bank. It is perfectly natural for Gish to have assumed that this was being done for the benefit of Mr. Taylor, since the record shows that Taylor was the active manager and owner of a large part of the stock of this bank. Consequently the case of appellee would fall even if the court should hold that whatever knowledge Gish had of the assignment of this lease was chargeable to the Corinth Bank & Trust Company. This, however, is not the law. In passing upon this question of constructive notice, this court, in the case of Claiborne v. Holmes, 51 Miss. 146, says:

"It is contended that aside from the question of registration, Thatcher had notice of the conveyance to Mrs. Dunbar. It is not pretended that Thatcher had positive knowledge of the deed, but that he had knowledge of facts from which notice should be inferred. The alleged fact is the possession by Mrs. Dunbar after her purchase. It is laid down in many cases that possession is notice, or a fact from which it may be inferred. *Dixon & Starkey v. Lacoste*, 1 Smedes & M. 107; *Willy v. Hightower*, 6 Smedes & M. 345; *Jones v. Loggins*, 37 Miss. 546. The subsequent vendee, with notice, is a purchaser mala fide. Where the evidence, as in this case, is to fix the notice inferentially, the circumstances ought to be positive, distinct, and emphatic. The notice must be clearly proved. *McMechan v. Griffing*, 3 Pick. (Mass.) 154, 15 Am. Dec. 198."

In the case of Loughridge & Bogan v. John Bowland, 52 Miss. 546, this court, through Chief Justice Simrall, said:

"Possession by the vendee under an unrecorded deed is notice to creditors. Possession is a badge of ownership and evidence of a right. If the debtor has parted with the possession, a creditor is interested to know the nature and extent of the right, and is therefore put upon inquiry and is esteemed to know the truth to which investigation would lead. But, that possession may have the effect of protecting the title under which it is held, it must be of that character which would arrest attention. Possession was laid hold of as a circumstance from which notice may be inferred; but, like other inferences, it depends for its force on the nature of the fact from which it is deduced. The reason which underlies the doctrine is that it is a fraud—an act of mala fides—for a creditor or purchaser who had knowledge of a prior sale and purchase to attempt to defeat the purchaser's right by getting his estate. * * * There was no change in the occupancy of the land. At the time of the sale Chears was in possession, by his tenants. After the sale the same tenants continued to hold, on an agreement to pay rents to Loughridge & Bogan. Nothing more occurred than a technical attornment of the tenants to them. There was a transfer of the title, but no change of possession that a stranger could observe. The actual occupancy in March and April after the sale, was just as it had been the prior months of the year. In all this there was nothing to arrest notice or to put a creditor or purchaser on inquiry."

In the case at bar Gish came into possession as a tenant of Taylor. There was no change in this tenancy whatever after the assignment of the lease. There was no knowledge of its assignment shown by said Gish, and there was no acknowledgment in any way by him or recognition of any other landlord than Taylor, so far as this record shows. In this respect the case is a much stronger one in favor of the appellant here than the case from which we have above quoted. In the Bowland Case there was notice shown in the tenants of the sale, and technical attornment by them to the new landlord, but the court held that the purchaser was not chargeable with such notice. We regard this case as decisive of the one under consideration.

A case directly in point is that of *Steel v. De May et al.*, 102 Mich. 274, 60 N. W. 684, decided by the Supreme Court of Michigan, upon this same proposition. The opinion in part reads:

"It is contended by complainant that it was not necessary to the protection of complainant's rights that the assignment of the lease be recorded; and that, the premises being in possession of lessees, and the leases in the custody of the complainant, it was the duty of the defendant Ella De May to make inquiry as to the terms of the lease, and as to the possession of the instruments, before purchasing, as the leases were the only evidence of the grantor's title to the rents reserved, and of his right to collect such rents from the tenants in possession; and that, in the absence of such inquiry, she [Mrs. De May] would be chargeable with notice of all the facts which she would have learned upon making the inquiry. We think that, while such possession of the lessees would be notice of their rights, it would not be notice that the title of De May had been incumbered by the assignment of the leases, reserving rent to himself."

To hold that a bona fide mortgagee for value without notice is chargeable with an unrecorded assignment of a lease, would be, in our opinion, to open wide the door for fraud in transactions of this kind. The assignee or owner of the lease should protect himself by having his lease acknowledged and recorded. When he fails to do this, his rights are always subject to that of a purchaser or mortgagee for value and without notice.

Reversed and decree here for appellant.

FINGER v. TAYLOR et al. (No. 17447.)
(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. JUDICIAL SALES —1—SALE UNDER DEED OF TRUST.

Under a deed of trust executed by defendants covering the land involved under which the trustee, who was also the receiver of defendants' business and property in the United States District Court, was permitted to sell the property under the terms of the deed of trust and report the sale back to that court, and according to which trust he sold it and executed to complainant, the purchaser, a trustee's deed conveying whatever title he had as trustee, which sale on report to the federal District Court was confirmed, was simply a sale by the trustee in the deed of trust, with the permission of the federal court, and neither its permission nor its confirmation made it a "judicial sale," so that the purchaser had to rely upon the strength of the trustee's title in the deed of trust and not upon the sanction of the federal court.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 1-4, 68; Dec. Dig. —1.

For other definitions, see *Words and Phrases*, First and Second Series, *Judicial Sales*.]

Appeal from Chancery Court, Alcorn County; J. Q. Robins, Chancellor.

Bill by S. S. Finger against Mrs. Della Taylor and others. Judgment for defendants dismissing the bill, and complainant appeals. Affirmed.

Thos. Spight and Thos. E. Pegram, both of Ripley, and G. G. Lyell, of Jackson, for appellant. W. H. Kier and T. D. Young, both of Corinth, and W. D. Anderson, of Tupelo, for appellees.

HOLDEN, J. This is an appeal from the chancery court of Alcorn county. The appellant, S. S. Finger, filed his bill in the lower court and obtained an injunction against a sale under execution of certain land that was levied upon under a judgment in favor of appellee Mrs. Della Taylor. Appellant claimed that he had a good title to said land under a trustee's deed. The chancellor decreed that appellant's alleged title under the trustee's deed was invalid, because the deed of trust under which the sale of the land was made was never delivered; the injunction was dissolved and the bill dismissed, hence this appeal. The appellant urges here that as a matter of fact the deed of trust in question was delivered, and that

the trustee's deed is valid. Appellant also contends that if the deed of trust was not delivered and the trustee's deed was thereby void, still, he should prevail, because the sale under the deed of trust was a judicial sale, and that appellant in good faith bought the land, paying for same, and holding it for two years thereafter, and such sale was "a sale by a chancery court," and that he is protected as purchaser by section 3122, Code of 1906.

The contention of appellant that the sale under the deed of trust was a judicial sale is based upon the following facts in the record, to wit: The deed of trust was executed by J. W. Taylor and the Tishomingo Savings Bank covering the land here involved, and the business and property of these parties went into the hands of a receiver, J. M. Boone, in the circuit court of the United States for the Northern District of Mississippi, and while such receivership was pending the equity side of said court granted permission to the said J. M. Boone, trustee in the said deed of trust, who incidentally was also the receiver in the proceedings in that court, to sell the property here in question under the terms of the said deed of trust, and report such sale back to that court. The trustee in the deed of trust, J. M. Boone, proceeded as trustee, according to the terms of the deed of trust, to sell the land here involved, and did sell it, and executed to the purchaser a trustee's deed, conveying to the purchaser whatever title he had as trustee by virtue of the deed of trust. Upon this trustee's deed the appellant here relies. When the sale was reported back to the equity side of the federal court it was by the court confirmed.

While this sale by Boone as trustee appears to have some of the earmarks and signs of a judicial sale, we do not think it was a judicial sale, but that it was simply a sale by the trustee in the deed of trust, with the permission or sanction of the federal court. The purchaser at this sale received such title only as was vested in the trustee by virtue of the deed of trust, and the permission granted by the federal court to the trustee to make the sale did not convert it into a judicial sale, nor did the court's confirmation of this sale by the trustee render it a judicial sale, as the confirmation was unnecessary and may be treated as surplusage. The fact that J. M. Boone was receiver in the proceedings in the federal court, and was at the same time trustee in the deed of trust, did not make the sale by him as trustee a judicial sale by the court. In making the sale under the deed of trust, he was acting clearly in the capacity of trustee, and not as receiver; and the appellant must rely upon the strength of the trustee's title in the deed of trust, and not upon the mere sanction given to the sale by the federal court.

Therefore we hold that there was no judicial sale. There being no judicial sale, it follows that it is unnecessary for us to pass upon the other question as to whether the appellant is protected under section 3122, Code of 1906, and we do not pass upon this question. There is no merit in the claim of an equitable lien.

The chancellor being warranted by the testimony in deciding that the deed of trust in question was never delivered, and that the trustee's deed was void, we see no reason for disturbing his finding on the facts. Affirmed.

SHOUB v. PERKINS et al. (No. 17253.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

PUBLIC LANDS §61(14) — SWAMP LANDS — CONFIRMATION—ACT—EFFECT.

Under Act Cong. Sept. 23, 1850, c. 84, § 519, known as the Swamp or Overflowed Land Act, ceding to the states therein mentioned certain swamp lands under which the state properly identified and selected lands, the list of which was rejected, and Act Cong. March 3, 1906, c. 1485, 33 Stat. 1258, known as the Mc-Laurin Act, ratifying the state's sales of such lands and confirming the title thereto in the purchasers as of the date of such sales as if the title of the United States had passed thereby, provided that no valid title under the public land laws should be affected thereby, whatever title the United States had remaining in it at the passage of the confirming act vested purchasers from the state; so that defendants claiming under such purchasers had good title as against complainant, who in 1907 entered or purchased under the homestead laws.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 212; Dec. Dig. §61(14).]

Appeal from Chancery Court, Jackson County; J. M. Stevens, Chancellor.

Suit by Thomas H. Shoub against Leroy Perkins and others, with answer and cross-bill by defendants. Demurrer to cross-bill overruled, and complainant appeals. Affirmed.

Wood & Taylor, of Gulfport, for appellant. H. B. Everitt, of Pascagoula, for appellees.

SYKES, J. Suit was filed in the chancery court of Jackson county by the appellant against the appellees, to establish his title to certain lands claimed to have been acquired by homestead entry under the acts of Congress, and to have declared void the claim of title of defendant to these lands arising under chapter 1485, United States Statutes at Large of the Fifty-Eighth Congress. Appellees answered, and made their answer a cross-bill, setting up their claim of title to said lands. Appellant then dismissed his original bill; but the cross-bill of appellees, by leave of court, was retained and an amended cross-bill was then filed, which presented to the court, in full, the titles of both appellant and appellees. A demurrer was interposed to the cross-bill by the appellant,

which was overruled by the court; hence this appeal.

The material facts alleged in the cross-bill are as follows:

The lands in controversy were claimed by the state as swamp and overflowed lands, under the Swamp Land Act of Congress, of September 28, 1850. Under this act, these lands were selected by the state as swamp and overflowed lands in the year 1859, and were afterwards sold by the state to the remote vendors of the appellees. This list was also filed in the office of the Secretary of the Interior at Washington; but no action was taken by the government on same for more than 20 years, at which time the lands in controversy were rejected as not being swamp lands. The bill alleges that on a part of the land in controversy, one Maggie Davis had filed an entry under the United States homestead law, and as to the other part, one E. E. Gould appeared as an entryman of a homestead. Neither Gould nor Maggie Davis had ever resided upon the land, or made any improvements thereon, as required by the statutes of the United States. Further, that the entry of Gould at the time of the passage of the act of Congress of 1905 (known as the McLaurin Act) was barred by the limitation of 7 years, and was afterward canceled because of such bar. Maggie Davis relinquished her entry, and the part she had entered was in December, 1905, after the passage of the McLaurin Act, entered at the land office by one Klatt, who, without complying with the laws, also relinquished. The appellant, Shoub, made his entry under the acts of Congress in 1907. The cross-bill alleges in effect that at the time of the passage of the act of Congress in 1905 in question, the attempted entries of Davis and Gould had failed because they had not complied with the acts of Congress relating thereto. The demurrer admits these facts.

By the act of Congress of 1850, known as the Swamp or Overflowed Land Act, it was the purpose and intention of Congress to cede to the states therein mentioned certain swamp lands. The lands involved in this suit were properly identified and selected by the state; but the list of same was not approved by the federal government—in fact, these lands were rejected by the United States as swamp lands and stricken from said list. The act of 1905, known as the McLaurin Act, was passed for the purpose of validating the titles of all parties who had purchased these rejected lands from the state of Mississippi. Said act, in part, reads as follows:

“ * * * And said sales [meaning sales by the state of Mississippi to parties] are hereby ratified and confirmed, and the titles to said lands are hereby validated and vested in the purchasers, respectively, thereof, as of the date of said sales in all respects as if title of the United States had passed by such sales: Provided, that no valid title or valid claim under the public land laws of the United States heretofore

acquired and now existing to any of said lands shall be affected by this act.”

The remote vendors of appellee purchased these lands from the state of Mississippi in 1862. This act of Congress vested whatever title the United States had remaining in it at its passage in these purchasers, subject only to outstanding valid claims or valid titles.

The bill, on its face, shows that neither of the above-named parties had complied with the law relating to the entries of these lands, and that they could not have perfected their titles under these entries. This being true, they were not valid claims, and neither held valid titles to this land. The appellant here does not claim title through either of them, but claims title through a subsequent entry of these lands as belonging to the United States. The contention of appellant is that by the first entry of the parties above mentioned, the lands were segregated and separated from the public lands, consequently were not public lands at the time of the passage of the McLaurin Act, and for this reason the act did not apply to them. The case at bar is different from the railroad grants discussed in the authorities cited by counsel for appellant. In this case, the state of Mississippi and her vendors claimed title to a considerable body of land under the Swamp Land Act, and by the McLaurin Act the government expressly recognized this claim; and by said act, the government intended to convey and did convey to the purchasers of the lands from the state whatever right or title remained in the government to these lands. This is expressly shown by the language used in the act and in the proviso above quoted.

If this were a suit between the United States government and the purchaser of the land from the state of Mississippi, the government would be clearly estopped to assert any such title, because of the passage of the above act. The appellant in this case, when he purchased the same, or entered it in 1907, certainly acquired no better title to the land than was vested in the government at that time. We think the case of *United States v. Des Moines Valley R. Co.* (C. C. A. 8th Circuit) 84 Fed. 40, 28 C. C. A. 267, clearly states the law; in delivering the opinion of the court, Judge Thayer says:

“It seems obvious, therefore, that the United States, by the act of March 3, 1871, voluntarily relinquished whatever right or title to the land in controversy it then had; that it did so with full knowledge of its rights; and that the sole purpose of that act was to cure an existing defect in the state's title, and to estop the United States from ever after taking advantage of such defect for its own benefit. It is argued, however, that by reason of the proviso contained in the act of March 3, 1871, the government reserved to itself the right to challenge the title of the state of Iowa, and those claiming under it, to the particular tract of land now in controversy, because Fairchild entered the land as a homestead on October 3, 1866. We cannot assent to this proposition. We fully concur in the view of

the learned trial judge that the proviso in question did not reserve any interest in the land, so far as the United States was concerned, but was simply intended to leave homestead, pre-emption, and swamp-land claimants unaffected by the government's relinquishment of its own rights. By the act in question Congress declared, in effect, that the United States would not thereafter, for its own benefit, question the title to the lands which had been erroneously certified to the state; that the state should hold the lands free from all claims on the part of the government, but subject to such legal rights, if any, as had at the time become vested in any homestead, pre-emption, or swamp-land claimant."

Affirmed.

YAZOO & M. V. R. CO. v. BELL. (No. 17297.)
(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. CARRIERS — 228(1) — CARRIAGE OF LIVE STOCK—ACTIONS—BURDEN OF PROOF.

Where cattle were in good condition when delivered to the carrier, and when received some of the animals were dead and others injured, the carrier has the burden of showing that the injuries were not caused by its negligence, and to escape liability must account for its handling of the cattle during all the time they were in its charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957, 958; Dec. Dig. 228(1).]

2. CARRIERS — 218(3) — CARRIAGE OF LIVE STOCK.

Where a bill of lading fixing an agreed valuation for shipment of live stock showed that the rate was reduced in consideration of the lessened liability, but did not show that the reduction of the rate was a consideration for the agreement to give notice of injuries in writing within ten days after delivery of the shipment, or that such provision would have been omitted from a bill of lading containing no limitation of liability, the provision for notice is unenforceable, being without consideration.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 938; Dec. Dig. 218(3).]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by W. H. Bell against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

On the afternoon of November 16, 1912, appellee delivered to appellant at Pochontas, Miss., 46 head of cattle, for shipment to New Orleans, La. The cattle were in good condition when loaded into the car in which they were to be transported; but when the car arrived in New Orleans three of the cattle were missing, one heifer was dead in the car, and others of the cattle were bruised and otherwise injured. The conductor in charge of the train, of which the car of cattle in question constituted a part, from Pochontas to Jackson, Miss., testified that the train was properly equipped, properly handled, and that on its arrival at Jackson, the cattle were in good condition. On its arrival in Jackson at 10:30 p. m. of the day of shipment, the train was turned over to the yard-

master, and the evidence is silent, except as hereinafter stated, with reference to what disposition was then made of the car in which the cattle were loaded, until 6:10 the next evening, when it was incorporated into a train on the Illinois Central Railroad, which train, at 10:20 p. m., departed for New Orleans. The conductor in charge of this train, from Jackson to McComb, testified that it was properly equipped, properly handled, and that the cattle suffered no injury between Jackson and McComb, at which latter place he turned the train over to another conductor who was in charge to Harrahan, La. On the waybill turned over to the conductor who had charge of the train from Jackson to McComb, there appeared a notation indicating that "three head were dead and three badly crippled at Jackson," and that the car had been "unloaded and reloaded" at that point. When the car was turned over to the conductor of the train at Jackson, several of the cattle were down, but he got all of them up but one, and neither this one nor the others appeared in any way to be injured; on leaving Brookhaven two of them were observed to be down in the car, but appeared in no way to be injured. The conductor who had charge of the train from McComb to Harrahan stated that it was properly equipped, received no improper handling, and the cattle were not injured while in his charge. The conductor in charge of the train from Harrahan to the Crescent City Stockyards, the place of delivery and about ten miles from Harrahan, stated that when the car was delivered to him there was "one yearling dead and there was also a yearling gored near the shoulder." He further stated that the train was properly handled while in his charge.

The bill was lading on which these cattle were shipped, and which was signed by appellee, was headed, "Live Stock Contract"; and among its stipulations occur the following:

"(5) It is further expressly agreed that the value of the live stock to be transported under this contract does not exceed the following sums:

Each horse (gelding or mare) or pony, stallion, mule or jack.....	\$100 00
Each ox or bull.....	50 00
Each cow.....	30 00
Each calf or pig.....	10 00
Each sheep.....	3 00

"And the liability of the railroad company for any loss or damage for which it may be responsible shall not exceed the actual cost at the point of shipment, and in no event exceed the above valuations for each animal.

"(6) It is further agreed by the shipper that no claim for loss or damage to stock shall be valid against said railroad company, unless it shall be made in writing, verified by affidavit and delivered to the general freight agent, or freight claim agent, of the railroad company, or to the agent of the company at the station from which the stock is shipped, or to the agent of the company at the point of destination, with-

in ten days from the time said stock is removed from said cars."

It is also provided that:

"When the declared valuation shall be greater than the printed valuation specified in the contract below, the agent will erase the printed valuation and insert the declared valuation. In such cases an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof of the additional valuation declared by the shipper."

The valuations printed in this bill of lading were accepted by appellee, so that no change therein was made.

Notice of appellee's claim was not given to appellant within ten days after the arrival of the cattle in New Orleans.

F. M. West and Mayes & Mayes, all of Jackson, for appellant. J. A. Baker and J. B. Ricketts, both of Jackson, for appellee.

SMITH, C. J. (after stating the facts as above). Numerous reasons are assigned for reversing the judgment of the court below, but the only one we deem it necessary to specifically notice is: That no liability on the part of appellant has been shown, first, because the evidence does not disclose that the cattle were injured by reason of the negligence of appellant or of the Illinois Central Railroad Company; and, second, because the provision in the bill of lading requiring written notice of appellee's claim for damages, verified by affidavit to be delivered to certain of appellant's agents within ten days from the time the stock were removed from the car, was not complied with.

[1] It appearing from the evidence that the cattle were in good condition when delivered to appellant for shipment, and that when the car in which they were loaded arrived in New Orleans, some of them were missing, one was dead, and others were injured, it devolved upon appellant to acquit itself of liability by showing that this did not occur by reason of its negligence. Railroad Co. v. Abels, 60 Miss. 1017; Railroad Co. v. Bigger, 66 Miss. 319, 6 South. 234. This appellant failed to do for the reason that the evidence is wholly silent as to the handling of the car while it was in Jackson, Miss.

[2] The provision in the bill of lading requiring notice in writing to be given appellant of appellee's claim within ten days after arrival of the cattle in New Orleans cannot be availed of here under the rule announced in the case of Railroad Co. v. Hariman Bros., 227 U. S. 657, 83 Sup. Ct. 397, 57 L. Ed. 690, for the reason that it does not appear from the evidence that this special feature of the contract was supported by a consideration. It is contended by counsel for appellant that the consideration for this provision of the contract was a lower freight rate obtained by appellee because of the acceptance by him of this bill of lading. This is true in so far as the stipulations

therein relative to the value of the cattle are concerned, but it is not true with reference to the clause of the bill of lading here in question. All that appears in the evidence with reference to the freight rate is the provision in the bill of lading indicating that a higher rate would be charged in event the declared valuation of the cattle should be greater than that printed therein. In any event, for aught that appears from the evidence, the bill of lading would have contained the stipulation here in question.

Affirmed.

SORENSEN v. WEBB. (No. 17341.)

(Supreme Court of Mississippi. March 27, 1916.)

1. CONSTITUTIONAL LAW ~~§~~248 — MASTER AND SERVANT ~~§~~69—EQUAL PROTECTION OF LAWS—REGULATION OF MANUFACTURERS—PAYMENT TO EMPLOYÉS.

Acts 1912, c. 141, §§ 1, 2, imposing a penalty in a reasonable attorney's fee upon every manufacturer for a failure to pay his employes once in every calendar month, recoverable, if the employé has employed an attorney, by suit 10 days after demand, in addition to the amount of wages due, and upon no other class of individuals or corporations, construed as including one engaged in the sawmill business, does not treat them equally with other debtors, and hence violates the provision of Const. U. S. Amend. 14, and Const. Miss. 1890, § 14, forbidding the denial of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. ~~§~~248; Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. ~~§~~69.]

2. CONSTITUTIONAL LAW ~~§~~208(16)—CLASSIFICATION—REGULATION OF BUSINESS—PAYMENT OF EMPLOYÉS.

Such act, imposing the extra burden and penalty of attorney's fees only upon manufacturers, including one in the sawmill business, was arbitrary, and not founded upon any difference bearing a just and proper relation to the attempted classification, and hence was without any reasonable and proper basis for the classification, and invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 675, 676; Dec. Dig. ~~§~~208(16).]

In Banc. Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Suit by B. W. Webb against C. Sorenson. Judgment for plaintiff, and defendant appeals. Reversed in part, and affirmed in part.

Stingily & McIntyre, of Brandon, for appellant. A. J. McLaurin, Jr., of Brandon, for appellee.

HOLDEN, J. The appellee, B. W. Webb, filed suit against the appellant, C. Sorenson, in the circuit court of Rankin county, claiming that the said Sorenson, who was engaged in the sawmill business, was indebted to appellee, Webb, in the sum of \$313.52 for hauling logs to Sorenson's sawmill. Sorenson denied the indebtedness, and the case went to trial, and there was a verdict for plaintiff for \$363.52, \$50 of which was allowed as a

reasonable attorney's fee in the case, and from this verdict Sorenson appeals here.

The \$50 attorney's fee recovery in the court below is based upon chapter 141 of the Acts of 1912, which is as follows:

"Section 1. Be it enacted by the Legislature of the state of Mississippi, that every company, corporation or association now existing or hereafter organized in this state and any individual or partnership engaged in the business of manufacturing shall, in the absence of a written contract to the contrary, be required to make full settlement with and full payment in money to their employes for services performed at least once in every calendar month of the year: Provided that said employers may hold back fifteen days' wages earned immediately before the regular pay day, which wages to be included in the next settlement.

"Sec. 2. If any company, corporation, association, partnership or individual engaged in manufacturing, as provided in section 1 of this act, shall refuse or neglect to make such payment after demand, and within ten days from said demand, such employe may bring suit, and if recovery is had such employe may, in addition, recover reasonable attorney's fee for the prosecution of such suit, if such employe has employed an attorney to prosecute the same."

[1] Appellant contends here that chapter 141, Acts of 1912, is unconstitutional and is within the inhibition of the Fourteenth Amendment of the United States Constitution (and also violates section 14, article 3, of the Constitution of the state of Mississippi), in that it denies to the appellant "the equal protection of the laws." The appellant was engaged in the sawmill business, which may be said to be a manufacturing business, as meant by chapter 141, Acts of 1912. It will be observed that the state statute imposes a penalty in a reasonable attorney's fee upon every manufacturer for a failure to pay his employes once in every calendar month, which penalty is recoverable by suit 10 days after demand, in addition to the amount of wages due by the manufacturer to the employe.

This is a penalty or a burden imposed upon manufacturers for their failure to pay employes wages at a certain time, and is imposed upon no other class of individuals or corporations. The act singles out a certain class of debtors, to wit, manufacturers, and punishes them, when, for like delinquencies, it punishes no others. Thus they are not treated equally with other debtors. As said by Justice Brewer in *G. C. & Santa Fe Railway Co. v. W. H. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666:

"They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equally

before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

It is true that the state has the power of classification, but—

"It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." *Railway v. Ellis*, supra.

[2] Chapter 141 of the Acts of 1912 arbitrarily selects manufacturers as a class, without any reasonable and proper basis for the classification. We see no good reasons justifying the imposition of the extra burden and penalty of attorney's fees upon a sawmill manufacturer, as the business is not such as to warrant the discrimination against it, while other persons and corporations are not penalized for like delinquencies. We do not think that the classification made by the state statute here is based upon a reasonable ground. There is no difference which bears a just and proper relation to the attempted classification, but it is a mere arbitrary selection. Therefore, in view of these conclusions, we hold that the state Legislature was without power to impose attorney's fees in the act here in question.

The judgment of the lower court is reversed as to the \$50 attorney's fee, and judgment entered here for appellant; and in all other respects the judgment is affirmed.

Reversed in part, and affirmed in part.

FIRST NAT. BANK OF COLLINS v. TRENHOLM. (No. 17899.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Chancery Court, Covington County; R. E. Sheehy, Chancellor.

Action between the First National Bank of Collins and E. L. Trenholm, trustee. From the judgment, the bank appeals. Affirmed.

M. U. Mounser, of Collins, and Chalmers Alexander, of Jackson, for appellant. D. A. McIntosh, of Collins, and E. L. Trenholm, of Jackson, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. MARTIN. (No. 17470.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Sharkey County; H. C. Mounser, Judge.

Action between the Yazoo & Mississippi Val-

ley Railroad Company and L. E. Martin. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Jas. D. Thames, of Vicksburg, and J. S. Joor, Jr., of Rolling Fork, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. BARBOUR.
(No. 17448.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and T. L. Barbour. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Elmore & Ruff, of Lexington, for appellee.

PER CURIAM. Affirmed.

WILLS v. YAZOO & M. V. R. CO.
(No. 17530.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action between Ellen Wills and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Ellen Wills appeals. Affirmed.

J. B. Dabney, of Vicksburg, for appellant. Mayes & Mayes, of Jackson, for appellee.

PER CURIAM. Affirmed.

POSTAL TELEGRAPH & CABLE CO. v. LUCKETT. (No. 17361.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between the Postal Telegraph & Cable Company and Mrs. Mattie E. Luckett. From the judgment, the Company appeals. Affirmed.

J. G. Smythe, of Kosciusko, and Mayes & Mayes and Flowers, Brown, Chambers & Cooper, all of Jackson, for appellant. R. H. & J. H. Thompson, of Jackson, for appellee.

PER CURIAM. Affirmed.

LEE LINE STEAMERS v. AMERICAN EXPORT CO. (No. 17480.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action between the Lee Line Steamers and the American Export Company. From the judgment, the Lee Line Steamers appeal. Affirmed.

See, also, 68 South. 771.

Wells, May & Sanders, of Jackson, for appellant. Henry & Canizaro, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

ABRAHAM v. BOUNDS. (No. 17410.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Action between Kelly Abraham and M. Bounds. From the judgment, Abraham appeals. Affirmed.

W. I. Munn, of Newton, for appellant. G. H. Banks, of Newton, for appellee.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. HUNT.

(No. 17498.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Tate County; N. A. Taylor, Judge.

Action between the Illinois Central Railroad Company and Walter Hunt. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. M. H. Thompson and J. F. Dean, both of Senatobia, for appellee.

PER CURIAM. Affirmed.

MOBILE & OHIO R. CO. v. BENNETT.

(No. 17409.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Prentiss County; Claude Clayton, Judge.

Action between the Mobile & Ohio Railroad Company against Abb S. Bennett. From the judgment, the Railroad Company appeals. Affirmed.

J. M. Boone, of Corinth, for appellant. E. C. Sharp, of Booneville, for appellee.

PER CURIAM. Affirmed.

JONES v. YAZOO & M. V. R. CO.

(No. 17551.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Hinds County; E. L. Brien, Presiding Judge.

Action between Mrs. Lewis J. Jones and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Mrs. Jones appeals. Affirmed.

Burch & Stricker and Greaves, Potter & Hallam, all of Jackson, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

GRAND LODGE KNIGHTS OF PYTHIAS OF MISSISSIPPI v. STRAUTHER

et al. (No. 17390.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Chancery Court, Washington County; E. N. Thomas, Chancellor.

Action between the Grand Lodge Knights of Pythias of Mississippi and Sarah J. Strauther,

administratrix, and others. From the judgment, the party first mentioned appeals. Affirmed.

Percy, Moody & Percy, of Greenville, for appellant. Watson & Jayne, Percy Bell, and M. M. Hartman, all of Greenville, for appellees.

PER CURIAM. Affirmed.

CULP v. WOOTEN & AGEE. (No. 17363.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Chancery Court, Coahoma County; M. E. Denton, Chancellor.

Action between Ben Culp and Wooten & Agee. From the judgment, Culp appeals. Affirmed.

Maynard & Fitzgerald, of Clarksdale, and Mayes & Mayes, of Jackson, for appellant. D. A. Scott, of Clarksdale, and A. D. Somerville, of Cleveland, for appellee.

PER CURIAM. Affirmed.

DE SOTO COUNTY v. BREWER.

(No. 17485.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, De Soto County; N. A. Taylor, Judge.

Action between De Soto County and Edward Brewer. From the judgment, the County appeals. Affirmed.

R. L. Dabney, of Hernando, for appellant. Lauderdale & Lauderdale, of Hernando, for appellee.

PER CURIAM. Affirmed.

MAYFIELD v. MAYFIELD. (No. 17465.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Chancery Court, Washington County; E. N. Thomas, Chancellor.

Action between Walter Mayfield and Alta Mayfield. From the judgment, Walter Mayfield appeals. Affirmed.

William T. Wynn, of Brownsville, Tex., for appellant. Percy Bell, of Greenville, for appellee.

PER CURIAM. Affirmed.

JOHNSON v. PEYTON et al. (No. 17550.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Hinds County; E. L. Brien, Special Judge.

Action between Joel F. Johnson, Sr., and Anna Peyton and another. From the judgment, Johnson appeals. Affirmed.

Butler, Easterling & Potter, of Jackson, for appellant. P. D. Ratliff, of Raymond, and Wells, May & Sanders, of Jackson, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. DELTA TABLE & CHAIR CO. (No. 17376.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Yazoo County; W. H. Potter, Special Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and the Delta Table & Chair Company. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. E. L. Brown and Campbell & Campbell, all of Yazoo City, for appellee.

PER CURIAM. Affirmed.

JONES v. ALABAMA & V. RY. CO.

(No. 17475.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Action between Albert Jones and the Alabama & Vicksburg Railway Company. From the judgment, Jones appeals. Affirmed.

Stingily & McIntyre, of Brandon, for appellant. R. H. & J. H. Thompson, of Jackson, for appellee.

PER CURIAM. Affirmed.

JAYNE v. W. B. NASH LUMBER CO.

(No. 17340.)

(Supreme Court of Mississippi. March 27, 1916.)

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Action between R. K. Jayne and the W. B. Nash Lumber Company. From the judgment, Jayne appeals. Affirmed.

See, also, 66 South. 221, 813.

J. B. Ricketts, of Jackson, for appellant. Lamar F. Easterling, of Jackson, for appellee.

PER CURIAM. Affirmed.

MILLER et al. v. PACE.

(Supreme Court of Florida. March 1, 1916. Rehearing Denied March 7, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1129—AFFIRMANCE—BILL OF EXCEPTIONS—MOTION TO STRIKE.

Where, in the consideration of a motion to strike the bill of exceptions from a transcript, on the ground that the entire evidence adduced at the trial was not included therein, although the defendant in error before said bill of exceptions was settled or signed demanded its inclusion therein, the court gives full consideration to the entire merits of the cause and concludes that no reversible error has been made to appear, the court may affirm the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4441, 4442; Dec. Dig. \S 1129.]

2. NEW TRIAL \S 54—MISCONDUCT OF JURORS—WAIVER OF OBJECTION.

Where the counsel for the defendant in error conveys in his automobile two of the trial jurors to and from their homes to the place of

trial, and this fact is fully known to the counsel for the plaintiff in error before the rendition of the verdict, it is too late, after verdict rendered, to object or protest against such irregularity in a motion for new trial, such irregularity, to avail the party having knowledge thereof, must be seasonably objected to and protested against before verdict rendered; otherwise it will be held to have been waived.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 112-114; Dec. Dig. ¶54.]

Error to Circuit Court, Seminole County; Jas. W. Perkins, Judge.

Action between F. X. Miller and others and J. E. Pace. From the judgment, the parties first mentioned bring error. Affirmed.

T. B. Ellis, Jr., of Gainesville, and Jones & Jones of Orlando, for plaintiffs in error. C. B. Robinson and C. P. Dickinson, both of Orlando, and Geo. A. De Cottes, of Sanford, for defendant in error.

PER CURIAM. [1, 2] This cause coming on to be heard upon a motion to strike the bill of exceptions from the transcript of the record on the ground that said bill of exceptions omits and fails to contain all the evidence adduced in the trial of the cause, although the defendant in error demanded that all of said evidence be included in said bill of exceptions, all of which appears from the transcript, and in the consideration of said motion, the court having considered the entire merits of the cause, and coming to the conclusion that the plaintiffs in error have failed to make any reversible error to appear, the irregularity complained of, touching the conveying of two jurors from their homes to and from the place of trial by the counsel for defendant in error in an automobile, was not complained of until after verdict, when, to avail the plaintiffs in error, who had full knowledge thereof, it should have been raised and objected to before verdict, so that the trial court could have discharged the jurors and declared a mistrial. The judgment below is hereby affirmed at the costs of plaintiffs in error. All concur, except WHITFIELD, J., absent on account of sickness.

COLSON v. STATE.

(Supreme Court of Florida. March 1, 1916.)

(*Syllabus by the Court.*)

1. BRIBERY ¶1(2)—ELEMENTS OF OFFENSE.

Section 3476 of the General Statutes of 1906 of Florida, prescribing punishment for the crime of bribery, does not, in the definition of the crime denounced, include all the essential elements of such crime.

[Ed. Note.—For other cases, see *Bribery*, Cent. Dig. § 2; Dec. Dig. ¶1(2).]

2. BRIBERY ¶6(1)—INFORMATION—SUFFICIENCY.

An information charging one with an offense under the provisions of section 3476 of the General Statutes of 1906 of Florida is fatally defective which charges that the offense was

committed by offering to a juror a gift of money, and fails to allege knowledge on the part of the accused of the official character or capacity of the person to whom the bribe was offered, and that the thing offered was of value.

[Ed. Note.—For other cases, see *Bribery*, Cent. Dig. § 5; Dec. Dig. ¶3(1).]

Error to Criminal Court of Record, Hillsborough County; Lee J. Gibson, Judge.

Bert Colson was convicted of attempting to corrupt a juror, and brings error. Reversed.

Thos. Palmer, G. H. Cornelius, and Dickenson & Dickenson, all of Tampa, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

ELLIS, J. Bert Colson was convicted in the criminal court of record for Hillsborough county upon an information charging him in four counts with—

"attempting to corrupt one E. E. Durham, who was then and there a juror in the criminal court of record in and for Hillsborough county, Florida, by offering a gift of money to the said E. E. Durham, with the intent to influence the decision of the said E. E. Durham, in relation to a certain cause pending in said court and set for trial on the 14th day of April, A. D. 1915, wherein the state of Florida was plaintiff and Byron Crandon, alias Byron Crandell, was defendant."

The information contained four counts: The first count charged the offense in the language above quoted; the second count charged the offense as having been committed by "promising a gift of money"; the third charged the defendant with "offering a gift of money to the said E. E. Durham with the intent to bias the opinion of the said E. E. Durham," etc.; and the fourth count charged the defendant with promising a gift of money with the intent to bias the opinion of the juror.

The defendant by his attorneys moved the court to quash the information upon several grounds, the first of which was that the information charged the defendant with the commission of no crime or offense under the laws of the state, and, fourth, that the information failed to allege that E. E. Durham was at the time of the alleged offer of a bribe a juror in any cause or matter pending in court.

This motion to quash the information was overruled, and the defendant placed on trial. The jury returned a verdict of "guilty as charged in the information," and to the judgment the defendant takes a writ of error.

The seventh and last assignment of error rests upon the order of the court overruling the defendant's motion to quash the information.

[1] In the case of *Brunson v. State*, decided by this court in November, 1915, and reported in 70 South. 390, it was held that an indictment which charged the defendant with violating section 3476 of the General Statutes of Florida against bribery was defective,

which alleged that the defendant offered and promised the officer named "a certain gift or gratuity, to wit, money, with intent," etc., because the language used was not equivalent to an allegation that the money or thing offered by the defendant to the officer to influence his act was of any value.

The language in this information is, that the defendant attempted to commit the offense "by offering a gift of money" to the juror with intent, etc.

Section 3476 of the General Statutes of Florida defines the crime of bribery or offering a bribe to any legislative, executive, or judicial officer by its legal result, and does not contain all the essential elements of the crime. These essential elements are knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered was something of value, and that it was offered with the intent to influence the official action of the person to whom it was offered. 2 Bishop's Crim. Proc. (2d Ed.) § 126; 3 Chitty's Crim. Law, 696; 4 R. C. L. p. 186.

[2] The information in this case does not allege knowledge on the part of the defendant that E. E. Durham was a juror in the criminal court of record for Hillsborough county, nor that the gift of money offered was a thing of value. It might also be well to point out here that the allegation that E. E. Durham "was then and there a juror in the criminal court of record in and for Hillsborough county, Florida," does not exclude the idea that he was a talesman called one day to serve as a juror in a certain case who after the termination of that case would be discharged from further attendance upon the court and could therefore in no sense be considered as a juror of the court likely to be chosen to try the cause referred to upon the following day.

It follows, therefore, that the motion to quash the information should have been sustained.

The other assignments of error need not be discussed.

The judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD and COCKRELL, JJ., concur.

WHITFIELD, J., absent on account of illness.

SIMMONS et al., County Com'rs, v. STATE ex rel. TEW.

(Supreme Court of Florida. March 2, 1916.)

(Syllabus by the Court.)

COSTS §302—VIOLATION OF LOCAL OPTION LAW—SECURITY FOR COSTS—OPERATION OF STATUTE.

Laws of 1907, c. 5651 (Comp. Laws 1914, § 4072), requiring committing magistrates to take security for costs from the party applying

for the warrant, or an affidavit of insolvency and of "substantial injury to person or property by him suffered," has no applicability to crimes of a public nature, such as the violation of the local option law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1150-1155; Dec. Dig. §302.]

Error to Circuit Court, Holmes County; D. J. Jones, Judge.

Mandamus by the State, on the relation of P. W. Tew, against J. A. Simmons and others, County Commissioners of Holmes County. Judgment for relator, and defendants bring error. Affirmed.

James H. Finch, of Marianna, for plaintiffs in error. Will H. Price, of Marianna, for defendant in error.

COCKRELL, J. A peremptory writ of mandamus issued against the county commissioners, ordering the payment of the fee bill of the county judge on the trial and acquittal of one charged with a violation of the local option law.

The sole basis for the refusal to pay the bill when presented and for bringing the case to this court is that no insolvent affidavit or bond for cost had been filed with the county judge, which in the judgment of the county commissioners was made a prerequisite condition by chapter 5651, Laws of 1907 (Comp. Laws 1914, § 4072). This act reads:

"In all cases of justices of the peace and county judges in this state shall require payment in advance or security for costs of process service of the same and of examination unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury, to person or property, by him suffered, in which case process shall issue without payment of costs."

The constitutionality of the act is here questioned, but we may readily dispose of this case by an inspection of the act itself, which clearly has reference only to those classes of crimes where the complaining witness has suffered special damage in his own person or private property, and it has no applicability to the crimes of a public nature like the instant one.

Judgment affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

OTSTOTT et al. v. MERRYMAN.

(Supreme Court of Florida. March 3, 1916.)

(Syllabus by the Court.)

CONTRACTS §275—CONDITIONS PRECEDENT—PERFORMANCE BY PLAINTIFF.

A plaintiff may not recover upon a contract that he shows to have been based upon certain acts on his part to be performed, which were neither performed nor waived.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1207; Dec. Dig. §275.]

Error to Circuit Court, Dade County; J. Emmet Wolfe, Judge ad litem.

Action by V. L. Merryman against Abba Miller Otsott and another. Judgment for plaintiff, and defendants bring error. Reversed.

Gautier & Pine, of Miami, for plaintiffs in error. McCaskill & McCaskill, of Miami, for defendant in error.

COCKRELL, J. This case was tried by an attorney, as judge ad litem, by agreement of the parties, the resident circuit judge being disqualified. There was judgment for the plaintiff, and the defendants took writ of error.

The plaintiff's supposed cause of action arose as follows: Mrs. Otsott and her husband entered into a contract to sell Merryman and his wife a lot in Miami upon certain payments being made; the contract providing for its forfeiture should the payments be not made at certain times. Mrs. Merryman made the first payment, but the would-be purchasers were unable or unwilling to live up to the contract. A conference was then held, and it was then agreed that the Otsotts would pay the Merrymans a certain sum provided they would surrender possession of the property and execute a release of all their rights under the contract. Owing to the inability of the Otsotts to supply that agreed sum of money, the conference failed of its purpose.

Merryman proceeded at once to place upon the public records the contract of sale, and even at the trial disclaimed a willingness to accept the sum agreed upon as a settlement of his rights under the contract. It is not clear that he surrendered possession of the lot.

We think the court erred in giving him judgment for this amount. It is beyond question that the agreement to pay that or any amount was expressly conditioned upon the two Merrymans surrendering all their rights, whatever they might be, under the contract of sale. We do not know Mrs. Merryman's attitude in the matter, as she is not before us, but Merryman at the trial testified:

"I am not willing at this time upon payment to me of the amount promised to give the Otsotts a quitclaim deed in the nature of the receipt as they requested. I am not willing at this time to surrender if they paid me."

He was willing to do this only upon the payment of what he conceived to be his equities under the contract of sale, but this action is not upon that contract nor is its solution before us.

The judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur. WHITFIELD, J., absent on account of illness.

LAND v. STATE.

(Supreme Court of Florida. March 1, 1916.)

(Syllabus by the Court.)

1. INFANTS \S 85—CRIMINAL RESPONSIBILITY—NONSUPPORT OF WIFE.

A minor husband, who is able by his labors to support his wife and child, may be held criminally for withholding that support, under a statute aimed at delinquent husbands.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 171; Dec. Dig. \S 85.]

2. HUSBAND AND WIFE \S 313—NONSUPPORT—PROSECUTION—EVIDENCE OF REPUTATION.

In a prosecution against a husband for withholding support from his wife, though adultery be a defense, general reputation of the wife for chastity is inadmissible.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. \S 313.]

3. HUSBAND AND WIFE \S 313—NONSUPPORT—PROSECUTION—EVIDENCE.

Occurrences arising subsequent to the separation, and having no connection therewith, are inadmissible in evidence in behalf of a husband, charged with wife desertion.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. \S 313.]

Taylor, C. J., dissenting.

Error to Circuit Court, Madison County; M. F. Horne, Judge.

Manan Land was convicted of unlawfully withholding support from his wife and infant child, and brings error. Affirmed.

R. H. Rowe and Chas. E. Davis, both of Madison, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. The plaintiff in error was convicted of the statutory crime of unlawfully withholding support from his wife and infant child.

The only attack upon the indictment suggested in the brief is based upon the alleged invalidity of the statute by reason of a supposed defect in the title, and as to this it is admitted that this title was upheld by us in *Welch v. State*, 69 Fla. 21, 67 South. 224. Nothing is suggested to cause us to overrule that case.

[1] It is argued that the testimony falls in proof that the husband withheld the means of support. He testified that he was 18 years of age, and there is no proof that he possessed any property. There is evidence, however, that he supported his wife by his labors until he left her and went to live with and work for his father. Some support is found for this contention in the case of *People v. Todd*, 61 Mich. 234, 29 N. W. 79. The facts in that case are so meager that we have difficulty in understanding the decision. The Michigan statute requires proof that the husband has "sufficient ability" to support the wife, and the case would appear to have been decided that marriage was not an emancipation, and that the wages of a married minor

son would, despite the marriage, still go to the father. The Supreme Judicial Court of Massachusetts takes the opposite, and we think the correct, view, that the wife has the prior claim to the earnings. *Commonwealth v. Graham*, 157 Mass. 73, 81 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255. The statute is aimed at delinquent husbands, and makes no distinction as to age. This plaintiff in error was permitted under the law to enjoy the privileges of the marital status, and he must be held to the responsibilities of the state belonging to that status.

[2] Under the proviso of the statute a cause for divorce existing at the time of the desertion is made a defense, and under this proviso a witness was offered to prove the general reputation of the wife for chastity. We can find no authority for the admission of such testimony, and *Washburn v. Washburn*, 5 N. H. 196, holds such evidence clearly inadmissible. Some state courts hold that the one charged with adultery may put her reputation for chastity in evidence, just as in criminal cases the defendant may put in character evidence; but says Mr. Bishop, in his book on Marriage, Divorce, and Separation, section 1425, sustaining such ruling, it is in perfect accord with this doctrine to deny the complainant in a divorce suit the right to attack the defendant's character through general reputation for lewdness and unchastity. There are a number of cases deciding that it is permissible to prove the character of a woman with whom a husband, charged with adultery, associates or visits, or the reputation of a house visited by the wife, charged with this ground for divorce. In this class of cases the character offered is that of a third person, not a party to the cause, and it may be material as bearing upon the guilt or innocence of the party charged, as showing the probable purpose of the association or visit. See 1 Wigmore's Evidence, § 68. The case of *Sutton v. State*, 124 Ga. 815, 53 S. E. 381, recognizes this distinction. To the same effect are *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378, and *State v. Eggleston*, 45 Or. 346, 77 Pac. 738.

[3] The defendant offered, also, to prove what some one said several months after the separation. It is evident from the defendant's own statement that this occurrence had nothing to do with the separation, which he attributes to the wife's going into the nearby town with a man as to whom there is no suggestion of criminal intimacy, or any act constituting a cause for divorce.

We find no error of law, and we are entirely satisfied with the verdict rendered.

The judgment is affirmed.

SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent by reason of illness.

TAYLOR, C. J. (dissenting). I am unable to agree to the conclusion reached by the majority of the court in this case.

To two witnesses for the defendant his counsel propounded the following question:

"Do you know the general reputation of Luanny Land [the wife of defendant] for chastity in the community in which she lives?"

But the trial judge sustained objections to these questions, made by the state attorney, on the ground that said questions sought irrelevant and immaterial testimony, and the said witnesses were not permitted to answer the said questions, to which rulings exceptions were duly taken, and they are assigned as error. In my judgment the court below erred in excluding the evidence sought by these questions. If the defendant could have shown the existence of any ground for divorce recognized by our statute, then under the proviso to the statute alleged to have been violated he was not amenable to prosecution or punishment for an infraction of such statute. Adultery is under our divorce laws a well-recognized ground for divorce, and the evidence sought by the excluded questions, viz., that the wife's general character for chastity in the community in which she lived was bad, when coupled with other testimony introduced by the defendant showing the opportunity for adultery by her on three or four different occasions with three different men, tended strongly to prove the existence of that ground for divorce, and in my opinion was pertinent and admissible. *Sutton v. State*, 124 Ga. 815, 53 S. E. 381; 1 Ency. Ev. p. 628 et seq.; *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378; 2 Corp. Jur. §§ 52, 53, p. 25; *State v. Eggleston*, 45 Or. 346, 77 Pac. 738. And my view is that the judgment of conviction should be reversed, because of the exclusion of such evidence.

MILLER v. STATE.

(Supreme Court of Florida. March 2, 1916.)

(Syllabus by the Court.)

1. FORGERY — 28(4) — INDICTMENT — SUFFICIENCY.

An indictment for forgery of a bank check is not fatally defective in calling the check, set out in full, an order for money.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 70; Dec. Dig. 28(4).]

2. FORGERY — 44(2) — EVIDENCE — SUFFICIENCY.

A conviction for forgery will be set aside when there is no evidence that the party accused ever had possession of the forged instrument, or that he could write at all.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117½, 118; Dec. Dig. 44(2).]

Error to Circuit Court, Palm Beach County; H. Pierre Branning, Judge.

Archle Miller, alias Henry Harper, was convicted of forgery, and brings error. Reversed.

G. R. Broome, of West Palm Beach, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. This is a writ of error to a judgment of conviction of the crime of forgery. The indictment alleges the forgery to consist in counterfeiting the name of the payee in a check.

[1] A motion in very general terms to quash the indictment was interposed and overruled. While the indictment may lack the certainty required by the common law, we think it sufficiently charged the crime to satisfy the requirements of our law. The instrument is set out in full, and shows itself to be a check on a bank, and the fact that the pleader also styled it an order for money does not vitiate the indictment. Reading the whole indictment, it appears with sufficient clearness that the crime consisted in forging the payee's name by indorsement on the check, and this was the case sought to be made by the state at the trial.

[2] The evidence gives us greater concern. It is not shown that the accused cashed the check, and only by a remote probability that he had the check in his possession. The state attempted to prove the handwriting by a deputy sheriff. The court ruled out writings that the accused made at the preliminary trial before the committing magistrate, and we find nothing else in the record to prove that this witness ever saw any writing of the accused. There is testimony that the witness had intercepted letters and notes sent from the jail by the accused where he was being held awaiting trial, but the witness does not testify that he saw this man write them. In fact, putting aside the testimony stricken by the court, there is no proof that he could write at all.

We are therefore unwilling to sustain a conviction upon this evidence, and the judgment is accordingly reversed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

BETTS NAVAL STORES CO. et al. v. WHITTON.

(Supreme Court of Florida. March 3, 1916.)

(Syllabus by the Court.)

1. PUBLIC LANDS § 186—MORTGAGE BY ENTRYMAN—VALIDITY.

A mortgage given upon government land, which had been entered as a homestead and for which the entryman had made final proof and received a final certificate, but before there was an issuance of the patent, is valid, notwithstanding section 2296 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 4551), which provides that no government lands acquir-

ed as homesteads shall in any event become liable to the satisfaction of any debt or contract prior to the issuance of the patent therefor; the purpose of said statute being the protection of the entryman, and to prevent the involuntary appropriation of the land to the satisfaction of debts incurred prior to the issuance of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 364-366; Dec. Dig. § 136.]

2. APPEAL AND ERROR § 773(4)—FAILURE TO FILE BRIEF—AFFIRMANCE.

Where a separate appeal from a final decree has been entered by one of the defendants, but no brief has been filed on the part of such appellant, the decree appealed from may be affirmed as to such appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3109; Dec. Dig. § 773(4).]

Appeal from Circuit Court, Calhoun County; D. J. Jones, Judge.

Suit by J. K. Whitton against the Betts Naval Stores Company, a corporation, and others. From decree for complainant, defendants appeal. Affirmed.

J. M. Calhoun, of Marianna, and Milton Pledger, of Kissimmee, for appellants. Paul Carter and B. L. Solomon, both of Marianna, for appellee.

SHACKLEFORD, J. J. K. Whitton filed his bill in chancery against Willie E. Warren and Laura Warren, his wife, for the enforcement of a mortgage lien. Service by publication was obtained upon the defendants, and a decree pro confesso was entered against Willie E. Warren for failure to appear, plead, answer, or demur to the bill of complaint, as required by law. Laura Warren filed her answer to the bill, and by order of court the Betts Naval Stores Company, a corporation, was permitted to intervene and file a cross-bill against the complainant and the two defendants in the original suit. The complainant filed his answer to such cross-bill, to which the cross-complainant filed exceptions, one of which was sustained, and the others overruled, whereupon the cross-complainant filed its replication to such answer. The cause was referred to a special master, to take and report the testimony therein. On the 15th day of February, 1915, the cause came on for a final hearing upon the pleadings and the testimony taken before the special master, and a final decree was rendered in favor of the complainant and against the defendant and the mortgaged premises ordered sold by the special master. It was further ordered, adjudged, and decreed that as between the cross-complainant and the original complainant the equities were with the original complainant, and his mortgage was held to be prior and superior to the mortgage of the cross-complainant. From such final decree the cross-complainant has entered its appeal to this court and has assigned several errors, all of which we have

considered, and are of the opinion that the only assignment which merits treatment is the fifth, which is as follows:

"(5) The court erred in allowing to the complainant, J. K. Whitton, those items charged by the complainant, J. K. Whitton, to the defendant W. E. Warren before the date of the issuing of the patent to the land in question from the United States government."

The cross-complainant relies upon section 2296 of the United States Revised Statutes (U. S. Comp. St. 1913, § 4551), which is as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The evidence adduced clearly establishes that commutation final certificate had issued to Willie E. Warren upon his homestead entry for the lands described in the mortgage executed by Warren and his wife to Whitton, and that such mortgage was executed subsequent to the date of such final certificate, but prior to the issuing of the government patent to the homestead lands.

[1] We have never had occasion to pass directly upon this point, though there is a strong intimation of our views in Walker v. Johnson, 53 Fla. 1076, text 1077, 43 South. 771, wherein we said:

"Ordinarily the full beneficial interest and ownership vests in the homesteader upon receipt for final entry, and nothing remains of a perfect title but the mere routine act of signing the patent, which owing to congestion or other conditions in Washington usually requires many months and sometimes years."

In Smart v. Kennedy, 123 Ala. 627, 26 South. 198, it was held as follows:

"A mortgage given upon government land which had been entered as a homestead, and for which the entryman had made final proof and received a certificate, but before there was an issuance of the patent, is valid, notwithstanding section 2296 of the Revised Statutes of the United States, which provides that no government lands acquired as homesteads shall in any event become liable to the satisfaction of any debt or contract prior to the issuance of the patent therefor; the purpose of said statute being the protection of the entryman, and to prevent the involuntary appropriation of the land to the satisfaction of debts incurred prior to the issuance of the patent."

We think that this is a correct statement of the law. See the authorities cited in the opinion, and also those cited upon page 308 of 6 Federal Statutes Annotated.

[2] We call attention to the fact that Laura Warren also entered her appeal from the final decree, but has filed no brief in this court, and her appeal may be considered abandoned. See Wall v. Shelley, 36 Fla. 357, 18 South. 856.

The decree must be affirmed.

TAYLOR, C. J., and COCKRELL and EL-LIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

HARVEY v. HAYES.

(Supreme Court of Florida. March 8, 1916.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE — 29(2) — CONTRACTS ENFORCEABLE—SALE OF LAND.

Specific performance may be decreed against a conditional vendor who accounts to the vendee for the rents of a city lot, the vendor's letters showing the contract in detail, except as to the identity of the lot, and the tenant being advised by the vendor of the change of ownership.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 71-73, 75-82; Dec. Dig. — 29(2).]

2. SPECIFIC PERFORMANCE — 105(3)—LACHES —LAND SALE CONTRACT.

The suit for specific performance was brought with reasonable promptness.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327-341; Dec. Dig. — 105(3).]

3. APPEAL AND ERROR — 747(2)—PRESENTATION FOR REVIEW—ASSIGNMENT OF CROSS-ERRORS.

In the absence of the assignment of cross-errors, an appellee may not be heard to complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3053; Dec. Dig. — 747(2).]

Appeal from Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Suit by Sarah Ann Hayes against Corine Harvey, individually and as administratrix of the estate of W. H. Harvey, deceased. From decree for complainant, defendant appeals. Affirmed.

Watson & Pasco, of Pensacola, for appellant. R. P. Reese and E. D. Beggs, both of Pensacola, for appellee.

COCKRELL, J. This is an appeal from a decree awarding specific performance of a contract to convey a lot in the city of Pensacola and other relief.

It is argued by the appellant that there was insufficient showing of a change of possession to avoid the statute of frauds.

Omitting wholly the testimony of the appellee, an incompetent witness by reason of the death of W. H. Harvey, the evidence shows without contradiction that Harvey in his lifetime leased the property for Sarah to a tenant, whom he told that Sarah was the owner, and he was only the agent. Assuming that this statement would not in and of itself be a sufficiently notorious change of possession, there are numerous letters written by Harvey in which he refers to the contract of sale, with every element mentioned as to terms of payment, calling the property "your house," and speaking of the rentals he had collected from it for her. The only occasion for going outside these writings was to show with certainty what was meant by "your house," "the place," and as to this the oral proof was manifest. Any possible ambiguity in the contract was positively remov-

ed by the parties themselves, and the testimony of the tenant put in actual possession by the owner of the legal title that the real ownership was in the conditional vendee should not be held violative of the statute of frauds.

[1, 2] The suit was brought with reasonable promptness. There is some doubt as to when the conditional vendee was entitled to specific performance; the payments being made spasmodically, either directly from the vendee to the vendor, or in the way of rents collected by the latter. The vendee is apparently an unlettered negro woman, who much of the time was out of the state. Demand was made upon Harvey for a deed only a week before his death, but he put her off upon the plea of his physical condition, and suit was brought with reasonable promptness against his administratrix after his death.

[3] Appellee complains of an allowance to the administratrix, but she has not assigned cross-errors as required by the rule, and therefore may not be heard. *Morgan v. Jones*, 52 Fla. 543, 42 South. 242.

The decree is affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of sickness.

AULTMAN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida. March 1, 1916.)

(Syllabus by the Court.)

1. CARRIERS ⇐76 — CARRIAGE OF GOODS — CUSTODY AND CONTROL—RIGHT OF ACTION.

In an action against a common carrier, whereby it is sought to recover damages for the loss of perishable goods intrusted to such carrier for shipment, alleged to have been occasioned through the negligent handling of and unreasonable delay by the carrier in transporting such goods, the declaration is not demurrable for failing to allege that the plaintiff was the owner of the goods. The consignor has the implied right to bring such action by reason of his delivery of the goods by him to the carrier and its receipt of them for carriage, especially when it is made to appear from the allegations of the declaration that the consignee was to receive and sell the goods for the plaintiff as the consignor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 256-271, 363; Dec. Dig. ⇐76.]

2. NEGLIGENCE ⇐111(1) — ACTIONS—PLEADING.

In actions at law where the negligence of the defendant is the basis of recovery, it is not necessary for the declaration to set out the facts constituting such negligence, but an allegation of sufficient acts, causing injury to the plaintiff, coupled with an allegation that such acts were negligently done, will be sufficient.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 182, 184; Dec. Dig. ⇐111(1).]

3. CARRIERS ⇐131 — CARRIAGE OF GOODS — CUSTODY AND CONTROL.

In an action by a shipper to recover for loss of goods under Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3189), as amended by Act June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), requiring any interstate carrier to issue a bill of lading, and making it and any other carrier to which it may be delivered liable "to the lawful holder thereof" for any loss, the holding of the bill of lading is not a prerequisite to such right of action; but the statute extends its remedy directly against the carrier to whom goods are delivered for shipment in behalf of such shipper, or one who has succeeded to his rights. The declaration is not subject to demurrer for failing to allege that a receipt or bill of lading was issued for the goods, and that the plaintiff was the lawful holder of such bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 569-577, 593; Dec. Dig. ⇐131.]

Error to Circuit Court, Osceola County; *Jas. W. Perkins*, Judge.

Action by S. B. Aultman against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Johnston & Garrett, of Kissimmee, for plaintiff in error. Landis & Fish, of De Land, for defendant in error.

SHACKLEFORD, J. S. B. Aultman instituted an action at law against the Atlantic Coast Line Railroad Company, a corporation, whereby he sought to recover damages for unreasonable delay in transporting three separate shipments of celery delivered by the plaintiff to the defendant corporation at Kissimmee City, Fla., a station on the defendant's railroad, for shipment and delivery to certain named consignees in the city of Baltimore, Md., and New York City, alleged to have been occasioned by the defendant, and also for the improper and negligent handling of such shipments through lack of refrigeration. The amended declaration contains three counts, each relating to a separate shipment, and being of similar character in the allegations. The defendant interposed a demurrer to "each and every count severally" of the amended declaration, which demurrer was sustained by the court, and, the plaintiff declining to plead further, final judgment was rendered against the plaintiff, which judgment is brought here for review.

The declaration covers over seven typewritten pages, and the demurrer is almost as lengthy. We shall not copy either the declaration or the grounds of the demurrer, but shall refer to such portions of each as may seem advisable for a proper disposition of the case. The declaration is by no means a model, and could be much improved by condensation, and could be made more certain, clear, direct, and positive in its allegations, as we said was true of the declaration in the case of *Seaboard Air Line Railway v. Rentz*, 60 Fla. 420, 54 South. 13. After alleging the de-

livery by the plaintiff to the defendant at Kissimmee City, a station on defendant's railroad, of 350 crates of celery, perishable goods, in good order for transportation by the defendant to the city of Baltimore, and there to be delivered to W. E. Jones & Co., the assignee, the first count of the declaration proceeds to allege as follows:

"Said consignee had theretofore agreed to handle for plaintiff the said goods, provided they should be delivered, in good order and condition, at Baltimore aforesaid, and to sell same for plaintiff for the sum of \$875 therefor, as well as the freight charges thereon. But defendant and its connecting carriers did not carry the said goods with proper speed and care, and with proper refrigeration and attention to the said city of Baltimore, but, on the contrary thereof, transported the same with such great and unreasonable delay, and such improper attention and care, and such negligence of dispatch and refrigeration that, because of such great and unreasonable delay, and such improper attention and care, and such negligence of dispatch and refrigeration on the part of the defendant and its connecting carriers, the said goods became and were a total loss, and because of such great and unreasonable delay, and such improper attention and care, and such negligence of dispatch and refrigeration, said goods were refused by the consignee, on the ground that they were wholly decayed and valueless, and unfit for use and sale, and, because of such great and unreasonable delay, and such improper attention and care, and such negligence of dispatch and refrigeration, said goods became and were a total loss to the plaintiff in the sum of \$875. And the said defendant, and its connecting carriers, well knew that the said celery was perishable, and was liable to damage and destruction if not carried to its destination with proper speed and care, and with proper refrigeration and attention, and delivered to the consignee with proper speed and care and with proper refrigeration and attention. Yet the said defendant, not regarding its duty in the premises, did transport the said goods with great and unreasonable delay and with improper and insufficient attention and care and with negligence of dispatch and refrigeration, whereby the damage aforesaid resulted. And the said defendant has heretofore received from the plaintiff the reward demanded by it for the services which it undertook and agreed to perform, and the duties which it assumed toward this plaintiff. Yet it wholly failed and neglected to perform the said service and the said duties. Wherefore plaintiff claims damages in the amount of \$2,000."

[1, 2] We think that the declaration sufficiently alleges the ownership by the plaintiff of the property in question as to give him the right to maintain this action. See *Atlantic Coast Line R. Co. v. Partridge*, 58 Fla. 153, 50 South. 634, and authorities there cited. Also see 3 Ency. of Pl. & Pr. 825 et seq., and authorities cited in the notes. We are also of the opinion that the allegation of the acts of the defendant causing the injury to the plaintiff is sufficient to withstand the attack made by the demurrer upon that ground. See *Seaboard Air Line v. Rentz*, supra. The declaration alleges the date the celery was delivered to the defendant for shipment, and we do not think the failure to allege the date when the shipment reached its destination is fatal, since such information is peculiarly within the knowledge of the defendant, or

easily obtainable by it. We would add that there could be no possible objection to the declaration stating when the shipment did, as a matter of fact, reach the point of destination, if the plaintiff has such information, and it might be well to do so.

[3] The plaintiff admits in his brief that the action was brought under what is popularly known as the "Carmack Amendment," the same being section 20, as amended by the act of June 29, 1906 (34 U. S. Statutes at Large, 584). We had occasion to copy that portion of section 20 which is material here in *Fornel v. Florida East Coast Ry. Co.*, 65 Fla. 102, 61 South. 194, but, as a matter of convenience, we copy it again here:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It is contended by the defendant, in support of certain grounds of its demurrer, that the declaration is defective for its failure to allege or show that a receipt or bill of lading was ever issued for the shipment in question, and that the plaintiff was the lawful holder of such bill of lading. We do not think that this contention is sound. See the reasoning in *Bowden v. Philadelphia, B. & W. R. Co.* (Del. Super.) 91 Atl. 209, which is squarely in point. We would also refer to *Pecos & N. T. Ry. Co. v. Meyer* (Tex. Civ. App.) 155 S. W. 309.

There is an averment that the common carrier received and accepted the freight to be carried with proper refrigeration. We think this tantamount to an allegation that the carrier contracted for the usual and ordinary refrigeration accorded that particular kind of freight.

No further discussion seems to be necessary. The judgment must be reversed, with directions to overrule the demurrer to the amended declaration.

Judgment reversed.

TAYLOR, C. J., and COCKRELL and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

GEORGIA HOME INS. CO. v. HOSKINS.

(Supreme Court of Florida. March 1, 1916.)

*(Syllabus by the Court.)***1. CONSTITUTIONAL LAW** \S 89(1), 210 — **EQUAL PROTECTION OF LAWS—LIBERTY OF CONTRACT.**

All parties litigant who are sui juris, including insurance companies and persons having property insured, as well as others, in the eyes of the law, before the court, stand upon an equal footing, entitled to equal rights and protection, and none to special privileges. All parties are free to make whatever contracts they please, so long as no fraud or deception is practiced and the contract is legal in all respects.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 157, 679, 680; Dec. Dig. \S 89(1), 210.]

2. INSURANCE \S 615—**FORFEITURE—BREACH OF CONDITIONS.**

Where a party voluntarily accepts a fire insurance policy from an insurance company, no fraud or deception being practiced, in an action brought upon such policy the insurance company may base its defense to such action upon the failure of the insured to comply with any of the provisions of such policy, provided the same are lawful.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1530, 1532-1534; Dec. Dig. \S 615.]

3. INSURANCE \S 330(1) — **FORFEITURE—BREACH OF CONDITIONS.**

Where a person voluntarily accepts a fire insurance policy from an insurance company, no fraud or deception being practiced, containing the following provision: "This entire policy, unless otherwise provided by agreement and indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage"—when there is no element of waiver or estoppel arising from knowledge of the company or its agent, the execution of a chattel mortgage upon the property insured renders the policy void and constitutes a good defense to an action brought thereon. The insured is bound by the terms of the policy which he accepts, and the fact that no inquiries were made by the company or its agent, and no representations were made by the insured in a written application or otherwise, cannot strike out such provision in the policy. Likewise the incumbering of the insured property by the execution of a chattel mortgage thereon subsequent to the issuance of an insurance policy constitutes a good defense to an action brought thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 829, 830; Dec. Dig. \S 330(1).]

4. CHATTEL MORTGAGES \S 41 — **INSURANCE** \S 330(2)—**FORFEITURE OF POLICY—REQUISITES OF MORTGAGE.**

No particular form of words is necessary to constitute a chattel mortgage. If, without regard to form, the instrument is in legal effect a chattel mortgage, it will void a fire insurance policy which contains a provision to the effect that, if the insured personal property is or becomes incumbered by a chattel mortgage, the policy shall be void.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 84; Dec. Dig. \S 41; Insurance, Cent. Dig. \S 831-835, 837, 839; Dec. Dig. \S 330(2).]

5. CHATTEL MORTGAGES \S 40 — **NATURE OF INSTRUMENT—QUESTION OF LAW OR FACT.**

As to whether or not a written instrument is in legal effect a chattel mortgage is a ques-

tion of law to be determined by the court, and it is error to submit such question to the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 46; Dec. Dig. \S 40.]

6. EVIDENCE \S 461(1)—**PAROL EVIDENCE AFFECTING WRITINGS—CONSTRUCTION OF CONTRACT.**

Where a written instrument has been introduced in evidence, it is error to admit the testimony of one of the parties who executed such instrument as to what he and the other party who executed the same intended thereby, especially when this court has construed an instrument practically identical with the instrument introduced in evidence and announced its character and legal effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2129; Dec. Dig. \S 461(1).]

Error to Circuit Court, Jackson County; D. J. Jones, Judge.

Action by W. H. Hoskins against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. B. Farley, of Marianna, for plaintiff in error. John H. Carter and Will H. Price, both of Marianna, for defendant in error.

SHACKLEFORD, J. On the 7th day of March, 1910, W. H. Hoskins instituted an action at law against the Georgia Home Insurance Company, a corporation, upon a fire insurance policy. The declaration substantially follows the statutory form in such cases; a copy of the policy being attached thereto. The policy is dated the 5th day of August, 1909, to cover for one year the household and kitchen furniture of W. H. Hoskins to the amount of \$500, which property is alleged to have been destroyed by fire on the — day of October, 1909. On the 2d day of May, 1910, the defendant filed the following pleas:

"(1) That the alleged contract sued upon called a policy contains a provision and stipulation in substance and to the effect as follows: This entire policy, unless otherwise provided for by an agreement indorsed thereon or added thereto, shall be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. And defendant further avers that the subject of insurance covered by said policy was personal property, and there never was any agreement indorsed thereon or added to said policy permitting or otherwise providing the said property had been or might become incumbered by a chattel mortgage, but that in violation of said stipulation and provision the said plaintiff had incumbered said property by executing a chattel mortgage on same to H. V. Maund, dated the 1st day of February, 1909, and another chattel mortgage to H. V. Maund, executed October 18, 1909, and that said first chattel mortgage was in full force, not paid, satisfied, or canceled at the time of the execution by defendant of the policy sued upon and at the time of said alleged loss of the property by fire as in the declaration alleged, and that the second of said mortgages was executed after the time of the execution of the policy sued on, and was in full force, not paid, satisfied, or canceled at the time of said alleged loss of the property by fire as in the declaration alleged.

"(2) And for second plea defendant says that the alleged contract sued upon called a policy

contains a provision and stipulation in substance and to the effect as follows: This entire policy, unless otherwise provided for by agreement indorsed thereon or added thereto, shall be void, if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. And defendant further avers that the subject of insurance covered by said policy was personal property, and that there never was any agreement indorsed thereon or added to said policy permitting or otherwise providing the said property had been or might become incumbered by a chattel mortgage, but that in violation of said stipulation and provision, after the issuance of said policy and its delivery and acceptance, the said plaintiff did mortgage the property the subject of the said insurance to one H. V. Maund by executing to said H. V. Maund a chattel mortgage upon said property dated October 16, 1909, for \$102.50, due October 1, 1910, which incumbrance and mortgage was in full force, not paid, satisfied, or canceled at the time of the said alleged loss of the property by fire as in the declaration is alleged.

"(3) And for the third plea the defendant says: That, contrary to the stipulations and conditions of the policy of insurance sued upon, the plaintiff had on the 1st day of February, 1909, incumbered the said property described in said policy of insurance with a chattel mortgage executed by plaintiff to one H. V. Maund, and after the execution and delivery of said policy the plaintiff further violated the said stipulations and provisions of said policy by again incumbering said personal property so insured by another chattel mortgage of said H. V. Maund executed on the 16th day of October, 1909, which mortgages were and continued in force and unpaid, uncanceled, and unsatisfied from their execution until after the alleged loss by fire set up in plaintiff's declaration; and of said mortgages defendant had no notice, and no agreement permitting or otherwise providing for such incumbrance of such property was ever indorsed upon said policy, nor was such incumbrance ever consented to or acquiesced in by the defendant.

"(4) And for a fourth plea the defendant says: That at the time said policy of insurance was executed and delivered the plaintiff had already incumbered said property the subject-matter of the insurance by a chattel mortgage of which the defendant knew nothing, contrary to the stipulations in said policy contained, which chattel mortgage was then and there a valid existing lien and incumbrance upon the personal property described in said policy of insurance, and was not consented by the defendant in writing or otherwise, the lien and chattel mortgage being a chattel mortgage to one H. V. Maund upon all the personal property of plaintiff, including his household and kitchen furniture of every kind and character in Jackson county, Fla., and thereby the said policy became void and of none effect under the stipulations of said policy set up in plaintiff's declaration.

"All of which matters and things this defendant is ready to verify and prove, and of this it put itself upon the country."

A replication was filed to these pleas, which was subsequently withdrawn by the agreement of counsel, and the following replications filed on the 21st day of April, 1915:

"Now comes the plaintiff, by his attorneys, and with the consent of defendant, by its attorneys, withdraws the replication heretofore filed to defendant's pleas herein, and for replication to said pleas, says:

"(1) That he did not make the instruments mentioned in said pleas, nor either of them.

"(2) That he never executed a chattel mortgage upon the property insured either before said policy was issued or afterwards.

"(3) That as to the instruments referred to in said pleas the defendant had notice of the one

of February 1, 1909, before and at the time said policy was issued and delivered by defendant, and afterwards up to the time of the fire, but neglected to declare said policy void or to return the premium received by it thereon, and neglected to notify plaintiff that the giving of another such instrument would avoid said policy.

"Subject to the foregoing replications, plaintiff joins issue upon said pleas and each of them."

And on the same date the following additional replications were filed:

"The plaintiff for additional replications to defendant's pleas says:

"For replication to the second plea, that the policy sued upon was issued by defendant upon an oral application by plaintiff, and no question was asked plaintiff about mortgages or incumbrances upon the property, and no representation was made by plaintiff relative thereto, and plaintiff did not warrant against incumbrances or chattel mortgages, and, notwithstanding this, defendant issued said policy and delivered same to plaintiff, and accepted from plaintiff the premium thereon, and did not thereafter ever offer to return said premium or cancel said policy.

"For replication to the first, third, and fourth pleas, and to each of them, the policy sued on was issued by defendant upon the verbal application of plaintiff, and no question was asked in regard to chattel mortgage against said property, present or future, and no representation was made by plaintiff that said property was not then, or would not in future be, incumbered by mortgage, and no warranty to that effect was demanded by defendant nor made by plaintiff, and at no time after the issuance and delivery of said policy to plaintiff and the acceptance by defendant of the premium thereon was plaintiff notified that an incumbrance of said property would be construed as a forfeiture thereof by defendant, and, notwithstanding this, defendant accepted and retained the premium on said policy, and did not offer to return same nor to cancel the policy."

To these additional replications the following demurrer was interposed:

"Now comes the defendant by its attorney, and demurs to the additional replications of the plaintiff, and says that the said additional replications and each of them are bad in substance, upon the following grounds, to wit:

"(1) The additional replication to defendant's second plea is vague, indefinite, uncertain, and insufficient, and sets up matters immaterial to the issue.

"(2) The policy itself is the best evidence of the contract of insurance, and its acceptance by plaintiff binds him to its terms, stipulations and warranties.

"(3) The replication to the second plea shows no waiver of the stipulation of the policy set up in the second plea.

"(4) The additional replication to the first, third, and fourth pleas is vague, indefinite, uncertain, and insufficient, and sets up matters immaterial to the issue.

"(5) The policy itself is the best evidence of the contract of insurance, and its acceptance by plaintiff binds plaintiff to its terms, stipulations, and warranties.

"(6) The replication to first, second, and fourth pleas shows no waiver of the stipulations of the policy set up in said pleas.

"(7) To both of said additional replications: The giving of a mortgage after the policy as written was accepted would violate the stipulation and warranty set up in the pleas."

Upon this demurrer the following order was made:

"This cause coming on to be heard upon demurrer of defendant to plaintiff's additional replication to defendant's pleas, it was ordered that

said demurrer be, and the same is hereby, sustained as to the replication to second plea and sustained to the replication to first and second and fourth pleas so far as the mortgage of October 16, 1909, is concerned, but overruled as to mortgage of February, 1909."

The defendant joined issue upon the replications, and the cause was submitted to a jury upon the issues made by the pleadings as they then stood, which resulted in a verdict in favor of the plaintiff for \$801.33 for principal, interest, and attorney's fees, upon which judgment was entered, which judgment is brought here for review, and 19 errors are assigned.

[1, 2] We shall not discuss in detail the errors assigned. The order made by the court upon the demurrer interposed to the additional replications is not entirely clear. Undoubtedly the demurrer was sustained as to the additional replication to the second plea, which had the effect of eliminating such replication and leaving issue joined on such pleas by the plaintiff. Such order did not mention the third plea, but obviously intended to refer to such third plea, and inadvertently repeated the word "second," to which second plea the demurrer had already been sustained. It will also be observed that the fourth plea does not mention or refer to the mortgage averred to have been executed in October, 1909. As we understand the effect of this somewhat confusing or ambiguous order, it eliminated the February mortgage as a defense. We are strengthened in this conclusion by virtue of the fact that the court by its general charge would seem to have submitted the case to the jury upon the issue raised by the second plea, as to whether or not the plaintiff had incumbered the property by executing a chattel mortgage thereon subsequent to the writing and delivery of the policy. The policy contains the following stipulation:

"This entire policy, unless otherwise provided by agreement and indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

As we held in *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922:

"All parties litigant who are sui juris, including insurance companies and persons having property insured as well as others, in the eyes of the law, before the court, stand upon an equal footing, entitled to equal rights and protection, and none to special privileges. All parties are free to make whatever contracts they please, so long as no fraud or deception is practiced and the contract is legal in all respects.

"Where a party voluntarily accepts a fire insurance policy from an insurance company, no fraud or deception being practiced, in an action brought upon such policy the insurance company may base its defense to such action upon the failure of the insured to comply with any of the provisions of such policy, provided the same are lawful."

[3] As will be observed, the stipulation in the policy which we have copied above expressly provides that the policy shall be void

if the personal property insured "be or become incumbered by a chattel mortgage." We know of no reason why such provision is not lawful or why the failure of the insured to comply therewith would not constitute a good defense to an action brought upon the policy. See 2 *Clement's Fire Insurance*, tit. 5, entitled "Incumbrance by Chattel Mortgage," beginning on page 191, especially rule 11, found on page 199, which is as follows:

"When there is no element of waiver or estoppel arising from knowledge of the company or its agent, the existence of a chattel mortgage renders the policy void. The insured is bound by the terms of the policy which he accepts, and the fact that no inquiries were made by the company or its agent, and no representations by the insured in a written application or otherwise, cannot strike out the provision of the policy."

Also see the authorities there cited in support of the text.

The case of *Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co.*, 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 875, is well in point, wherein it was held:

"Insured, by accepting a policy on incumbered property containing a condition that it should be void in case the property insured should be or become incumbered prior or subsequent to the date of the policy, was charged with notice of and bound by such condition.

"Where a policy insuring certain incumbered personal property was issued without written application, knowledge, or notice on the part of the insurer or its agent that the property was incumbered, insurer did not waive a condition that the policy should be void in case the property was or should become incumbered.

"Where a policy insuring incumbered property was void from its inception because of the incumbrance, the insurer was not required to return or offer to return premiums voluntarily paid before notice of the invalidity of the policy as a condition precedent to its right to avail itself of such defense in an action on the policy."

We would also refer to our discussion in *J. I. Kelly Co. v. St. Paul Fire & Marine Insurance Co.*, 56 Fla. 456, 47 South. 742, 16 Ann. Cas. 654, wherein we were dealing with the provision in the policy that the same should be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed, which provision we held to be "a wise and proper safeguard." As we said in *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, text 223, 49 South. 922:

"The plaintiff having accepted a policy from the defendant with such a clause or condition of the contract therein, why should not the defendant have the legal right, in an action brought against it on such policy, to base its defense on such provision?"

Under such provision the defendant not only has the right to defend by reason of a mortgage having been executed on such property subsequent to the execution of the policy, but also by reason of the fact that a mortgage existed thereon at the time such policy was issued, of which the defendant company had no notice. By depriving the de-

defendant of the benefit of such defense the trial court committed error. We find from the testimony adduced that Moses Guyton, the agent of the defendant, who issued the policy, testified that at the time he issued the same he did not, as such agent, know of the existence of any incumbrance upon the property insured. We further find from the evidence that the policy was dated the 5th day of August, 1909, and that the first chattel mortgage was executed upon the insured property by the plaintiff to Maund on the 1st day of February, 1909, to secure the payment of a promissory note payable on or before the 1st day of May, 1909, for the sum of \$166, but the note and mortgage together formed only one instrument, and it was expressly stipulated therein that \$50 of the above amount was to be paid at maturity, and the "balance to be extended till October 1, 1909." If the balance was as a matter of fact so extended, it remained as an existing incumbrance upon the property at the time the policy was issued. As to just when all of this amount was actually paid the testimony of neither the plaintiff nor Maund is very clear. We shall not undertake to discuss their testimony. Even if we should assume that the testimony established the payment of the entire amount of this first mortgage prior to the issuance of the policy, that would not cure the erroneous ruling made by the court upon the pleadings. Be all this as it may, the testimony clearly establishes that a second chattel mortgage was executed by the plaintiff to Maund on the 16th day of October, 1909, upon the insured property to secure the payment of the sum of \$102.52, payable on or before the 1st day of October, 1910. It makes no difference when the amount so secured was paid, whether before, at, or after maturity, or whether prior or subsequent to the fire which destroyed the insured property; its execution was a clear violation of the provision in the policy relating to incumbrances which we have copied above. After some

vacillation and uncertainty in his testimony, the plaintiff finally admitted that he paid such amount after the fire had occurred, and after Maund had brought suit against him.

[4-6] The plaintiff sought to avoid the force and effect of this instrument by contending that it was not a chattel mortgage and introduced Maund as a witness in his behalf, who was permitted to testify, over the objection of the defendant, to the effect that neither he (Maund) nor the plaintiff intended or considered such instrument as a chattel mortgage, but only as "a retain title paper" for the horse which Maund had sold to the plaintiff. There is no occasion to set forth Maund's testimony. It is sufficient to say that the court erred in admitting his testimony as to his construction of such instrument and as to what he and the plaintiff intended thereby. We had occasion to consider an instrument practically identical with the instrument which was introduced in evidence in the instant case in *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 59 Fla. 322, 51 South. 547, and held that such instrument was both a retain title instrument and a chattel mortgage. We shall not repeat what we said there. See, also, our discussion in *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 62 Fla. 239, 56 South. 391, Ann. Cas. 1913D, 1197. Also see 2 *Clement's Fire Insurance*, 195, where it is said:

"No particular form of words is necessary to constitute a chattel mortgage. If, without regard to form, the instrument is in legal effect a chattel mortgage, it voids the policy."

And a number of authorities are cited which support the text.

It necessarily follows from what we have said that the judgment must be reversed.

Judgment reversed.

TAYLOR, C. J., and COCKRELL and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

NEW STANDARD CLUB v. McRAVEN,
City Tax Collector. (No. 18773.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

1. EQUITY — 373 — PRACTICE — HEARING ON BILL AND ANSWER.

Where complainant, within the time allowed by law for taking testimony, sets down the cause for hearing on bill and answer, the answer is, under Code 1906, § 603, to be taken as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 711-713; Dec. Dig. — 373.]

2. TAXATION — 251 — EXEMPTIONS — BURDEN OF PROOF.

One claiming to fall within a statute exempting property from taxation has the burden of proof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 343-345; Dec. Dig. — 251.]

3. TAXATION — 204(2) — EXEMPTIONS — STATUTES.

Statutes exempting property from taxation are to be strictly construed against the exemption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 322; Dec. Dig. — 204(2).]

4. TAXATION — 241(1) — EXEMPTIONS — "CHARITY."

Code 1906, § 4251, par. d, exempts from taxation all property, real or personal, belonging to religious or charitable societies and used exclusively for the purposes of such societies and not for profit. A social club, the main purpose of which was to furnish diversion for the members, their families and friends, and which maintained a clubhouse for that purpose, but incidentally dispensed charity to the members and outsiders, claimed that its property was exempt. *Held*, that such club did not fall within such section and its property was subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 389, 391, 393; Dec. Dig. — 241(1).]

For other definitions, see Words and Phrases, First and Second Series, Charity.]

5. TAXATION — 241(3) — EXEMPTIONS — FRATERNAL ORDERS.

Under Code 1906, § 4252, exempting from taxation the property and revenues of any religious, charitable, or benevolent society on the lodge system, where no dividends are declared, a social club which collected dues and devoted part of them to charitable purposes, but was not run on the lodge plan, cannot escape taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 392; Dec. Dig. — 241(3).]

Appeal from Chancery Court, Lauderdale County; G. C. Tann, Chancellor.

Bill by the New Standard Club against E. B. McRaven, City Tax Collector of the City of Meridian, Mississippi. From a decree for defendant, complainant appeals. Affirmed.

This is an appeal from the chancery court of Lauderdale county. The city of Meridian assessed the property of the New Standard Club, consisting of its clubhouse and grounds, in the city of Meridian, for taxes for the fiscal year of 1914. There was no appeal

from the assessment, but when the tax collector undertook to collect the taxes, pursuant to the assessment, the New Standard Club filed its bill of complaint enjoining the collection of the taxes.

The tax collector answered the bill of complaint, and the cause was set down for hearing by the defendant within the time allowed by law for taking depositions on bill of complaint, exhibit thereto, and answer of defendant. The chancellor dissolved the injunction, and rendered a decree in favor of defendant for taxes due, together with interest and damages, as provided by law. From this decree, complainant appeals.

Appellant contends that certain property situated in the city of Meridian and owned by it is exempt from taxation, under the provisions of paragraph "d" of section 4251, Code 1906, and under the provisions of section 4252, Code 1906.

Paragraph "d," section 4251, Code 1906, is as follows:

"All property, real or personal, belonging to any religious or charitable society, and used exclusively for the purpose of such society and not for profit. All property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purpose."

Section 4252, Code 1906, is as follows:

"All public libraries and buildings in which the free public schools are taught, and the lots on which the same are situated, not exceeding four acres in dimensions, without cost to the state or any county or municipality thereof for rent or lease, and also the real and personal property of library associations, used for library purposes where no dividends are declared, and to which the children attending the public schools have free access; and all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes."

The bill of complaint sets out the charter of incorporation, and it shows that the declared purpose of the New Standard Club, as set out in its charter, is as follows:

"* * * For the promotion of social, literary, and intellectual culture, and a closer union of its members in the bonds of friendship; for administering benevolence and charity to its members and others, and towards the carrying out of said object and purpose, may own or lease a clubhouse and grounds or other apartments, own and conduct a library, conduct lectures for the benefit and instruction of its members or the public, accumulate and hold or invest a fund for the care and relief of its members and other charitable purposes, conduct carnivals, bazars, and other entertainments for the instruction, amusement and pleasure of its members or the public, or the advertisement of its home city, or for the benefit of its said benevolent and charity fund, and shall have such other lawful powers incidental and necessary to the carrying out of its purpose and object."

The bill of complaint charges that the defendant corporation derives its funds for

carrying out its objects and purposes solely through the payment of dues and assessments, as provided in its by-laws, and that said corporation has no capital stock and does not derive any revenue otherwise, and that under its by-laws, there is created a fund for the purpose of administering benevolence and charity to the members of the club, and others, by setting aside from monthly dues of members of the club, 2½ per cent. of the dues paid, and that same is deposited with the treasurer of the club as a benevolent and charity fund. The bill shows that in all about \$2,880 annually is collected as monthly dues from the members, and that all amounts received by the club, other than the 2½ per cent., is used to maintain a library, lecture hall, and meeting place and home for the use of the club, and that to this end, the club has purchased a lot in the city of Meridian and erected thereon a building and furnished same, at a total cost of \$24,000. The bill sets out that \$22,500 of the purchase money was to be paid in deferred payments, secured by first and second mortgages on the club property, and that all the dues paid by the members, except the 2½ per cent. set aside for benevolent and charity purposes are used solely for the purpose of maintaining the corporation, the furtherance of its objects and purposes, and paying paving assessments, interest and insurance, and in paying its principal or mortgage indebtedness, and that the personal property assessed is used exclusively and directly for the purposes and object set out, and that no revenues are derived, nor dividends declared, from the use of said property.

The bill further sets out that no part of the real or personal property owned by the said corporation is leased to or used by any other persons, and is used only, and occupied, as set out therein; that no part of the funds or property is held or used for private or corporate benefit, but that the whole thereof is used exclusively to carry out the object and purposes of its existence. The complainant alleged that it was making donations from time to time, out of the funds in question, to the Mattie Hersee Hospital, a public and charitable hospital domiciled in the city of Meridian, and to the King's Daughters, an organization for public charity in the city of Meridian, and other public charities, and that in every instance, the contributions to charitable purposes have been given to public charities at large in the city of Meridian, and that it has in every instance dispensed charity in general relief of the distressed of the human family as contemplated by the law with reference to the exemption of certain institutions mentioned in sections 4251 and 4252, Code 1906.

The facts set out above, but not the legal conclusions to be drawn therefrom, are practically admitted in the answer of defendant; but the answer sets out affirmatively:

"That the New Standard Club is a social organization of the city of Meridian, which owns, operates, and maintains a clubhouse, or a place of meeting for the entertainment of the members of said club, their families, and their friends; that its revenues are derived from initiation fees and from monthly dues paid by the members of said club, and that while as a matter of fact it has a small charitable fund, consisting of 2½ per cent. of the monthly dues paid by the members, and while as a matter of fact it makes donations from this charitable fund to divers worthy objects of charity and benevolence; yet the chief end, object, and purpose for which the New Standard Club was organized, and the chief end, purpose, and object for which it acquired the property in controversy, constructed the building and furnished and equipped the same, was to provide a place for the entertainment in a social way of the members of said club, their families, visitors, and friends, and that the charitable contributions of said club are merely incidental to its chief objects and purposes"

—and that said club is not a religious or charitable society, nor is it a benevolent order on the lodge system.

Jacobson & Brooks, of Meridian, for appellant. Amis & Dunn, of Meridian, for appellee.

POTTER, J. (after stating the facts as above). [1] In this case, the complainant set down the cause for hearing on bill and answer before the expiration of the time allowed by law for taking testimony; therefore, under section 603, Code 1906, the answer must be taken as true.

[2] The law imposes upon the complainant in this case the duty of showing affirmatively that the property in question is clearly within the terms of the exemption statute, as it is the universal law that one claiming an exemption from taxation assumes the burden of showing that he is entitled to it. *Morris Ice Co. v. Adams*, 75 Miss. 410, 22 South. 944.

[3] Statutes of exemption from taxation must be strictly construed, and the language employed must be construed most favorably to the state. *Yazoo, etc., R. Co. v. Thomas*, 65 Miss. 563, 5 South. 108; *Greenville Ice & Coal Co. v. City of Greenville*, 69 Miss. 86, 10 South. 574; *State v. Simmons*, 70 Miss. 485, 12 South. 477.

[4] The main contention of appellant is that it is a charitable society, and that the property in question is used exclusively for the purpose of such society, and not for profit. The answer of the defendants sets out, however, that the New Standard Club is a social organization, and that the main purposes of its existence is to furnish a place of meeting for the entertainment of the members of said club, their families, and their friends, and that the dispensation of charity is merely an incidental feature. In the case of *Odd Fellows v. Redus*, 78 Miss. 352, 20 South. 163, in construing section 3744, Code of 1892, paragraph "d" (section 4251, Code 1906, being practically a rescript thereof), this court, through Judge Terral, said:

"The lodge claims that this property is exempt from taxation under paragraph 3744, Code, which exempts all property, real or personal, belonging to any charitable society, used exclusively for the purposes of said society, and not for profit. The exemption cannot be maintained. It does not come within the letter of the act. The property is used for profit, and not for charity, and so cannot be exempt. It is said in argument that the income is used for charity, and that makes it the same in effect as if the property itself was used for charity. But that is not the letter of the law, nor its spirit."

The complainant club is a social organization, not a charitable society, though it does some charity. The property in question is used for a clubhouse, and not for any charitable use. Neither the property in question, nor anything growing out of it, is devoted to charitable uses or purposes, nor is there any pretense that this property is exempt upon any other ground named in said subsection "d" of section 4251, Code 1906; therefore we conclude that said property is not exempt thereunder.

[5] It is urged, however, that the property of complainant is exempt under section 4252, Code 1906. This contention is untenable. Section 4252 refers to charitable societies or benevolent orders run on the fraternal or benevolent lodge system. The complainant in this case is an incorporated social club, and is not run on the fraternal or benevolent lodge system. The New Standard Club does not come under the provisions of said section, simply because the section does not undertake to exempt social clubs.

The complainant was not entitled to the relief sought, and the decree of the chancellor is therefore affirmed.

STATE ex rel. BROWN, Land Com'r, v. SCOTTISH AMERICAN MORTGAGE CO., Limited. (No. 17632.)

(Supreme Court of Mississippi, Division B. April 8, 1916.)

1. CORPORATIONS \S 631, 661(1) — FOREIGN CORPORATIONS—RIGHT TO SUE—COMITY.

Under the law of comity a foreign corporation can do business in another state or country and sue in its courts, unless expressly prohibited by statute or contrary to public policy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2489-2494, 2528, 2563, 2565-2567; Dec. Dig. \S 631, 661(1).]

2. ALIENS \S 12(4)—DISABILITIES—HOLDING REAL PROPERTY—STATUTE.

Under Code 1906, \S 2768, prohibiting non-resident aliens from holding land, but providing that they might take a lien on land to secure a debt and, under sale to enforce the payment of the debt, might purchase the land and hold it not longer than 20 years, with full power to sell it in fee to a citizen, where the state filed a suit to escheat the title of a foreign corporation to land bought by it at a sale under a trust deed given to secure a loan before the expiration of the 20-year period during which the corporation could hold the land, and filed a notice of lis pendens which practically prevented any sale thereof, the time such suit was pending, not

only prior to the decision in the court below in favor of the corporation, but also pending an appeal by the state, should not be counted as part of the time the corporation could hold the land.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. \S 39, 41-46; Dec. Dig. \S 12(4).]

3. ALIENS \S 12(4)—DISABILITIES—HOLDING REAL PROPERTY—STATUTE.

There should also be excluded from such period the time during which the land was in the possession of a resident under a contract of purchase, which contract was subsequently rescinded because of a defect in the title, since, during that time, the general purpose of the statute to invest ownership in the residents of the state was being accomplished.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. \S 39, 41-46; Dec. Dig. \S 12(4).]

4. ALIENS \S 12(4)—DISABILITIES—HOLDING LAND—PURCHASE TO PROTECT LIEN.

Where a foreign corporation, which had purchased land at a sale under a trust deed securing a debt to it, contracted to sell it to residents of the state, and thereafter, because of a defect in the title, agreed to rescind the contract and repay the purchase price, it did not, by that repayment, become a purchaser at a sale to enforce the payment of a debt within Code 1906, \S 2708, and authorized to hold the land for 20 years thereafter, since, after the rescission, it merely held the title originally acquired by it, and the statute contemplates an involuntary sale at which the alien only buys as a last resort to protect his lien.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. \S 39, 41-46; Dec. Dig. \S 12(4).]

Appeal from Chancery Court, Franklin County; R. W. Cutrer, Chancellor.

Action by the State, on the relation of M. A. Brown, as Land Commissioner, against the Scottish American Mortgage Company, Limited, to escheat certain lands held by the defendant. Judgment for the defendant, and plaintiff appeals. Affirmed.

Theo. McKnight, of Vicksburg, for appellant. Caruthers Ewing and Wilson & Armstrong, all of Memphis, Tenn., for appellee.

STEVENS, J. This action was instituted by the state of Mississippi on the relation of its land commissioner, to escheat certain lands purchased by appellee at a sale foreclosing a mortgage or deed of trust held by appellee against one Nathan Bunckley. The suit was brought April 29, 1913, and is based on the ground that appellee is a nonresident alien. The bill alleges that appellee is a nonresident alien corporation; that said corporation, April 26, 1888, loaned Nathan Bunckley \$5,000, and to secure the payment of same, took a deed of trust on the lands in dispute, with one Albert S. Caldwell as trustee; that thereafter, one Roscoe Stinson was appointed substituted trustee, and, acting under his appointment, the substituted trustee, on December 30, 1892, sold the lands embraced in the deed of trust, at public auction, in accordance with the terms of the mortgage; at which sale appellee appeared and bid in the lands to protect its lien, and obtained a conveyance therefor from the substituted trustee; that appellee entered into

possession of the lands January 6, 1893, charged with the duty of conveying, and has not conveyed, the particular lands involved in this suit, to a citizen of this state within 20 years, as provided by section 2439, Code 1892, and section 2768, Code 1906. This section of the Code reads as follows:

"Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may; but non-resident aliens shall not hereafter acquire or hold land, although a non-resident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt, may purchase the same, and thereafter hold it, not longer than twenty years, with full power during said time to sell the same in fee to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or non-resident, if he be a bona fide purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person."

It appears that one John M. Judah, attorney in fact for appellee, undertook to appoint the substituted trustee, and also that Mr. Judah actually bid in the land at the trustee's sale and received, himself, a deed therefor, but that this conveyance was made to him for the mortgage company; that John M. Judah, in March, 1894, conveyed by special warranty deed the lands in question to Henry I. Sheldon, who, in May following, executed a declaration of trust in the lands in favor of appellee. In other words, it is conceded that although the title came through Judah and Sheldon, that appellee was the real claimant and owner of the lands in September, 1895, when Henry I. Sheldon conveyed the lands to Paul L. Lizzie C., and E. Fisher Jones. This conveyance was partly in consideration of a conveyance to the said Henry I. Sheldon by the Joneses of a house and lot in Memphis, Tenn., and in the consummation of this trade, appellee took 20 promissory notes, payable annually from January 1, 1897, and secured by deed of trust on the lands conveyed. After Paul L. Lizzie C., and E. Fisher Jones purchased these lands, they detected what appeared to them to be a serious defect in the title, made complaint to the officers of appellee about this alleged defect, and refused to pay the first note executed by them as a part of the purchase price; and after considerable correspondence between them and the representatives of appellee, rescinded their contract of purchase, reconveyed the lands to appellee, and had delivered up to them their notes and trust deed. This contract of rescission bears date of February 16, 1897. On April 28, 1911, the state filed a bill of complaint to escheat these lands, and caused to be filed a regular *lis pendens* notice. This first bill, however, was dismissed on the 28th of April, 1913; and on the next day, April 29th, the bill of complaint in the present cause was

filed. The mortgage which appellee took up on the lands contained a provision for a sale by trustee, and with this express agreement: " * * * And at such sale, any of the parties hereto may become purchasers."

At the time the original deed of trust was executed, section 1230, Code 1880, was in force, and expressly provided that:

"Aliens may acquire and hold land in this state, and may dispose of it, and transmit it by descent, in the same manner as citizens * * * may do."

Appellee has been so unfortunate as to be involved in a series of litigations in reference to these lands, as reflected by the following cases: *Bunckley v. Jones*, 79 Miss. 1, 20 South. 1000; *Mortgage Co. v. Bunckley*, 81 Miss. 599, 33 South. 416; *Mortgage Co. v. Bunckley*, 88 Miss. 642, 41 South. 502, 117 Am. St. Rep. 763; *Mortgage Co. v. Butler*, 99 Miss. 56, 54 South. 666, Ann. Cas. 1913C, 1236; *Bunckley v. Mortgage Co.* (Circuit Court of Appeals, Fifth Circuit) 185 Fed. 783, 107 C. C. A. 653.

The result of this litigation, generally speaking, was the holding that one Albert Bunckley was entitled to a one-fourth interest in a large portion of the lands; and that the appointment of the substituted trustee was void because made by an attorney in fact, when there was no provision in the trust deed authorizing it. It appears that appellee has been adjudged to have acquired a good title, however, by adverse possession.

The answer submits to the court the defense that, at the time the mortgage was executed, appellee had the right to purchase and hold the lands in fee forever; that while enjoying such right it entered into the contract with Nathan Bunckley in good faith, and, as a part of its contract, had the vested right to purchase the lands at foreclosure sale. It is next contended that if the mortgage company cannot claim as a purchaser at the original trustee's sale, that it, as a nonresident alien, took a lien on the lands to secure \$2,000 which the Joneses agreed to pay appellee as a part of the purchase price of the lands, as evidenced by the deed of trust executed by the Joneses, and that the contract of rescission of February, 1897, constituted a purchase by appellee at a sale to enforce payment of the Joneses' debt; and that under the provisions of the Code, appellee has a right to hold the land for 20 years from and after February 16, 1897. In other words, it is contended that the mortgage company held a valid and subsisting lien against the Joneses, taken in accordance with the provisions of law, and that instead of having the trustee sell the land to enforce payment, appellee simply purchased at a private sale, and took a reconveyance, at a time when the Joneses were in default, and as full settlement and satisfaction of the lien lawfully held at that time. It is contended, further, that whether the deed is to be regarded as a purchase in fee

forever, or whether it took the lands impressed with the duty of selling or disposing of them under the statute, that it has not yet enjoyed the full right and power to sell, because the state, by its bill of complaint exhibited April 28, 1911, restrained and prevented appellee from consummating the sale of any portion of the land; that the filing of this bill and the lis pendens notice accompanying the same effectually warned the public that appellee had no title which it could convey, and that the state was claiming the absolute right to escheat. The defendant insists that all time subsequent to April 28, 1911, should not be counted against it.

The chancellor held that the mortgage company took a valid lien on the land to secure a debt due it by the Joneses, that the Joneses were in default for this debt in February, 1897, and that the reconveyance by the Joneses to appellee was a sale to enforce the payment of this debt, and that, therefore, under the terms of the statute, appellee had a right to hold the land 20 years from February 16, 1897, with full power during said time to sell in fee to a citizen or citizens of this state, and that the bill of complaint in this cause was filed prematurely.

As remarked by counsel for appellee, "it was a bad day for the Scot" when the original loan reflected by the record of this case was granted Nathan Bunkley. The question whether appellee, as a nonresident alien corporation, had the right to purchase the lands involved in this suit at foreclosure sale and to acquire title in this state by adverse possession, is answered in the affirmative by the learned opinion of our court, speaking through Judge Anderson, in the case of *Mortgage Co. v. Butler*, supra. The same conclusion was reached by the Circuit Court of Appeals of the Fifth Circuit in another branch of litigation over the same lands, as disclosed by the opinion in the case of *Bunkley et al. v. Scottish American Mortgage Co., Ltd.*, supra.

In the disposition of the appeal in the instant case, it is unnecessary for us to answer the contention of counsel for appellant that a corporation, organized under the laws of a foreign country, has no right to acquire and hold lands in fee forever in Mississippi. It appears that under the express provisions of the Code of 1880, aliens could acquire and hold land, and transmit it by descent, in the same manner and to the same extent that citizens might. When this statute was in force and effect, appellee, in good faith, made a loan of \$5,000 to Nathan Bunkley and took a contract expressly providing that the beneficiary might purchase the land at any foreclosure sale. Before there was a foreclosure, however, the Code of 1892 was effective, making a distinction between resident and nonresident

aliens, and limiting the right of nonresident aliens to that of merely taking a lien on land to secure a debt, and that in a sale to enforce payment of the debt, to purchase and thereafter hold the lands not longer than 20 years, with full power during said time to sell in fee to a citizen. In adopting the Code of 1892, it is expressly provided by section 4 that the repeal of any statutory provisions shall not affect "any right accruing or accrued or established." The argument is persuasive, therefore, that appellee, in entering into the contract with Nathan Bunkley, under the Code of 1880, had a vested right to buy in the lands in fee simple for the protection of its lien, and that having been forced to purchase at the foreclosure sale, is the absolute owner of the property so purchased.

[1] We fail to see how the fact that appellee is an alien corporation in any way alters the case.

"The law of comity in its application to the question of the right of a corporation to act in another state or country is that a corporation created by the laws of one state or country is permitted to do business in another state or country and sue in its courts, unless expressly prohibited by statute, or the recognition of the corporation is contrary to the public policy of the state. The law of comity is a part of the common law and the courts give it the effect that they give to any other rule of the common law." *Thompson on Corporations* (5th Ed.) vol. 3, par. 6626.

The corporation could not enter this state and do business contrary to the express provisions of our statute, or contrary to the public policy of our state; this, we understand, it did not undertake to do. The right of a foreign corporation to enter into contracts in a foreign state or country, and to seek the protection of the courts in reference to such contracts, is discussed in an exhaustive way and upheld by the Supreme Court of the United States in the case of *Bank of Augusta v. Earle*, 13 Peters, 519, 10 L. Ed. 274. But so far as the right of appellee originally to enter into the mortgage contract is concerned, there is no attack by counsel for appellant in the present case; its right to enter into this contract, and to sue in the courts of our state to protect its right has already been recognized; and, more than this, appellee has been accorded the right of pleading title conferred on it by adverse possession. The answer to the question whether this title thus acquired is in fee forever or should be held no longer than 20 years under our statute, may for the present be deferred. It was expressly held by Knowles, District Judge, in the case of *Black v. Caldwell* (C. C.) 83 Fed. 890, in reference to a like question, that:

"A foreign corporation which owns a contract, has, as a matter of comity, a right to sue and collect the same in this state (Montana). * * * The right of a creditor to bid in property decreed to be sold in an action brought by him is a valuable one. In many cases it is the only means

afforded a creditor of obtaining anything of value from his judgment or decree. That provision of the fourteenth amendment of the Constitution of the United States which provides that 'no state shall deny to any person within its jurisdiction the equal protection of the law' applies to corporations, whether domestic or foreign, the same as individuals. * * * If such a corporation comes into the courts of a state rightfully to have its rights adjudicated, I apprehend for that purpose it is within the jurisdiction of the state."

[2] Regardless of any other question in this case, we construe the provisions of our Code as granting the nonresident alien purchasing property at foreclosure sale the right to hold the same for the full period of 20 years, "with full power during said time to sell the same in fee to a citizen; or he may retain it by becoming a citizen within that time." It is not only granted the right to hold, but the right to convey a good title to one of our citizens. No obstruction should be by the state thrown in the way of appellee in selling. The record in this case shows that appellee first entered into possession of these lands January 6, 1893; but the conveyance was made to the Joneses September 6, 1895. This contract or conveyance to the Joneses was rescinded and the parties placed in statu quo February 16, 1897; and therefore during the period of time from September 6, 1895, to February 16, 1897, appellee did not hold these lands at all, but during said time, the general purpose of the statute to invest ownership in residents of this state was being accomplished.

It is further reflected by the record that on April 28, 1911, the state exhibited its bill of complaint, seeking to escheat these lands, and that a suit, at the instance of the state, has been prosecuted ever since. Counsel for appellee contend that this suit did not operate as an injunction, or prevent appellee from complying with the statute. It is true that appellee might have sold and conveyed the lands pending this litigation, initiated by and prosecuted at the instance of the state, yet, as an everyday common-sense proposition, we are bound to know that the prudent purchaser of real estate would not buy the title at its market price at a time when the state was claiming the right to escheat. The statute expressly protects a bona fide purchaser or holder by conveyance from a non-resident alien; but no one could acquire title in the face of the lis pendens notice and thereafter contend that he was a bona fide purchaser without notice of the state's claim of right to escheat. As a matter of common justice to appellee, and as a proper construction of the statute, we think all time from April 28, 1911, to the date of the final determination of the present suit, should be excluded.

"Where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his

right. Thus, during the pendency of litigation provoked by defendant's own acts, limitations do not run against plaintiff." 25 Cyc. 1278.

Not only should this time be counted to the date of the final decree by the court below, but the period of time required for disposition of this appeal should also be excluded.

"* * * While a plaintiff's right of action is thus suspended by an appeal from the judgment which fixes such right, thus depriving him of the means of enforcing his claim, pending such appeal, limitations will not run until the final disposition of the appeal." 25 Cyc. 1280.

The Supreme Court of Minnesota, in the case of St. Paul, etc., Ry. Co. v. Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693, says:

"Whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitation has barred his right, even though the statute makes no specific exception in his favor in such cases. *Braun v. Sauerwein*, 10 Wall. 218 [19 L. Ed. 895] 19 Am. & Eng. Ency. of Law (2d Ed.) 216."

This is nothing more than common justice; and the rule announced is well supported by authorities.

[3] Under the facts of this case, we believe, also, that the time during which the Joneses held the title should also be excluded. Appellee should not be penalized for rescinding the contract, under the circumstances disclosed in this case. The title conveyed by it had been brought into question, and in an effort to satisfy its vendees, and avoid litigation, it took back its title, and under any view of the case, appellee should not be charged with the time lost by it through its transactions with the Joneses. The Joneses were residents of Mississippi, and actual settlers upon the lands in question, during the time they held title. If the time during which the Joneses held title is eliminated, as well as all time from the filing of the first suit by the state to escheat to the final disposition of this appeal, then appellee has a material length of time yet to its credit for disposing of the lands in accordance with the conclusions reached by the lower court, and the views here expressed.

[4] We are not in accord with the view that appellee, in accepting a reconveyance of the land from the Joneses, thereby became a purchaser under the statute at a sale "to enforce payment of the debt" due and owing by the Joneses. In the first place, this contract seems to have been one, purely and simply, of rescission, and when consummated, appellee acquired and was holding the title originally acquired by it January 6, 1893. In the next place, we think section 2768, Code 1906, contemplates a forced sale, and not a private contract whereby the grantor of the mortgage or deed of trust conveys the mortgaged premises to the beneficiary in satisfaction of the secured debt. As said by Dunbar, J., in his dissenting opinion in the case

of Oregon Mortgage Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841:

"If sold under foreclosure some citizen might have bought in the land. * * * If the mortgage were foreclosed, the citizen would at least be placed upon an equal footing with the alien in obtaining title to the land, which the alien is resorting to to collect his debt 'in the ordinary course of justice.' The object of the Constitution evidently was to prevent the acquisition of lands by aliens as a matter of public policy, and to prevent them from acquiring lands excepting when it was actually necessary for the collection of their debts."

The sale mentioned by our statute is a sale "to enforce payment," an involuntary proceeding, whereby the beneficiary deals at arm's length with his mortgagor, and only buys as a last resort to protect his lien. Any other construction would afford a sure avenue for the acquisition of lands by nonresident aliens, contrary to the statute and policy of the state.

What we have said necessarily leads to an affirmance of this case; and this opinion is written to the end that appellee may deal with its property in accordance with the views here announced.

Affirmed.

MILES v. MILES. (No. 17308.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

1. HABEAS CORPUS §99(3) — CUSTODY OF CHILDREN.

While the law gives the father the preference, the courts have always limited the general rule of the common law whenever it was found that the moral and physical welfare of the child required the mother to have its custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. §99(3).]

2. HABEAS CORPUS §93 — CUSTODY OF CHILDREN—JURISDICTION.

Where a wife filed a bill for divorce, the chancellor denying the relief sought and dismissing the bill had power on the father's habeas corpus proceedings to award the custody of the infant child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. §93.]

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Jr., Chancellor.

Habeas corpus by Alex P. Miles against his wife, Lula Miles, for the custody of their infant child. Judgment for petitioner, and defendant appeals. Reversed, and custody awarded to the mother.

S. M. Graham, of Meridian, for appellant. F. K. Ethridge and Scott & Christian, all of Meridian, for appellee.

COOK, P. J. The appellant, Mrs. Lula Miles, filed a bill for divorce from her husband, Alex P. Miles. The chancellor denied the relief sought, and dismissed the bill. From this decree, no appeal was prosecuted.

After the divorce bill was dismissed the husband, Alex P. Miles, immediately instituted habeas corpus proceedings against his

wife, Lula Miles, for the custody of their child, then about ten months of age. The chancellor heard the evidence, and entered judgment awarding the custody of the child to its father. From this judgment, the mother prosecutes this appeal.

To make clear the views of the chancellor, we here copy his statement made before he entered his judgment, viz:

"If the divorce and alimony suit had proceeded to a final hearing on the merits, and the testimony therein had been such as to convince me that the complainant was entitled to a divorce, then and in that event I would without hesitation have awarded the custody of the child to its mother. But my holding, from all the evidence in that case, was that the wife, without legal cause to do so, had left her husband in the state of Louisiana, where they both then had and now have their legal domicile, and since the hearing on habeas corpus involves only the question as to who is properly and legally entitled to the custody of the child, and since the court in such hearings sits not as a court of equity, and has no power or authority to retain jurisdiction of the cause or to alter or modify its decree, but that, the habeas corpus decree, when rendered, being final, the only thing the court can do is to make the award and make it permanent according to all the evidence in the case.

"If counsel can produce any authority holding that on habeas corpus hearing of this character the temporary custody of the child can be granted, jurisdiction of the cause retained, and such order afterwards altered or modified, if deemed proper, then I shall be glad to hear the authorities, but I feel that no such authority can be produced, and that the award must be in its very nature final, for that, when a habeas corpus court has disposed of a particular matter before it and adjourns, it has no power to reconvene for the purpose of reopening such matter.

"The court finds from the competent evidence in this case that the father is entitled to the permanent custody of this child, but, if there was any authority vested in a habeas corpus court to make a temporary order that could afterwards be altered, the court would be glad to give the temporary custody of the child to its mother because of its tender years. But I do not believe that the mother in this case has the right without sufficient cause, as I see it from the evidence, to take even her infant child in Louisiana and without the consent of its father, who also has the natural right to share its affection and companionship, bring it to this state, and retain its permanent custody separate from its father. Sam Whitman, Jr., Chancellor."

We construe this statement to mean that the chancellor was of the opinion that the chancery court of Lauderdale county was without jurisdiction to try the divorce case on its merits, and, having no jurisdiction to try the divorce case, there was nothing left for him to do but give the child to its father. The child was a nursing infant, and was in the custody of its mother. We have searched the record in vain for any evidence which could justify a belief that the mother was not a fit person to keep and care for the babe. Taking the evidence as a whole, we are convinced that the welfare of the child will be best promoted by giving it to its mother.

[1] We do not believe the father, situated as he was, could give to the infant that care and attention which its tender age demanded.

True, the law as it now stands gives the father the preference, but the courts have always limited this general rule of the common law whenever it was found that the moral and physical welfare of the child demanded a mother's love and care.

[2] The learned chancellor, we think, was in error about his power in the case. If his premises were sound, his conclusion was correct. We do not think his premises were sound.

Putting to one side the law of the domicile, the father in the present case invoked the jurisdiction of the courts of this state and got what he asked for, and we think he got more than he was entitled to. The decree below will be reversed, and the custody of the child will be awarded to its mother.

Reversed.

STATE v. GRAY. (No. 18154.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

CRIMINAL LAW — 678(1) — TRIAL — ELECTION BETWEEN ACTS.

It is error, in a prosecution for unlawful sale of intoxicating liquors, to require the prosecution to elect a particular sale on which to ask a conviction; three sales having been charged and proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1580; Dec. Dig. — 678(1); Indictment and Information, Cent. Dig. § 434.]

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

Gum Gray was acquitted of selling intoxicating liquors unlawfully, and the State appeals for the purpose of settling the principles only. Reversed.

Lamar Easterling, Asst. Atty. Gen., for the State. Gardner, McBee & Gardner, of Greenwood, for appellee.

POTTER, J. This is an appeal from the circuit court of Leflore county. The appellee, Gum Gray, was charged in the magistrate's court with unlawful selling of intoxicating liquor and, having been convicted, appealed to the circuit court. In the trial of the case in the circuit court the state produced evidence of three separate and distinct sales of liquor by the appellee, Gum Gray, within a period of two years anterior to the date charged in the affidavit. At the conclusion of all the evidence, and after instructions had been asked and granted by the court, except instruction No. 1, counsel representing the appellee moved the court to require the state to elect on which sale, as testified to by witnesses, a conviction would be asked for. This motion was sustained by the court, and the district attorney was required to elect a particular sale upon which he would ask for a conviction. To the action of the court sustaining the motion to elect, the state then and there duly excepted, and now appeals

to this court for the purpose of settling the principles of this case only; the defendant having been acquitted by the jury.

The only question to be determined in the case is whether or not the trial judge was in error in requiring the district attorney to elect a particular sale upon which to ask a conviction. The court below was clearly in error in making this requirement. *Thomas v. Yazoo City*, 95 Miss. 396, 46 South. 821, 1041; *Wadley v. State*, 96 Miss. 77, 50 South. 494; *Neely v. State*, 100 Miss. 211, 56 South. 377; *King v. State*, 99 Miss. 23, 54 South. 657.

Reversed.

WILSON et al. v. PEACOCK. (No. 17577.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

1. EJECTMENT — 14 — TITLE TO SUPPORT ACTION — BY ESTOPPEL OF DEFENDANT.

In ejectment the plaintiff can recover only by strength of his own title, and not by estoppel of defendant to deny plaintiff's title by reason of the relation of landlord and tenant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 58; Dec. Dig. — 14.]

2. LANDLORD AND TENANT — 63(2) — ESTOPPEL OF TENANT — OPERATION — ACTIONS IN WHICH EFFECTIVE.

In an action by a landlord against his tenant holding over after expiration of the lease, the landlord's title cannot be questioned by the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 159; Dec. Dig. — 63(2).]

3. TRIAL — 41(1) — EXCLUDING WITNESSES.

The rule of excluding witnesses from the courtroom is but a rule of court, and is not enforced unless invoked by parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 101; Dec. Dig. — 41(1).]

4. TRIAL — 41(3) — EXCLUSION OF WITNESSES — PARTIES.

Before a party can be kept from testifying under the rule for the exclusion of witnesses, he must be given the alternative of testifying first or leaving the courtroom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 103; Dec. Dig. — 41(3).]

5. COURTS — 82 — RULES — SUSPENSION.

The trial court has the power, and should always exercise it, to relax or suspend all court rules to assure a full and fair hearing.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 295; Dec. Dig. — 82.]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Action by M. L. Peacock against A. A. Wilson and another. From judgment for plaintiff, defendants appeal. Reversed and remanded.

O. C. Moody, of Indianola, for appellants. Chapman & Johnson and S. D. Neill, all of Indianola, for appellee.

COOK, P. J. This is a suit in ejectment for about ten acres of land located in Sunflower county, a thin strip of land lying along the southern portion of the north half of the

south half of a certain described section. Appellee was the plaintiff and appellants were the defendants in the trial court. The court instructed the jury to find for the plaintiff, and of this instruction defendants complain. Appellants claimed that they obtained title to the land in controversy by adverse possession.

[1, 2] It was the contention of the plaintiff that defendants had rented the land from him after the expiration of ten years' adverse possession, and, having attorned to him as the landlord, they will not be permitted to deny their landlord's title to the land in this action in ejectment. This contention seems to have been approved by the trial court.

This is an action in ejectment to secure possession of the land by the alleged owner of the legal title, and not an action by the landlord against his tenant holding over after the expiration of his lease. The plaintiff in ejectment can only recover possession of land by the strength of his title; while in an action to secure possession of land from a tenant who refused to deliver possession to his landlord after the expiration of his term the landlord's title cannot be questioned by the tenant. The title is not involved in the latter case. The mere fact that the defendant is the tenant of the plaintiff obviates the necessity for any proof of title in the landlord. The landlord's title may not be questioned by the tenant at all. He is estopped to do so by reason of the relation existing between him and his landlord. If it be true that the court below granted the instruction upon the theory that the tenant was estopped to question his landlord's title, we think he was in error. However, there is another question in the record, and, if the court below correctly solved that question against defendants, the judgment will stand. So the case would be affirmed notwithstanding the court erred upon the theory of estoppel, and it therefore becomes necessary to consider the other question.

We quote from the record what occurred, viz.:

"Mr. A. A. Wilson (white), witness for the defendant, after being first duly sworn, was presented to testify:

"Jury retired.

"By Mr. Neill: The plaintiff objects to Mr. Wilson testifying in this case, because the rule was invoked, and the defense failed to put Mr. Wilson on the stand first, so we object to his testifying in this case, because the rule was invoked, and he was in here, and was not put on the stand to testify first.

"By the Court: When the witnesses in this case were called the rule was invoked by the plaintiff. All of the witnesses were called, the plaintiff, together with all of the witnesses who had been called, was sworn, and the court instructed the witnesses that they would have to go out of the hearing of the court. The defendant was not sworn at that time as a witness, and after the plaintiff had rested his case, and witness, who it appears was agent of the defendant in reference to the property in litigation, testified, then the said defendant was called to the witness stand, whereupon the plaintiff ob-

jected. That objection is sustained in so far as the testimony of this witness will go to offer things not testified to by the witness Haynes, who was put on the stand by the defendant, and as to other things that the defense might offer to show by the defendant not testified to by the witness Haynes he may do so, and the objection is overruled.

"By Judge Moody: The defendant who is the witness now has been present all of the time in the courtroom from the time this case was called until offered as a witness. The court was not asked by the plaintiff at the time that the witness Haynes took the stand to testify to exclude the defendant from the room if he expected to testify, nor did the plaintiff ask the court at any time to exclude the defendant from the room if he expected to testify.

"By Mr. Chapman: That the defendant gave no notice to the plaintiff that they would introduce one of the defendants as a witness, by notice or by calling the witness, the defendant Wilson to be sworn with the other witnesses.

"By Judge Moody: The attorneys for the defendant now state to the court that the reason they didn't call the court's attention to their purpose of having the defendant Wilson testify because they understood the law to be that, if the plaintiff wished him excluded, they must ask the court to do so, or call for him to testify first.

"By Mr. Chapman: And the plaintiff's attorneys state that they didn't call for the defendant Wilson to testify first, or to be excluded from the courtroom while the defendant's witness Haynes was testifying, because they didn't know that Wilson, one of the defendants, would be called as a witness in behalf of the defense, and, second, because attorneys representing the defendants are old and experienced attorneys, and are presumed to know the law.

"The defendant then and there excepted to the ruling of the court.

"Jury returned.

"Counsel for the defendant states to the court that, in view of the fact that it is impossible for them to examine the witness the defendant A. A. Wilson without examining him in reference to some things testified to by witness R. L. Haynes, we are forced to keep him off the stand."

[3] It must be conceded, we think, that the trial judge exercised a delicate discretion (if discretion he had) when he denied to the defendant the privilege of giving testimony in his own behalf. The rule of excluding witnesses from the courtroom is but a rule of court, and is not enforced, unless it be invoked by the parties to the litigation.

[4] It would seem that the statement of eminent counsel the reasons why defendant was not sent from the courtroom should have appealed strongly to the court; while this court seems to have held that the court possessed the power to exclude a party to a lawsuit at certain stages of the trial if the trial judge deemed it essential to the discovery of truth. It is difficult for the writer to reconcile this holding with the undoubted right of a party to a lawsuit to conduct his own case, examine all of the witnesses, and argue on the facts to the judge and jury; and, if a litigant's lawyer who is also a witness must testify before any other witness has testified, I can imagine a case wherein the orderly presentation of facts might be seriously impaired. Speaking for the court, before a party to a litigation can be kept from tes-

tifying, he must be given the alternative of testifying first or leaving the courtroom.

[6] Mere rules of practice should never stand in the way of permitting the jury to hear all the witnesses, and in this case the record discloses that nothing save a rule of practice denied this substantial rule of justice to the defendants. The trial court has the power, and should always exercise it, to relax or suspend all court rules, to the end that litigants may be assured of a full and fair hearing of their side of the controversy. The record does not show any reason why the discovery of the actual truth would have been imperiled by the defendant's testimony, and, in the absence of such showing, we think the trial court erred in refusing to permit the witness to testify. This question has been discussed in several decisions of this court, and we find nothing in any of the cases inconsistent with our ruling in the present case. See *French v. Sale*, 63 Miss. 386; *Bernheim v. Dibrell*, 66 Miss. 202, 5 South. 693; *Smith v. Team*, 16 South. 492; *Kline v. Hazzlerigg*, 21 South. 11.

Reversed and remanded.

ILLINOIS CENT. R. CO. v. SHACKLEFORD. (No. 17441.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

CARRIERS \S 277(6) — **PASSENGERS** — **INADEQUATE ACCOMMODATIONS** — **COMPENSATORY AND PUNITIVE DAMAGES.**

Where defendant railroad stopped a limited train at a nonstop station, for the accommodation of plaintiff and her friends, and plaintiff with her friends by direction of the conductor rode a distance of eight miles in a baggage coach after passing through a compartment devoted to negroes, the minor discomforts did not support an award of \$100 actual and punitive damages, although the passenger coaches were not filled, the plaintiff having failed to protest against riding in the baggage car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1084; Dec. Dig. \S 277(6).]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by Mrs. Harriet Shackleford against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Mayes & Mayes, of Jackson, and J. M. Boone, of Corinth, for appellant. W. L. Elledge, of Iuka, for appellee.

POTTER, J. This is an appeal from the circuit court of Tishomingo county.

Some time in June, 1913, Mrs. Harriet Shackleford purchased a first-class ticket over the Illinois Central Railroad from Dennis, Miss., to Paden, Miss., two stations on said railroad about eight miles apart. Mrs. Shackleford on the day in question had been to a singing entertainment being held at Dennis, and because quite a number of people

wanted to return, a request was made of the Illinois Central Railroad Company, the defendant, through its agent, to have its fast train that runs from Chicago, Ill., to Jacksonville, Fla., stop at Dennis, a place that it did not usually stop, in order to accommodate the crowd who had gone to the entertainment in question at Dennis. The plaintiff, Mrs. Shackleford, came to Dennis from her home at Paden in the morning in her buggy, but, being sick with a headache, she concluded to return home on the train with the crowd of people who were returning by rail.

When Mrs. Shackleford and her companions boarded the train that had stopped for their accommodation, according to their testimony, the conductor on the train directed them to the left hand, and that this way led them through a part of a coach provided for negroes into another part thereof partitioned off from the negro coach as a baggage car, and that in this coach the plaintiff and her companions, who held first-class tickets, rode from Dennis to Paden, a distance of about eight miles. There was some evidence that the passengers experienced a disagreeable sensation of smelling bad odors as they passed through the negro coach, and that in the baggage coach was the grime and dirt usually found in a baggage coach. The railroad company defended its action in putting the passengers in question in the baggage coach on the ground that the first-class passenger coaches were filled up. There was evidence that this was not true, but however that may be, the plaintiff in this case was surrounded by her good friends, a jolly crowd returning from a social gathering, and the disagreeable features of the trip were trifling and were probably offset by the novelty of the situation enjoyed perhaps by every one of the passengers on their trip to Paden. The good lady did not protest when shown this place to ride, and in view of the fact that she did not herself protest against riding in this car, and in view of the fact that the entire trip only consumed 15 minutes, and no negligence is shown, we are of the opinion that the judgment rendered in the court below for \$100 actual and punitive damages is erroneous.

Reversed and dismissed.

TILL v. FAIRBANKS CO. (No. 17585.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

MASTER AND SERVANT \S 318(1)—**INJURIES TO SERVANT—RELATION OF PARTIES.**

A company which sold a railroad scale at a fixed price at its place of business and agreed to furnish an expert, who was regularly in its employ and whose wages were paid by it, to superintend the installation of the scale, the buyer furnishing the materials and all other workmen and exercising a general control over the work, is not an independent contractor to install the scale, so as to be considered the em-

ployer of a carpenter who was injured through no fault of the expert while the scale was being installed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1242; Dec. Dig. 316(1).]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action by J. S. Till against the Fairbanks Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

R. D. Cooper and Jacobson & Brooks, all of Meridian, for appellant. Amis & Dunn, of Meridian, for appellee.

STEVENS, J. Appellant, as plaintiff in the court below, instituted this action of tort against appellee jointly with Southern Oil & Fertilizer Company seeking damages for personal injuries alleged to have been sustained by appellant while a workman engaged in certain construction of a railroad track scale. From an adverse judgment in the court below, plaintiff appeals. It appears that the Southern Oil & Fertilizer Company of Meridian in July, 1912, purchased of the Fairbanks Company, a corporation domiciled at New Orleans, La., a large railroad track scale. The order for the scale is as follows:

"Date 7/13/12. No. 1502. The Fairbanks Company, New Orleans, La.: Ship to Southern Oil & Fertilizer Company. Address, Meridian, Miss. How ship, N. O. & N. E. When, at once. Salesman, F. M. Yager. Terms, f. o. b. N. O. 9/1/60 days: Balance 90 days thereafter. One 80 ton 42 ft. Fairbanks Std. R. R. Track st. Type Registering Beam. Dead Rail Stands and Steel construction with supt. at \$862.50 net and our Fairbanks scale with blueprints. We to furnish foundation and decking timber. O. K. Southern Oil & Fertilizer Company, by H. C. Forrester, President."

This scale was in due time shipped f. o. b. New Orleans. In accordance with the language of the order, "with supt. at \$862.50 net," appellee furnished a skilled mechanic to assist in the installation of the scales at the plant of the Southern Oil & Fertilizer Company in Meridian. The construction which the parties to this contract give to the written order is reflected in the following letters:

"Sept. 18, 1912. Southern Oil & Fertilizer Company, Meridian, Miss.—Gentlemen: Yours of the 16th received and in reply would ask that you kindly advise us if you have your foundation ready, as well as the small amount of timber called for in the plans and the dead railstand in addition to the scale and the structural steel. If these be all on the ground and the foundation ready, we will then send our mechanic at once to superintend the installation, as we have been holding him here at New Orleans on local work, so as to have him at your disposal as soon as your material arrives. Awaiting your advice concerning this, we remain, The Fairbanks Company."

"Meridian, Miss., 9/19/12. The Fairbanks Company, New Orleans, La.—Gentlemen: Answering yours of the 18th, we will have old scales torn out, and be ready for your man Tuesday morning, so please let him leave New Orleans Monday night. We want him to superintend building the dead-rail piers, etc., but expect to pay for time he is delayed by having

to do so. It is our desire to have a scale that is put up from pier up to beam box by a competent superintendent. Very truly yours, H. C. Forrester, President."

The appellee sent one Costellow to superintend the installation while the Southern Oil & Fertilizer Company furnished and assembled the materials for the foundation and employed such laborers as were necessary to do the work. In addition to the ordinary laborers, the Southern Oil & Fertilizer Company had a mechanical superintendent, a Mr. Brown, who, to some extent, assisted in the work as well as directions as to how the work should proceed. Mr. Brown himself says:

"I did all I could to rush it, as much as I could, because it was as much to my interest to do it, because I was working for the company."

All labor was paid by the Southern Oil & Fertilizer Company. In the work of installation it became necessary to handle what is referred to as an I-beam, a steel rail some 28 feet long, about 18 inches wide, and having a flange on each side, called the facing of the beam, some six inches wide. In adjusting this beam, it became necessary slightly to chip off one end of it. In chipping off the end of this beam and in the handling of same by certain negro laborers, the beam turned over and fell against appellant, who was then engaged as a carpenter constructing the wooden framework of the scale box, and crushed and broke his legs. Just why the beam fell it is difficult, if not almost impossible, to determine from the evidence. There is no direct evidence that the place where plaintiff was working was unsafe. The declaration was filed against both companies, but at the trial and before evidence was introduced plaintiff entered into an agreed settlement with the Southern Oil & Fertilizer Company, one of the defendants, and released that company without prejudice to its right to proceed against appellee. After the plaintiff had introduced his evidence and rested his case, the defendant moved the court to exclude the testimony offered and to grant appellee a peremptory instruction. This motion was sustained and judgment final entered in appellee's favor.

It is the contention of appellant that the Fairbanks Company under the facts of this case was an independent contractor. Appellee, on the other hand, contends not only is no negligence shown against either of the defendants, but that the work being done was prosecuted by the Southern Oil & Fertilizer Company and not by appellee. Counsel for appellee contend that, under the terms of the written contract as construed by the parties, appellee simply sold to Southern Oil & Fertilizer Company a railroad track scale f. o. b. New Orleans, and, as an inducement to the trade or part of the purchase price for the property, furnished a skilled mechanic to assist in the installation to be done, directed, and paid for wholly by the purchaser.

Without discussing the evidence in detail and aside from the question whether or not liability was shown against either company, we are firmly convinced that appellee under the facts in this case was in no wise an independent contractor. The articles purchased were the component parts of a large railroad track scale. This machinery was bought f. o. b. New Orleans. When this personal property was loaded upon the cars at New Orleans, it became the property of the Southern Oil & Fertilizer Company. When it arrived in Meridian, it was, of course, unloaded at the expense of and installed by and at the expense of the purchaser. It is immaterial whether the Fairbanks Company added anything to the price for furnishing a superintendent or skilled mechanic to direct the installation. When the skilled mechanic appeared in Meridian, he was there merely to assist the foreman and laborers employed exclusively by the purchaser and to use materials furnished exclusively by the purchaser. The Southern Oil & Fertilizer Company selected the site for the scales. It selected and furnished the materials. It employed and paid for all labor. It had a right to continue or discontinue the work at any moment. The skilled mechanic furnished by appellee, while there to give the purchaser the benefit of his experience and skill, was nevertheless under the general supervision of the Southern Oil & Fertilizer Company. They could use him or not use him in their pleasure. Their officers and agents might disagree with the judgment or plans of this mechanic and override or brush aside any plan of installation advised by the mechanic. In other words, while the wages of Mr. Costellow were not paid to him directly by the Southern Oil & Fertilizer Company, yet he became in a real sense the servant of this company in the work of installing the scale. Our court announced the different tests by which this question is generally determined in the case of *N. O., B. R. V. & M. R. R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191, as follows:

"Among the numerous tests which have been from time to time suggested for the determination of the question, whose servant is this? are the following, each of which has in some case been considered as conclusively fixing the existence of the relation: (1) The right of selecting the servant; (2) the right to discharge the servant; (3) the right to control the servant; (4) that he is not a master who is interested in the ultimate result of the work done as a whole, but not in the details of its performance."

Measured by these general tests, we have no hesitancy in saying that Mr. Till, who here complains, was the servant of the Southern Oil & Fertilizer Company, and not that of appellee. The latter in this case did not enter into a contract for construction work. It simply did that which factories are daily doing when they send out their experts to assist purchasers in unloading or taking

down and setting up complicated machinery, automobiles, etc. There is no contention here that Mr. Costellow was an inexperienced or unskilled mechanic, or that appellant was injured through his incompetency. Even though his skill was relied upon, the Meridian company still had a right to control him. As said by the Supreme Court of Massachusetts in *Samuelian v. American Tool Co.*, 168 Mass. 12, 46 N. E. 98:

"The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their machinery."

Likewise, in the case of *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328:

"The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant."

We do not mean to say that the method of payment or the fact that materials are furnished would in any particular case prevent an employe from being an independent contractor. It would seem to be elementary that there could be no independent contractor in construction work of the character here reflected in the absence of a well-defined contract to construct. All that appellee did or undertook to do was either to lend or furnish the skilled mechanic. This, in our judgment, was not sufficient to constitute it an independent contractor for the extensive and important work in connection with which appellant received his unfortunate injury.

The views here expressed are in no wise in conflict with the recent case of *Callahan Construction Co. et al. v. Rayburn*, 69 South. 669. Affirmed.

WILLIAMS v. WILLIAMS. (No. 17564.)
(Supreme Court of Mississippi, Division B.
April 3, 1916.)

PARTITION \Leftrightarrow 12(3) — **HOMESTEAD — EFFECT — WIDOW'S SHARE.**

Under Code 1906, § 5086, authorizing a widow to renounce the provision for her made in her husband's will and to elect to take her legal share of his estate, whereupon she is entitled to such part of his estate as she would have been entitled to if he had died intestate, a widow with one child, upon renouncing, took by descent a child's share or an undivided interest in the homestead, which, under section 1659, shall not be subjected to partition during her widowhood, as long as occupied by her, without her consent.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 50; Dec. Dig. \Leftrightarrow 12(3).]

Appeal from Chancery Court, De Soto County; J. G. McGowen, Chancellor.

Harriet Williams excepted to the report of a sale made by W. S. Williams, the executor of the homestead of Richard Williams, deceased. Exceptions sustained, and sale vacated and set aside, and the executor appeals. Affirmed.

Lauderdale & Lauderdale, of Hernando, for appellant. J. E. Holmes, of Memphis, Tenn., and R. F. B. Logan, of Hernando, for appellee.

STEVENS, J. The appeal in this case is prosecuted by appellant as the executor of the last will and testament of one Richard Williams, deceased, and is based upon a decree rendered by the chancery court of De Soto county sustaining exceptions to the report of a sale made by the executor of the homestead of the deceased. The record discloses that Richard Williams, by his last will and testament, directed that his executor should take possession of the real property, sell the same, together with his other property, real and personal, for cash at public sale, and, after paying all debts and the expenses of administration, should pay or divide the proceeds of sale amongst his widow, Harriet Williams, appellee herein, and his five children mentioned by name in the will. The widow, in proper time after the death of the testator, renounced the will and thereby elected to take by inheritance in accordance with the statute. The testator, with his wife and minor child, resided upon their country home consisting of the 135 acres of land involved in this suit. This exempt homestead the executor attempted to sell in accordance with the terms and directions of the will, and it is to his report of the sale of the homestead that the widow objected, on the ground that the same constituted the exempt homestead and that the widow had the statutory right to reside upon this homestead during her widowhood. The court sustained the objections and set aside and vacated the sale attempted to be made by the executor. From this decree the executor appeals, contending that the testator had a right to dispose of his exempt property by will, and that when he has thus made disposition of the homestead the widow no longer has the right given her by section 1659, Code of 1906.

There is no contention that the widow in this case has a separate estate, and her rights, therefore, are fixed by section 5086, Code of 1906. Under this section the widow is not only awarded a child's part of the estate in the instant case, but enjoys such statutory rights as are given her by the laws of descent and distribution. So far as her rights are concerned, there is no will. She is accorded the statutory right

to renounce the will and thereby brush aside the instrument of writing by which the rights of the other devisees are measured. In thus electing to take an heir's portion of the estate, she inherits by descent an undivided interest in the homestead, which, under the express provisions of the statute, "shall not be subjected to partition or sale for partition during her widowhood, as long as it is occupied or used by the widow, unless she consent." This understanding of the statute was evidently in the mind of Judge Terral when he, in the case of McGaughey v. Eades, 78 Miss. 853, 29 South. 516, employed the following language:

"Where she gets nothing by the will, or where the devise to her is unsatisfactory, and she renounces the will, she takes a child's part of his estate; but where she takes a legacy under the will, and the will is expressly made in lieu of the allowance of one year's provisions and all exemptions, she may not, without renouncing the will, take the legacy and the year's provision and other exemptions."

The same thought is expressed in unmistakable terms in the case of Gordon v. James, 86 Miss. 719, 39 South. 18, 1 L. R. A. (N. S.) 461. Among general expressions of the court in harmony with this view, Judge Truly observed that the widow in a case of this kind "is at liberty to signify her dissent to the will; and, when she has done this, in the eyes of the law the decedent, so far as her rights are concerned, becomes an intestate, and her rights are fixed by the law, which would control if he had died in a state of total intestacy." The law looks with favor upon the homestead exemption and guards jealously, not only the right of the husband to occupy with his family the home while he is living, but continues to give shelter to his widow during her widowhood, even saying to the creditors that the homestead is sacred ground and cannot be subjected to their debts.

The case of Nash v. Young, 81 Miss. 134, is relied on by appellant. Without expressly approving the announcement of the court in that case, the facts differentiate it from the instant case. The Nash Case dealt largely with personal property which had been specifically devised to parties other than the widow, and when this case was decided the widow had the right of dower, and in the setting apart to her of dower the mansion house was embraced in the portion to be allotted her. Furthermore, in the present case we think section 1659 of our present Code should be so construed as to embrace this case. We think the Legislature so intended, and this construction does not materially interfere with the right of the testator to dispose of his exempt property in accord with his wishes.

Affirmed.

FIDELITY MUT. LIFE INS. CO. v. OLIVER.
(No. 17581.)

(Supreme Court of Mississippi, Division B.
April 3, 1916.)

1. INSURANCE — 349(1)—LIFE POLICIES—CONTRACTS.

A life policy provided that if any premium should not be paid when due, the policy should lapse after 30 days, but could be revived if the insured, being in good health, should present a reinstatement certificate, which reinstatement was subject to the approval of the president or vice president and medical director of the insurer. *Held*, that the policy automatically lapsed when insured failed to pay the premium and the interest on a policy loan, and was not revived by the insured's application for reinstatement and tender of the amount due, which was never accepted by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 891; Dec. Dig. 349(1).]

2. INSURANCE — 367(1)—LIFE POLICIES—EXTENDED INSURANCE.

Where insured, who had paid ten annual premiums on a life policy, procured a loan to the full value of the policy and then defaulted in payment of premiums, interest and principal, the insurance was not extended under a nonforfeiture clause declaring that after three full years' premiums should have been paid the policy should be automatically extended on nonpayment, provided it should be free from debt.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 935; Dec. Dig. 367(1).]

Appeal from Circuit Court, Sunflower County: R. C. McBee, Special Judge.

Action by Mrs. Rena C. Oliver against the Fidelity Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Moody & Williams, of Indianola, for appellant. F. E. Everett, of Indianola, for appellee.

COOK, P. J. The appellee recovered a judgment on a life insurance policy written by the appellant upon the life of her husband, she being the beneficiary named in the policy. The insurance company appeals. For the purposes of this appeal the case is presented to this court upon an agreed statement of facts.

The policy was issued on March 4, 1902, and remained in full force and effect up to March 4, 1912. The assured paid ten full years' premiums. On the 4th day of March, 1911, the company loaned the assured \$560, which was the loan value of the policy, and the assured on the same date paid one year's premium and one year's interest on the loan in advance. According to the contract, interest on the loan was to be paid in advance, and the second payment thereof was due March 4, 1912, as was also the premium on the life insurance. The assured did not pay the premium or the interest when due.

"On the 25th day of April, 1912, the appellant notified Mr. Oliver that his policy had lapsed and suggested that he make application for reinstatement. Thereafter, on the 14th of October, 1912, Mr. Oliver, being in Jackson, made an ap-

plication for a reinstatement of this policy and delivered the same to Messrs. Ragland and Anderson, the managers of the company at that place, who forwarded the same to the reinstatement department of the company. On the 25th day of October, 1912, Messrs. Ragland and Anderson wrote Mr. Oliver a letter, bearing that date, which stated, in substance, that the company had advised them that the amount necessary to be paid, before the policy could be put in good standing, was \$154.54. They suggested that he remit that amount and stated to him that if the policy should not be reinstated the remittance would be returned to him. This letter was received in Indianola on the 28th of October, 1912, and I. A. Oliver, a brother of A. W. Oliver, the latter being sick in bed at the time, wrote Messrs. Ragland and Anderson, inclosing them a check to cover the amount to be paid on the policy, \$154.54. This letter, with the check inclosed, was received by Messrs. Ragland and Anderson on the 27th of October, 1912, and on that day A. W. Oliver died. However, by letter dated the 28th day of October, Messrs. Ragland and Anderson wrote Mr. I. A. Oliver, they not being aware of Mr. A. W. Oliver's death but still being aware that he was ill when the letter addressed to them was written, that in view of Mr. A. W. Oliver's illness the company would not be able to approve his application for reinstatement at that time. However, the check inclosed by Mr. Oliver was forwarded to the company, but it was never collected by it. This check was, by the company, after it had been advised of Mr. Oliver's death, returned to Mr. I. A. Oliver at Indianola, in a letter dated the 13th of November, 1912.

"Afterwards, on the 7th of June, 1913, a check for \$595.63 was forwarded to the company by Judge Everett, as attorney for Mrs. Rena C. Oliver, and this check was, by the company, promptly returned to him on the 11th of the same month."

The clauses of the policy pertinent to this appeal are as follows:

"In consideration of the written application of the above-named insured, which is made a part hereof, a copy of which is hereto attached, and the payment in advance to said company of one hundred twenty and 60/100 dollars on the delivery of this policy, and thereafter to the company, at its head office in the city of Philadelphia, upon the fourth day of the month of March in every year during the continuance of this contract."

"If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured, but if it shall have been in force exceeding one year, it shall be extended and remain in force thirty days from due date, and if premium be not then paid with interest for the time taken at the rate of 5% per annum, or if any obligation given for premium be dishonored or not paid when due without grace, this policy shall be absolutely void, except as provided in the nonforfeiture clause, and after said period of thirty days, or nonpayment of any such obligation, it can only be revived if the insured be in good health upon presentation of a reinstatement certificate signed by said insured, and upon the approval of the same by the president or vice president and medical director, but not otherwise."

"*Nonforfeiture.*—After three full years' premiums shall have been paid, then, provided this policy be free from debt, upon the nonpayment of any subsequent premium within the thirty days of grace, this policy is automatically extended for the time indicated between the parallel red lines in the table below, computed from the date of nonpayment of premium; or, if this policy be legally surrendered within three months from the date when such premium be-

came due, the company will issue in exchange a participating paid-up policy for five times the amount specified between the parallel red lines in the table below."

[1] There seems to be but little, if any, room for doubt as to the law of this case. The contract is the law of the case and it is plain that the policy automatically lapsed when the insured failed to pay either the premium or the interest on the loan within the time fixed by the agreement of the parties.

"The contract of life insurance is really a contract for insurance for one year in consideration of an advance premium, with the right of the assured to continue it from year to year upon payment of the premium as stipulated. The assured is not bound to pay anything, and may drop his policy at the end of any one year. He does drop it and the company is relieved, if he does not pay. In such case there is a lapse of the policy."

This definition of a life insurance contract given in *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. 172, precisely states the contract made in the present case. Mr. Oliver did not pay the premium due March 4, 1912, within the time limit fixed in the contract, and his policy by its terms then lapsed. Mr. Oliver realized that this was true and made written application for a revival of the contract, stating that the policy was "void by reason of the nonpayment of premium and interest on loan." Unfortunately, pending the negotiations for a revival, the assured died. Of course, it is not within the power of the court to revive the policy—this power rested alone in the parties to the contract.

[2] But it is said the nonforfeiture provision of the policy saves the policy; that more than three years' premiums had been paid by Mr. Oliver, and the time was extended. The vice of this contention is apparent. The extension privilege mentioned in this clause of the policy is not met with the facts necessary to its operation. This policy was not "free from debt." The assured had exercised his option of borrowing the full value of the policy, and there was nothing left to be applied to his debt.

The judgment of the court below is reversed, and the cause dismissed.

Reversed and dismissed.

GOEHNS et al. v. WALLACE et al.
(No. 17583.)

(Supreme Court of Mississippi. April 3, 1916.)

Appeal from Chancery Court, Leake County; J. F. McCool, Chancellor.

Action between Mrs. M. A. Goehns and others and N. F. Wallace and others. From the judgment, Mrs. Goehns and others appeal. Affirmed.

See, also, 66 South. 978.

J. B. Sullivan, of Mendenhall, for appellants. J. L. McMillon, of Carthage, and O. A. Luckett, of Kosciusko, for appellees.

PER CURIAM. Affirmed.

FUGITT v. SEAMAN. (No. 17552.)
(Supreme Court of Mississippi. April 3, 1916.)

Appeal from Circuit Court, Prentiss County; Claude Clayton, Judge.

Action between J. W. Fugitt and A. Seaman. From the judgment, Fugitt appeals. Affirmed.

E. C. Sharp, of Booneville, for appellant. A. J. McIntyre, of Booneville, for appellee.

PER CURIAM. Affirmed.

FORD v. COHN et al. (No. 17996.)
(Supreme Court of Mississippi. April 3, 1916.)

Appeal from Chancery Court, Lincoln County; P. Z. Jones, Chancellor.

Action between Mrs. Genevieve L. Ford, by next friend, against A. A. Cohn, trustee, and others. From the judgment, Mrs. Ford appeals. Affirmed.

Brennan & Boothe, of Brookhaven, for appellant. A. A. Cohn and H. Cassedy, both of Brookhaven, for appellees.

PER CURIAM. Affirmed.

BURKHALTER v. SANDERS. (No. 17400.)
(Supreme Court of Mississippi. April 3, 1916.)

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action between W. T. Burkhalter and Angelo Sanders. From the judgment, Burkhalter appeals. Affirmed.

Shands & Montgomery, of Sardis, for appellant. L. B. Lamb, of Batesville, for appellee.

PER CURIAM. Affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. CARR. (No. 17647.)

(Supreme Court of Mississippi. March 29, 1916.)

Appeal from Circuit Court, Leflore County; Frank E. Everett, Judge.

Action between the Cumberland Telephone & Telegraph Company and Kate W. Carr. From the judgment, the Company appeals. Appeal dismissed.

PER CURIAM. Affirmed.

ALABAMA & V. RY. CO. v. WILLIAMS.
(No. 17566.)

(Supreme Court of Mississippi. April 3, 1916.)

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Action between the Alabama & Vicksburg

Railway Company and Handy Williams. From the judgment, the Railway Company appeals. Affirmed.

R. H. & J. H. Thompson, of Jackson, for appellant. A. J. McLaurin, Jr., and S. L. McLaurin, both of Brandon, for appellee.

PER CURIAM. Affirmed.

BENNETT et al. v. TISHOMINGO COUNTY et al. (No. 18911.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Chancery Court, Tishomingo County; A. J. McIntyre, Chancellor.

Action between W. T. Bennett, receiver of the Tishomingo Banking Company, and others, and Tishomingo County and others. From the judgment, the receiver and others appeal. Affirmed.

W. L. Elledge, of Iuka, and Young & Young and W. C. Sweat, all of Corinth, for appellants. W. J. Lamb, of Corinth, for appellees.

PER CURIAM. Affirmed.

SHEMPER v. CITY OF HATTIESBURG. (No. 18131.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Action between I. Shemper and the City of Hattiesburg. From the judgment, Shemper appeals. Affirmed.

J. B. Davis, of Hattiesburg, for appellant. D. E. Sullivan, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

BANK OF ITTA BENA v. COCKRELL. (No. 17171.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Chancery Court, Leflore County; M. B. Denton, Chancellor.

Action between the Bank of Itta Bena and Mrs. Annie Cockrell. From the judgment, the Bank appeals. Affirmed.

Gwin & Mounger and Pollard & Hamner, all of Greenwood, for appellant. Gardner & Whittington and Sam I. Osborn, all of Greenwood, for appellee.

PER CURIAM. Affirmed.

COBB v. McPHERSON. (No. 17554.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Prentiss County; Claude Clayton, Judge.

Action between W. E. Cobb and T. P. McPherson. From the judgment, Cobb appeals. Affirmed.

E. C. Sharp, of Booneville, for appellant. J. A. Cunningham, of Booneville, for appellee.

PER CURIAM. Affirmed.

EASON v. STATE. (No. 18651.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Smith County; W. H. Hughes, Judge.

Action between John Eason and the State. From the judgment, Eason appeals. Affirmed.

Martin & Currie, of Raleigh, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

GARNETT, Sheriff, v. SOUTHERN RY. CO. IN MISSISSIPPI. (No. 17488.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Action between R. C. Garnett, Sheriff, as administrator, and the Southern Railway Company in Mississippi. From the judgment, the administrator appeals. Affirmed.

Whitfield & Whitfield, of Jackson, for appellant. Catchings & Catchings, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

POWELL v. MERIDIAN LIGHT & RY. CO. (No. 17383.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between Mrs. M. S. Powell and the Meridian Light & Railway Company. From the judgment, Mrs. Powell appeals. Affirmed.

Wyatt Easterling, of Meridian, for appellant. Baskin & Wilbourn, of Meridian, for appellee.

PER CURIAM. Affirmed.

TAYLOR et al. v. McDANIEL et al. (No. 17359.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between John H. Taylor and another and B. A. McDaniel and another. From the judgment, Taylor and another appeal. Affirmed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellants. Thomas Percy Guyton, of Kosciusko, for appellees.

PER CURIAM. Affirmed.

KOSCIUSKO TELEPHONE CO. v. McCool TELEPHONE CO. (No. 17358.)

(Supreme Court of Mississippi. April 3, 1916.)
Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between the Kosciusko Telephone Company and the McCool Telephone Company. From the judgment, the Kosciusko Telephone Company appeals. Affirmed.

J. G. Smythe, of Kosciusko, for appellant. Flowers, Brown, Chambers & Cooper, of Jackson, for appellee.

PER CURIAM. Affirmed.

FIDELITY MUT. LIFE INS. CO. v. ELMORE. (No. 17496.)

(Supreme Court of Mississippi, Division B.
April 8, 1916. Suggestion of Error
Overruled April 17, 1916.)

INSURANCE §258(2)—**AVOIDANCE OF POLICY**
—**STATEMENTS AS TO HEALTH.**

Under a policy provision that all statements of the insured shall, in the absence of fraud, be deemed representations and not warranties, the company cannot contest payment on his death, relying on the "continued good health" clause of his application and his illness when applying for or being delivered his policy, unless it can show he fraudulently concealed his ill health when he received the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540; Dec. Dig. §258(2).]

Appeal from Circuit Court, Grenada County; J. A. Teat, Judge.

Action by L. R. Elmore, administrator, against the Fidelity Mutual Life Insurance Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

McLean & Carothers, of Grenada, for appellant. B. L. Mayes, of Jackson, for appellee.

COOK, P. J. This suit was instituted by appellee, administrator of the estate of Jas. A. Elmore, deceased, to recover on a policy of insurance issued by appellant upon the life of the deceased. There was a verdict for the plaintiff, and from the judgment rendered thereon the defendant prosecuted this appeal.

The application for the policy was made on April 10, 1912; and on the next day appellant's medical examiner examined the applicant. About a month later the policy was delivered to and accepted by the applicant. Shortly after the delivery of the policy it was discovered that the assured was afflicted with tuberculosis, and it is probable that he was so afflicted at the time he made the application for the insurance, and when the policy was delivered to him. When this discovery was made the insurance company requested a surrender of the policy, which was refused. The insured died June 23, 1913, and upon the refusal of payment of the policy, this suit was brought.

It was agreed that the insured was suffering with tuberculosis at the time his application was made and when the policy was delivered, and, subsequently, his death was caused by the disease named. It is, however, insisted that the insured did not know of his condition when he made the application—that his statements as to his health were made in perfect good faith—and that he believed his statements were absolutely true. The insurance company contends his representations, in the form they were made, were in effect warranties, and that if his statements were not true, the policy never had any legal effect and was void. It is insisted, further, that the applicant's being in good health at the time the policy was deliv-

ered was a condition precedent to the validity of the policy.

The plaintiff relied on this clause in the policy itself as a complete answer to the defenses set up by the defendant, viz.:

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid or be used in defense to a claim under this policy, unless it is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued."

First, as to the contention that the policy never had any validity, because it was admitted that the insured was not in good health at the time the policy was delivered, we think the statement in the application to this effect merely means that the defendant's health had not undergone any change between the date of the application for and the delivery of the policy. In other words, if at the time the policy was delivered the insured's health had changed, and the insured was aware of the fact, it would have been his bounden duty to have disclosed the fact; but if neither the insured nor the company knew of this changed condition of insured's health when the policy was delivered, the "continued good health" clause in the application is saved by the terms of the policy itself, and the company will not be permitted to contest the payment of the policy, unless it can show that the insured fraudulently concealed the fact that he was not in good health when he received the policy.

The phrase "continued good health" can mean only that the insured having stated that he was in good health when he applied for the insurance, the company would not be bound to deliver the policy, if this state of good health had changed to a state of bad health, even though the application had been approved, the policy signed by the officers of the company and delivered to its agents for delivery to the insured. "Continued good health" is a relative term and manifestly relates to the insured's statement of his condition when he signed the application. This is the letter of the document prepared by the insurance company, and its own carefully prepared documents will be construed most strongly against it. The phrase in question refers alone to the reserved right of the company to withhold delivery of the policy, and has no reference to the validity of the policy after its delivery to the insured. The only difference in the essential facts of this case and the facts of Life Ins. Co. v. Swords, 68 South. 920, is that in the present case the applicant said he was aware that his answers were "material to the risk."

Learned counsel for appellant finds much more potency in "material to the risk" than we have been able to discover. In fact, we think this phrase has very little practical value. Any person of ordinary intelligence knows that his answers to questions pro-

pounded to him as a basis for life insurance are material, else they would not be asked. The applicant must have known that his answers were of material consequence, and he is bound to answer truthfully whether he is made to say that he knew his answers were "material to the risk" or not.

This case is ruled by the Swords Case, 68 South. 920, and will be affirmed.

Affirmed.

DIXON v. SOUTHERN RY. CO. (No. 17451.)
(Supreme Court of Mississippi. April 10, 1916.)

1. RAILROADS — 396(1)—INJURY TO PERSON ON TRACK—PERSONS ENTITLED TO BENEFIT OF LOOKOUT.

In an action against a railroad for death of one killed by a train, based on Shannon's Code Tenn. §§ 1574-1576, requiring a constant lookout by engine crews and proof thereof by the company in order to escape liability, plaintiff must show, not only that deceased was killed by the running of locomotive or cars of defendant, but also that deceased appeared as an obstruction on the track when he was killed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343; Dec. Dig. — 396(1).]

2. RAILROADS — 398(3)—INJURY TO PERSON ON TRACK—EVIDENCE—SUFFICIENCY.

Evidence that deceased was found dead on the defendant's right of way six or eight feet from the track, bruised and broken, the weeds bent as if he had been thrown, and that several trains had passed since he was last seen going up the track at night, held sufficient to sustain the conclusion that deceased appeared as an obstruction upon the railroad track, within Shannon's Code Tenn. §§ 1574-1576, when struck by a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1359; Dec. Dig. — 398(3).]

In Banc. Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action by W. L. Dixon, administrator, against the Southern Railway Company. From an order granting a peremptory instruction for defendant, plaintiff appeals. Reversed and remanded.

W. C. Sweat, of Corinth, for appellant.
W. J. Lamb, of Corinth, for appellee.

HOLDEN, J. This suit was filed in the circuit court of Alcorn county by W. L. Dixon, administrator of the estate of Luther Dixon, deceased, against the Southern Railway Company, for damages for the alleged killing of the said Luther Dixon by one of its trains in July, 1913, in McNairy county, Tenn., about one-half mile east of Pocahontas. The suit for damages was based upon paragraph 4 of section 1574 and sections 1575 and 1576 of Shannon's Code of the state of Tennessee; the alleged killing having occurred in the state of Tennessee. The said Tennessee statutes in question read as follows:

Section 1574, subsec. 4, is as follows:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other object appears

upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent the accident."

"Sec. 1575. *Failure to Observe Precaution.*—Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"Sec. 1576. *Observance of.*—No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

After the plaintiff in the court below, appellant here, had introduced all of his evidence at the trial, the defendant railroad company, appellee here, moved the court to exclude the testimony offered by the plaintiff and grant a peremptory instruction to the jury to find for the defendant. The circuit court excluded the testimony, and granted the peremptory instruction for the defendant, from which action the appellant, Dixon, appeals here, and urges that the lower court erred in granting the peremptory instruction.

The plaintiff below proved his case by testimony in substance as follows: Luther Dixon, deceased, a young farmer, left Memphis and came to Pocahontas on the defendant's train which arrived there at about 1 o'clock in the morning. He got off of the train at Pocahontas. He had two bottles with him. He was last seen alive at this station, on the south side of the track, at 1 o'clock in the morning. His wife was spending that night at her mother's house two miles east of Pocahontas, and the nearest way to where his wife was spending the night was to go up the railroad track east. The next morning he was found dead on the defendant railroad's right of way, about six or 8 feet from the track, about one-half mile east of Pocahontas. His back and the back of his head were badly bruised, and his arm broken. At the place where his body was lying the track was built on a high fill or dump ten or twelve feet high. His feet were nearly at the bottom of the dump, and his head resting up the bank. The weeds for a distance of six or eight feet were knocked down and bent over toward where his body was lying; the weeds bending in a southwesterly direction from a northeasterly direction. On the end of the cross-ties of the track pieces of broken bottle glass were found, which was about 30 feet in a northeasterly direction from the body. Several trains of the defendant railroad passed along this track between the time deceased was last seen at Pocahontas station and the time his body was found the next morning. Some time that night after 1 o'clock a light (loose) engine with a bad headlight passed along this track going west. A witness by the name of Thomas Moreland, introduced by the

plaintiff, testified that he had lived on the railroad and had seen a good many persons and stock knocked off by trains, and that he examined the ground and the surroundings and the weeds near the body of the deceased, Dixon, and that he could tell from the way the weeds were bent over toward the body that the deceased was knocked off the track by a train; that he could tell that this was the way it happened as he could see where he hit the ground and rolled over the weeds like a yearling or large hog had been knocked off by trains. An objection to part of the testimony of this witness, Moreland, was sustained by the court, and the appellant excepted.

[1] Under the statutes of Tennessee set out above the burden of proof was upon the plaintiff in the court below to show by competent testimony that the deceased, Dixon, had appeared upon the track in front of a moving train, by which he was struck and killed. Proof that he was killed by the running of locomotive or cars of the railroad company is not sufficient, under the Tennessee statute, unless the testimony also tends to show that the deceased appeared as an obstruction upon the track when he was killed. This construction of the statute in question is well settled by the courts of Tennessee. Boiled down, the vital question and test here is whether or not the plaintiff in the court below introduced any substantial proof, by circumstances or otherwise, tending to show that the deceased was struck and killed by the front end of a moving train of the appellee railway company. Many cases are cited by counsel on both sides to sustain their respective contentions here, but it will be observed, upon reading these different cases, that the facts in the cases cited are different, and in none of them are the facts precisely the same as in the case before us now. Therefore, in passing upon the question of the correctness of the decision of the court below in granting the peremptory instruction for the defendant railway company, we must look to the facts in this particular case alone to guide us in our conclusion, as each case must stand upon its own facts.

[2] In the case of *Railroad Co. v. Salmon, Administrator*, 2 Higgins, 721 (Court of Appeals of Tennessee), which is a recent decision, the court of Tennessee said:

"The contention below, and the one ably and earnestly pressed upon us here, is that the defendant in error had failed to introduce any substantial proof to the effect that the deceased had appeared upon the track in front of a moving train as an obstruction. It is undoubtedly true that the burden was upon the defendant in error to adduce evidence directly or indirectly showing this fact. It was not incumbent upon the railroad company to observe the precaution prescribed by the statute until the deceased did appear upon the track in such a manner as to become an obstruction; * * * and it is not required to show observance of the statutory precaution until that is shown, or introduction of evidence tends to show it. The statement of the question shows that it is one of fact, and courts certainly should hesitate to

invade this domain and decide the issue. It is the duty of the court, however, to determine whether or not there was adduced any material facts or circumstances upon which a jury could found a verdict. If the testimony be made up of possibilities and conjectures, the question should not be submitted to the jury. On the other hand, if there are facts, surroundings, and circumstances from which a jury could, following the logic of the layman, draw the inference that the deceased was as a matter of fact upon the track, the trial judge should submit the case to the jury. After a careful scrutiny of this record, we have reached the conclusion that the defendant below introduced testimony that tended to show this essential to the recovery. We are further of the opinion that these facts and circumstances were strong enough to put the case beyond the realm of mere conjecture; that there is to be found evidence which naturally, physically, and legally tends to the establishment of this essential."

Following the reasoning in the above decision by the Court of Appeals of Tennessee, which is sound in common sense, we hold that the facts shown in evidence by the appellant here substantially tend to prove that the deceased appeared as an obstruction upon the railroad, and was struck by the front end of a moving train, and that this conclusion may be reasonably reached from the surroundings, facts, and circumstances in proof, which, following the logic of the layman, develops the inference that the deceased was as a matter of fact upon the railway track when struck and killed.

Counsel for appellee cites the cases of *Lewis Barkshadt, Administrator, v. Southern Railway Co.* (Tenn. Oct. 3, 1914, not reported) and the case of *Lucinda Hackney v. Cincinnati, New Orleans, and Texas & Pacific Railroad Co.* (Tenn.) decided in 1907, but which is not reported (a copy of the manuscript opinion being filed here), and urges that this case should be controlled by the decision in those cases. We cannot agree with counsel in this, because the facts in the cases there are materially different from those in the case here, and the cases are easily differentiated. The evidence in the instant case, although circumstantial, is much stronger for appellant than in the cases referred to by counsel for appellee.

There is little room for speculation or conjecture under the facts in this case. The testimony introduced by appellant puts this case so clearly within the statute that the logic of the professional man, as well as that of the layman, could develop no other reasonable inference than that the deceased was struck by the front end of a moving train.

The statute here was conceived and enacted to cover precisely the character of case proven by the appellant. Whether or not the deceased appeared as an obstruction on the track, and the employees of appellee railway did what was required of them by law to prevent the injury, are facts which lie peculiarly within their knowledge, and, under the statute and the testimony in this case, the appellee should have been required to exonerate itself by competent proof.

The question of whether or not our *prima facie* statute (section 1985, Code of 1906) is a rule of evidence and may be successfully invoked here in aid of appellant is not presented to us by counsel on either side, and therefore we do not pass upon it.

Reversed and remanded.

SMITH, C. J. (specially concurring). The evidence was sufficient to warrant a finding by the jury that the deceased came to his death as the result of injuries inflicted upon him by the running of appellee's locomotives and cars; but, in my judgment, and as held by the Supreme Court of Tennessee in two cases, both of which on their facts are practically on all fours with the case at bar, but which seem not yet to have been reported, it is "purely a matter of speculation as to whether the deceased was an obstruction on the track, or so near it as to be struck by the engine, when he could have been seen by any one on a proper lookout on the engine." The cases I refer to are *Hackney v. C., N. O. & T. P. Ry. Co.*, decided in November, 1907, and *Barkshadt v. Southern Ry. Co.*, decided in October, 1914, certified copies of the opinions in which are attached to the brief of counsel for appellee. Under our *prima facie* evidence statute (section 1985, Code 1906), brought forward into chapter 215, Laws 1912, it was not necessary for appellee to prove that the deceased appeared as an obstruction upon the track in order to make out a *prima facie* case; such a case being made out simply by proof that deceased's injuries were inflicted by the running of appellee's locomotives and cars. This statute creates merely a rule of evidence (*Easterling Lumber Co. v. Pierce*, 106 Miss. 672, 64 South. 461), and all matters of evidence are governed by the *lex fori*. The peremptory instruction therefore should not have been given.

If authority be desired for holding that statutes of the character of the one herein referred to are applicable in cases like the one at bar, it may be found in 10 R. O. L. 862, and authorities there cited in note 6, particularly *Penn. Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 768, 31 L. R. A. 651, 56 Am. St. Rep. 695. See, also, *R. & D. Railroad Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290, and *Hilton v. A. M. Railroad Co.*, 97 Ala. 275, 12 South. 276.

I am requested by my Brother SYKES to say that he concurs in the views herein expressed.

SETHNESS CO. v. HOME ADE BOTTLING CO. et al. (No. 17549.)

(Supreme Court of Mississippi, Division A. March 27, 1916.)

SALES \Leftrightarrow 161(1)—DELIVERY TO CARRIER—LIABILITY FOR PRICE.

Plaintiff, who on defendant's order shipped goods to defendant by delivering them to a com-

mon carrier *f. o. b.* for delivery to defendants, and duly notified defendant of the shipment and mailed him the bill of lading, although defendant failed to receive notice of the shipment and never obtained the goods which were destroyed by fire before delivery to him, might recover the purchase price, as a delivery to the carrier was a delivery to the defendant.

[Ed. Note.—For other cases, see *Sales, Cent. Dig. §§ 377-380*; *Dec. Dig. \Leftrightarrow 161(1)*.]

Appeal from Circuit Court, Hinds County; E. L. Brien, Judge.

Action by the Sethness Company against the Home Ade Bottling Company and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Appellant is a manufacturing chemist of Chicago, Ill. Appellees ordered a shipment of merchandise from appellant. The goods were delivered to the Illinois Central Railroad Company at Chicago, Ill., and shipped to Jackson, Miss., where they were destroyed by fire before delivery to appellees. Appellees advised appellant that the goods had been destroyed and appellant duplicated the order. Appellees returned the second order to the appellant, advising the appellant that they had ordered elsewhere. Appellant gave appellees credit back for the second shipment and brought suit on open account for the first shipment. Appellees deny liability upon the grounds that the goods were never delivered. On the trial the case was submitted to a jury, who found for the defendants.

R. H. & J. H. Thompson, of Jackson, for appellant. Watkins & Watkins, of Jackson, for appellees.

HOLDEN, J. From a judgment in favor of the appellees in the circuit court of Hinds county, the appellant appeals.

The undisputed evidence in this record discloses that the appellees, defendants in the court below, directed the appellant by written order to ship to appellees at Jackson, Miss., from Chicago, the goods sued for in this case, and that the appellant, acting upon this written order, promptly shipped the goods to appellees by delivering the same to a common carrier, the Illinois Central Railroad Company, *f. o. b.* at Chicago, for transportation and delivery to appellees at Jackson, Miss., which shipment, it seems, was not received by the appellees, on account of the goods having been destroyed by fire at Jackson while in the hands of the railroad company. It is further shown that the appellant duly notified appellees of the shipment by mailing to them the acceptance of the order, invoice of the goods, and the railway bill of lading. The appellees, however, deny, in a very unsatisfactory way, receiving any notice of the shipment.

Under this state of facts, the appellees were clearly liable for the purchase price of the goods. It is well-settled law that a de-

livery to a common carrier is a delivery to the consignee. The appellant, acting under the written instructions of appellees, shipped the goods and did everything required of it; and, even though appellees failed to receive notice of the shipment, this did not relieve them of liability to the appellant. If the appellees have any right of redress at all, it would be against the railroad company for the loss of the goods. The judgment of the lower court is reversed, and judgment entered here for the appellant for the amount of its claim.

Reversed, and judgment here.

LOWREY v. LOWREY. (No. 17508.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. DEEDS \S 19—FAILURE TO SUPPORT—RIGHT TO CANCELLATION.

Failure to support a grantor as promised, as consideration for his deed, does not entitle him to have the deed canceled.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 38; Dec. Dig. \S 19.]

2. VENDOR AND PURCHASER \S 254(4)—EQUITABLE LIENS.

Failure to support a grantor as promised, as consideration for his deed, does not entitle him to have a lien fixed on the land to secure an allowance decreed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 643-647; Dec. Dig. \S 254(4).]

Appeal from Chancery Court, Alcorn County; T. L. Lamb, Chancellor.

Action by G. W. Lowrey against O. Lowrey. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee filed a bill in chancery against appellant, his son, seeking to cancel two deeds executed by himself and wife conveying to appellant two tracts of land. It is charged in the bill and admitted in the answer that no money was paid for the land, but that the real consideration for the conveyance was that appellant was to take appellee and his wife into his home and support and maintain them for life. Appellee charged that he and his wife had received such treatment at the hands of appellant and his family that, after having lived there for several years, they were forced to leave, all of which the answer denies. On the hearing the chancellor entered a decree adjudicating a monthly allowance to be paid to appellee and his wife by appellant, and fixed a lien upon the land to secure the amount so adjudicated. From this decree appellant appeals.

Thos. H. Johnston, of Corinth, for appellant. W. O. Sweat, of Corinth, for appellee.

HOLDEN, J. [1, 2] This case is controlled by the rule announced in *Lee v. McMorries*, 107 Miss. 889, 66 South. 278, L. R. A. 1915 B, 1069.

Reversed and remanded.

YAZOO & M. V. R. CO. v. JONES.

(No. 17483.)

(Supreme Court of Mississippi, Division B.

April 3, 1916.)

1. RAILROADS \S 443(1)—KILLING STOCK—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit against a railroad for the negligent killing of two mules, held to sustain the burden imposed upon it by the prima facie statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1608, 1617; Dec. Dig. \S 443(1).]

2. RAILROADS \S 415(2)—INJURY TO STOCK—NEGLIGENCE.

There is no obligation on the servants of a railroad to keep a lookout for trespassing stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1477; Dec. Dig. \S 415(2).]

Appeal from Circuit Court, Bolivar County; W. A. Alcorn, Judge.

Action by J. Carl Jones against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The suit was filed in the circuit court for damages on account of the alleged negligent killing of two mules belonging to the appellee, and resulted in a judgment against appellant, from which it appeals.

The accident occurred at night. The only evidence introduced by plaintiff shows that the mules had run down the track and had evidently been struck by the train. Both of them had their backs and legs broken. They were found standing some distance from the track a short time after the cannon ball train had past, which was about 3:30 a. m. The appellant's engineman testified that he was running his train about 50 miles an hour in the country, and that he was in his proper place on the engine, keeping a lookout ahead, and that his headlight revealed the mules on the track about 400 or 500 feet ahead of the train; that the engine was properly equipped and all equipment was working well; that he immediately shut off the steam, blew the stock alarm, and applied the emergency brakes, and did all that he could do to prevent the accident, but that the train could not have been stopped in less than 1,200 feet after the brakes had been applied, and that the mules were struck by the engine before the engine could be stopped; that the train ran about 500 feet after he first discovered the mules until they were struck; that they were running up the track when overtaken and struck; and that the accident was unavoidable. On appeal it is contended that the court should have granted a peremptory instruction for the railroad company.

Mayes & Mayes, of Jackson, for appellant. D. J. Allen, Jr., of Cleveland, for appellee.

COOK, P. J. [1] We have examined the evidence taken at the trial of this case, and

it seems clear to us that the defendant below met the burden imposed by the prima facie statute. The defendant showed just how and under what circumstances the mules were injured by the running train. It appears that the engineman did everything possible to avoid striking the animals after he saw them. We can find nothing in the testimony of plaintiff's witnesses in conflict with the testimony of the engineman. We may admit all that plaintiff's evidence tends to prove, and yet we are unable to see where in the defendant's witnesses are contradicted. It stands undisputed that the train crew were not negligent when they discovered the mules on the track.

[2] There is no obligation on the servants of the company to keep a lookout for trespassing stock. We think the engineman gave a perfectly valid reason for his not seeing the mules earlier, and we can find no facts or circumstances warranting a belief that he falsified. We are unable to say that the engineman's statement of the facts is unreasonable, in the absence of any evidence tending to a contradiction thereof, and we find no such evidence in the record.

Reversed and remanded.

HICKMAN EBBERT CO. v. ASA W. ALLEN CO. (No. 17548.)

(Supreme Court of Mississippi, Division A. March 27, 1916.)

EVIDENCE §441(9) — PAROL EVIDENCE TO VARY WRITINGS—ADMISSIBILITY.

Where a contract for the sale of goods provided for discount for cash on a certain date, the buyer could not defeat recovery of the entire account, where he failed to pay on that date, on the ground that the agreement was for a trade discount allowed regardless of time, since that would merely be a modification of a written contract by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1729, 1787, 1791, 1798; Dec. Dig. §441(9).]

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action by the Hickman Ebbert Company against the Asa W. Allen Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Appellant filed suit on open account against appellee. The record shows that on September 20, 1911, a traveling representative of appellant called on appellee and took an order for a carload of wagons, the price being agreed upon. The order which appellee signed contained the following clause:

"For which I agree to give you settlement within thirty days from date of invoice, either by notes on your blanks due ——— months from date of invoice payable at ——— Bank of ———, or by cash less 10 per cent. December 1st."

The account was not paid on December 1st, but payments were made at various times between January 8, 1912, and October 3, 1912,

and appellant charged appellee with interest at 6 per cent. and credited him with the partial payment he made.

Appellee contends that he has paid the invoice price of the goods plus 6 per cent. interest, but that appellant failed to give him credit for the proper discount of 10 per cent. which its traveling representative said would be allowed. Appellant stands on the contract as written, claiming that the 10 per cent. discount was only to be allowed if the account was paid in full by December 1st.

The case was submitted to a jury, and a verdict returned for the defendant. On the trial the court gave the following instruction to the jury at the request of the defendant:

"The court charges the jury for the defendant, Asa W. Allen Company, that if they believe from a preponderance of the evidence that under the contract of purchase of the wagons the defendant was to have a trade discount of 10 per cent. on the regular price, and that defendant relied on plaintiff's representative to write the contract according to the agreement, and so relying signed the contract without reading it, then, although the jury may believe that the contract as written does not mean a trade discount, still the failure of plaintiff's representative to write the contract as made was a fraud on defendant, and it is not bound by it, and the jury will find for the defendant."

W. A. Blair, of Tupelo, for appellant. C. P. Long, of Tupelo, for appellee.

SMITH, C. J. Appellee's defense is, not that the contract sued on "never had any legal existence because its execution was procured by fraud," but that the provision therein relative to the discount to be allowed does not express the real agreement entered into at the time the contract was signed; in other words, the attempt here is simply to vary the terms of a written contract by parol.

Reversed and remanded.

MISSISSIPPI CENT. R. CO. v. BENNETT. (No. 18022.)

(Supreme Court of Mississippi. April 10, 1916.)

1. MASTER AND SERVANT §125(1)—INJURIES TO SERVANT — TOOLS AND APPLIANCES — KNOWLEDGE OF MASTER.

In order to hold the master liable for negligence in furnishing a servant with an unsafe tool, it must appear not only that the tool furnished was in fact defective, but also that the master knew, or by reasonable inspection thereof could have known, of such defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 243; Dec. Dig. §125(1).]

2. MASTER AND SERVANT §265(9)—INJURIES TO SERVANT—TOOLS AND APPLIANCES—ACTIONS—BURDEN OF PROOF.

A servant seeking recovery for alleged negligence of the master in furnishing him an alleged unsafe tool with which to work, has the burden of proving actual or constructive knowledge on the part of the master of the defect in the tool.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 882-889, 900-905; Dec. Dig. §265(9).]

3. MASTER AND SERVANT \S 278(3)—INJURIES TO SERVANT—DEFECTIVE TOOLS—EVIDENCE—SUFFICIENCY.

The mere fact that a splinter was struck from an anvil by a servant is insufficient to prove that the anvil was too hard, and therefore defective and unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 958; Dec. Dig. \S 278(3).]

4. MASTER AND SERVANT \S 278(14) — INJURIES TO SERVANT — DEFECTIVE TOOLS — KNOWLEDGE OF EMPLOYER—EVIDENCE.

The mere fact that a splinter was struck from an anvil, indicating that the anvil was too hard, does not show even prima facie that the employer knew of such defect or could have discovered it by inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 986; Dec. Dig. \S 278(14).]

5. MASTER AND SERVANT \S 276(2)—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE—SUFFICIENCY.

Evidence held to show that an injury to the employe's eye by a splinter struck from an anvil by a fellow servant was an unavoidable accident for which the master was not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 951, 959; Dec. Dig. \S 276(2).]

In Banc. Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action by A. H. Bennett against the Mississippi Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

S. E. Travis, of Hattiesburg, for appellant. Tally & Mayson, of Hattiesburg, for appellee.

SMITH, C. J. This is an appeal from a judgment awarding appellee damages for an injury sustained by him while in appellant's employ, by reason of its failure to exercise reasonable care to furnish him with reasonably safe tools with which to work.

Appellee was an experienced blacksmith, working as such for appellant in its repair shop at Hattiesburg. About a week prior to the 20th day of February, 1914, the anvil furnished him by appellant with which to work broke, and upon his calling the attention of appellant's master mechanic and shop foreman thereto they decided to have it repaired and returned to appellee for further use, directing him to use, while this was being done, one of three other anvils, of which he was given the choice, not then in use and which had not been in use for some time. He selected one which he and the foreman thought was the best of the three and used it until he received the injury complained of. This anvil was of iron, faced with steel, about four inches of which steel facing was broken off "on the horn end of it." The anvil was otherwise apparently in good shape, and the absence of this four inches of the steel facing did not interfere with its use. Appellee, while testifying as a witness at the trial, said:

"A. * * * I didn't want the anvil and I said something to Mr. Naylor about it, and he

said, 'What are you going to do, knock off?' and I says, 'Mr. Naylor, I am not able to knock off,' and I had to go over there and get the anvil."

Why he did not want the anvil does not appear, nor does it appear that appellee, the master mechanic, or the foreman considered the anvil defective in the sense that appellee would be in danger when using it.

On the 20th day of February, 1914, appellee, with the assistance of a helper, was engaged in cutting a five-eighth inch iron rod into two pieces, and had cut it "pretty well in two" when he shoved the cut portion over the edge of the anvil so the helper could break it off by striking it with a sledge hammer. This the helper proceeded to do, striking, according to the evidence for appellee, both the rod and the edge of the anvil a glancing blow, and when he did so a small splinter from either the rod or the anvil flew up and struck appellee in the eye, resulting in his losing the sight thereof. On the evidence, some of which is here omitted, whether this splinter came from the rod or anvil was a question of fact for the jury if the case had been otherwise one for their consideration. This blow was struck not on the broken part of the anvil, but on the edge of that part of the facing thereof that was apparently in good shape. No evidence was introduced tending to show that the facing of this anvil was defective, except that the anvil was exhibited to the jury, and appellee himself testified that it was too hard, but when asked how he knew this, answered, because of the splinter flying from it.

The uncontradicted evidence for appellant is that it is impossible to manufacture an anvil that will not be liable to splinter when struck on the edge with a sledge hammer in the manner in which this anvil was struck on the occasion in question. At the close of the evidence appellee requested a peremptory instruction, which was refused.

[1, 2] In order that the master may be held to have been negligent in furnishing the servant with an unsafe tool with which to work, it must appear not only that the tool furnished was in fact defective to such an extent as to render it unsafe for the servant to use it, but it must further appear that the master knew, or by a reasonable inspection thereof could have known, of the defect therein, and the burden of proving such actual or constructive knowledge on the part of the master is on the servant when attempting to recover damages for an injury sustained by him by reason of a defect in a tool furnished by the master. *Hope v. Railroad Co.*, 98 Miss. 829, 54 South. 369, and authorities therein cited.

[3, 4] This burden was not met by appellee in the case at bar, for we are not prepared to hold that the mere fact, even though unexplained, that this splinter came from the anvil amounts to proof that the anvil was

too hard and therefore defective and unsafe; but even should we so hold, it does not follow, even prima facie, from that fact alone that appellant knew of the defect in the anvil or could have discovered it by an inspection, reasonable or otherwise.

[5] On the evidence it seems clear that appellee's injury was the result of an unfortunate accident for which no one was to blame, unless it was the helper, who, according to appellee, should not have struck the anvil in breaking the rod, but should have struck the rod only. The peremptory instruction requested by appellant should have been given.

Reversed and remanded.

DICKERSON et al. v. YAZOO & M. V. R. CO. (No. 17673.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

RAILROADS §446(1)—INJURIES TO STOCK—CASE FOR JURY.

In action against a railroad for killing mules on the track, case held for the jury under the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1627; Dec. Dig. §446(1).]

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Suit by Ezra Dickerson and another against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant on a directed verdict, plaintiffs appeal. Reversed and remanded.

Wynn, Wasson & Wynn, of Greenville, for appellants. Mayes, Wells, May & Sanders, of Jackson, for appellee.

SMITH, C. J. Appellants instituted this suit in the court below to recover of appellee damages for the killing of five mules and one horse owned by them. At the close of the evidence the jury were instructed to find for appellee, and there was a verdict and judgment accordingly. The evidence introduced in behalf of appellants made out a statutory prima facie case, and was to the effect that at about 12 o'clock on the night of October 8, 1913, at Marathon, a station on appellee's road, a gentleman living at that station was awakened by a noise, the nature of which does not appear, and upon going out to ascertain its cause he observed one of appellee's passenger trains passing going south, and that it stopped at a trestle a short distance south of the station, remaining there, however, only a few minutes, after which it proceeded on its journey. He then discovered appellants' mules and horse dead upon the track, having apparently been killed by the passing train. One of the mules was lying north of the station, another mule and a horse were lying 133 yards south of the first mule, and the other three mules were lying

at different places further south, the last being 388 yards south of where the first mule was found. Other witnesses testified to tracks of mules going south on the railroad beginning 260 yards north of where the first mule was killed, and from the way the gravel was kicked up the mules making the tracks appeared to have been running. The driver of the engine pulling appellee's train on the occasion in question testified that he was running at the time between 50 and 60 miles an hour, and that he could not bring the train to a stop at that speed within a distance of less than 1,500 or 1,600 feet; that he did not see the mules until too late to prevent striking them, and that as soon as he saw them he shut off the steam and applied the air brakes; that when he struck the animals, they were not scattered along the track, as testified to by witnesses for appellant, but they were "all huddled up together" in a space not larger than the courthouse in which the case was then being tried.

The evidence of this engineer seems not to be in accord with the physical facts testified to by the witnesses for appellant, so that the case is of the type illustrated by Scott v. Railroad Co., 72 Miss. 37, 16 South. 205, from which it follows that the peremptory instruction should not have been given.

Reversed and remanded.

J. M. ROBINSON, NORTON CO. v. GODSEY et al. (No. 17646.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

PRINCIPAL AND AGENT §145(1)—LIABILITY OF PRINCIPAL—CLAIM OF PROPERTY.

Code 1906, § 4784, declares that if a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," and "company," or the like, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, all property and choses in action used or acquired in such business shall as to the creditors of any such person be liable for his debts as if they were his property. The active clerk in a store conducted by partners had the same surname as the partners. There was no sign on the building naming the members of the firm, and such clerk frequently drew checks on the partnership account. Held, that as such clerk merely did what he was directed to do, and as the partners themselves participated in running the business, creditors of the clerk could not hold the partnership property liable for their debts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 513, 518-520; Dec. Dig. §145(1).]

Appeal from Circuit Court, Leflore County; Monroe McClurg, Judge.

Action by the J. M. Robinson, Norton Company against J. H. Godsey, in which execution was levied on the property of the Itta Bena Mercantile Company. S. A. and M. J.

Godsey claimed the property, and, from a judgment for claimants, plaintiff appeals. Affirmed.

Lomax & Tyson and Yerger & Hughston, all of Greenwood, for appellant. Gardner, McBree & Gardner, of Greenwood, for appellees.

SYKES, J. An execution was issued by the circuit clerk of Leflore county based upon a judgment rendered by the circuit court of said county in favor of J. M. Robinson, Norton & Co., appellant here, against J. H. Godsey et al., for the sum of \$2,334.91 with interest from the date of its rendition. Said execution was levied on a stock of goods in the town of Itta Bena, Miss., as the property of the said J. H. Godsey. Thereupon S. A. and M. J. Godsey, the appellees here, made claimants' affidavit and bond for the release of said merchandise seized under said execution. The evidence shows that the goods levied upon were used and acquired in a mercantile business operated in a store building at Itta Bena, Miss., under the firm name of Godsey & Co., without any sign being placed conspicuously at the house where such business was transacted. The evidence further shows that the claimants, appellees here, S. A. and M. J. Godsey, were the owners of the business, and that J. H. Godsey, the husband of M. J. Godsey, was employed by the owners of said building as clerk at a salary of \$75 a month; that as such clerk he did nearly all of the buying of the goods, under the direction of the partners, and wrote nearly all of the checks for the firm, signing them "Godsey & Co., by J. H. Godsey"; that he prepared practically all of the notes and deeds of trust given by the said partnership or received by it in the course of its business; but that the said S. A. and M. J. Godsey would sign their individual names to these instruments. The evidence also shows that the goods levied upon were used and acquired in the business of the said firm; also, that the partnership did business at a bank, carrying an account there under the firm name of Godsey & Co. In short, the testimony shows that J. H. Godsey was the active clerk in the store and did whatever he was told to do by the owners, M. J. and S. A. Godsey. The uncontradicted testimony further shows that S. A. and M. J. Godsey both stayed in the store, giving their time and attention to the conduct and management of the said business. In fact, the testimony of S. A. Godsey is to the effect that he was the manager and the head of the concern.

It is the contention of appellant that, under section 4784 of the Code of 1906, this stock of goods was subject to be levied on in this case. Section 4784 reads as follows:

"If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in let-

ters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

In this case the business was being transacted in the name of Godsey & Co. without having a sign disclosing the names of the partners placed conspicuously at the house where such business was being transacted. This case would therefore come under this section of the Code, provided J. H. Godsey transacted the business of the firm as is contemplated by this section. However, in this case the uncontradicted testimony shows that J. H. Godsey was only an employé of the partners, doing whatever he was instructed to do by them. The entire management and control of the business was not intrusted to J. H. Godsey. On the contrary, the owners of the business stayed in the store and looked after the business of the firm practically the whole time. This section of the Code was enacted for the prevention of fraud; its object being to primarily protect those dealing with the ostensible owner of a mercantile business whether he does business in his own name or whether he does business by the use of the words "agent," "company," "manager," or words of like character, without also using a sign placed conspicuously at the store showing the names of the owners or partners. In this case, had not M. J. and S. A. Godsey also stayed at the store and participated in the transactions of its business, there would be some grounds for the contention of the appellants. Under the above section of the Code, the business of Godsey & Co. was not transacted by J. H. Godsey as the ostensible owner of the said business. Neither was there anything in the manner in which the business was transacted to mislead any one into the belief that J. H. Godsey was the ostensible owner of the business. The case of *Hamblet v. Steen*, 65 Miss. 474, 4 South. 431, is one where Mr. Hamblet conducted and managed the business of a livery stable. His wife, who was the real owner, had nothing to do with the active management of it. The only sign at the building was "Carr Stable." In that case the outside world was therefore justified in believing that Mr. Hamblet was the owner of the stable. Had Mrs. Hamblet participated in the conduct and management of the business and personally remained at the stable, an entirely different conclusion would have been reached by the court.

This court, in the case of *Bufkin v. Lyon & Co.*, 68 Miss. 256, 10 South. 38, in part said:

"It does not appear from the statement of facts who transacted business as to the goods, and that is the material inquiry and the determining factor under section 1300 of the Code. O. E. Bufkin was in possession as clerk, and

presumably what he did was in that capacity, and in the name and behalf of his employer, as there is nothing to suggest the contrary."

The personal presence of the owners and their active participation in the conduct of the business negatives the fact that J. H. Godsey was transacting the business of the partnership as is contemplated by the statute.

Affirmed.

CALEDONIAN FIRE INS. CO. v. SHEPHERD. (No. 17500.)

(Supreme Court of Mississippi, Division A. March 27, 1916.)

1. PLEADING \S 180(2) — REPLICATION — DEPARTURE.

Where the insured brought suit simply upon the policy, permitting her by replication to plead a waiver of one of the clauses of the policy, an alleged breach of which clause was pleaded in bar by the insurer, is not a departure from the declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 366, 368-376, 378, 379, 381; Dec. Dig. \S 180(2).]

2. INSURANCE \S 375(1) — FIRE INSURANCE — LIABILITY OF INSURED—DEFENSE.

The insurer cannot defeat recovery under a policy on the ground that its agent failed to comply with Code 1906, \S 2627, requiring every agent to obtain a certificate showing that he is the duly authorized agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 948-951, 956-965; Dec. Dig. \S 375(1).]

3. INSURANCE \S 383 — FIRE INSURANCE — CONDITIONS OF POLICY—WAIVER.

The waiver by the insurer of a provision of the policy after its issuance is not within Code 1906, \S 2597, providing that the rules of the company shall not be considered as a warranty or a part of the contract except so far as they are incorporated in full into the policy, and that the conditions of the policy shall be stated in full therein, so that a written waiver in the policy is unnecessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1018; Dec. Dig. \S 383.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Nora Shepherd against the Caledonian Fire Insurance Company. Judgment on peremptory instruction for plaintiff and defendant appeals. Affirmed.

This is an appeal from a judgment based on a peremptory instruction for the appellee, who was the plaintiff below, in her suit against the appellant for the proceeds of a fire insurance policy covering her residence in the town of Utica. The People's Bank of Utica conducted a fire insurance agency, and it was the custom of the cashier of said bank to act as agent of the various fire insurance companies operating through the agency. On February 16, 1913, one Price was the cashier of said bank, and, acting as agent of the appellant and other insurance companies, delivered to the appellee a policy of insurance for the sum of \$1,300, and collected from appellee the premium thereon. On

April 10, 1913, Price resigned as cashier, and one Cook succeeded him and assumed the duties of the cashier of the bank and took charge of the insurance agency, and at once notified the general office of the appellant at New York of the change, and advised the company that he had charge of all the books, blanks, and other supplies of the company, and asked that the agency be transferred from Price to Cook. Replying to this letter, the New York office advised Cook that the matter had been referred to their general agent, one Burke, of Atlanta, Ga., who would communicate with him. On May 2d, Burke wrote the following letter to Cook:

"Caledonian Insurance Company.

"Atlanta, Georgia, May 2, 1913.

"Mr. R. F. Cook, Utica, Miss.—Dear Sir: Your letter of April 22d, asking that we transfer the agency from our former agent, W. H. Price, to yourself has been referred to me. In this connection, I wish to advise that Special Agent C. R. Bartley, who is now in Mississippi, will call on you in the near future. In the meantime, this letter will be your authority to act as our agent, pending Mr. Bartley's arrival. I wish to call your attention to the fact that the company wrote our former agent on April 17th, requesting cancellation of policy 2,231,321—Buckner, but have not as yet received this policy. Will you therefore be good enough to see that the same is properly returned canceled.

"Yours very truly,

"Norman D. Burke, General Agent."

After the receipt of the above letter by Cook, appellee called on him at the bank and stated that she desired \$350 additional insurance on her said residence, and called attention to the fact that her policy in the appellant company had been left by her at said bank with Mr. Price, the former cashier, for safe-keeping. Cook stated to appellee that she could have the additional \$350 insurance, and that he would issue the policy for her in some one of the companies represented by his agency, and that he would indorse the written permission upon the policy in the appellant company, which was then in his possession and under his control. On the 8th day of May, 1913, one Bartley, the special agent of the appellant company, went to Utica, and took up all blank policies in the hands of Cook, and took up his letter of authority and instructed him to write no new business in the company, but left in his control and possession the policy register, containing the list of outstanding policies, with indorsements thereon and other blanks and supplies. Bartley did not tell Cook what he would do in reference to outstanding policies, but that he would communicate with him later, but he did not cancel any outstanding policies. On May 14, 1913, Cook issued to appellee another policy of insurance for the additional amount of \$350 in another company, and made a written indorsement on the original policy in the appellant company, using one of the forms left with him by Bartley, the special agent, and on

the same day he wrote the appellant at the New York office the following letter:

"People's Bank, Utica, Mississippi,

"May 14, 1913.

"Caledonian Insurance Company, New York, N. Y.—Gentlemen: Inclosed you will find duplicate of indorsement on policy #2,231,318, for Mrs. Nora Shepherd. Also three indorsements for your execution, to take the place of my temporary indorsement and notification.

"Yours very truly, R. F. Cook."

On the night of May 19, 1913, the property burned. The appellant denied liability, and this suit followed.

To the declaration filed by appellee, the defendant filed a special plea, alleging that, after the resignation of Price, its former agent, Cook, who had assumed to act for it, was never its agent, and that when he made the indorsement on the policy on May 14, 1913, permitting the additional insurance, he was not the agent of appellant and never had been its agent, and that on May 8th, appellant through its special agent had terminated all authority which he may have had, if any, to represent the company. To this special plea appellee filed a replication, which set out in detail the manner in which the agency was operated through the bank by its cashier, and the issuance of the policy through Price, and the action taken by the company after Price's resignation, and that Cook had authority to act when he agreed with appellee to the additional insurance, and advised her that he would make the indorsement on the policy previously issued in the appellant company, and that the appellee dealt with Cook and took out the additional insurance and paid the premium therefor, and that she had no notice that he was acting without authority, and that, as to her, appellant was estopped to deny his authority. Appellant demurred to the replication, and on the hearing, after the testimony for both sides had been concluded, the court gave a peremptory instruction for plaintiff, from which an appeal was taken.

It is contended on appeal that the replication and the declaration are at variance, for the reason that the replication sets up the fact that Cook, acting as the agent of the appellant, gave permission to appellee for the additional insurance to the amount of \$350, whereas the declaration is simply a suit on the policy, which is made an exhibit thereto.

It is contended, also, that Cook had not complied with section 2627 of the Code, requiring every agent to obtain annually from the Commissioner of Insurance a certificate, showing that he is the agent of the company, and duly authorized to do business for it.

It was next contended that the agreement by Cook was not a part of the contract, and that he could not waive any of the provisions of the contract, under the provisions of section 2597 of the Code as follows:

"In all insurance against loss by fire the condition of insurance shall be stated in full, and

the rules and by-laws of the company shall not be considered as a warranty or a part of the contract except so far as they are incorporated in full into the policy, and are not in conflict with this chapter."

W. O. Wells, of Jackson, and McLaurin & Armistead, of Vicksburg, for appellant. Watkins & Watkins, of Jackson, for appellee.

SMITH, C. J. [1] The replication of appellee, setting up a waiver of the additional insurance clause of the policy, an alleged breach of which was pleaded in bar by appellant, is not a departure from the declaration.

[2] That Cook, at the time he consented to the additional insurance, may not have complied with section 2627 of the Code cannot be availed of by appellant to avoid its liability under the policy. Insurance Co. v. Rust, 141 Ill. 85, 30 N. E. 772; Marshall v. Insurance Co., 78 Hun, 83, 29 N. Y. Supp. 334.

[3] In our judgment, a waiver by an insurer of one of the provisions of a policy, after its issuance, is not within section 2597 of the Code.

Affirmed.

MUNN v. POTTER. (No. 17617.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

1. CHATTEL MORTGAGES §235 — POSSESSION — RIGHT TO.

Under Code 1906, § 2782, payment extinguishes mortgages or trust deeds.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 496-499, 507; Dec. Dig. §235.]

2. CHATTEL MORTGAGES §73 — VALIDITY — COMPOUNDING OFFENSE.

Where defendant gave a deed of trust on personalty to secure a promise by the beneficiaries not to prosecute him for obtaining goods under false pretenses, the contract is in violation of public policy, and the trust deed is void.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 144; Dec. Dig. §73.]

3. REPLEVIN §69(4) — ACTIONS — EVIDENCE — ADMISSIBILITY.

As under Code 1906, § 4232, the general issue is the only pleading allowed in replevin, evidence showing the invalidity of the trust deed on which plaintiff based his claim, or that it had been extinguished by payment, is admissible, though not specially pleaded.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 272-277; Dec. Dig. §69(4).]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Replevin by M. R. Potter, trustee, against L. Munn. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. I. Munn, of Newton, for appellant. J. D. Carr, of Newton, for appellee.

SMITH, C. J. This is an appeal from a judgment in an action of replevin, awarding appellee, trustee in a deed of trust executed by appellant, the possession of two mules covered by the deed of trust.

[1, 2] On the trial the court below erroneously excluded evidence offered by appellant to prove that the debt, to secure which the deed of trust was given, had been paid, and that the deed of trust was executed by appellant pursuant to a promise by the beneficiaries therein not to prosecute him for having obtained from them under false pretenses goods of the value of \$400. If the deed of trust has been paid, appellee's right to the possession of the mules has been extinguished (section 2782, Code 1906); and if it was executed in consideration of an agreement on the part of the beneficiaries therein to compound a felony, it is void.

[3] The ground upon which this evidence was excluded seems to have been that the facts sought to be proven had not been pleaded in bar of the action. Special pleas are not allowed in actions of replevin, and the evidence offered was admissible under the general issue. Code 1906, § 4232; *Bennett v. Holloway*, 55 Miss. 211.

Reversed and remanded.

COCHRAN v. LATIMER et al. (No. 17471.)
(Supreme Court of Mississippi, Division A.
March 27, 1916.)

APPEAL AND ERROR \S 1195(1) — **REMAND** —
SUBSEQUENT TRIAL—LAW OF THE CASE—
MATTERS CONCLUDED.

Where, on former appeal, it was held that the evidence was insufficient to show undue influence or fraud by the defendant upon her intestate, and on the trial after remand, under a new allegation, the plaintiff sought to prove a promise of the defendant connected with such undue influence, and such contention was sustained by the chancellor, without further evidence than that offered on the first trial, his decree was erroneous, since it did not follow the law of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4661; Dec. Dig. \S 1195(1).]

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Action by Mrs. Norma W. Latimer and others against Mrs. M. J. Cochran and others. Judgment for petitioners, and defendant named appeals. Reversed, and decree entered.

The facts are stated in the opinion on the former appeal. See *Wherry v. Latimer*, 103 Miss. 524, 60 South. 563, 642.

After the case was reversed and remanded to the lower court, appellees, having obtained leave of the court, filed an amended bill, which in substance alleged that on account of the protracted illness of Samuel Wherry, deceased, he had become a physical and mental weakling, and that he was annoyed and embarrassed by debts, and that his daughter, Miss Mollie Wherry, now Mrs. M. C. Cochran, nursed him during his last illness, and that, having the utmost confidence in her, her influence over him became

paramount and undue, and that she took advantage of his emaciated condition and passive will, and while he was in this condition of mind and body proposed to him that, if he would make her the sole beneficiary of his insurance policies, she would keep the premiums paid and pay his debts out of the proceeds, and divide what was left among his children, her brother and sisters, and that Mr. Wherry readily consented to this and changed the beneficiary in his insurance policies accordingly, and that after his death she refused to divide with complainants. The bill prays that appellant be declared the trustee for the other children's part of the insurance.

Appellant answered under oath, denying any mental weakness on the part of her father, or that he reposed any special confidence in her, or that she exercised any undue influence over him, or that she made any agreement to pay his debts out of the proceeds and divide the remainder with the other children. She also pleaded that the matters and things set up in the amended bill had been adjudicated. On the hearing the chancellor sustained the allegations of the amended bill and granted an appeal.

Elmore & Ruff, of Lexington, for appellant. Boothe & Pepper, of Lexington, for appellees.

HOLDEN, J. This case is here for the second time, it having been reversed in *Wherry et al. v. Latimer*, 103 Miss. 524, 60 South. 563, 642; this court deciding that there was no fraud or undue influence used, or mental incapacity shown as to Mr. Samuel Wherry, the insured in the insurance policies about which this controversy arose. When the cause went back to the lower court the appellees amended their bill of complaint and alleged in substance that the appellant exercised undue influence over her father, the deceased Wherry, and that, while he was feeble in mind and body and a mental weakling, she unduly and corruptly induced her father to change the insurance policy to her, and in order to get him to more readily consent promised that, if he would make her the sole beneficiary of this insurance, she would keep the premiums and assessments paid up, pay his debts out of the proceeds, "and divide what was left between the children, her sisters and brother"; that he readily assented to this, and in consequence the change of beneficiary was made; and that after the father's death appellant refused to divide the insurance with appellees. No new evidence was taken by the appellees on the hearing of this cause in the court below, but they introduced and relied alone upon the evidence taken in the former hearing.

The appellant here invokes the doctrine of "the law of the case," urging that this appeal should be controlled and settled by the

opinion in Wherry et al. v. Latimer et al., supra. The decree of the chancellor in the case before us now reads in part as follows:

"And now having fully considered said cause, and all of the questions of law and fact at issue therein, and being of the opinion after a due consideration of all of the material facts and circumstances proven, and it so appearing to the satisfaction of the court, that defendant Miss M. J. Wherry, now Mrs. M. J. Cochran, had and possessed undue influence and control over the will, actions, and conduct of her father, Samuel Wherry, at the time of the change of beneficiaries in the policies or relief fund certificates described in the pleadings, and that said undue influence was then exercised by her, and that in order to induce her father to yield more readily to her suggestion and request she said to him in effect that, if he would make her the sole beneficiary in the two policies, she would keep the premiums and assessments paid up and would pay his debts out of the money she received thereon, and divide what was left equally between all of the children and herself, and that, yielding to such *undue influence and promise* and in consideration of said promise, said change was made as sought by said defendant."

[1] It is very evident to us that the chancellor was persuaded for the second time to believe, and he so decreed, that the change of the beneficiary in these insurance policies was brought about by undue influence, and that such undue influence, which is tantamount to corruption and fraud, connected inseparably with the other allegation of the amended bill (that is, that the appellant promised to pay the debts and divide the money to be obtained from the insurance policies with appellees), moved the chancellor in his finding on the second hearing. This being true, we are bound to conclude that the chancellor did not follow "the law of the case," because this court had said on the former appeal that there was no mental incapacity, undue influence, corruption, or fraud; and the appellees in their amended bill present these same questions of mental incapacity, undue influence, fraud, and corruption, in connection with the new allegation, the two being inseparable, leaning upon each other for strength, and upon this proposition insisted that there was a parol trust in favor of the appellees. And following the allegations of the amended bill, the chancellor decreed in effect that it was a parol trust by reason of mental incapacity, undue influence, corruption, and fraud, with the incidental promise of appellant to divide the insurance money with appellees. Therefore we hold that under "the law of the case" the decree of the chancellor is erroneous.

Furthermore we do not think from the whole testimony in this case that the proof is sufficient to lawfully divert the insurance money from appellant, the beneficiary written in the face of the policies, to the appellees. The testimony in the record does not clearly show that there was a parol trust established in favor of the appellees by fraud, or by agreement with appellant. The competent evidence in the case overwhelmingly refutes

this idea; the proof sustaining the contention is so slight that we feel it would be unsafe to rely upon it as establishing a parol trust. And the correctness of this conclusion becomes more apparent to us when we consider the fact that the appellees, their attorneys, and the chancellor, throughout the records in both cases, have clung tenaciously to the charge of undue influence, mental incapacity, fraud, and corruption in connection with the alleged promise of appellant, depending upon this former charge to support them in the latter; and, neither being able to stand alone, both must fall here under "the law of the case." The decree is reversed, and decree for appellant entered here.

Reversed, and decree here.

NEW ORLEANS GREAT NORTHERN R. CO. v. MCGOWAN. (No. 17336.)

(Supreme Court of Mississippi, Division A.
March 27, 1916.)

1. RAILROADS §99(1) — DUTY TO ERECT BRIDGE—STATUTE.

Code 1906, § 4053, providing that, where a railroad is constructed so as to cross a highway, and it is necessary to raise or lower the way, the road shall make the proper grades and erect such bridges as may be necessary, has no application to a plantation road, not a public way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. §99(1).]

2. RAILROADS §308(6)—DUTY TO MAINTAIN BRIDGE—LIABILITY FOR FAILURE—STATUTE.

Under Code 1906, § 4058, imposing the duty on a railroad to construct and maintain cattle guards and suitable crossings on plantation roads, prescribing liability for failure, and giving the right of recovery to any person interested, including a tenant on the land in the inclosure, one traveling a plantation road, not being in any way connected with the plantation to which the road was appurtenant, but merely traveling as a member of the general public, could not recover against a railroad for injuries to his mule, when it fell through a defective bridge taking the plantation road over the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 966; Dec. Dig. §308(6).]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Suit by Jack McGowan against the New Orleans Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The appellee was the owner of the mule upon which he was riding on a plantation road on the property of one W. T. McGowan. The bridge was constructed by the railroad company on the approach of the plantation road to the railroad track. Appellee was not the owner of the plantation, nor was he the tenant of the owner, but was the tenant of one J. H. McGowan, whose property adjoined that of W. T. McGowan. Suit was filed for the value of the mule, the declaration alleging that the timbers of the bridge had,

through the negligence of the defendant, become rotten and decayed, so that appellee's mule, stepping upon a rotten plank, fell through the bridge, receiving injuries resulting in its death. There was a jury and verdict for appellee, and a judgment accordingly, from which comes this appeal.

The appellant contends that there should have been a peremptory instruction for the railroad company, as the road upon which the bridge was constructed was not a public road, and the appellee was not entitled to recover, since he was not the owner of the property on which the plantation road lay, nor was he the tenant of the owner.

Section 4053 of the Code provides that where a railroad is constructed so as to cross a highway, and it shall be necessary to raise or lower the highway, the railroad company shall make the proper grades, keep the crossings in order, and erect such bridges as may be necessary, and for failure so to do they shall forfeit the sum of \$100 to the county.

Section 4058 imposes the duty on the railroad of constructing and maintaining necessary cattle guards and suitable crossings on plantation roads, the prescribed liability in the amount of \$250 for failure so to do, and gives the right of recovery to any person interested, including a tenant on land in the inclosure.

Green & Green, of Jackson, for appellant.
W. C. Wells, of Jackson, for appellee.

SMITH, O. J. [1, 2] Since the road here in question is a plantation and not a public road, section 4053, Code Miss. 1906, has no application; and since the evidence does not disclose that appellee was in any way connected with the plantation to which the road was appurtenant, nor that, at the time his mule was injured, he was traveling the road in any capacity other than as a member of the general public, no recovery can be had under section 4058 of the Code.

The case of Railroad Co. v. Watson, 82 Miss. 89, 33 South. 942, is not here in point, for the reason that the road there involved was "a connection between two public roads * * * for use by anybody and everybody who wished."

Reversed and remanded.

ALABAMA & V. R. CO. v. JONES. (No. 17648.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

MASTER AND SERVANT §156(2)—INJURIES TO
SERVANT—DUTY TO WARN.

A young negro boy about 13 years old was employed as a laborer on a ditching train; it being his duty to remove dirt from flat cars. The ditching train, having unloaded dirt and left the crew at the place where it had been unloaded, was placed on a side track, so that a

freight train could pass. When the freight came along, the young boy attempted to jump on the train and was injured. Held, that the railroad company had no cause to anticipate that the boy would jump on or off passing trains, and therefore was not guilty of negligence in failing to warn him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 312; Dec. Dig. § 156(2).]

Appeal from Circuit Court, Rankin County; A. J. McLaurin, Judge.

Action by Maceo Jones, by next friend, against the Alabama & Vicksburg Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

This was a suit in the circuit court by appellee for injuries received by him, resulting in the loss of a leg. There was a jury and verdict for \$1,500, and from a judgment thereon this appeal is taken. The record shows that appellee, a negro boy about 13 years old, weighing 143 pounds and about 5½ feet in height, was employed by appellant as a laborer on a ditching train, and that his duties were to move dirt from flat cars. On the day of the accident the ditching train had just unloaded some dirt, and left the crew at the place where the dirt had been unloaded, and had taken a side track so that a freight train could pass. When the freight train came along, appellee undertook to jump on the moving train, and was thrown to the ground and injured. It is contended that by reason of his youth it was the duty of appellant to warn him against the danger of jumping on moving trains, and for failure so to do they became guilty of negligence, and consequently liable for the injuries received by appellee.

R. H. & J. H. Thompson, of Jackson, for appellant. Stingly & McIntyre, of Brandon, for appellee.

SMITH, O. J. Appellant had no cause to anticipate that appellee would jump on or off of passing trains, and therefore was under no duty to warn him not to do so. The peremptory instruction requested by appellant should have been given.

Reversed, and judgment here.

B. ALTMAN & CO. v. WALL. (No. 17395.) (Supreme Court of Mississippi, Division A. April 10, 1916.)

JUSTICES OF THE PEACE §6 — JUSTICE DE
FACTO — VALIDITY OF ATTACHMENT — STAT-
UTE.

Under Code 1906, § 3473, making the official acts of any person in possession of a public office, exercising the functions thereof, valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not, an attachment issued by a mayor of a town, who, after qualifying as deputy sheriff of the county, exercised the duties of mayor and ex officio justice of the peace until his term of office as mayor expired, was valid despite Const. art.

1, § 2, providing that no person belonging to one of the departments of government shall exercise any power belonging to either of the others, and that acceptance of an office in a department shall vacate all offices held by the person so accepting in any other department.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 9; Dec. Dig. ¶6.]

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Suit by B. Altman & Co. against Mrs. W. D. Wall. From an order sustaining defendant's motion to quash a writ of attachment, plaintiffs appeal. Reversed and remanded.

This is an appeal from an order of the circuit court sustaining a motion to quash a writ of attachment. The motion alleges that the mayor of the town, who acted as ex officio justice of the peace at the trial of the case, was at the time of the issuance of the writ of attachment a deputy sheriff of the county, and that the acceptance of latter office, which belonged to the executive department of the state, forfeited his office as a justice of the peace, which belonged to the judicial department.

G. M. Johnson, of Sardis, for appellants.
L. L. Pearson, of Sardis, for appellee.

SYKES, J. The appellants, B. Altman & Co., instituted an attachment suit against Mrs. W. D. Wall in the court of T. J. Taylor, mayor of the town of Sardis, and ex officio justice of the peace in and for said town. The question before this court is whether or not said Taylor was either a de facto or a de jure justice of the peace at the time of the issuance of the attachment. The facts relating to this question are as follows: T. J. Taylor was elected mayor of the town of Sardis for a term of two years, and duly qualified as such and fulfilled the duties of the office for the term. One year after his said election he accepted and qualified as deputy sheriff of the county of Panola, and entered upon and fulfilled the duties of the office of deputy sheriff during the term of his appointment. At the time of the suing out of the attachment in this case he was acting both as mayor and ex officio justice of the peace, and also as deputy sheriff under this appointment. The appellee contends that under section 2 of article 1 of the Constitution of the state of Mississippi, which reads:

"No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments"

—that the said Taylor vacated the office of mayor and ex officio justice of the peace as soon as he qualified and entered upon the duties of the office of deputy sheriff, and that his act in issuing or attempting to issue the attachment in this case was a nullity and was absolutely void.

It is the contention of the appellant that the office of mayor is an executive one, under

the authority of the case of *State v. Armstrong*, 91 Miss. 513, 44 South. 809, and that, the office of sheriff being also an executive office, then the acceptance of the second office was not violative of the above article of the Constitution. It is unnecessary for us to pass on this proposition in this case.

The agreed statement of facts shows that Taylor continued to exercise the duties of mayor and ex officio justice of the peace until his term of office as mayor expired. Consequently he was, to say the least, a de facto mayor and ex officio justice of the peace when he issued the writ of attachment. Section 3473 of the Code of 1906 makes the official acts of any person in possession of a public office and exercising the functions thereof valid and binding as official acts in regard to all persons interested or affected thereby, whether such persons be lawfully entitled to hold the office or not.

This question has been before this court where special judges were commissioned to try cases, owing to the disqualification of regular judges. In the case of *Powers v. State*, in 83 Miss. on page 702, 36 South. 8, the opinion is in part as follows:

" * * * This being so, it brings us at last to the sole question of whether the acts of the special judge are void for the reason only that he failed to take, before entering upon the discharge of his duties, the oath prescribed by law. It is contended by counsel for appellant that, the oath of office being a constitutional requirement, it is indispensable to the legitimate exercise of any of the functions of office, and that the acts of such an incumbent cannot be upheld upon the ground that he is a de facto officer, for the reason, it is said, that he is not rightfully in possession and control of the office. This is a question on which a great variety of opinions has been expressed, and many authorities can be cited sustaining the contentions here made. We adopt, however, as the true view, that one in possession of an office, judicial or not, who exercises the functions of the position, is to be considered, as to all persons dealing with him, rightfully in possession of the office, and that his acts as such are valid and binding, and this, too, whether he fails to take the oath required, or even though it should be judicially determined that the law under which he was appointed or selected was unconstitutional. The orderly dispatch of business, the validity which is implied of all judicial decisions, the necessity that official acts should not be set aside by any future happening, and that rights vested and causes adjudicated by any tribunal should not afterwards be disturbed and unsettled for any cause, all demand the recognition of the rule, and show the reason and wisdom on which it is founded. In the instant case a disqualification existed as to the regular circuit judge, and the special judge who presided herein was duly appointed and commissioned to fill such position, and by virtue of such appointment he assumed such position and discharged the duties thereof. He was therefore not a usurper, but a de facto officer, and to his acts as such the law attaches validity. 'Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of office and exercises its powers and functions.' Field, J., in *Norton v. Shelby Co.*, 118 U. S. 425 [6 Sup. Ct. 1121], 30 L. Ed. 1121."

Reversed and remanded.

**COMMISSIONERS OF CAMP CREEK
DRAINAGE DIST. v. JOHNSTON et al.**
(No. 17484.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

**1. DRAINS \S 14(3)—DRAINAGE DISTRICTS—
ORDERS OF COMMISSIONERS—EFFECT.**

A false recital in the order of the board of supervisors that a petition praying affirmation of drainage district was signed by the necessary landowners does not confer jurisdiction on the board to proceed with the organization of the district; inquiry into the legality of the proceedings being authorized by Laws 1912, c. 198, § 5, providing procedure in forming drainage districts.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 5; Dec. Dig. \S 14(3).]

**2. DRAINS \S 14(3) — DRAINAGE DISTRICTS —
ESTABLISHMENT—PROCEEDINGS—DISCRETION
OF SUPERVISORS.**

Under Laws 1912, c. 198, § 5, providing procedure in forming drainage districts, though it be conceded that the board of supervisors has the power to continue hearing of objections from day to day or from term to term, the exercise of such power is not mandatory.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 5; Dec. Dig. \S 14(3).]

Appeal from Circuit Court, De Soto County; N. A. Taylor, Judge.

Proceedings for the establishment of the Camp Creek Drainage District, to which J. S. Johnston and others protested. From a judgment of the circuit court affirming the order of the board of supervisors in favor of protestants, the Commissioners of the proposed district appeal. Affirmed.

At the August, 1916, meeting of the board of supervisors of De Soto county there was presented to said board a petition praying the establishment of a drainage district under the provisions of chapter 198 of the Laws of 1912. The petition alleged that it was signed by a majority of the resident landowners of the proposed drainage district owning not less than one-third of the land, as required by section 1 of said law. The board entered an order on its minutes reciting the filing of the petition, and that it was signed by a majority of the resident landowners of the proposed district owning more than one-third of the land therein, and granted the prayer of the petitioners.

At the September meeting the board levied an acreage tax to defray the preliminary expenses of organization and cost of survey and maps and profiles.

At the October meeting the commissioners and engineer made their report to the board, together with estimates of cost of construction. At the same meeting notice was given to all parties owning land in the proposed district to appear at the November meeting and present any objections they might have to the creation of the district.

At the November meeting a counter petition was presented to the board protesting against the creation of the proposed district,

and there was also presented at this meeting a written protest against the establishment of the proposed district for the reason that the original petition filed at the August meeting was not signed by a majority of the landowners resident in the district and owning the required amount of land. The protesting petitioners prayed that the original petition be dismissed for want of jurisdiction, and that the action of the board subsequent to the filing of the original petition be declared null and void.

The matter was continued to the December meeting, when the board found in favor of the protestants and entered an order dismissing the whole proceedings for want of jurisdiction, and rescinding the acreage tax levy, and the commissioners of the proposed district appealed to the circuit court where the judgment of the board was affirmed.

Section 5 of the act referred to provides as follows:

"On the day appointed for the hearing the board of supervisors shall hear and determine any objection that may be offered to the report, and unless said report or the proceedings leading up thereto are shown to have been illegal, imperfect or lacking in compliance with this act, and unless a petition shall have been filed at least fifteen days before the date set for the hearing signed by a majority of the landowners, representing at least three-fourths of the land included in said proposed drainage district, petitioning the board of supervisors not to declare said proposed territory a drainage district and not to levy a drainage tax thereon for the carrying out and completion of the work as shown in the map, profiles, etc., and recommended by the engineer and commissioners, they shall declare the territory as petitioned for and recommended to be declared, a drainage district as shown in the maps aforesaid, and the same shall be designated by a name or number. The board of supervisors may make such orders as are necessary to have any imperfections or defects of said work heretofore done by the engineer and commissioners corrected and perfected, and for that purpose may continue the hearing from day to day or from term to term as may enable the original petition to be perfected and carried into effect."

R. L. Dabney, of Hernando, for appellants.
J. W. Loch, of Hernando, for appellees.

SMITH, C. J. [1] The recital in the order of the board of supervisors that the petition praying for the formation of the drainage district had been signed by the necessary number of landowners owning the necessary quantity of land, when the contrary was the fact, did not confer jurisdiction upon the board to proceed with the organization of the district (*Supervisors v. Buckley*, 85 Miss. 713, 38 South. 104), and inquiry into the legality of the proceedings by which the formation of the contemplated district was begun, when the report of the engineer and commissioners comes on to be heard, is expressly authorized by section 5 of chapter 198 of the Laws of 1912, under which the district was being attempted to be formed.

[2] Conceding for the sake of the argu-

ment, but without intending to express any opinion relative thereto, that the board of supervisors had the power, under section 5 of this statute, to continue the hearing of the objections to the petition "from day to day or from term to term" in order that the requisite number of signatures to the petition might be obtained, the exercise of such power is clearly not mandatory.

Affirmed.

DAHMER v. CITY OF MERIDIAN et al.
(No. 17696.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

**1. MUNICIPAL CORPORATIONS — 780, 800(1)—
INJURIES TO PEDESTRIANS — LIABILITY OF
CITY AND LICENSEE.**

Plaintiff, who was injured by a billboard being blown over on him while he walked along a sidewalk, could not recover for his injuries against the city or a party who, by contract with the lessee of the lot on which the billboard stood, had the privilege of using it for advertising purposes, the lessee of the premises being the party liable, if any.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1634, 1688, 1690-1694; Dec. Dig. 780, 800(1).]

2. MUNICIPAL CORPORATIONS — 780—INJURIES ON SIDEWALK.

A city was not liable for injuries to a sidewalk pedestrian, upon whom a billboard was blown which was on private premises and not obviously dangerous to pedestrians; the city having no notice that the board was defective or dangerous and it appearing to be reasonably safe.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1634; Dec. Dig. 780.]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Suit by Claude L. Dahmer against the City of Meridian and another. From a judgment for defendants, plaintiff appeals. Affirmed.

One Hester was the owner of a lot in the city of Meridian upon which a billboard had been erected by one Hopper, who afterwards died. The property was afterwards leased to one Louin, who entered into a contract with appellee Ziller, whereby Ziller secured the privilege of using said billboard. The billboard was fastened to posts and was about 2½ feet from the sidewalk. Appellant, while walking along the sidewalk holding an umbrella over him to protect him from the rain, was struck by the billboard, which was blown over across the sidewalk, and received the injuries sued for. The suit was brought against the city of Meridian and Ziller jointly, being an action in tort for damages for personal injuries, plaintiff claiming that the accident was caused by the negligence of Ziller in maintaining an insecure and unsafe billboard, and that the city was liable for permitting Ziller to maintain a dangerous billboard in close proximity to the sidewalk.

The city of Meridian gave notice under a plea of general issue that it would show that the billboard was located on private property, and was not apparently dangerous to pedestrians, and that no complaint had been made of its being insecure, and that it was not a nuisance, and that it was not imminently and obviously dangerous, and that the city was without authority to abate it as a nuisance, and that the city was therefore not liable.

Ziller defended upon the grounds that he had only leased the privilege of posting signs on the billboard which did not belong to him, was not erected by him, and was not his land or land leased by him, and that nothing he had done had made the billboard less secure.

After the plaintiff had introduced his evidence, there was a peremptory instruction for defendants, and plaintiff appeals.

Fewell & Cameron, of Meridian, for appellant. Amis & Dunn, of Meridian, for appellee City of Meridian. Neville, Stone & Currie, of Meridian, for appellee Ziller.

HOLDEN, J. This is an appeal from the circuit court of Lauderdale county. The appellant, Claude L. Dahmer, plaintiff in the court below, sued the city of Meridian and Fred R. Ziller for damages for personal injuries, on account of a billboard being blown over on him while walking on the sidewalk. After the plaintiff had introduced all his evidence, and rested, the court, on request of the defendants, granted a peremptory instruction to the jury to find for the defendants, from which action of the court the plaintiff appeals here.

[1, 2] First. The testimony introduced by the plaintiff in the lower court makes this case, on the facts, so similar to the case of *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129, that we refer to the facts stated in that case, and hold here that the rule announced there is sound and reasonable, and we adopt it as the law in the case before us. If the appellant is entitled to any redress for the personal injuries received by him, it seems clear to us that he should have proceeded against the lessee in possession of the property, and not against the appellees.

Second. The record discloses no testimony tending to show that the city of Meridian was guilty of any negligence whatever. The billboard which fell upon appellant was on private property, and, if we concede that the city had authority, and that it was its duty to abate an obvious danger on private premises, this was not an obvious danger to pedestrians using the sidewalk of the city. The city had no notice whatever that the billboard was defective or dangerous; on the other hand, it appeared to be reasonably

safe. *Temby v. City of Ishpeming*, 146 Mich. 20, 108 N. W. 1114; *City of Meridian v. Crook*, 69 South. 182, L. R. A. 1916A, 482. Affirmed.

WHITE et al. v. WHITE. (No. 17497.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

1. INSURANCE — 784(6) — MUTUAL BENEFIT INSURANCE—BY-LAWS OF ASSOCIATION.

Where a member of a fraternal insurance order, after delivering to his wife a policy naming his minor child as beneficiary, left his wife and unlawfully cohabited with another woman, and by means of a false affidavit that the policy had been mislaid and could not be found secured the issuance of a new policy, payable to his paramour and illegitimate son, objections that the second policy was not issued in accordance with the by-laws of the order can be raised only by the order, and are not available to the original beneficiary; the order having required the rival claimants to interplead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1954; Dec. Dig. — 784(6).]

2. INSURANCE — 782 — MUTUAL BENEFIT INSURANCE—POLICIES.

Where, on affidavit by a member that the original policy of insurance had been lost or mislaid, a fraternal insurer issued a new policy, payable to a different beneficiary, and the insurer did not question the validity of the second policy, such policy, notwithstanding the second beneficiary was ineligible, canceled the original, and no rights can be predicated thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. — 782.]

3. INSURANCE — 782 — FRATERNAL INSURANCE—BENEFICIARIES.

Where a policy issued by a fraternal order did not provide for apportionment and one of the beneficiaries was ineligible, the other was entitled to the entire proceeds to the exclusion of a beneficiary named by a previous policy, which had been canceled by the issuance of the second.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. — 782.]

Appeal from Chancery Court, Yazoo County; P. Z. Jones, Chancellor.

Bill of Interpleader by the Odd Fellows' Benefit Association of the G. U. O. of O. F., District of Mississippi, against A. W. White and others. From a judgment for Estelle White, A. W. White and another appeal. Reversed, and decree rendered for appellant.

Barbour & Henry, of Yazoo City, for appellants. Percy Bell, of Greenville, for appellee.

SMITH, C. J. The Odd Fellows' Benefit Association of the G. U. O. of O. F., District of Mississippi, a negro benevolent insurance association, exhibited its bill in the court below against Andrew W. White, Ada White, and Estelle White, alleging that on March 3, 1907, it issued its policy of insurance on the life of J. W. White, payable to Ada and Andrew White in the sum of \$500; that J. W. White is now dead, and that payment of the policy is demanded of it by Ada and

Andrew White, and also by Estelle White, the latter claiming to be the beneficiary in a policy formerly issued by the association on the life of J. W. White, and for which, during his lifetime, the policy payable to Ada and Andrew White had been substituted. With this bill, the association paid into court the amount due under the policy, and prayed that it be discharged from further liability thereon, and that the defendants, Ada, Andrew, and Estelle White, be summoned to "make claim to the said sum here paid into court," and that the court, on final hearing, render a decree, determining and ascertaining to whom said money should be paid. Pursuant to the summons issued in accordance with the prayer of this bill, Estelle White appeared and filed an answer and cross-bill, claiming to be entitled to the fund, which claim was denied by the answer of Ada and Andrew White, who, themselves, claimed to be entitled thereto.

The evidence disclosed that J. W. White obtained a policy from the Odd Fellows' Benefit Association, etc., payable to his infant daughter, Estelle, which policy was delivered to his wife, the mother of Estelle; that afterwards, the insured and Estelle's mother separated, and he thereafter unlawfully cohabited with appellant, Ada White; that on April 30, 1912, the association, at his request, changed the beneficiary in the policy on his life by issuing a new policy, payable to "Mrs. Ada White and Andrew W. White, wife and son"; that, in order to do this, he executed and delivered to the association an affidavit, reciting that:

"His policy has been mislaid and lost and cannot be found, and that he wishes a new policy issued and made payable, as beneficiaries, to his wife, Ada White, and to his son Andrew W. White, share and share alike after burial expenses have been fully paid and satisfied."

At the time this affidavit was made, the policy therein referred to was not lost, but was in the possession of Estelle's mother, which fact it is claimed by Estelle was known to her father.

It was claimed by Estelle that Andrew White is not the son of J. W. White. The chancellor, however, found as a fact that he is the son of J. W. White, but awarded the money paid into court by the association to Estelle.

The contention of counsel for appellee, as we understand his argument, is that the policy payable to Ada and Andrew White is void, and that the original policy, payable to Estelle White, is still in force, for the reasons: First. That the change in the beneficiary, or substitution of the second policy for the first, was not made in accordance with the by-laws of the association. Second, that the substitution of the second policy for the first was fraudulently obtained by J. W. White, without the surrender of the first, by means of two false statements: (a) That

the first policy was lost; and (b) that Ada White was his wife. Third, that Ada White, one of the beneficiaries in the second policy, is not one of the class for whose benefit the association is authorized to issue its policies of insurance.

[1] The first two contentions must necessarily be disposed of adversely to appellee, for the reason that they relate to matters which can be availed of only by the association. *Hall v. Allen*, 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601. If both of the beneficiaries in the second policy were ineligible as such, a different question would be here presented, and we would then be called upon to determine whether or not the case, in this connection, falls within the rule announced in *Carson v. Bank*, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596.

[2] While it is true that the first certificate was not actually surrendered to the association and canceled, it was, to all intents and purposes, canceled by the issuance of the new policy. This being true, Estelle "can predicate no right to this fund upon such" canceled policy, even should it be held that the second policy is void because issued to an ineligible beneficiary. *Carson v. Bank*, supra. The cases cited from other states, holding that, where the substituted policy is void, because issued to an ineligible beneficiary, the original policy remains in full force and effect, are in conflict with the case just cited, and therefore are of no value here.

[3] It is true that Ada White is not within the class to whom the association is authorized to issue its policies, but that fact does not render the policy void. It simply eliminates her from any right to participate in the benefits thereof, leaving the policy in full force and effect so far as the other beneficiary is concerned, who is entitled to the whole fund, the policy not providing for an apportionment thereof between the beneficiaries therein. *Cunat v. Supreme Tribe of Ben Hur*, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057.

The decree of the court below will be reversed, and a decree rendered here, awarding the money paid into court by the association to appellants; Andrew, the only person who can here complain at Ada's participating therein, not having objected to her so doing.

HALL v. SHEAN. (No. 17634.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

TRESPASS — 67 — CUTTING OF TIMBER — ACTIONS — DAMAGES.

Where it appeared that the line between plaintiff's property and that of defendant was clearly marked, and that defendant's agents cut

trees from plaintiff's land, which timber was hauled and delivered to defendant at his saw-mill, the question of actual damages sustained should be submitted; there being evidence as to the actual value of the timber so taken.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. 667.]

Appeal from Circuit Court, Bolivar County; W. A. Alcorn, Jr., Judge.

Action by John I. Hall against C. D. Shean. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

D. J. Allen, Jr., of Cleveland, for appellant.
T. S. Owen, of Cleveland, for appellee.

SYKES, J. This suit was instituted in the circuit court of the second district of Bolivar county by John I. Hall, the appellant here, against C. D. Shean, the appellee, for damages for the cutting of trees from the lands of the appellant. The declaration is in two counts, the first count being for the statutory penalty prescribed by section 4977 of the Code for the cutting of these trees, and the second count for the actual value of the trees cut. After the plaintiff closed his case the defendant made a motion to exclude the testimony and that he be granted a peremptory instruction, which motion was sustained; hence this appeal.

It is the contention of the appellee that the statutory penalty cannot be recovered in this case because the testimony fails to show that the trees were cut within 12 months before the institution of the suit, or that they were cut by the agents or employes of the defendant while acting within the scope of their employment, or that the cutting was done willfully or recklessly. It is the contention that no actual damages were proven, and that the testimony did not show that the employes of the appellee cut the trees from the lands of the appellant; that the declaration claimed as actual damages the value of the trees, while the only testimony as to actual value was the value of the logs or timber after the trees had been cut. We do not think the testimony in the case was sufficient to submit the question to the jury of the recovery of the statutory penalty in the case. *Therrill v. Ellis*, 83 Miss. 494, 35 South. 826.

On the question of actual damages, there was testimony introduced by the plaintiff which showed that the line between the land of the plaintiff and the land upon which the defendant was cutting timber was plainly marked. The testimony also shows that about 19 trees were cut on the land of the plaintiff by the same employes of the defendant who had cut the defendant's timber north of the line. The testimony further shows that some of this timber was hauled and delivered to the defendant at his saw-mill.

There was also testimony introduced as to the actual value of the logs cut upon the plaintiff's land. This case falls squarely

within the rule announced in *Keirn v. Warfield*, 60 Miss. 799. The court erred in not submitting to the jury the question of actual damages under the testimony.

Reversed and remanded.

CURRIE v. BENNETT. (No. 17807.)
(Supreme Court of Mississippi, Division A.
April 10, 1916.)

APPEAL AND ERROR ⇨ 158(1)—**RIGHT OF REVIEW—COMPLIANCE—PAYMENT.**

A defendant against whom a money judgment has been rendered may pay it and afterwards appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 973, 977; Dec. Dig. ⇨ 158(1).]

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

Action by Annette Currie against J. F. Bennett, administrator. From a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal. Denied.

See, also, 67 South. 484.

T. M. Evans, of Gulfport, and L. Brame, of Jackson, for appellee. U. B. Parker, of Wiggins, and Bowers & Bowers, of Gulfport, for appellant.

SMITH, C. J. Appellant, who is the widow of B. D. Currie, deceased, filed a bill in the court below seeking to recover from appellee, the administrator of his estate, the sum of \$1,423.50, alleged to be due her by this estate. Appellee filed an answer and cross-bill denying appellant's right to recover this money, and praying that she be held to account to him for the sum of \$950 found on the body of B. D. Currie after his death, and appropriated by her, and also for certain money alleged to have been received by her and which belonged to the estate of her deceased husband. Numerous amendments were made in the pleadings by both parties, but the issue was substantially as stated. An objection had been filed by appellant in the administration proceedings to the confirmation of the report of the appraisers, the objection being that no allowance for the year's support for herself and children had been set apart. These two cases were consolidated and tried as one. A decree adjudicated each of these controversies separately, awarding to appellant: First, the \$1,423.20 claimed by the estate of her deceased husband, together with interest thereon amounting to \$318.75, making a total of \$1,741.75; second, the sum of \$748 as a year's support for herself and children; third, that she retain the \$950 found on the body of her deceased husband after his death, she having established her right thereto; and, fourth, directing that she account to appellant for the sum of \$1,228.96 collected by her and adjudged to be the property of appellee's intestate—the total amount thus ad-

judged to be due appellant being \$2,225.95. Appellee was directed to deduct therefrom the \$1,228.96 found to be due him by appellant, and to pay her the balance, amounting to \$1,296.99. After the rendition of this decree, appellee and cross-appellant paid to appellant the sum of money adjudged therein to be due her; and thereupon appellant appealed to this court in order to obtain relief from that portion of the decree which was adverse to her. A motion was then made by appellee to dismiss this appeal, for the reason that appellant had accepted the fruits of the decree appealed from and was thereby estopped from appealing; which motion was overruled, and the opinion then rendered will be found reported in *Currie v. Bennette*, 67 South. 484. After this motion was overruled, appellee perfected a cross-appeal, intending to complain of that portion of the decree which was adverse to him. The cause now comes on to be heard on motion of appellant to dismiss this cross-appeal, for the reason that:

"The record and proceedings herein show that, after the rendition of the decree in the court below, the cross-appellant complied with that part of the decree which was adverse to him by paying and satisfying the amount decreed against him, and therefore he has no right to prosecute an appeal therefrom."

Waiving the question as to whether or not the point here raised should have been presented by motion, or plea in bar, we will say that the right of a defendant against whom a money judgment has been rendered, to pay the same and afterwards appeal to this court, was settled in the case of *Gordon v. Gibbs*, 8 Smedes & M. 473, which case seems to be in accord with the present weight of authority. 3 C. J. 678; note to *McKain v. Mullen*, 29 L. R. A. (N. S.) 22.

Overruled.

WILDER v. FERGUSON. (No. 17489.)
(Supreme Court of Mississippi, Division B.
April 17, 1916.)

BILLS AND NOTES ⇨ 537(2)—**ACTION—JURY CASE.**

In suit on a note given for the price of land, the question whether defendant executed the note *held* for the jury under plaintiff's evidence.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1863-1865; Dec. Dig. ⇨ 537(2).]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Suit by Mrs. R. A. Wilder against J. F. Ferguson. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Appellant was plaintiff in the court below, and appellee was defendant. Suit was brought on a note alleged to have been executed by appellee in favor of the Concho Land Company, which had been indorsed without recourse to appellant, and which

note is made an exhibit to the declaration. The declaration alleges and the note on its face shows that the signature was witnessed by E. C. Perry, a partner in the Concho Land Company and one Lanberhriu, and that appellee could not write, but made his mark. The following testimony was taken on the trial, at the end of which the defendant moved the court to exclude the evidence of witness Ferguson on the grounds that it did not appear that he executed the note sued on, and the court sustained the motion, and thereupon granted a peremptory instruction, directing the jury to return a verdict for the defendant from which plaintiff appeals. Mrs. R. A. Wilder (white) witness for the plaintiff, after first being duly sworn, testified as follows, to wit:

"By Mr. Grace: Q. Your name is Mrs. R. A. Wilder? A. Yes, sir. Q. Where do you live? A. St. Angelo, Tex. Q. Are you acquainted with the Concho Land Company at St. Angelo, Tex.? A. Yes, sir. Q. Who is the Concho Land Company? A. T. O. Oraig and E. C. Perry. Q. Do you know the defendant, Mr. Ferguson? A. Yes, sir. Q. How long have you known Mr. Ferguson? A. I met him a short time ago at Inverness, when I was there working for the Concho Land Company trying to get home prospects to go to Texas, and I also met his son, and he went out on one trip, and Mr. Ferguson went on another to see the land. Q. What position do you occupy with the Concho Land Company? A. I am their agent to get people to look at their land. Q. You met Mr. Ferguson at Inverness? A. Yes, sir; I met him there. Q. And you met his son? A. Yes, sir. Q. What did Mr. Ferguson do relative to going to Texas? A. He said that he would go out there with me some time to look at the land. Q. Did he go with you after that? A. Yes, sir. Q. You are the plaintiff in this suit, I believe, are you, Mrs. Wilder? A. Yes, sir. Q. I will hand you a note signed by Mr. J. F. Ferguson. Take this instrument of writing, Mrs. Wilder, and state to the jury what it is. A. It is the note that Mr. Ferguson signed while he was in Texas, in payment on some land. Q. How much did Mr. Wilder buy there, if you know, Mrs. Wilder? A. I don't remember for sure; I think that it was one-half section. Q. Who is the payee in the note; that is, who is it made payable to? A. The Concho Land Company. Q. Would you mind reading that note to the jury? (Objection; sustained; exception.) Q. Who is the owner of that note now? A. I am. Q. How did you get possession of it, Mrs. Wilder? A. It was signed over to me by the Concho Land Company. Q. Was it indorsed to you? A. Yes, sir. Q. Where does the indorsement appear to you from the Concho Land Company? A. On the back of it. Q. You say that Mr. Ferguson executed that note? A. Yes, sir. (Objection; sustained; exception.)

"By Mr. Price: We ask the court to exclude from the jury that answer to that question.

"By the Court: It is sustained. Gentlemen of the jury, you may disregard the answer to the last question. (The plaintiff then and there excepted to the ruling of the court.)

"Q. Mrs. Wilder, did you have any conversation with Mr. Ferguson in Carlsbad, Tex., after the supposed execution of that note? A. Yes, sir; I did. (Objection; sustained; exception. Witness excused.)"

Mr. Ferguson, after being first duly sworn, testified as follows, to wit:

"By Mr. Grace: Q. Your name is J. F. Ferguson? A. Yes, sir. Q. Where do you live?

A. North of Morehead, Miss. Q. Are you acquainted with Mrs. Wilder, the plaintiff in this case? A. Yes, sir. Q. Tell the court and jury whether or not you went to Texas in August, 1911, to look at some land of the Concho Land Company; did you go there with Mrs. Wilder? A. Yes, sir; I went over there with her. Q. Did you make a trade with the Concho Land Company for some land? (Objection; overruled; exception.) A. Yes, sir. Q. I will ask you whether or not you signed a note there. (Objection; overruled; exception.) A. I couldn't tell the court whether I signed that note or not; I signed a note; I don't know whether this is the note, or not, that I signed. Q. How did you sign that note; did you sign it by writing your name there, or did you make a mark? A. I see a mark there; I can't read or write my name. I couldn't write my name to that note, or any other kind of note; that resembles the mark that I always sign with. Q. Well, you signed a note; that is, you made a cross mark on it? A. Yes, sir. Q. That note is for what amount? A. \$500. Q. What date was that? A. I don't know, sir, what date it was, or anything about it. Q. Who was present when you signed the note? A. Mr. Perry and—I forget the other fellow's name; I can't call his name. There is just two of them. Q. You signed the note there; what was your reason for signing the note there? (Objection; sustained; exception.) Q. You say that you did sign a note for the Concho Land Company? A. Yes, sir. Q. You don't know whether this is the one or not that you signed? A. No, sir; I don't. (Objection.)

"The defendant moves the court to exclude the evidence of the witness Ferguson, on the ground that it does not appear that he executed the note sued on in this case.

"By the Court: The motion is sustained. (Exception. Witness excused.)"

M. B. Grace, of Greenwood, for appellant.
J. H. Price, of Indianola, for appellee.

POTTER, J. The plaintiff's evidence produced in this cause made out a case, and the court erred in granting a peremptory instruction.

Reversed and remanded.

CITY OF DURANT v. BELL (No. 17651.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action between the City of Durant and Willie Bell. From the judgment, the City appeals. Affirmed.

J. D. Guyton, of Durant, for appellant. Noel, Boothe & Pepper, of Lexington, for appellee.

PER CURIAM. Affirmed.

MASSEY et al. v. NEWTON LUMBER & MFG. CO. (No. 17615.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Newton County; O. I. Dobbs, Judge.

Action between Sam and James Massey and the Newton Lumber & Manufacturing Company. From the judgment, Sam and James Massey appeal. Affirmed.

Day & Day, of Decatur, for appellants. Byrd & Byrd, of Newton, for appellee.

PER CURIAM. Affirmed.

POYTHRESS v. CARMICHAEL
(No. 17695.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.
Action between C. H. Poythress and D. M. Carmichael. From the judgment, Poythress appeals. Affirmed.

Easterling & Bailey, of Meridian, for appellant. R. D. Cooper and A. O. Hulett, both of Meridian, for appellee.

PER CURIAM. Affirmed.

DURRETT et al. v. BROUFF. (No. 17603.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.
Action between Will and Ben Durrett and Mrs. Nora Brouff. From the judgment, the Durretts appeal. Affirmed.

Leftwich & Tubb, of Aberdeen, for appellants. Paine & Paine, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

VANDEBURG et al. v. JOHNSON et al.
(No. 17450.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Chancery Court, Panola County; D. M. Kimbrough, Chancellor.
Action between Mrs. L. A. Vandenburg and others and C. L. Johnson and another. From the judgment, Mrs. L. A. Vandenburg and others appeal. Affirmed.

P. H. Lowrey, of Marks, and Lomax B. Lamb, of Batesville, for appellants. Shands & Montgomery, of Sardis, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. KEIRN.
(No. 17650.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Holmes County; F. E. Everett, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Samuel G. Keirn. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Elmore & Ruff, of Lexington, for appellee.

PER CURIAM. Affirmed.

GORDON v. GOLDEN et al. (No. 17411.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Action between Nettie Gordon and J. E. Golden and others. From the judgment, Nettie Gordon appeals. Affirmed.

W. I. Munn, of Newton, for appellant. G. H. Banks, of Newton, for appellees.

PER CURIAM. Affirmed.

BURRIS v. McCLURE et al. (No. 17668.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Lowndes County; Thos. B. Carroll, Judge.

Action between T. O. Burris and W. J. & W. C. McClure. From the judgment, T. O. Burris appeals. Affirmed.

Jas. T. Harrison, of Columbus, for appellant. Frierson & Hale, of Columbus, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. ROBBINS.
(No. 17340.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and O. M. Robbins. From the judgment, the Railroad Company appeals. Dismissed.

Mayes, Wells, May & Sanders, of Jackson, for appellant.

PER CURIAM. Appeal dismissed.

ALABAMA & V. RY. CO. v. DOOLITTLE.
(No. 17654.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action between the Alabama & Vicksburg Railway Company and Samuel Doolittle. From the judgment, the Railway Company appeals. Affirmed.

R. H. & J. H. Thompson, of Jackson, for appellant. Byrd & Byrd, of Newton, for appellee.

PER CURIAM. Affirmed.

LESTER v. STATE. (No. 18898.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Hancock County; James H. Neville, Judge.

Harry C. Lester was convicted of murder and sentenced to life imprisonment, and he appeals. Affirmed.

Wm. A. Dixon and Harry P. Sneed, both of New Orleans, La., for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

KLEINPETER v. CUMBERLAND TELEPHONE & TELEGRAPH CO.
(No. 17461.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Quitman County; T. B. Watkins, Judge.

Action between O. L. Kleinpeter and the Cumberland Telephone & Telegraph Company. From the judgment, Kleinpeter appeals. Affirmed.

P. H. Lowrey, of Marks, for appellant. Cutrer & Johnston, of Clarksdale, for appellee.

PER CURIAM. Affirmed.

MAYER BROS. v. HODGES. (No. 17707.)
(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.
Action between Mayer Bros. and A. M. Hodges. From the judgment, Mayer Bros. appeal. Affirmed.

F. V. Brahan, of Meridian, for appellants. J. W. McCall, of Meridian, for appellee.

PER CURIAM. Affirmed.

McPHERSON BROS. v. STINSON.
(No. 17704.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Quitman County; W. D. Cutrer, Special Judge.
Action between McPherson Bros. and Harry Stinson. From the judgment, McPherson Bros. appeal. Affirmed.

W. E. Gore, of Marks, for appellants. P. H. Lowrey, of Marks, for appellee.

PER CURIAM. Affirmed.

PONTOTOC COTTON CO. v. WEIL BROS.
(No. 17625.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Pontotoc County; Claude Clayton, Judge.

Action between the Pontotoc Cotton Company and Weil Bros. From the judgment, the Pontotoc Cotton Company appeals. Affirmed.

Mitchell & Roberson and Fontaine & Fontaine, all of Pontotoc, for appellant. C. Lee Orum, of New Albany, for appellee.

PER CURIAM. Affirmed.

COTTON STATES LUMBER CO. v. SHIRLEY. (No. 17714.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Cotton States Lumber Company and W. T. Shirley. From the judgment, the Lumber Company appeals. Affirmed.

Amis & Dunn, of Meridian, for appellant. Cochran & McCants, of Meridian, for appellee.

PER CURIAM. Affirmed.

MILLBROOK LUMBER CO. v. J. A. FAY & EGAN CO. (No. 17713.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Millbrook Lumber Company and the J. A. Fay & Egan Company. From the judgment, the Lumber Company appeals. Affirmed.

Neville, Stone & Currie, of Meridian, for appellant. F. V. Brahan, of Meridian, for appellee.

PER CURIAM. Affirmed.

STONE v. STEIN GROCERY CO.
(No. 17635.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, Sunflower County; Frank E. Everett, Judge.

Action between Mrs. Ed. Stone and the Stein Grocery Company. From the judgment Mrs. Stone appeals. Affirmed.

C. C. Moody, of Indianola, for appellant. S. F. Davis, of Indianola, for appellee.

PER CURIAM. Affirmed.

SIMMONS v. STATE. (No. 18496.)

(Supreme Court of Mississippi. April 10, 1916.)

Appeal from Circuit Court, De Soto County; E. D. Dinkins, Judge.

Ed Simmons was convicted of murder and sentenced to life imprisonment, and he appeals. Affirmed.

R. E. L. Morgan, of Hernando, and Montgomery & Montgomery, of Tunica, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

BROWN et al. v. BANNING et al.
(Supreme Court of Florida. Feb. 15, 1916.
Rehearing Denied April 7, 1916.)

(Syllabus by the Court.)

USURY \S 124 — FINDINGS — REVIEW — QUESTIONS OF FACT.

Where a bill in chancery is filed for the purpose of having a conveyance declared to be a usurious mortgage, and the chancellor finds on the evidence adduced that the transaction was a mortgage and that the same was usurious and renders a decree accordingly, such decree will not be reversed by an appellate court when there is ample evidence to sustain such finding and it does not appear to be erroneous.

[Ed. Note.—For other cases, see Usury, Cent. Dig. \S 362; Dec. Dig. \S 124.]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Bill by E. P. Banning and others against H. D. Brown and others. From a decree for complainants, defendants appeal. Affirmed.

J. S. Maxwell, of Jacksonville, for appellants. Carter & McCollum and John T. Crawley, all of Jacksonville, for appellees.

PER CURIAM. A bill was brought to decree a conveyance to be a usurious mortgage and for appropriate relief. The chancellor decreed for the complainants, and the defendants appealed.

There was an absolute conveyance, a contract to reconvey, and a lease of the premises to the grantor. The amount loaned was \$35,000, while the agreement to reconvey was to cover the amount with 8 per cent. interest, together with a bonus of \$15,000 for the loan and an indebtedness of the original grantors to attorneys of \$20,000, making a total of \$71,400. The chancellor on the evi-

dence found the transaction to be a mortgage, and that it is usurious as to the \$15,000 bonus. There is ample evidence to sustain this finding, and as it does not appear to be erroneous, the decree will not be disturbed. See section 2494, Gen. Stats. 1906; Connor v. Connor, 59 Fla. 467, 52 South. 727; Elliott v. Conner, 63 Fla. 408, 58 South. 241; Mitchell v. Mason, 65 Fla. 208, 61 South. 579; Hull v. Burr, 58 Fla. 432, 50 South. 754; Pervis v. Frink, 61 Fla. 712, 54 South. 862; Dixon Lumber Co. v. Jennings, 63 Fla. 405, 57 South. 615; Lovett v. Armstrong, 61 Fla. 681, 54 South. 381; 2 Florida Compiled Laws 1914, § 2494, and notes.

Where the evidence is conflicting, but it is legally sufficient to sustain a finding of the chancellor that the circumstances under which an absolute conveyance of land with a contract to reconvey the land and a lease thereof to the grantor were concurrently executed, constitute the transaction a mortgage under the statute, and the evidence shows usury in the transaction as found by the chancellor, the findings will not be disturbed, unless shown to be clearly erroneous.

Affirmed.

GOREY v. STATE.

(Supreme Court of Florida. Feb. 15, 1916.
On Petition for Rehearing, April
5, 1916.)

(Syllabus by the Court.)

1. WITNESSES — 277(3) — CROSS-EXAMINATION—ACCUSED AS WITNESS.

On cross-examination of a defendant who voluntarily becomes a witness, a wide latitude is allowed to test the credibility of the testimony given; and it is not error to permit proper questions as to previous statements or admissions of the witness that are relevant to the issues being tried, even though the tendency of the question is unfavorable to the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 961; Dec. Dig. —277(3).]

2. RAPE — 59(8) — PROSECUTION — INSTRUCTIONS.

In a prosecution for the crime of carnal intercourse with an unmarried female person under the age of 18 years, committed prior to the enactment of chapter 6974, Laws 1915, it is not error to charge the jury that the previous chaste character of the prosecuting witness is not in issue.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 92; Dec. Dig. —59(8).]

3. CRIMINAL LAW — 1169(12) — REVIEW — HARMLESS ERROR.

Even if technical error is committed in admitting testimony as to statements or confessions made by the accused while in custody, such error will not constitute reversible error when there is other evidence of confessions not objectionable, and there is evidence to sustain the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. —1169(12).]

4. CRIMINAL LAW — 814(1), 829(1), 830 — TRIAL—INSTRUCTIONS—REQUESTS.

Charges requested may properly be refused when they are incorrect or inapplicable or have

been covered by other charges which have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1980, 2011, 2012, 2017; Dec. Dig. —814(1), 829(1), 830.]

Error to Criminal Court of Record, Volusia County; Bert Fish, Judge.

Jesse Gorey was convicted of having carnal intercourse with an unmarried female under 18 years of age, and brings error. Affirmed.

Stewart & Stewart, of De Land, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

PER CURIAM. [1] Jesse Gorey was convicted of having carnal intercourse with an unmarried female person under the age of 18 years, a statutory offense. In such a prosecution evidence as to whether the prosecuting witness had had carnal intercourse or improper relations with other men was not material, the general reputation of the witness not being put in issue. On cross-examination of a defendant who voluntarily becomes a witness, a wide latitude is allowed to test the credibility of testimony given; and it is not error to permit proper questions as to previous statements or admissions of the witness, that are relevant to the issues being tried, even though the tendency of the question is unfavorable to the defendant. See Daly v. State, 67 Fla. 1, 64 South. 358; Bonner v. State, 67 Fla. 492, 65 South. 663.

[2] It was not error in this case to charge the jury that the previous chaste character of the prosecuting witness was not in issue. See Holton v. State, 28 Fla. 303, 9 South. 716. Such charges were justified by the nature of the case and the character of the evidence adduced.

[3, 4] If error was committed in admitting testimony as to statements or confessions made by the defendant while in custody, there is other evidence of confessions not objectionable, and there is ample evidence to sustain the verdict. Charges requested may be refused when they are incorrect or inapplicable or have been covered by other charges given.

The judgment is affirmed. All concur.

On Petition for Rehearing.

Questions as to whether other persons than the defendant below had had improper relations with the prosecuting witness, and as to who may be responsible for her condition of pregnancy are not within the issues under the statute then in force, the offense being statutory and is committed by mere carnal intercourse with an unmarried female under the age of 18 years. Section 3521, Compiled Laws of 1914; section 3521, Gen. Stats. 1906.

The transcript of the record does not clearly show an error in admitting evidence of

confessions by the accused, since the confessions testified to were not shown to have been made under circumstances requiring the accused to be warned that confessions made by him could be used in evidence against him.

Rehearing denied. All concur.

GASQUE v. BALL et al.

(Supreme Court of Florida. March 1, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 345(2)—PROCEEDINGS TO TRANSFER CAUSE—TIME FOR APPEAL.

The mere filing and presentation of a petition for a rehearing in a cause in chancery does not operate to lengthen the time within which an appeal may be taken from the final decree beyond that prescribed by section 1904 of the General Statutes of Florida of 1906.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. \Leftrightarrow 345(2).]

2. EQUITY \Leftrightarrow 428—DECREE—ENTRY AND ENROLLMENT.

Under chancery rule 87 in equity actions a final decree in chancery may be recorded immediately upon its being signed by the chancellor, and the formality of entry is completed when it is recorded in the minutes of the court. No formal enrollment of it is required.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1015-1019; Dec. Dig. \Leftrightarrow 428.]

3. APPEAL AND ERROR \Leftrightarrow 874(5) — REVIEW — SCOPE AND EXTENT—NATURE OF DECISION APPEALED FROM.

An appeal from an order denying a petition for a rehearing where no appeal was taken from the final decree within the time prescribed by the statute for taking appeals in chancery does not bring before the court for review the final decree, and, where the order denying the petition for a rehearing cannot be considered without reviewing the final decree in such a case, the order will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3480, 3481; Dec. Dig. \Leftrightarrow 874(5).]

Cockrell, J., dissenting.

Appeal from Circuit Court, Pasco County; F. M. Robles, Judge.

Suit in equity by Annie Ball and others against E. J. Gasque. From an order refusing a petition for rehearing after decree for plaintiffs, defendant appeals. Affirmed.

J. A. Hendley, of Dade City, and J. F. Glen, of Tampa, for appellant. Annie Ball, for appellees.

ELLIS, J. Annie Ball and others exhibited their bill in chancery in the circuit court for Pasco county against E. J. Gasque to remove a cloud upon the title to 80 acres of land alleged to be owned by the complainants, for an injunction to restrain the defendant, his agents and employes, from trespassing upon the lands, and from going thereon and turpentineing the timber, and from cutting the same, and from removing turpentine and rosin from the trees, and that

the defendant be required to account for "all timber, turpentine, rosin, and wood taken from the land" by him, and that he be required to account "for all damage done your complainant by reason of many acts of trespass committed upon said land," and that he be ordered and decreed to pay to the complainants "whatever sum shall be found to be due" upon such accounting.

There was a decree in favor of the complainants granting the relief prayed and awarding damages in the sum of \$800. From this decree the defendant appealed to this court, with the result that the decree of the chancellor was reversed. The court, speaking through Mr. Justice Whitfield, said:

"In this case the accounting prayed is for timber, turpentine, rosin, and wood taken from the land. If this accounting and the decree thereon are confined to matters that tend to ascertain the true measure of damages to the reality, the recovery of which may be regarded as an appropriate incident to a removal of cloud from title to the land, there may be no impropriety in the proceedings."

See Gasque v. Ball, 65 Fla. 383, 62 South. 215.

The mandate required such further proceedings in the cause to be taken as according to right, justice, the judgment of the Supreme Court, and the laws of the state of Florida ought to be had.

On the 16th day of May, 1914, the complainants filed their motion for a final decree in accordance with the directions of the Supreme Court in the said cause. The said motion set up the trial of the cause, the rendering of the final decree and its reversal by the Supreme Court, and—

"that the only testimony taken in said cause at the trial before this honorable court was the testimony of Annie Ball (see page 32 of the record), in which the witness made the statement that the land, before the trespass, was worth \$10 per acre, and it had since depreciated over one-half, fixing the damage at \$5 per acre, and that there was no other testimony adduced at said hearing contradicting such testimony."

On the same day the court rendered its final decree, which, among other things, provided that:

The complainants "do have and recover of and from E. J. Gasque, the defendant, the sum of \$400 as damages sustained by the said owners by reason of the trespass of the said defendant upon the lands of the said owners as above described."

On the 27th day of May, 1914, the defendant, E. J. Gasque, filed his petition for a rehearing. The record does not show that the defendant had any notice of the complainants' motion for the entry of a final decree, or that he had any opportunity to be heard upon such motion. The petition for rehearing expressly states that he had no such notice or opportunity to be heard, and that the testimony did not justify such decree. The petition was sworn to before the circuit judge by one of the solicitors for the defendant on the day before it was filed, namely,

May 26, 1914, on which day the court made an order that the petition "shall operate as a supersedeas and stay all proceedings thereon for thirty days from the date hereof as provided by section 1904 of the General Statutes of Florida."

Ten months and three days after the filing of the petition for rehearing the court made the following order:

"Upon the application of the defendant next Monday, April 6, 1915, is fixed for hearing the foregoing petition, and in the meantime execution is stayed, ordered, adjudged, and decreed at chambers this 30th day of March, 1915."

On April 3, 1915, the court made an order denying the petition, which order recited that the defendant had given notice of an appeal to the Supreme Court, and further ordered that:

"Said appeal shall operate as a supersedeas upon defendant making and filing a bond with sufficient sureties," etc.

No reason appears why the hearing was had and the order made on April 3, 1915, instead of the 5th day of the month, as fixed by the order dated March 30th.

The record contains the following entry:

"On the 9th day of April, A. D. 1915, the following final decree was filed:

"In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, in and for Pasco County, in Chancery.

"*Annie Ball et al. v. El. J. Gasque.*

"The above-stated cause coming on this day to be heard upon the petition of complainants in said cause for an extension of time and change of date for the hearing of the defendant's petition for rehearing, and it appearing that said date was fixed without notice to the complainant, and that complainant is necessarily obliged to be in Brooksville, Fla., on legal business on said day, and that, both the legal representatives for complainant and defendant being present in court, it was considered, ordered, and decreed that the said date for such hearing be changed, and the same be heard forthwith, to said order both the legal representatives of complainant and defendant consented, and thereupon, the argument of both complainant and defendant being heard, and the court being fully advised, it was considered, ordered, and decreed that the petition for rehearing filed on May 27, 1914, be and the same is hereby denied, and the order of supersedeas and order staying execution made March 30, 1915, be and the same is hereby vacated and set aside. To which defendant excepts.

"Done and ordered at chambers at Tampa, Fla., this 3d day of April, 1915.

"F. M. Robles, Judge."

From this order an appeal was taken on the 5th day of April, 1915, more than 10 months after the final decree was filed.

There was no appeal from the final decree. The order of April 9, 1915, from which the appeal was taken, was not a final decree, although it is so named in the transcript. The record does not show when the final decree which was filed May 16, 1914, was entered. But the brief of appellees states that it was "recorded" the same day, and that statement is not denied by appellant.

The record, we think, sufficiently shows a

presentation of the petition for a rehearing, which under the statute operated to stay all proceedings on the final decree for 30 days from May 26, 1914.

Section 1904 of the General Statutes of Florida is as follows:

"The presentation of a petition for rehearing presented within thirty days from the time of pronouncing the decree, shall stay all proceedings thereon for thirty days from such presentation, but for no longer unless bond be given by the petitioner, with good and sufficient sureties, as in cases of appeal, conditioned for the payment of all damages and costs which may accrue by such delay, the penalty of which shall be fixed by the judge of the court to whom said petition for rehearing may be presented. When such bond shall have been given, all proceedings shall be stayed until the petition shall have been heard and determined."

No bond was given by the defendant as required by this statute, so that proceedings on the decree were not stayed beyond June 26, 1914.

Chancery rule 87 provides that:

"Decrees may be signed when pronounced and may be recorded at once. Clerical mistakes in decrees or decretal errors, or errors arising from any accidental step or omission may at any time before an actual entry thereof be corrected by order of the court or judge upon petition without the form or expense of a rehearing."

Now, the petition for rehearing was filed and presented within the time prescribed by the statute. This being true, the actual entry of the decree upon the minutes of the court did not preclude a rehearing. *McLane v. Piaggio Bros.*, 24 Fla. 71, 3 South. 823. The petition for rehearing, however, was not heard until more than nine months had elapsed from June 26, 1914, and no order was made vacating or suspending the final decree save the one quoted above and made when the petition for rehearing was presented on May 26, 1914.

Section 1904, General Statutes, provides for the filing and presentation of a petition for rehearing after the final decree may have been entered when under the chancery practice the period within which a party might file his petition to rehear would have been terminated. The enrollment of the decree under the practice of the English Court of Chancery terminated the right of one to file his petition for a rehearing. The time for filing a bill of review then began. In this country the time for filing a petition for rehearing, as a general rule, is limited by the end of the term at which the decree is entered. 10 R. C. L. p. 564. But in this state a decree may be entered or recorded in the minutes of the court as soon as pronounced, and there are no terms of court for chancery proceedings; the court being always open for issuing and return of process, granting injunctions, passing interlocutory and final decrees and orders. Chancery Rule 87; section 1859, General Statutes.

A final decree in chancery is as conclusive as a judgment at law; both are conclusive on the rights of the parties thereby adjudi-

cated. After the term at which a final decree is rendered the court rendering it has no power to annul or reverse it unless for clerical mistakes. See *Sibbald v. United States*, 12 Pet. (U. S.) 488, 9 L. Ed. 1167; *McMicken v. Perlin*, 18 How. (U. S.) 507, 15 L. Ed. 504; *Central Trust Co. v. Grant*, 135 U. S. 207, 10 Sup. Ct. 736; 2 *Daniell's Chancery* (8th Ed.) c. 26, §§ 3, 4, and 5.

[2] The formalities attending the entry and enrollment of a final decree under the practice of the English High Court of Chancery do not obtain in this country. When a decree is pronounced by the chancellor, a draft is usually prepared by the solicitor representing the party in whose favor it is pronounced, this draft is examined by the chancellor, and, if found by him to be correct, he signs it, whereupon the document is delivered to the clerk, who records it in the minutes of the court; thus completing the formality of entry. No formal enrollment of it is made or required under our practice. *Owens v. Forbes*, 9 Fla. 325.

Applying, then, the chancery rule as it obtained in the practice of the English High Court of Chancery, a petition for a rehearing could not be entertained after the record of the final decree in the minutes of the court, were it not for the provisions of section 1904 General Statutes of Florida, above quoted.

After the time has elapsed in which a petition for a rehearing may be filed, the party's remedy against whom the decree has been rendered or who desires a reversal or modification of the decree is by bill of review or appeal. See *Prentiss v. Paisley*, 25 Fla. 927, 7 South. 56, 7 L. R. A. 640; 3 *Ency. Pl. & Pr.*

[1, 3] The petition for a rehearing did not have the effect of postponing the time for appealing from the decree beyond six months from the 26th day of June, the date to which proceedings upon the decree were suspended by the statute. Section 1904, Gen. Stats. Nor, as stated, did the court during the period when the decree was suspended make any order continuing the suspension of the decree, if, indeed, it had the authority to do so, nor did it make an order directing the decree to be set aside and annulled unless cause to the contrary be shown within a certain time. Therefore any time within six months after June 26, 1914, the defendant had his right to appeal from the decree; but he elected not to do so, and prosecutes his appeal from the order denying the petition for a rehearing. Without deciding whether an appeal lies from such an order, we cannot consider it, for the reason that it cannot be passed upon without reviewing the decree of May 16, 1914, from which no appeal was taken within the time fixed by the statute. *Judson Lumber Corp. v. Patterson*, 68 Fla. 100, 66 South. 727. The reversal of the order denying the petition for a rehear-

ing would have the same effect as if the appellant had obtained a reversal of the decree upon an appeal taken from the decree within the time prescribed by the statute. Thus any advantage that the appellant might have derived from taking an appeal from the final decree within the time prescribed by the statute would be obtained by him in this indirect way long after the time limit fixed by the statute for taking an appeal had elapsed.

This court has no jurisdiction over an appeal taken after the lapse of six months from the entry of the decree or order from which the appeal is taken. Section 1907, Gen. Stats. of Florida; *Hodges v. Moore*, 46 Fla. 598, 35 South. 13; *Charlotte Harbor & N. Ry. Co. v. Lancaster*, 70 Fla. —, 69 South. 720. In the case of *Fitzpatrick v. Turner*, 14 Fla. 382, the appellant appealed from an order overruling a motion to stay execution and set aside a judgment of foreclosure. The judgment was rendered in November, 1870. Under the statute as it then existed the defendant had two years from that time to take his appeal. Instead of adopting that course, he attacked the legality of the execution and asserted his rights in that form. On April 22, 1873, the motion was overruled, and defendant appealed from that order. The court said:

"If he has mistaken his remedy, it is now too late for this court to afford him relief. The reversal of the order of April 22, 1873, would operate simply to give the defendant all the advantage that he could possibly have derived from an appeal from the judgment within the time limited by the statute."

See, also, *Jacobs v. Bealmear*, 41 Md. 484; 18 *Ency. Pl. & Pr.* 27; 3 *Corpus Juris*, 1051. The order appealed from is affirmed.

TAYLOR, C. J., and SHACKLEFORD, J., concur.

COCKRELL, J., dissents.

WHITFIELD, J., absent on account of illness.

EDWARDS v. STATE.

(Supreme Court of Florida. March 15, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW — §518(2) — VOLUNTARY CONFESSION — ADMISSIBILITY.

A voluntary confession to an officer is not rendered inadmissible because made by one in custody who had not been warned or cautioned against self-incrimination.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1158; Dec. Dig. — §518(2).]

2. CRIMINAL LAW — §531(3) — CONFESSION — ADMISSIBILITY.

Calling an officer "friend" does not indicate that a confession was induced improperly.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1215; Dec. Dig. — §531(3).]

3. CRIMINAL LAW — 517(4)—CORPUS DELICTI — ADMISSIBILITY OF CONFESSION.

Evidence that the corpse of A. was found with holes in the body and other portions made by shot is sufficient as to corpus delicti to admit a confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147; Dec. Dig. —517(4).]

4. HOMICIDE — 237 — DEFENSE — INSANITY — SUFFICIENCY OF EVIDENCE.

The evidence does not show insanity.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. —237.]

Error to Circuit Court, Palm Beach County; H. Pierre Branning, Judge.

Nathan Edwards was convicted of manslaughter, and brings error. Affirmed.

A. R. Roebuck and D. F. Dunkle, both of West Palm Beach, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. Nathan Edwards was convicted of manslaughter and sentenced to the state prison for a term of ten years.

[1] While under arrest, he made a full confession to the officer having him in charge, a few hours after the preliminary hearing at which he had been cautioned by the committing magistrate that any statement he might make would be used against him. The deputy sheriff to whom the confession was made testified that it was made freely and voluntarily and without any inducement or threat being offered. The confession began with the words, "I will tell you as a friend, Mr. Barber, I did it."

In the recent case of McDonald v. State, 70 Fla. —, 70 South. 24, we reviewed our former decisions, and held that a voluntary confession to an officer is not rendered inadmissible by reason of the fact that it was not preceded by a warning or caution that the one in custody need not incriminate himself, and that his words might be used against him.

[2] It is argued that the use of the word "friend" indicated some inducement, but that this word was merely a colloquial meaningless expression appears from the fact that the two were strangers to each other.

Some attempt was made to prove that Edwards was not in his right mind when the confession was made, but this attempt was not made until after the confession was admitted.

[3] Prior to the admission of this confession, the state had proven the finding of the dead body of D. D. Sharkie, with whose murder Edwards was charged. Though the body was beginning to decompose, it was identified as Sharkie, and there were holes in the body made by shot, and shot were found imbedded in the upper teeth; the collar bone had been perforated with shot. We think this sufficient proof of the corpus delicti to admit the confession.

The accused was represented by counsel who offered a vigorous objection to the admission of this confession, but who made no suggestion as to paucity of proof as to the corpus delicti.

[4] The only remaining assignment questions the sufficiency of the evidence, as to the sanity of the plaintiff in error. No expert testimony was offered; nothing, in fact, but what any one accused of crime might present. Some thought he took the charge too indifferently. That he was excited at the time of the killing by familiarities between Sharkie and his wife was doubtless the operating cause in the action of the jury in reducing the grade of the crime from murder to manslaughter. We follow the circuit judge in giving to the mental status of the accused no higher consideration.

The judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

JACKSON v. STATE.

(Supreme Court of Florida. March 3, 1916.
Rehearing Denied April 7, 1916.)

(Syllabus by the Court.)

1. HABEAS CORPUS — 30(2)—GROUND FOR RELIEF—INSUFFICIENCY OF INFORMATION.

The right to attack an information by the writ of habeas corpus is more limited than is permitted in motions to quash and in arrest, and may avail only when the offense charged does not constitute a crime under the laws of the state, by reason of the unconstitutionality of the statute invoked or when there is a total failure to allege a crime under any statute; artificiality in pleading will not avail.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. —30(2).]

2. HABEAS CORPUS — 30(2)—GROUND FOR RELIEF—INSUFFICIENCY OF INFORMATION.

Upon habeas corpus an information will be upheld as charging malpractice in office, when it alleges that a county commissioner received a money consideration for purchasing certain property for the county, even though the information fails to state that it was corruptly done.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. —30(2).]

3. OFFICERS — 121—CRIMINAL RESPONSIBILITY—MALPRACTICE.

A county commissioner is an officer of this state within the contemplation of Gen. St. 1906, § 3481, penalizing malpractice in office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 207, 208; Dec. Dig. —121.

For other definitions, see Words and Phrases, First and Second Series, Officer.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Application by J. M. Jackson for writ of habeas corpus against the State of Florida. Judgment discharging writ and remanding petitioner, and he brings error. Affirmed.

John P. Wall, of Tampa, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. This writ of error is directed to a judgment of the circuit court for Hillsborough county, discharging a writ of habeas corpus and remanding the petitioner.

The information under which the petitioner is held charges as follows:

"J. M. Jackson, whose Christian name is to the solicitor unknown, late of the county of Hillsborough aforesaid, in the state aforesaid, on the 4th day of September, in the year of our Lord one thousand nine hundred and thirteen, with force and arms at and in the county of Hillsborough aforesaid, was then and there a county commissioner of Hillsborough county, Florida, and on the said 4th day of September, in the year of our Lord one thousand nine hundred and thirteen, the board of county commissioners of Hillsborough county, Florida, did then and there let a contract to one Willie Bryan for the purchase of and from the said Willie Bryan by the county of Hillsborough, of a certain lot or tract of land situated, lying and being in the county of Hillsborough, state of Florida, and more particularly described as follows, to wit: Lot eight (8) of block two (2) of Irma subdivision, according to a map or plat thereof, recorded in Plat Book 4 on page 98 in the office of the clerk of the circuit court of Hillsborough county, Florida, for the sum of three hundred dollars (\$300.00) in money, payable to the said Willie Bryan by the county of Hillsborough as follows, to wit: Fifty dollars (\$50.00) in cash, and two hundred and fifty dollars (\$250.00) on the 8th day of January, A. D. 1914, and he, the said J. M. Jackson, being then and there a county commissioner of Hillsborough county, Florida, as aforesaid, was a party to the letting of said contract for the purchase by the county of Hillsborough of said lot of land from him, the said Willie Bryan, and he, the said J. M. Jackson, being then and there a county commissioner of Hillsborough county, Florida, as aforesaid, was interested in the letting of the said contract for the purchase of the said land as aforesaid, in that it was agreed and understood by and between him, the said J. M. Jackson, and him, the said Willie Bryan, that he, the said J. M. Jackson, out of the purchase price derived from the sale of the said land as aforesaid, should be paid by him, the said Willie Bryan, the sum of twenty-five dollars (\$25.00), and upon the completion of the payment of the purchase price of said land to the said Willie Bryan by the said county of Hillsborough, he, the said Willie Bryan, did pay to him, the said J. M. Jackson, and he, the said J. M. Jackson, did accept and receive from him, the said Willie Bryan, the sum of ten dollars (\$10.00) in money current in the United States of America, of the value of ten dollars, as compensation for the letting of said contract by the county of Hillsborough to the said Willie Bryan for the purchase of the said land as aforesaid, against the forms of the statute in such cases made and provided and to the evil example of all others in like case offending, and against the peace and dignity of the state of Florida."

[1] The right to attack an information by this procedure is more limited than is permitted in motions to quash or motions in arrest, and may avail only when the offense

charged does not constitute a crime under the laws of the state either because the statute invoked is unconstitutional or when there is a total failure to allege a crime under any statute, inartificially in pleading being brushed aside. *Lewis v. Nelson*, 62 Fla. 71, 58 South. 436.

[2] The gist of the offense charged is that J. M. Jackson, while a county commissioner of Hillsborough county, took part as such commissioner in purchasing property from one Willie Bryan, for which transaction Jackson was to and did receive a money consideration; this is a charge that Jackson permitted himself to be bribed in the performance of his official action, clearly an act of malpractice, and we do not see what additional force could be given by characterizing the conduct as corrupt; if the laws of good pleading require the use of that word, it is matter of form rather than substance, and therefore not available upon this quasi indirect attack.

[3] Having reached the conclusion that malpractice is charged, the case falls within the condemnation of section 3481 of the General Statutes against "any officer of this state" who is guilty of any malpractice in office not otherwise expressly provided for.

We do not give to that section the narrow construction sought to be placed upon it by the plaintiff in error. A county commissioner is an officer of the state, though not perhaps a state officer, in the sense of one paid by the state and having jurisdiction coextensive with the state. The county is a mere political subdivision of the state government, and the county commissioners are creatures of that government deriving their powers only from the state. The section is directed more particularly against extortionate fees, and it is well known that when the section became a law, state officers in the strict sense were paid fixed salaries almost exclusively, while county officers depended almost wholly upon fees.

Without therefore determining whether the charge may be covered by special acts of malpractice in office particularly denounced by legislation, we think if it escapes all of them, it would yet be made a crime by this general provision.

The other objections to the information do not properly come within the scope of this proceeding.

The judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

WHITFIELD, J., absent on account of illness.

LOUISVILLE & N. R. CO. v. PORTER.
(8 Div. 234.)

(Supreme Court of Alabama. Feb. 3, 1916.
Rehearing Denied March 23, 1916.)

1. RAILROADS ⚡359(1)—ACCIDENTS TO PERSONS ON TRACKS—PERSONS ENTITLED TO PROTECTION.

A trespasser coming up a track to a crossing is not entitled to the protection of the care required of the railroad as to people using the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1238; Dec. Dig. ⚡359(1).]

2. NEGLIGENCE ⚡11—WANTONNESS.

Wanton negligence rests upon the wrongdoer's just apprehension of a probability of untoward consequences of his act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. ⚡11.]

3. RAILROADS ⚡398(5)—INJURY TO PERSON ON TRACK—WANTONNESS—EVIDENCE.

Evidence, that a trespasser was run down in the daytime by a slowly running engine near a station where people were frequently on the track during the day, does not justify submission of wanton negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1362; Dec. Dig. ⚡398(5).]

4. RAILROADS ⚡355(1)—TRESPASSERS.

A person for purposes of his own catching a ride on a freight train and on alighting walking down a track to a station held a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220, 1223, 1227, 1235; Dec. Dig. ⚡355(1).]

5. RAILROADS ⚡396(1)—INJURY TO PERSONS ON TRACKS—BURDEN OF PROOF.

The burden of proof of his own catching a ride on a freight train and on alighting walking down a track to a station held a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343; Dec. Dig. ⚡396(1).]

Appeal from Circuit Court, Blount County;
J. E. Blackwood, Judge.

Action by John Porter, administrator, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Ward & Weaver, of Oneonta, and M. L. Ward, of Birmingham, for appellant. Erle Pettus, of Birmingham, for appellee.

SAYRE, J. Plaintiff (appellee) sued in two counts, charging: (1) That defendant's servants or agents wantonly or willfully ran or propelled a locomotive engine upon or against plaintiff's decedent, thereby killing him; and (2) that defendant's servants or agents negligently ran or propelled the engine upon or against plaintiff's decedent after his peril was discovered by one of them, thereby killing him. Defendant has appealed. We entertain the opinion that the result of the trial cannot be sustained.

Defendant has a station and two tracks, main line and siding or house track, at Blount Springs. The main line is located to the west, the house track between it and the depot. The depot is to the east of the tracks, which are straight and nearly level for a

considerable distance north and south. The spaces between and around the tracks and rails are filled to a practical level with cinders, above which only the rails appear. A north-bound freight train had stopped on the house track some distance south of the depot, where its engine was detached and moved north beyond the depot to shove a cattle car onto a spur track and out of the way. Doing this, it passed a cattle pen where plaintiff's decedent was on some business. This cattle pen was about 200 feet north of the depot. Another freight train, moving south on the main line, had stopped at the water tank just across the tracks from the cattle pen. While the detached engine was in the neighborhood of the spur, the south-bound train moved to the south. Plaintiff's decedent got upon this train, several car lengths back from the engine, and rode down to a point nearly opposite the depot office, where he alighted between the tracks some 30 or 35 feet from the place where he was killed a few moments later. He moved obliquely over toward the office door; but, when he reached the middle of the house track, he turned and started walking along that track to the south. At that time the detached engine was about 60 feet away, moving back to its train. Deceased had gone only a little way along the track, 15 to 20 feet, when the detached engine struck him from behind and killed him. The weight of the evidence goes to show that the engine was moving about 5 or 6 miles an hour; the witness who testified to the highest rate of speed said it was moving 6 or 8 miles an hour. The evidence was in conflict as to whether any signals of approach were sounded as the engine backed.

[1] In view of the fact, previously established and at no time denied, that deceased was walking along the track and not across it, all that evidence which was intended to show that people from the Mulberry neighborhood used a footpath over Duffy's Mountain and a footbridge across a little creek near the railroad by which they approached and crossed defendant's tracks from the west was irrelevant and calculated to work injury to the defense against the first count of the complaint. Deceased was not crossing the track according to the custom of the Mulberry folks, and notice of what he was doing was not to be brought home to the defendant's agent in charge of the locomotive by knowledge of the wholly different thing customarily done by them; and besides, at the time in question, the south-bound train was in the way, so that the Mulberry folks, approaching the railroad from the west, as plaintiff's decedent approached the house track, could not cross. Defendant's objection to plaintiff's question about the footpath that crossed the track and went over the mountain to the west should have been sustained. Southern Ry. Co. v. Drake, 166

Ala. 540, 51 South. 996; Southern Ry. Co. v. Stewart, 179 Ala. 304, 60 South. 927. This evidence was, of course, totally irrelevant to the specific issue of subsequent negligence raised by the second count of the complaint.

[2, 3] The verdict in the case, if it is to be referred to the first count of the complaint, may be explained under the evidence on the following hypothesis of facts: That the engineer became actually aware of the presence of deceased upon the track and should have known in the exercise of due caution that deceased was not conscious of the approach of the engine, and thereafter the engineer consciously omitted to do something that his reason told him he ought to do, something that perchance might have averted the disaster—an hypothesis of technical possibility under some phases of the evidence. This would exclude error in the refusal of the general charge requested by defendant. But in its concrete illustration of wantonness such as would justify a verdict against defendant under the first count, the court dealt with wrong of a character different from that to be inferred from the facts we have mentioned as being of possible finding from the evidence. It dealt exclusively with that character of wrong which rests upon an inference of reckless indifference to the probable consequences of a probable situation, the wrongdoer, the engineer, in this case, being charged with knowledge, not that some person is at the time in a position of actual, imminent danger, but with knowledge, based upon previous observation or information, of the probability that some person will be exposed to danger by his manner of operating the engine. Wrong of this sort had been properly characterized as the equivalent of universal malice; to its existence the specific intent to injure any particular person is not essential. *Weatherly v. N. C. & St. L. Ry. Co.*, 166 Ala. 575, 51 South. 959. This court has frequently held that to the implication of wantonness it is essential that the act done, or omitted, should be done or omitted with a knowledge and a present consciousness that injury will probably result. *L. & N. R. R. Co. v. Brown*, 121 Ala. 226, 25 South. 609. Wantonness of that character is the moral and legal equivalent of intentional wrong, and rests upon the just apprehension, with which the wrongdoer is charged, not of a mere possibility, but of a probability, a likelihood, that untoward consequences will ensue to some one, and this probability, this likelihood, must have support and foundation in a reasonable interpretation of the evidence. Eliminating the testimony in respect to the custom of the Mulberry folks, which under the circumstances was entitled to no consideration, the only evidence lending color or semblance of support to the hypothesis of wantonness in the sense of universal malice was, to quote

the language of the witness, that "people were on the track at the point where the accident occurred frequently, all during the day." In view of the undisputed evidence that the engine was run in the daytime, and not in excess of 8 miles an hour, this evidence was too vague and indefinite to sustain the charge, even though the engine was backed without signals of approach along by the side of a village of not exceeding 200 inhabitants. That part of the court's oral charge assigned for error and which undertook to define "wantonness" such as may be inferred from the customary presence of people on the track was misleading and erroneous as authorizing the jury to believe there was in the evidence such an issue for their decision.

[4, 5] Clearly, the deceased was a trespasser upon the track, and defendant owed him no original duty to know he was there; but if the engineer was apprised of the presence and peril of deceased upon the track in time to save him by the prompt use of any means at his command, and thereupon negligently, willfully, or with conscious indifference to the probable consequences of the situation thus known to him, omitted to do what he might have effectually done to save deceased, then defendant was liable under the first or second count of the complaint, according as the jury may have found that the engineer intended to kill plaintiff's decedent or was consciously indifferent to that result on the one hand, or that his omission was the result of mere inadvertence on the other. These were the true issues made by the pleading and the evidence, and to these questions of fact the consideration of the jury should have been limited. Cases cited first above. The burden of proof as to both counts was upon the plaintiff throughout the case. *Carlisle v. A. G. S. Ry.*, 166 Ala. 591, 52 South. 341; *L. & N. R. R. Co. v. Jones*, 67 South. 691; *L. & N. R. R. Co. v. Rayburn*, 68 South. 356; *Empire Coal Co. v. Martin*, 67 South. 435.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

ALABAMA GREAT SOUTHERN R. CO. v. SKOTZY. (6 Div. 162.)

(Supreme Court of Alabama. Feb. 3, 1916. Rehearing Denied March 23, 1916.)

1. MASTER AND SERVANT §264(3)—ACTIONS—PLEA—ASSUMPTION OF RISK.

Assumed risk, when set up as a defense, is subject-matter for a special plea, and cannot be availed of under the general issue.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 864; Dec. Dig. §264(3).]

2. COMMERCE §27—"INTERSTATE COMMERCE"—FEDERAL LIABILITY ACT.

Where plaintiff was engaged as a railroad fireman in a crew making up interstate trains, and was injured during temporary lull in the

work, he was engaged in "interstate commerce" when injured, and his case is properly brought within the federal Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. 27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. MASTER AND SERVANT 286(31) — QUESTION FOR JURY—NEGLIGENCE OF MASTER.

Evidence that while plaintiff fireman stood on an adjacent track in order to work, another crew switched some cars, with no one controlling them and no warning signal, into the cars on that track, which ran over him, and that the switching foreman could have seen the fireman or his tools, held to warrant submission of the question of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. 286(31).]

4. MASTER AND SERVANT 289(29) — QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Evidence that cars ran over plaintiff fireman, standing on a track adjacent to his engine to straighten his flue auger between wheels of his engine, there being nothing to indicate that cars on that track would be moved during the short time he was engaged, held to warrant submission to jury of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1121; Dec. Dig. 289(29).]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by A. K. Skotzy against the Alabama Great Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion. The following are the charges referred to:

(5) Unless you are reasonably satisfied from all the evidence in this case that it was the duty of the crew of engine No. 114 to give notice of the fact that they proposed or intended or were about to kick a car or cars on the track on which plaintiff was standing, then you must find a verdict for defendant.

(9) If you believe the evidence in this case, the court charges you that plaintiff is guilty of contributory negligence.

A. G. & E. D. Smith, of Birmingham, for appellant. Harsh, Harsh & Harsh, of Birmingham, for appellee.

GARDNER, J. [1] Appellee recovered a judgment against appellant for injuries received while in its employ as fireman on one of its engines in the yards of said railroad in Birmingham. The complaint contained but one count, declaring for simple negligence, and was under the federal Employers' Liability Act. The cause proceeded to trial upon the plea of the general issue and the plea of contributory negligence. Much stress is laid in argument for appellant upon the question of assumption of risk, and authorities of other jurisdictions are cited to the effect that such a defense need not be specially pleaded. There is no plea setting up that character of de-

fense in this case. The question as to whether or not a special plea is necessary was set at rest in this state by the following language found in *Foley v. Pioneer Mfg. Co.*, 144 Ala. 182, 40 South. 274:

"Assumed risk, when set up as a defense, is subject-matter for a special plea. There is a well-defined distinction between assumption of risk and contributory negligence, still both of these defenses are in confession and avoidance of the plaintiff's action, and cannot be availed of under the general issue, but must be specially pleaded."

The holding in the *Foley Case* was reaffirmed in the more recent case of *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461. See, also, in this connection *King v. Woodward Iron Co.*, 177 Ala. 487, 59 South. 264.

[2] It is next insisted by counsel for appellant that the plaintiff is not shown under the evidence to have been engaged at the time of the injury in interstate commerce, and that therefore as the complaint was made under the federal Liability Act there was a fatal variance entitling the defendant to the affirmative charge. It may be seriously questioned that appellant is in position to raise this question on this appeal, for the reason that it appears from the record that the court in its oral charge to the jury stated that there was no dispute or controversy between the parties that defendant and the plaintiff were engaged in interstate commerce at the time of the injury, and that they need spend no time "on questions which both sides admit." No objection or exception was taken to this portion of the charge, which seems to have been repeated in substance. It would therefore appear that the trial was had upon that theory of the case. *L. & N. R. Co. v. Holland*, 173 Ala. 696, 55 South. 1001. Brushing aside this consideration (and without determining the same), we prefer to rest our conclusions upon the real merits of the question as presented by the evidence. As previously stated, the plaintiff was employed as a fireman on one of the engines—No. 117—of defendant's railroad. The crew of which he was a member was, at the time of the injury, "making up trains." Quoting from the plaintiff:

"The crew and myself were using that engine for making up a train to go south, to go as far south as Meridian, Miss. * * * Yes, sir; these cars that were dropped down and run over me were being made up into a train to go to Meridian, Miss."

At the time of the injury the engine on which plaintiff was fireman was standing still, and the plaintiff was in the act of cleaning out the flues (a part of his duty) with the flue auger. The crew had stopped, temporarily, to go up to the yard office for some purpose not disclosed, and the evidence for plaintiff tends to show that he merely took advantage of this temporary

lull in the work of making up the train to blow out the flues of his engine. This is further indicated by his testimony, where he says: "We were going to go back at making up the through train." The answer of the defendant to interrogatories propounded by the plaintiff shows that "engine No. 117 was standing still at the time the accident occurred, but had been handling or switching in the Birmingham yard cars loaded with interstate freight on the day plaintiff was injured." One Gladden, witness for defendant, and who was in charge of said engine No. 117, testified:

"All that day we were switching cars in the yard, * * * making up trains to go south, to go to Meridian, Miss. The other crew were switching cars in there to go south. * * * We were both switching in the same yard, making up trains, Meridian, Miss., trains."

The evidence for plaintiff further tended to show that the cleaning out of flues was necessary to make the engine steam and do its proper work. There seems to be no insistence by appellant's counsel that defendant was not engaged in interstate commerce, but the argument is devoted to the proposition that the plaintiff was not so engaged at the time of his injury. In the case of *Pedersen v. Del., Lack. & West. Ry.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, it was said:

"Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

The plaintiff was engaged as a member of a crew at the time of the injury, making up a train to go to Meridian, Miss. A fair inference from the testimony as above indicated would be that there was a temporary lull while some of the crew went to the yard office for some purpose, and the work of making up the trains had not been completed. We deem a discussion of the cases cited by counsel for appellant unnecessary, as we think the principles which controlled the court in the case of *N. C. & St. L. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, are conclusive in this case against the contention of appellant. See, also, the *Pedersen*, etc., Case, supra; *Roberts on Injuries to Interstate Employees*, § 35, and cases there cited; *L. & N. R. Co. v. Carter*, 70 South. 655; *Pittsb., C. & St. L. Ry. v. Glinn*, 219 Fed. 148, 135 C. C. A. 46; *N. C. & St. L. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554. We are of opinion that the case was properly brought within the influence of the federal Liability Act. There is nothing in the case of *I. C. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, cited by counsel for appellant, which in the least militates against the conclusion here reached. In that case the

employé was engaged in moving cars from one part of the city to another, all of which were loaded with intrastate freight.

[3] It is next insisted that the defendant was entitled to the affirmative charge, for the reason that no negligence was shown on the part of any employé or servant of the defendant company. It appears from the evidence that near to and parallel with the track on which plaintiff's engine was standing was another track, on which were two unconnected cars. Plaintiff insists that the engineer instructed him to clean out his flues, and that he got off his engine and found the flue auger was bent. He placed the auger between the driving wheels of the engine in order to straighten it, and in doing so placed himself on the parallel track where the idle cars were standing. The flue auger was of steel, about 12 feet long and 1 inch in diameter, and plaintiff being at one end of the auger, for the purpose of straightening it, placed him on the opposite track. Plaintiff testified that straightening the auger in this way required only a minute or two, and that the accident "happened in that minute or two." While he was thus in the act of straightening the auger, the other crew, which was also engaged in switching cars to make up a south-bound train, ran some cars into the ones standing idle, and caused them to knock down and run over plaintiff and injure him. The cars thus dropped down were cut off from the control of the engine and turned loose. The witness Fuller, who was foreman of the switch engines and with the crew that cut off these cars, testified that he did not put any one, or cause any one to be, on those cars when they went down and bumped into the other cars. He said:

"I just threw them down by themselves. * * * Without anybody on them; they ran in that condition about 7 car lengths; it was a gradual down grade, going north. * * * When they left our engine * * * the train was going about three or four miles an hour. * * * They increased their speed until they struck the other cars. * * * It did not stop them. They are not supposed to stop, knock them on down in the clear; clear the switching lead. * * * On that occasion I turned those cars loose to bump against two standing cars, * * * with the knowledge that the two standing cars would not stop them, and that the standing cars would be bumped, and might run about as far as 20 car lengths, * * * without any control at all. * * * I knew that this engine Skotzy was fireman of was standing on the next track. * * * I knew that when I cut the cars off. * * * It was daylight there; I could see those cars. I was about 7 car-lengths away from Skotzy's engine. A car length is about 36 feet. * * * I was about 252 feet away. * * * I could see everything perfectly plain. And I did look down to see."

The witness further testified that the two tracks were straight and close together, but stated that from where he stood he could not see down between the tracks to the engine. There was evidence tending to show that no signal or warning was given at the approach of these cars, and we are of the opinion that

there was sufficient testimony from which the jury could infer that the witness Fuller could or did see plaintiff, or that at least he was looking ahead down the track and could have seen, and did see, the auger protruding from the engine and entirely across the space between the engine and in front of the standing cars. *So. Ry. Co. v. Shelton*, 136 Ala. 191, 34 South, 194.

Much of the argument of appellant's counsel seemed to rest upon the theory that the defendant owed plaintiff no duty to keep a lookout or to give any signal of approach. The evidence for the plaintiff tends to show that in switching the cars the crew, to quote the witness, "is supposed to look out and see if anybody is on the track," and "It was a rule not to move cars without a signal." In *L. & N. R. R. Co. v. Thornton*, 117 Ala. 274, 23 South, 778, the following charges were held properly refused:

"(8) I charge you that the brakeman on the car that ran over plaintiff was only required to keep such a lookout as a reasonably prudent man would have kept in performing the duties of a brakeman, and he was not required to keep a special lookout for persons lying on the track. (10) I charge you that it was not the duty of the brakeman on the car that ran over plaintiff to keep a lookout for human beings on the track in front of his car."

The facts in the Thornton Case bear some analogy to those here under consideration. Speaking to the ruling of the court in refusing charges 8 and 10, above quoted, the court said:

"This brakeman was, for the time, so to speak, the engineer of the descending car. He, and no other person had control over it, and that was his duty. It has been held that engineers, or persons in control of an engine or car, 'should always be on the lookout for obstructions (whether of persons or things), and, when discovered, no matter when or where, should use all the means within their power to escape the impending danger, or to avert the threatened injury; and less care than this is not due diligence.' *S. & N. Ala. R. R. Co. v. Williams*, 65 Ala. 78. The rule of the company required 'each employé * * * to look out after, and be responsible for, his own safety, as well as to exercise the utmost caution to avoid injury to his fellow servants, especially in the switching of cars, and in all movements of trains.' The injury to plaintiff occurred in the nighttime, in the switching yard of defendant in the city of Birmingham, which was interlaced with switch tracks. If true, as the charges postulate, that the brakeman was under no duty to keep a special lookout for persons on the track, yet, if a proper lookout for obstructions of any kind, which he was bound to keep, would have revealed a person on it, in a perilous condition, the duty would have arisen to save him if practicable. The charges were calculated to confuse and mislead the jury. The question of negligence or not, as averred in the complaint, was, under all the surrounding circumstances, one proper for the determination of the jury, under proper instructions."

We are of the opinion that the question of negligence was one for the jury. *Randle v. B. R. & P. Co.*, 158 Ala. 532, 48 South, 114. An examination of the case of *Johnson v. N. C. & St. L. Ry.*, 177 Ala. 284, 58 South, 447,

cited by counsel for appellant, discloses that there was no ruling by a majority of the court in that case that no negligence was shown.

Charge 5, requested by defendant, was properly refused. If not bad for other reasons, its refusal could be properly based upon the fact that it fails to take into consideration any duty on the part of the servants of the defendant to look out for obstructions on the track (*L. & N. R. R. Co. v. Thornton*, supra), or to give warning after the discovery of plaintiff's perilous situation.

[4] Charge 9 was also properly refused. It is misleading, in that it makes no reference to the fact that the negligence of the plaintiff must be such as proximately to contribute to his injury. It seems to be further incomplete in failing to instruct the jury as to the result of the finding in this particular case. We are further of the opinion that the contributory negligence of plaintiff was, under the evidence in this case, a question for the jury. There was evidence tending to show that in straightening the auger—which was a part of his duty—while the cars were standing disconnected on the opposite track, there was nothing to indicate that they would be struck or moved during "the minute or two" that he was so engaged. As to whether the conduct of the plaintiff in so placing himself in a dangerous position was such as to make him guilty of such negligence as proximately contributed to his injury was a question properly submitted for the determination of the jury.

We have dealt with each of the questions presented by counsel for appellant, although we have not commented upon the several authorities of other jurisdictions cited by counsel in their brief, as we deem the case ruled by the decisions of our own court herein noted, and by those cited from the Supreme Court of the United States.

Finding no reversible error in the record, the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

LOUISVILLE & N. R. CO. v. LYNNE. (8 Div. 856.)

(Supreme Court of Alabama. Feb. 3, 1916.
On Rehearing, March 30, 1916.)

1. CARRIERS ⇐177(4) — CONNECTING CARRIERS—LOSS TO GOODS—LAST CARRIER.
Carmack Amendment June 29, 1906, 34 Stat. 593, c. 3591, § 7, para. 11, 12 (U. S. Comp. St. 1913, § 8592), does not abrogate or impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 791-803; Dec. Dig. ⇐177(4).]

2. CARRIERS — 185(1) — CONNECTING CARRIERS—ACTION—BURDEN OF PROOF.

In an action against the terminal carrier for loss of goods, the burden is on plaintiff to show that his goods were lost or diverted while in defendant's custody.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-844; Dec. Dig. 185(1).]

3. CARRIERS — 185(1) — CONNECTING CARRIERS — RECEIPT OF GOODS—LOSS—BURDEN OF PROOF.

By showing defendant railroad's delivery to plaintiff of a part of the original shipment, a presumption arises of its receipt by defendant in the same condition as when delivered to the initial carrier, which imposes upon defendant the burden of showing that missing goods were not lost while in its custody.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-844; Dec. Dig. 185(1).]

4. EVIDENCE — 317(2)—HEARSAY.

In a suit for loss of goods, the declaration of a depot agent that the goods were short and would arrive is but hearsay, and not a verbal act within the scope of duty then being performed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1175, 1192; Dec. Dig. 317(2).]

On Rehearing.

5. CARRIERS — 185(3) — CONNECTING CARRIERS—ACTION FOR LOSS OF GOODS—EVIDENCE.

In suit against terminal carrier for loss of goods, testimony of checking clerk that at point of delivery to defendant the car was found short the goods complained of held insufficient to overcome a presumption that the missing goods came into defendant's possession, where the clerk did not see the car opened.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 848-850; Dec. Dig. 185(3).]

6. APPEAL AND ERROR — 1050(1)—HARMLESS ERROR—EVIDENCE—PREJUDICIAL EFFECT.

In a suit for loss of goods by carrier, the admission in evidence of the declaration of a depot agent that the goods were short and would arrive held not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. 1050(1).]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by W. E. Lynne against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 449. Affirmed.

The plaintiff shipped 20 cases of dry goods from New York City to himself as consignee at Hartselle, Ala. The initial carrier was a steamship line which delivered the goods to the Southern Railway Company at Charleston, S. C., and it in turn delivered the shipment to defendant in a sealed car at Montgomery. From this point the car, with its seal unbroken was carried to Birmingham by the defendant, where the seal was broken, parts of the contents removed, other goods loaded to complete the carload, the car resealed, and thence carried by defendant to Hartselle. At this point the shipment was delivered to plaintiff as consignee. One Reader, checking agent of defendant at Birmingham, testified that when the car was opened at Bir-

mingham he checked over this shipment, and found it short one case of dry goods, and found another case recoopered. This shortage and condition was noted by him on the waybill issued by him for defendant when the shipment was checked and sent on its way to Hartselle. Nineteen cases, including the recoopered case, were delivered to plaintiff, and he found the recoopered case short a large part of its original contents. Plaintiff introduced in evidence the steamship's bill of lading showing receipt and shipment of 20 cases of his goods. The defendant introduced in evidence the waybill issued by the Southern Railway, showing receipt and transshipment over its lines of these same 20 cases from Charleston to Birmingham. Defendant also introduced its own waybill from Birmingham to Hartselle, indorsed with the notation of shortage and condition as above stated, which was verified by the testimony of the checking agent. The defendant objected to the introduction in evidence of the steamship bill of lading on the ground that it was not signed by the carrier, and was not shown to be genuine, and the objection was overruled. Defendant also objected to the testimony of plaintiff that he told defendant's agent at Hartselle that "I would have to bring suit for the goods, and he requested me to wait a few days, maybe he would find it, and to give them a little more time"; and "he mentioned about the goods being short, that they would come the next day or two." These objections were overruled. The trial judge refused to give the general affirmative charge for defendant, and also a written request to charge the jury that plaintiff could not recover of this defendant for the lost case. The following charges were also refused to defendant:

(1) The initial carrier is liable for the loss of goods when lost upon any road between the point of shipment and delivery, but connecting carriers are only liable for loss proved to have occurred while the goods were in possession of such connecting carrier.

(2) If you believe from the evidence that the shipment sued on was an interstate shipment, and that the Clyde Steamship Company was the initial carrier of said shipment, and this defendant a connecting or delivering carrier of such shipment, and if you further believe a portion of said shipment was lost, I charge you the Clyde Steamship Company would be liable therefor, and not this defendant.

Eyster & Eyster, of New Decatur, for appellant. Wert & Lynne, of Decatur, for appellee.

SOMERVILLE, J. [1] The act of Congress known as the Carmack Amendment of the act of June 29, 1906 (Fed. St. Ann. Supp. 1900, pp. 273, 274), although it prescribes and extends the liability of initial carriers of interstate shipments, does not abrogate nor in any way impair the separate liability of terminal or delivering carriers for losses occurring on their own

lines, as fixed by the statutes or decisions of the several states. That act makes the initial carrier responsible for the safe delivery of shipments over connecting lines, no matter where the loss may occur, but it certainly does not exempt connecting lines from direct responsibility to the owner for their own failure to safely carry and deliver goods received by them for that purpose.

[2] This being the liability of defendant in this case, the burden was on plaintiff to show that his goods were lost or diverted while in the custody of defendant.

[3] By showing defendant's delivery to him of a part of the original shipment, a presumption arose of its receipt by defendant in the same condition as when delivered to the initial or a preceding carrier, which imposed upon defendant the burden of showing that missing goods were not lost while in its custody. *South. Exp. Co. v. Saks*, 160 Ala. 621, 49 South. 392.

With respect to the missing case, we are of the opinion, on the undisputed evidence, that defendant fully discharged this burden, and that the jury should have been instructed, as requested, that plaintiff could not have of defendant any recovery therefor. This conclusion cannot, however, be affirmed as to the contents of the recovered box, and the time and place of their loss was a question for the jury under the evidence. The charge which affirmed the liability of the initial carrier and the exemption of defendant, regardless of where the goods were lost, was properly refused.

The other special charge (1) correctly stated the law as to the liability of connecting carriers, but, as it was fully covered by other given charges, its refusal was not error.

[4] The declaration of the Hartselle depot agent that the goods were short and that they would come in the next day or two was but hearsay, and was not admissible as a verbal act within the scope of a duty then being performed. It should have been excluded, though its erroneous admission might not alone be a reversible error in this case.

Let the judgment be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and GARDNER and THOMAS, JJ., concur.

On Rehearing.

SOMERVILLE, J. [5] On the original hearing we held that defendant had overcome the presumption that the missing case of goods came into its possession as carrier; this because defendant's checking clerk at Birmingham testified to that effect.

Upon a careful consideration of his entire testimony, however, it appears that he did not *know* the fact stated, since he did not see the seal clerk break the car seal, and did not know how long it had been broken before he checked the contents of the car and discovered that a case was missing; thus leaving an interim during which so far as appears, the case may very well have been abstracted from the car while in defendant's custody at Birmingham. Such an inference we now think it was within the province of the jury to draw, and we are impelled therefore to hold that the affirmative charge for defendant as to liability for this case, was properly refused.

[6] While we still hold that the admission of the declaration of the depot agent at Hartselle was technically erroneous, yet we are convinced that its admission could not and did not influence the jury in arriving at their verdict, and we will not reverse the judgment for that insignificant error.

It results that the application must be granted, and the judgment of reversal set aside, and the judgment appealed from will be now affirmed.

Affirmed.

SEALS PIANO & ORGAN CO. v. BELL et al. (3 Div. 170.)

(Supreme Court of Alabama. Feb. 15, 1916.
Rehearing Denied March 30, 1916.)

1. LANDLORD AND TENANT ⇄ 229(2)—RENT—LIEN—ATTACHMENT—"FRAUDULENTLY DISPOSE OF."

Under Code 1907, § 4748, authorizing attachment of tenant's goods for rent not due where he has or is about to fraudulently dispose of them, actual, not constructive, fraud warrants attachment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 950; Dec. Dig. ⇄ 229(2).]

2. LANDLORD AND TENANT ⇄ 229(2)—RENT—LIEN—ATTACHMENT—EVIDENCE.

Evidence of an attempt, without landlord's knowledge, to remove tenant's goods to another city, there to be mingled with other goods on which landlord had no lien, the tenant being solvent, held not to show a fraudulent disposition of the goods within Code 1907, § 4748, authorizing attachment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 950; Dec. Dig. ⇄ 229(2).]

3. LANDLORD AND TENANT ⇄ 229(2)—RENT—ATTACHMENT—EVIDENCE.

Removal of tenant's goods under such circumstances of secreting or hiding as would show intent to deprive the landlord of his lien is fraudulent intent within Code 1907, § 4748, authorizing attachment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 950; Dec. Dig. ⇄ 229(2).]

Gardner, J., dissenting.

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by N. J. Bell and others against the Seals Piano & Organ Company. From a judgment for plaintiffs, defendant appeals. Affirmed in part, and in part reversed and rendered.

Tilley & Elmore and W. A. Gunter, all of Montgomery, for appellant. Rushton, Williams & Crenshaw, of Montgomery, for appellees.

MAYFIELD, J. On rehearing the majority of the court have reached the conclusion that we were wrong in holding that the trial court committed no error in its findings on the plea in abatement of the writ of attachment. The plea merely denied the existence of the ground of attachment alleged in the affidavit. Issue was joined, and trial was had by the court without a jury, the court finding the issue in favor of the plaintiff and overruling the plea. In this ruling we now hold the trial court erred; the plea should have been held good and the writ of attachment quashed; and such judgment will be here entered as the trial court should have entered.

[1] We are led to this conclusion for the following reasons: The sole ground alleged in the affidavit which authorized the issuance of the attachment was the first ground mentioned in section 4748 of the Code, as for rent not due, which reads as follows:

"When the defendant has fraudulently disposed of his goods or is about fraudulently to dispose of his goods."

The plea put in issue the facts alleged. This ground of attachment is similar to, and in legal effect the same as, grounds 6 and 7 under section 2925 of the Code, relating to attachments by general creditors. The language of this last statute has been construed by this court to mean actual fraud, as distinguished from constructive fraud.

It was ruled by this court in the case of *Durr v. Jackson*, 59 Ala. 207, that fraudulently withholding property, as used in the attachment statute, must involve "actual fraud and evil intent to defraud creditors." Our statutes have been frequently readopted with this construction placed on them; and we see no reason why similar language in a statute giving the landlord a lien and providing for its enforcement by attachment should receive a different construction so far as the statutory grounds for issuing are concerned. This seems to be also the construction placed on similarly worded statutes by English and American authorities. The rule is thus stated in *Ruling Case Law*, vol. 2, § 27, p. 821:

"A decided preponderance of authority supports the rule that a mere constructive fraud—that is, an act involving no positive wrong, the invalidity of which arises entirely from the provisions of law—will not warrant an attachment upon the ground of fraud."

[2] We find no evidence in this record sufficient to show "fraud" in the disposition of

the defendant's goods, in the sense in which the term is defined above, by our court and other courts, when referring to grounds for an attachment. The most that is shown is a removal of the goods without the knowledge or consent of the landlord, in a way that might impair or destroy the lien given by the statute. This alone, we now hold, is not sufficient to show "actual fraud" or "intent to defraud" the creditor, and to authorize the issuance of the attachment. It is shown that the debtor or tenant is perfectly solvent; and no act is shown, other than the removal of the goods from Montgomery, Ala., to Birmingham, Ala., and there mingling the same with others upon which this landlord has no lien. The mere removal of the goods from the rented storehouse or premises, without more, is not a ground for attachment as for rent not due, and is not the equivalent of a fraudulent disposition of the goods, for the reason that section 4739 of the Code, relating to landlords of agricultural lands, makes a removal of the goods from the rented premises a ground for attachment, while the section under consideration, relating to landlords of storehouses, dwellings, etc., contains no such provision. These statutes should be construed in *pari materia*, and this difference in the two statutes is perfectly apparent from a reading of the two together. To construe section 4748 as authorizing the issuance of the attachment for a mere removal of the goods from the rented premises is to read into it provisions which the Legislature omitted from it, and which they inserted in section 4739.

[3] Of course, if the removal of the goods from the premises should be under such conditions and attended with such circumstances, as secreting, hiding, etc., as would show intent to deprive the creditor of his debt and lien, then this would authorize the inference of actual intent to defraud the creditor, and might therefore warrant the issuance of the attachment. But no such facts are shown by this record, and therefore we are not warranted in inferring such fraud as is meant by the statute.

It therefore follows that the finding by the court to the effect that ground for attachment existed and that the writ properly issued was error; and a judgment will be here entered quashing the writ of attachment, because wrongfully issued.

The judgment against the defendant for the rent due as claimed in the complaint, however, is not reversed or disturbed, but is held to be proper and valid. In fact, there is no assignment of error as to the main judgment, and no insistence that it was erroneous or improper; and it is therefore affirmed. This judgment would have been proper and without error, if the trial court had found in favor of the defendant on the plea in abatement, as we hold it should have done.

Let the judgment of this court be entered in accordance with this opinion.

Affirmed in part, and in part reversed and rendered.

ANDERSON, C. J., and McCLELLAN, SAYRE, SOMERVILLE, and THOMAS, JJ., concur. GARDNER, J., dissents.

GARDNER, J. I cannot concur in the opinion of the majority, and will here state briefly my views.

Appellant, a corporation under the laws of Alabama, doing a large business in this state and elsewhere in the purchase and sale of pianos and organs, and with its principal place of business in Birmingham, Ala., rented for a term of three years storerooms in what is known as the Bell Building, located in Montgomery; the same being property of the appellees. Appellant kept in said stores a stock of goods consisting of pianos and organs and continued to do business there until August 7, 1913, when the lease contract had yet 14 months to run. Appellant concluded to cease business in Montgomery and to move its stock of goods to Birmingham, there to be mingled with its stock in its rented store in that city, which stock consisted of pianos and organs of the same character and manufacture. Effort was made to get appellees to discount the notes for the rent yet to accrue, but the parties could not agree. Without notifying appellees of its intention, appellant then commenced moving its stock; and a large portion thereof had been loaded on cars at the depot, and the remainder was being prepared for shipment, when the attachment in this cause was levied. There had been sued out, just prior to the attachment in this cause, an attachment for past-due rent amounting to \$300, but this was paid, and this past-due rent therefore was not treated by counsel as material to this cause. At the time the attachment here involved was sued out there was no rent past due. The affidavit made in support of the attachment stated as a ground therefor that it was for rent past due, but before the trial was had this affidavit was amended so as to state as cause for the attachment that the defendant was about to fraudulently dispose of its goods.

Upon the trial of the cause issue was taken by defendant upon the truthfulness of the affidavit as amended, which issue came on to be heard by the court without a jury. The court, upon hearing the testimony, reached the conclusion that on the evidence adduced the defendant was, within the meaning of the statute, about to fraudulently dispose of its goods as against the rights of its landlord, and thereupon overruled the plea in abatement. This is the question of prime importance for determination. The evidence shows that the defendant was entirely solvent; and there is no testimony in reference to any disposition, or intent to dispose of,

defendant's goods, otherwise than in due course of sales, except that in reference to its intention to remove the said goods from defendant's store in Montgomery to its rented store in Birmingham without the knowledge and consent of plaintiffs, and where these goods would be mixed and mingled with other goods of like character for sale in said store.

It is insisted by counsel for appellant, and agreed to by the majority, that to authorize an attachment for rent not yet due upon the ground that the tenant is about to fraudulently dispose of his goods (Code 1907, § 4748) there must exist, and the proof must tend to show, actual fraudulent intent on the part of the tenant to "cheat" the landlord. It is further insisted that the word "dispose," used in the Code section referred to, means assign, sell, or transfer, and that so long as the tenant retains the title and custody of his property there can be no disposition thereof in the sense of the statute. In the case of Builders' Supply Co. v. Lucas, 119 Ala. 202, 24 South. 416, this court had under consideration a statute which provided:

"That every person who sells, removes or otherwise disposes of property subject to execution, with the intent to hinder, delay or defraud his creditors," should be punished.

It was there said:

"The word 'sells,' as used in the statute, implies a divestiture of title by the debtor, and the words 'disposes of,' if they do not mean the same thing, imply some act of the debtor operating on the property itself to place it beyond the reach of creditors, such as removal or secreting of the property."

I need not dwell further on this insistence. It is clear to my mind that the word "dispose," as used in the said statute, should not be construed as being confined to a transfer of the title, but as "implying some act of the debtor, operating on the property itself, * * * such as removal or secreting of the property." I revert, therefore, to a consideration of the insistence that there must appear, within the meaning of said subdivision, an actual fraudulent intent on the part of the tenant to justify the attachment. The lien given by this statute attaches from the commencement of the tenancy for the security of the rent when it matures, and it—

"attaches for the whole rent, for the entire term, upon all the property belonging to the tenant which 'enjoyed the protection of the premises for which the rent is claimed,' so long as the property can be found and identified, provided it has not come into the hands of a bona fide purchaser for value without notice of the lien." *Nicrosi v. Roswald*, 113 Ala. 592, 21 South. 338; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475.

And from *Well v. McWhorter*, 94 Ala. 543, 10 South. 132, we quote:

"It is a recognized doctrine * * * that, when a house is rented for mercantile purposes, it is the implied understanding of the parties that goods kept therein for sale may be disposed of in the usual course of the particular business, free from the claim for rent, and that the purchaser, though with full notice, it may be, that the rent has accrued, takes them discharged

from the landlord's lien. * * * The usual course of trade in such business we apprehend to be the sale of the commodities constituting the stock of goods to persons who have need of them, for money either paid or to be paid. * * * Sales for money take nothing out of the business; indeed, they add to the capital of the business to the extent of the profits which it is to be presumed are made, increase the tenant's ability to pay rent, and enable him to buy other goods which become subject to the lien and afford security to the landlord until they are in like manner disposed of. And these considerations afford additional reasons for the law's implication that goods thus sold are by the intentment of the parties discharged of the lien. Not so with respect to a sale in payment of and for the purpose of paying an antecedent debt. This may be beneficial to the tenant, but it cannot be otherwise than detrimental to the business from the point of view of the landlord. The property taken out of the business by such transaction is not replaced by other property, or by money with which to buy other property upon which the lien would become operative. The tenant's ability to pay rent is lessened. The landlord's security is decreased. Such transaction can in no just sense be said to be necessary in the prosecution of the business. And every reason for an implication for an intentment between the parties that property so disposed of shall be discharged of the lien is wholly lacking. All this is true, moreover, as well with respect to a sale of any part of the stock upon such consideration as to a sale of the whole of it."

A lien given the landlord in a case of this character is superior to all other liens except those for taxes. Code 1907, § 4747. It makes the landlord more or less independent of the solvency or insolvency of the tenant. In this case appellant, charged with a knowledge of the law, placed its stock of goods in the appellees' store, and the lien attached thereto as security for the rent. Without the knowledge or consent of the landlord appellant was proceeding to dismantle its fixtures and remove its entire stock to its rented store in Birmingham. Such being the case, the record shows an intention on the part of the tenant to remove its property covered by the lien of the landlord in such manner and to such place as to lose its identity and thereby to destroy the lien—all without the landlord's knowledge or consent. I am of the opinion that such a destruction of the lien would be a fraudulent disposition of the goods, as against the rights of the landlord, and within the meaning of the statute, although the tenant may have had no actual intent to cheat and defraud. He nevertheless had the intent, or such would be the necessary consequence of his act, to utterly destroy, without the knowledge or consent of the landlord, the latter's lien for his rent. This would be a willful disregard of the rights of the landlord and a willful destruction of the lien given him by the statute.

The reasoning of the majority would permit the tenant to remove the entire stock of goods beyond the confines of the state, and the landlord would be compelled to stand impotently by and see his lien destroyed unless he were able to show that the tenant acted with the actual intent to cheat and defraud

him. Such a construction of the statute would render the lien of the landlord of extremely doubtful value, and in such a construction I cannot concur. Counsel for appellant, in support of his contention that there must be fraud in fact—that is, that the tenant must have the intent to cheat and defraud—cites the cases of *Cuendet v. Lahmer*, 16 Kan. 527; *Robinson v. Melvin*, 14 Kan. 484; *Donnelly v. Stanton*, 6 Misc. Rep. 168, 27 N. Y. Supp. 124; and *McGrath v. Sayer*, 19 App. Div. 321, 46 N. Y. Supp. 113. The cases cited from the Supreme Court of Kansas relate to suits by ordinary creditors without any lien, in which attachments were sued out upon the ground that the defendant had disposed of his property "with the intent to defraud, hinder, and delay his creditors." The two cases from the New York court were of like character, and the attachments were sued out upon the ground that "the defendant was intending to dispose of his property for the purpose of cheating and defrauding his creditors." The cases of *Weare Co. v. Druley*, 156 Ill. 25, 41 N. E. 48, 30 L. R. A. 465, was also of like character as the above quoted, as well as the cases cited in the note thereto, wherein the author of the note states that the preponderance of authority supports the rule that constructive fraud will not warrant an attachment upon the ground of a disposition of property "with intent to defraud." The cases cited in the note show, however, that some jurisdictions hold to the contrary. But these authorities are not here in point, for the reason that they deal with attachments by ordinary creditors without a lien, and in most instances with statutes using the language "with intent to defraud."

The majority opinion places stress also upon section 2925 of the Code, which relates to attachments by general creditors, but the analogy is wholly lacking, because there is no lien interfered with or destroyed. A reference to the citation in the majority opinion of 2 Rul. Case Law, 821, will disclose that the author there was likewise considering attachment by a general creditor, and not a case where a specific lien was involved. I cannot see that the fact that the attachment law as to agricultural tenants makes a removal of the goods from the rented premises a ground of attachment, while the section here under consideration contains no such provision, should be accorded the weight given it in the majority opinion. The reasons applicable to the one are not applicable to the other. The very nature of the business of a tenant of a storehouse would prevent any such provision being inserted in the statute, because his goods are placed in the store to be disposed of, to be removed, and a statutory provision similar to that in regard to agricultural tenants' would really seem to hinder and prevent the very purpose of the tenancy.

In 4 Cyc. 419, is cited the case of *Locke v.*

Boles, 14 Ky. Law Rep. 573, which is also cited in 5 Cen. Dig. 334, holding as follows:

"Where a creditor has a lien on goods, and they are about to be sold in violation of his right, he can have a specific attachment without alleging or proving an actual fraudulent intent on the part of the debtor."

But the value of this case as an authority is lessened by the fact that the report of it is not found in our library.

In the instant case we are dealing with a lien on the entire stock of goods for the rent for the entire term, which could be lost only by a sale to a bona fide purchaser without notice of the lien, or by a sale in due course of trade. It cannot be insisted that the removal of the entire stock of goods in the instant case was in due course of trade. That they were to be disposed of after being mingled with the stock of goods in Birmingham in due course of trade is entirely immaterial, as it was the removal of the entire stock from the store of the landlords, without their knowledge or consent, against which they have here protested as being in fraud of their rights, and not the contemplated sale of the goods in the usual course of business in Birmingham.

Nor does it seem that the solvency of the appellant can be a matter of material importance in this particular case. The statute gives a lien to the landlord that he may look to the stock of goods, the tangible property, as security for his rent, and does not contemplate that the solvency of the tenant should be sufficient to authorize the lien's destruction. Indeed, I understand the learned counsel for appellant to concede or recognize in his brief that the question of solvency has little bearing on the result of this appeal, as on page 25 of his printed brief he says:

"The question is: What is the law as to the right of a tenant, whether he is worth nothing or a million, to remove his stock of goods from one store to another, without his landlord's consent; there being no intent (other than such as results as matter of law from such removal) to fraudulently dispose of his goods?"

It is settled in this state that as to existing creditors a voluntary conveyance by a debtor is by presumption of law fraudulent and void, though there is an entire absence of any fraudulent intent, and though the donor is entirely solvent. *Bibb v. Freeman*, 50 Ala. 612; 3 Mayf. Dig. p. 801 et seq. Such a conveyance is designated as fraudulent and void as against existing creditors because it is a fraud upon their rights in law. I am unable to see how it requires any strained construction to hold that the word "fraudulent," used in the statute, includes a disposition of the goods fraudulent in law as against the rights of the landlord such as is here indicated by a deliberate and intentional destruction of the lien given by statute, without the knowledge or consent of the landlord. The lawmaking body has been

most careful to give such a landlord a lien for his protection superior to all other liens, except those for taxes; and it appears to me entirely consistent to construe the statute as forbidding an utter destruction of that lien by the tenant, and thereby leave the landlord helpless unless he can show an actual intent to cheat or defraud. Such a destruction of the lien is a fraud upon the rights of the landlord, and in law is therefore a fraudulent disposition of the property.

I respectfully dissent.

(139 La.)

No. 20776.

WALTHER v. WALTHER.

(Supreme Court of Louisiana. March 20, 1916.)

(Syllabus by the Court.)

HUSBAND AND WIFE §272(5)—COMMUNITY PROPERTY—PARTITION—EVIDENCE.

Plaintiff, divorced from her husband, alleging error and fraud in the exclusion of a certain mortgage note from a partition of the community property, is bound to make out her case by a clear preponderance of the evidence.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1007; Dec. Dig. §272(5).]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Georgiana B. Willman Walther against Otto Walther. From a judgment for plaintiff, defendant appeals. Reversed, and suit dismissed.

Woodville & Woodville, of New Orleans, for appellant. D. B. H. Chaffe, of New Orleans, and A. D. Preston, of Beckley, W. Va., for appellee.

LAND, J. The allegations of the petition may be briefly stated as follows:

The plaintiff was divorced from the defendant by judgment of the civil district court for the parish of New Orleans, rendered October 20, 1911.

On October 27, 1911, a partition between the parties of the community assets was had before a notary public. The partition was made on the basis of an itemized statement furnished by the defendant, showing, or purporting to show, the entire assets of the community. This statement was accepted and taken as true by the plaintiff and her counsel, and formed the actual basis of the settlement and partition between the parties. The defendant, however, through design or negligence, omitted from said statement an item of \$10,000 belonging to the community, which should have been included in the settlement and partition, and one-half of which, or \$5,000, should have been paid over to the plaintiff. The said omitted item was represented by a valid and subsisting mortgage executed by William A. Cooke in favor of the defendant by notarial act of date February 5, 1911, to secure a loan made by the defendant to the said Cooke, and the defendant willfully concealed the said mortgage note.

The petition concluded with a prayer for judgment against the defendant for the sum of \$5,000, with legal interest thereon from October 27, 1911, until paid, and costs of suit, "and for all general and equitable relief meet and suitable in the premises."

Defendant filed an exception of no legal right or cause of action, which was heard and overruled by the court.

For answer, after pleading the general issue, the defendant admits the existence of the Cooke mortgage note at the time of the partition, but denies that the defendant or the community had any real interest in said note, which was at that time held in pledge by third parties to whom the community was indebted for an amount slightly in excess thereof. Defendant, further answering, denies that he practiced any fraud on the plaintiff in failing to disclose the existence of said note, which was of no material benefit to him, and avers that, in addition to the debt for which the note was pledged, there were other debts of the community in excess of the amount of the face value of said note, all of which debts the defendant assumed, without receiving any benefit or consideration therefor in the partition with the plaintiff, she receiving more than one-half of the real assets of the community over and above its liabilities.

After the evidence was adduced on the trial of the case, on allegations of error and mistake of fact on the part of the counsel for defendant, he was permitted by the court to supplement his original answer, by averring that one Mr. Palfrey owned the Cooke mortgage note at the time of the partition.

A rule by the plaintiff to set aside the order permitting the filing of the supplemental answer was heard and discharged, "reserving the right to either party to offer further evidence."

The trial was concluded, and there was judgment in favor of the plaintiff, pursuant to prayer of her petition.

The defendant has appealed, and submits, first, that the judgment overruling his exception should be reversed, and said exception should be maintained.

Counsel for defendant in their brief say:

"The most that plaintiff is entitled to is her share of said asset, which she alleged belonged to the community, and which has never been partitioned. She is entitled, if the allegations are true, to have an inventory and appraisement made of this article, and the same duly partitioned, either in kind, if possible, or by licitation."

This argument admits that the plaintiff, on the face of the petition, owns an undivided half interest in the Cooke mortgage note for \$10,000, and is entitled to have the same partitioned according to law. It is a legal sequence of the allegations of the petition that the defendant is bound to account to the plaintiff for said note, or to pay her one-half of its value at the date of the dissolution of the community. While the plaintiff prays for

a present money judgment against the defendant, she also prays for general and equitable relief in the premises. Such a prayer authorizes all ordinary decrees which the pleadings and evidence may justify. *Leland v. Rose*, 11 La. Ann. 69; *Kinder v. Scharff*, 125 La. 595, 51 South. 654. As plaintiff, on the face of the petition, if not entitled to a money judgment, as prayed for, is entitled to a decree recognizing her undivided half interest in the Cooke mortgage note, it cannot be held that the petition discloses no right or cause of action. We therefore think that the defendant's exception was properly overruled.

The original answer of the defendant admitted that the Cooke mortgage note for \$10,000 belonged to the community, but averred that it had been pledged to its full value for the debts of the community.

The supplemental answer of the defendant averred error and mistake in the original answer as to the ownership of the note, and that, in truth and fact, the said note belonged to a Mr. Palfrey, and not to the community which existed between the defendant and the plaintiff.

The partition of October 27, 1911, was made between the defendant and the plaintiff for the declared purpose—

"to partition and divide in kind the assets of the community which formerly existed between them, forever settling each other's rights and titles in and to said property and adjusting all their differences."

In the act of partition certain described property, real and personal, was assigned to the plaintiff in full ownership; and the act recites that she accepted the same in full settlement and satisfaction of all her rights, titles, and interest in the community, said described property, as acknowledged by her, constituting exactly one half of the property owned by the community, and that the other half of the community property, specifically described, was assigned to the defendant; it being understood between the parties that the partition of the property which belonged to the community was final and complete. The concluding paragraph of the agreement of partition reads as follows:

"It is expressly agreed that the said Otto Walther assumed and promises to pay all the debts of the late community to the exoneration and discharge of said Mrs. Otto Walther, and without recourse upon her for any part thereof."

In this partition each party received property to the value of \$29,468.18.

Plaintiff testified that at the time of the partition she knew nothing of the existence of the Cooke mortgage note for \$10,000, and that the defendant furnished the list of property, real and personal, which was used as the basis of the partition.

The deposition of the defendant was taken in Germany; and he testified, in substance, that at the time of the settlement of the community in question the Cooke mortgage note

was owned and held by Mr. Palfrey of the New Orleans National Bank. It appears from the answers of the same witness to cross-interrogatories that Mr. Palfrey held as collateral for an old loan five mortgage notes of the defendant for \$4,000 each, and that he, in order to make a settlement with his wife, who had not yet sued for a divorce, induced Mr. Palfrey to accept the Cooke mortgage note for \$10,000 and \$2,000 in cash in lieu of the five mortgage notes aggregating \$20,000, which were surrendered and canceled. The same witness continues as follows:

"Some time during December, 1911, Mr. Palfrey sent for me and told me that his client who owned the Cooke note of \$10,000 was very dissatisfied, and asked me if I could arrange in some way to repurchase the note from him and that he would very much appreciate my doing so. After some little discussion I consented to his request, as I felt he had treated me so fairly, and as I had mortgaged my Marengo street property for \$12,000, I then and there without further delay went with Mr. Palfrey and paid him the \$10,000 in cash and some little accrued interest, and he handed me the Cooke note."

The mortgage was on a small vessel. The same witness testified that the Cooke note was subsequently renewed on February 9, 1912, in the form of two notes for \$5,000 each, Mr. J. A. Woodville, appearing as the owner of the notes; that the first note for \$5,000 was paid in March, 1913, to defendant's representative, and the second note is held by the defendant.

The record evidence shows that the five mortgage notes for \$4,000 each were executed by the defendant in November, 1903, and that the mortgage securing the same was canceled by act before a notary on October 30, 1911, on the production by defendant of said notes marked paid.

The evidence shows that on December 4, 1911, the defendant borrowed \$15,000 on a mortgage of his Marengo street property, which had been assigned to him in the partition.

No rebuttal evidence was adduced to contradict the testimony of the defendant, which on its face is not unreasonable or improbable. There was a special mortgage for \$20,000 on the community real estate, which was formally canceled on the third day after the partition, but this is no contradiction of defendant's testimony that the notes secured by the mortgage were taken up by him before the divorce suit was filed. If the Cooke note was not used in taking up said notes, as testified by defendant, what community assets were used for that purpose? The five notes were paid before the partition; the act reciting that the property was free of incumbrances.

The testimony of the defendant was taken under commission in Germany, and consequently the judge below did not have the advantage of seeing and hearing the witness. The witness has not been impeached,

nor has he been contradicted on any material point.

The evidence shows that the defendant's vocation was that of contractor and builder, and that he was closely connected in a business way with Mr. Cooke, who represented a number of fire insurance companies, and who was called upon from time to time to let out repair and construction work. The fact that the defendant had accumulated community property to the value of some \$59,000 shows that he was a successful business man.

The burden of proof was on plaintiff to make out her case by a preponderance of the evidence. She, assisted by competent counsel, acknowledged that the act of partition included all the assets of the community, and on the faith of that settlement the defendant assumed the payment of all the debts of the community. The defendant testified that the known debts of the community amounted to some \$400 or \$500, and that after the divorce the plaintiff had several hundred dollars worth of repairs made on property acquired by her in the partition, and the bills were charged to and paid by him. Defendant further testified that he had been sued by the Keystone Life Insurance Company for \$2,000 on a community stock subscription.

On the record before us, we would not be justified in finding that the defendant withheld the Cooke mortgage from the partition, and has committed perjury in order to conceal his fraudulent conduct.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's suit be dismissed, at her cost, in both courts.

(139 La.)

No. 21263.

McKETHAN v. CURRIE, Sheriff, et al.
(Supreme Court of Louisiana. March 6, 1916.
Rehearing Denied April 3, 1916.)

(Syllabus by the Court.)

HOMESTEAD \S 70—PROPERTY CONSTITUTING
—SEPARATE PARCELS.

A homestead exemption cannot extend to two distinct and separate parcels of land. *Tinney v. Vittur*, 134 La. 549, 64 South. 407, reaffirmed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. \S 100-103; Dec. Dig. \S 70.]

Appeal from Third Judicial District Court, Parish of Bienville; William C. Barnette, Judge.

Action by J. G. McKethan against J. E. Currie, Sheriff, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. U. Richardson, of Arcadia, and Wimberly, Reeves & Dormon, of Shreveport, for appellants. Grisham & Oglesby, of Winnfield, and Goff & Barnette, of Arcadia, for appellees.

LAND, J. The Bank of Winnfield, having obtained a judgment against J. G. McKethan (plaintiff herein), caused a writ of fieri facias to issue thereon, and the sheriff in execution of said writ seized two pieces of land, belonging to the said McKethan—one a house and lot, and the other 40 acres of land. These properties are not contiguous.

Plaintiff enjoined the sale on the ground that the lot and the 40-acre tract constituted his homestead, exempt from seizure under article 244 of the Constitution of 1898.

On the trial of the injunction, the Bank of Winnfield in open court released the seizure of the house and lot, occupied as a residence by the plaintiff and his family, and trial was had on the issue of the exemption of the 40-acre tract. On this issue there was judgment in favor of the defendant bank, dissolving the injunction. Plaintiff has appealed.

According to the allegations of the petition, the plaintiff established his homestead, on the lot, near the station of Lawhon. He testified, in effect, that he started to build on the 40-acre tract, but changed his mind, and built a small house on the lot, intending at some future time to erect a residence on the 40-acre tract.

The contention of the defendant bank is: First, that the plaintiff is not entitled to a homestead both rural and urban; and, second, that the land constituting a homestead must be adjoining and contiguous.

The last proposition was considered in the case of *Tinney v. Vittur*, 134 La. 549, 64 South. 407, in which Breaux, C. J., was the organ of the court. The syllabus of that case reads, in part, as follows:

"In order to claim a homestead exemption on two tracts of land, they must be adjacent, and, where the lot on which the person claiming an exemption lives is separated from the second tract by other land, the exemption will not be allowed on the second tract."

The syllabus was written by Chief Justice Breaux, and is in accord with the text of the opinion. The case is directly in point. Counsel for appellant say that a single decision will not support the rule of stare decisis, but they cite no authorities in support of their contention that *Tinney v. Vittur* should not be followed. That case was well considered, and was decided in accordance with, what we conceived to be the weight of authority in other jurisdictions. See 21 Cyc. 494, notes. Most of the cases cited to the contrary seem to admit the general rule, but hold that two distinct parcels of land may be so connected in their particular use and appropriation as to be exempted as a homestead, although they are not contiguous; for example, where two tracts are connected by a passageway and used as one tract, or if they are merely separated by a fence, or where one tract is used to support a cow kept on the other tract. Id.

The case at bar does not even fall within the minority rule as stated in 21 Cyc. 494.

We prefer, however, to rest our decision on *Tinney v. Vittur*, which restricts the homestead to the lot or tract of land, on which the debtor actually resides with his family. Under the construction contended for by the appellant, a debtor might have both an urban and a rural homestead.

A "homestead" is "the land and building thereon occupied by the owner as a home for himself and family, if any." Webster's New International Dictionary, Verbo. Hence under article 244 of the Constitution a tract or parcel of land, not occupied by the debtor as a home, cannot be included in his homestead. This is the reason for the rule that a homestead exemption cannot extend to two distinct and separate parcels of land.

We have considered appellee's prayer for the amendment of the judgment below as to costs. We think it is correct, as the plaintiff's injunction was maintained in part.

Judgment affirmed.

(139 La.)

No. 21381.

STATE v. DICKERSON.

(Supreme Court of Louisiana. March 20, 1916.)

(Syllabus by the Court.)

1. ANIMALS \S 12—MARKING—CRIMINAL RESPONSIBILITY.

A criminal statute which makes it unlawful to feloniously or maliciously mark or brand, or alter or deface the mark or brand of, any animal, a crime or offense, is not ambiguous, and it does not admit of a double meaning. It refers to the marking or altering the mark of animals belonging to third persons, and not to animals which belong to him who marked, or defaced the mark on, the animals.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 18-25; Dec. Dig. \S 12.]

2. ANIMALS \S 12—MARKING—CRIMINAL RESPONSIBILITY—"FELONIOUSLY."

Feloniously, in a legal sense, refers to an act done with intent to commit a crime (citing *Words and Phrases*, Feloniously).

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 18-25; Dec. Dig. \S 12.]

(Additional Syllabus by Editorial Staff.)

3. STATUTES \S 118(1) — TITLES OF ACTS — CRIMINAL LAWS.

Acts Extra Sess. 1870, p. 50, No. 8, entitled "An act relative to crimes and offenses," making it an offense by section 3 to feloniously mark or brand any animal, is not violative of Const. 1868, art. 114, providing that every law shall express its objects in its title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 158, 159; Dec. Dig. \S 118(1).]

Appeal from Twenty-First Judicial District Court, Parish of Pointe Coupee; Joseph E. Le Blanc, Jr., Judge.

Luron Dickerson was indicted for feloniously marking a calf. From a judgment quashing the indictment, the State appeals. Reversed, motion to quash overruled, and case remanded to district court.

R. G. Pleasant, Atty. Gen., and J. H. Morrison, Dist. Atty., of New Roads (G. A. Gondran, of New Orleans, of counsel), for the State. Claiborne, Claiborne & Claiborne and William C. Carruth, all of New Roads, for appellee.

SOMMERVILLE, J. Defendant was indicted with having wilfully and feloniously, without the knowledge or consent of the owner, marked the ears of a certain heifer calf, belonging to one John J. Chester, marking said calf with a "crop and a split" in each ear; said mark being the property mark for live stock of the said Luron Dickerson, etc.

Defendant moved to quash the indictment for the following reasons:

"Appearer shows that the only law of this state which denounces the felonious or malicious branding, or altering or defacing the mark or brand of neat cattle is Act No. 8 of the General Assembly of the state of Louisiana of the Extra Session of 1870, approved March 16, 1870, which provides a penalty for the felonious or malicious marking or branding or altering, or defacing the mark or brand of neat cattle. Appearer shows that the crime, or offense, of such felonious or malicious marking or branding, etc., of neat cattle is not created in said act, and is not definitely defined in said act, and is not defined in any other statute of the state of Louisiana.

"Appearer shows that therefore said crime or misdemeanor, if there be such a crime or misdemeanor, must be defined and considered according to the common law of England, as it existed prior to and at the time of the enactment of the act of the General Assembly of the state of Louisiana of 1806, approved March 4, 1806; and appearer shows that no such crime or misdemeanor was known to the common law of England. And that such crime or misdemeanor has never been created or defined by any statute of this state, and that, therefore, no conviction could be had under said Act No. 8 of the Extra Session of 1870, or under any other law of this state. Appearer further shows that at the time of the passage of said Act No. 8 of the Extra Session of 1870 the Constitution of the state of Louisiana of the year 1868 was in force and effect; and appearer shows that article 114 of the Constitution of 1868 reads as follows:

"Article 114. Every law shall express its object or objects in its title."

"Appearer shows that the title of said Act No. 8 of the General Assembly of the state of Louisiana of the Extra Session of 1870 reads as follows:

"An act relative to crimes and offenses."

"Appearer shows that said title to said act does not express its object or objects, and that therefore the said act is broader than its title, and is violative of said article 114 of the Constitution of 1868, and is therefore null and void and of no effect and should be decreed to be null and void and of no effect. * * *

[3] The objection that the act is broader than its title is without merit. The act has been on the statute books for more than 40 years, numerous convictions have been had thereunder, and it has not been attacked on such ground before this time. The Constitution of 1868, article 114, provides:

"Every law shall express its object or objects in its title."

And the title, "An act relative to crimes and offenses," clearly expresses the objects,

or the various crimes which are denounced in the act. The title is very similar to that used by the Legislature in 1870, in the acts amending and re-enacting the Civil Code and the Code of Practice of the state. It is the same as the title to act No. 120, of 1855, which is "An act relative to crimes and offenses," wherein many crimes are defined and penalties provided for, under article 115 of the Constitution of 1852, which provides:

"Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title."

[1] Turning now to a consideration of that portion of the motion to quash the indictment on the ground that section 3 of Act No. 8, Extra Session 1870, p. 50, does not define a crime or misdemeanor, because it does not provide for the punishment of one who marks or brands, or alters or defaces the mark or brand of, certain animals, "the property of a third person," we find that it, also, is without merit.

The section of the act reads:

"Section 3. Be it further enacted, etc., that whoever shall wound or kill any neat cattle, hog, sheep or goat, the property of another, with intent to steal the same; whoever shall feloniously or maliciously mark or brand, or alter or deface the mark or brand of any horse, mare, gelding, colt, ass, mule, neat cattle, hog, sheep, or goat, and all persons present, aiding, abetting or assisting therein, shall, on conviction, be imprisoned at hard labor or otherwise not exceeding two years, and fined not exceeding one thousand dollars, at the discretion of the court."

The intention of the Legislature in adopting the section is clear, and the language used is not ambiguous. The title to the act is "An act relative to crimes and offenses," and the language of the section cannot be made to apply to owners of animals marking or branding, or altering or defacing the marks or brands of, animals belonging to themselves. The "crime" or "offense," which was made punishable by hard labor or by the imposition of a fine, was the marking or altering or defacing the mark on animals belonging to another person. This is indeed so clear that the court, in the case of *State v. Johnson*, 29 La. Ann. 717, wherein the question was not raised as to whether the animal was the property of another or not, held as follows:

"The second ground of error assigned is that the court erred in refusing a new trial, because the only offense proved against the accused was that of 'marking a calf,' which does not constitute larceny.

"That such is the law is beyond question, and a bill of exceptions in the record makes it almost certain that altering the marks of a calf, the property of another, which is of itself a * * * distinct offense, was the extent of that proved against the accused."

[2] The language of the section is:

"Whoever shall feloniously or maliciously mark or brand," etc.

The words "feloniously" and "maliciously" necessarily apply to crimes and offenses, and cannot refer to the marking of animals belonging to oneself. They necessarily refer

to the marking or altering the marks on animals belonging to another.

A felonious act is an illegal, or an unlawful, act. The word "feloniously" was used by the Legislature, as declared in the title to the act under consideration, with reference to crimes or offenses. As was said in the case of *State v. Mix*, 8 Rob. 549:

"It (feloniously) may be considered as descriptive of the state of mind under which the act was perpetrated."

And we are compelled to apply the words in the statute as descriptive of the crime of marking or defacing the mark on an animal belonging to another person.

"The word 'feloniously' is descriptive of the act charged. It means that the act was done with the mind bent on that which is wrong, or, as it has been sometimes said, with a guilty mind." 3 Words and Phrases, 2731.

"Felonious" is defined by Webster to be "malignant, malicious, villainous, traitorous, perfidious."

The object of the act, as expressed in the title, is to punish crimes and offenses.

A crime is:

"An act or omission which is prohibited by law as injurious to the public and punished by the state in a proceeding in its own name or in the name of the people or the sovereign." 12 Cyc. 129.

Act No. 8 forbids marking or branding of cattle feloniously or maliciously. The marking of one's own cattle is not an act prohibited by law; it is not unlawful; on the contrary, Act No. 46 of 1855, p. 38, is "An act relative to the brands and marks of animals," and it provides for the marking of animals by the owners thereof, and the inscription of the brands and marks used by said persons in the offices of the several recorders of the state.

"The term 'feloniously,' when used in the statute, shall be construed as synonymous in meaning with the word 'criminal,' and the word 'feloniously' when so used, as synonymous in meaning with the word 'criminally.'"

"Feloniously" in a legal sense means done with intent to commit a crime.

"The word 'feloniously' is essential to all indictments for a felony, for it alone can express the intent, the very offense.

"Feloniously" is a word of far broader and more criminal meaning than the word 'unlawfully,' as the word is used in an indictment charging that an act was 'feloniously' done. An act cannot be 'feloniously,' and not 'unlawfully,' done, but it may be 'unlawfully' done, without being 'feloniously' done."

3 Words and Phrases, 2731 et seq.

It may well be that the Legislature designedly omitted from the latter clause of section 3 under consideration the words "the property of another"; for the statute, as it stands, would provide for the punishment of feloniously or maliciously marking or branding, or altering or defacing the marks or brands, of any horse, etc., where such crime or offense is perpetrated upon mavericks:

"Bullocks and heifers that have not been branded, and are unclaimed or wild."

The statute makes it unlawful for any one other than the owner to brand such animals.

The statute in question is not equivocal; it does not admit of a double meaning. All persons who mark or brand, or alter or deface the marks or brands of, any animal, and all persons aiding or assisting therein, where the animals do not belong to the persons marking or defacing them, are guilty of a crime, and are punishable under the statute.

The motion to quash should have been overruled.

It is therefore ordered, adjudged, and decreed that the judgment in this case be annulled, avoided, and reversed; the motion to quash is overruled; and this case is remanded to the district court to be there proceeded with in accordance with law.

(139 La.)

No. 21662.

PILSBERY v. FRICKE et al.

(Supreme Court of Louisiana. March 20, 1916.)

(Syllabus by the Court.)

1. CORPORATIONS §547(4) — INSOLVENCY — REMEDIES OF CREDITORS.

The law authorizes the same individuals to establish and conduct the affairs of different corporations, vests each corporation, so established, with the capacity to incur debts, and, in effect, pledges the assets of each corporation for the payment of the debts incurred by it. Whilst, therefore, an individual, to whom a corporation has incurred a debt, may follow the assets of his debtor into the possession of another corporation, to which they have been illegally transferred, to his prejudice, the principle upon which that right is based operates, also, to prevent his obtaining the payment of his debt from the assets of the other corporation, and to enable the creditors of such other corporation to prevent its assets from being illegally diverted to their prejudice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2181; Dec. Dig. §547(4).]

2. FRAUDULENT CONVEYANCES §208 — SUBSEQUENT CREDITORS — TIME OF CONVEYANCE.

A creditor has no standing to complain of the alienation of property by his debtor, before the creation of his debt.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. §208.]

3. CORPORATIONS §542(4) — FRAUDULENT TRANSFER — PRESUMPTIONS — SOLVENCY OF DEBTOR.

When one corporation mortgages its property to secure the debt of another, composed of the same members, the contract, being thus purely gratuitous, will be presumed to have been made in fraud of its creditors, unless it be shown that, at the time of its making, the corporation had, over and above the amount of its debts, more than twice the amount represented by the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2157; Dec. Dig. §542(4).]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Joseph B. Lancaster, Judge.

Action by E. A. Pilsbery, trustee, against

A. Fricke, Sr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ponder, Gayer & Ponder, of Amite, for appellants. Arthur L. Bear, of Covington, and T. M. & J. D. Miller and Chas. F. Fletcher, all of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. Plaintiff, as trustee in bankruptcy of Robert Babington, Limited, a Louisiana corporation, enjoined the execution of a writ of seizure and sale, sued out by defendant, as holder of a note and mortgage for \$10,000, made and executed by the corporation on September 14, 1912; the allegations and prayer of petition for injunction being, in effect, as follows:

That Robert Babington, Limited, was adjudged a bankrupt on February 15, 1915, and that petitioner qualified as trustee on March 13th following; that petitioner is informed and believes that said corporation was insolvent on September 14, 1912; that the note and mortgage sued on were made and executed without consideration, to the knowledge of the parties thereto, and that the officers of the corporation were without authority in the premises; that the mortgage is, in fact, a simulation and a fraud upon the stockholders and creditors of said corporation; that, in the alternative, and should the court find that there was a consideration, it consisted of a pre-existing debt, and that the granting of the mortgage to secure the same was the giving of a fraudulent preference, the corporation having been, at that time, insolvent, to the knowledge of the defendant. He prays for a preliminary injunction and for judgment decreeing its perpetuation and further decreeing said mortgage to be a simulation and a fraud, or, in the alternative, a fraudulent preference, and ordering its cancellation.

Defendant, for answer, challenged the authority of plaintiff to bring the suit, or stand in judgment, but, as that point is not now insisted upon, it need not be further referred to. On the merits, he alleges that Robert Babington, Limited, and Babington Bros., Limited, were constituted of the same stockholders and managed by the same officers; that Robert Babington, Limited, was organized by Babington Bros., Limited, and its capital taken entirely from the assets of its creator, of which it is part and parcel; that the business of the two corporations was so interlocked and interdependent that one could not stand without the other; that the credit of one was the credit of the other, and that the assets of both were used indifferently for the purposes of either; that when he loaned the \$10,000, which he is seeking to recover, he did not know for which of the corporations it was intended, as W. W. Babington, to whom the loan was made, was the manager of both; that the loan was made in good faith, and inured to the benefit of Robert Babington, Limited.

It appears from the evidence that the property in controversy was conveyed by Babington Bros., Limited, to Babington-Bateman Company, Limited, in 1905; that defendant loaned the money that he is here seeking to recover out of that property to Babington Bros., Limited, in 1907; that Babington-Bateman Company, Limited, conveyed the property to Robert Babington, in January, 1909; that Robert Babington conveyed it to the Babington Company, which was a partnership composed of himself, his father (W. W. Babington) and his uncle (T. M. Babington), in December, 1909. At what time it was conveyed by the Babington Company to Robert Babington, Limited, does not appear. The mortgage sued on by defendant was executed by the corporation last mentioned on September 14, 1912, but was not recorded until September 23, 1914. The testimony of the defendant concerning the original loan made by him, the giving of the mortgage to secure that loan, and some other matters, reads, in part, as follows:

"Q. When you loaned this money, didn't you know who was using it, where it was going? A. Loaned it to Willie Babington; he was manager of the business, and he used it for the business. Q. At that time, did Babington Bros., Limited, have a mercantile establishment also? A. Of course they did. Q. At the time this mortgage was executed to you, just state in your own way * * * exactly what you said, and what W. W. Babington said, in reference to securing this \$10,000. A. He gave me a note, first, previous to the mortgage note, for \$10,000, secured by W. W. Babington and T. M. Babington, and which he said he estimated they were worth \$140,000, and he thought the amount was perfectly secure, and upon that he received my mortgage note (being the note of a third person, held by defendant, from which the money for the loan was to be derived) and cashed it, and it was understood that, any time, he would secure me by mortgage. Q. The note that was given, first, prior to this mortgage, or the one that this mortgage note took up, who owns that note, do you know; have you got that old note? A. T. M. Babington, president of the concern executed the note, and W. W. Babington indorsed it; that is my recollection. * * * Q. The old note, you say, was signed by T. M. Babington and indorsed by W. W. Babington? A. Yes, sir; T. M. Babington, as president. * * * Q. State whether or not this mortgage was given by Robert Babington, Limited, to you, for the purpose of obtaining an unfair preference over the other creditors; did you have that in view? A. I couldn't say that; all I know is, they wanted to secure me for my money. Q. At the time this mortgage was executed and the note given to you, state whether or not Mr. Babington, or anybody else, told you concerning the insolvency and failing condition of the corporation. A. No; if (it) was a fact, it never made no difference to me if (the) concern was insolvent, for I thought the mortgage was perfectly safe for the money."

It having been shown that there was an understanding at the time the mortgage was executed, that it should not, then, be recorded, defendant was asked the reason for that understanding, and he replied:

"Mr. Babington asked me not to do so, for his own purposes; he didn't care. (I) had all the trouble in the world to get it executed."

Being asked whether he knew what the conditions were, among the banks and mercantile corporations of the parish, at that time, he replied:

"Yes, sir; everybody was pushed, but I don't call that insolvency; I have been in business myself, and been pushed, but I was solvent as ever."

W. W. Babington states the circumstances under which the mortgage was given as follows:

"Mr. Fricke came to me and told me that we owed him—that Babington Bros. Limited, owed him—and that he was not satisfied. He believed we'd pay him if we could, but conditions were getting such he was not satisfied; he'd like to have some kind of security. I suggested other security, but he said he wanted a mortgage on the drug store building and real estate. I told him I didn't know if we could give a mortgage on that—it was a different corporation—and that Robert Babington, Limited, didn't owe him this amount. But, to satisfy him, we decided to give him a mortgage, and it was executed and held over. The reason we didn't put it on record—our putting as large a mortgage as that amount would precipitate things. He decided not to put it on record, until such time as we'd let him know whether or not we were insolvent; he could put it on then. He was advised to put it on record, which he did. * * * Q. Did Robert Babington, Limited, receive the consideration of the mortgage-money, property or anything of that kind? A. No, sir; nothing at all."

It is shown that Babington Bros., Limited, dealt in real estate, but co-operated with J. E. Bateman & Co., composed of J. E. Bateman and E. A. Burris, in establishing Babington-Bateman Company, Limited, for the conduct of a mercantile business; that Babington-Bateman Company, Limited, was succeeded in the mercantile business by Robert Babington; that Robert Babington was succeeded by the "Babington Company," and the "Babington Company" by Robert Babington, Limited. All of those concerns were controlled by about the same members of the Babington family (though Bateman and Burris appeared to have owned an appreciable minority interest in Babington-Bateman Company, Limited), and the stock and assets of each succeeding concern was paid for, mainly, with the stock and assets of its predecessor. It is a fair inference from the testimony that the real estate and the mercantile businesses, though conducted through the different agencies mentioned, were regarded rather as departments, or branches, of one general business which belonged to, and was conducted by, practically, the same people, and that, when occasion seemed to require, the assets of the real estate concern were used for the benefit of the mercantile company and those of the mercantile company for the benefit of the real estate concern. Thus W. W. Babington was asked, "Isn't it a fact that Babington Bros., Limited, loaned Robert Babington Company 1,000 acres of land, for them to borrow money on, without security?" to which the witness replied, "They had some kind of transaction like that." And, then,

we have the transaction out of which this litigation has arisen, whereby Robert Babington, Limited, mortgaged its property to secure a debt due by Babington Bros., Limited. Nevertheless, Babington Bros., Limited, was always engaged in the real estate business, and, from, say, 1909, Robert Babington, Limited, as the successor of the other concerns that have been mentioned, was engaged, as a distinct juridical entity, in the mercantile business, and each of those corporations incurred its own debts to the people with whom it dealt. It is shown that, in 1912, times were hard in Washington parish, and that the Babington concerns had trouble in paying their bills, and several of the members of those concerns have testified that they did not believe (speaking as of the date when the testimony was given) that they could have realized enough from their assets to pay their debts, and it is evident that defendant felt some uneasiness on that subject; for, whereas, he had loaned his money, without security, in 1907, and had theretofore been contented to allow the transaction to stand in its original shape, he, then, made his demand for security, and the demand was complied with in order to avert the probable crash which its denial would have precipitated. The effort to sustain the business proved unsuccessful, however, and, in September, 1913, Robert Babington, Limited, was put in the hands of receivers, and so remained until June 1, 1914, when its affairs were taken in charge by a committee of creditors, who administered until February, 1915, when the corporation was adjudged bankrupt. It may be here remarked that, when defendant was granted the mortgage sued on by him, there was already a mortgage resting upon the property affected by it for an amount about equal to the value of the property, and defendant was given that as another reason why no mortgage that might be granted to him would be of any value. In the course of the administration by the committee of creditors, however, the bank, which held the first mortgage, threatened to foreclose, and the committee, feeling that such a proceeding would destroy the last hope of pulling the business through, concluded to use the funds which they had succeeded in gathering in paying the bank, and the payment so made left the mortgage to defendant in the front rank. But, as has been stated, the business of Robert Babington, Limited, was not to be pulled through; nor was that of Babington Bros., Limited, for that concern was also put into the hands of a receiver, and had so remained up to the time of the trial in this case. The liabilities of Robert Babington, Limited, are shown by the testimony of the trustee to be about \$92,000, exclusive of the mortgage claim here asserted by defendant, and the assets some \$10,000, or \$12,000, and it appears from the testimony that the relative condition was about the same in 1912.

After this case had been submitted in the trial court, defendant pleaded the "prescription of one year against the alternate plea of plaintiff's petition, for the reason" (as alleged) "that prescription begins to run from the date of the appointment of receivers of Robert Babington, Limited." The plea was overruled, and there was judgment, on the merits, for plaintiff, from which defendant has appealed.

Opinion.

[1] The conditions presented in this case are different from those in which, after a corporation has incurred debts, the individual members organize another corporation, which takes over the assets of the old and leaves its creditors unpaid. The courts do not tolerate juggling of that kind; but the principle which governs is about the same in both cases, i. e., that the assets of a corporation are the common pledge of its creditors, and must be first devoted to their payment, before any other disposition can lawfully be made of them. In the case mentioned, the members of a corporation, burdened with debt, attempt to appropriate its assets to the creation of the capital stock of a new corporation that is free of debt, and the controversy most frequently arises between the creditors, who are thus left unpaid, and the corporation and individuals who have thus attempted to convert and misappropriate the assets which were pledged for their payment. In the instant case, a corporation, burdened with debt, has attempted to make use of its assets for the payment of a debt due by another corporation, composed of the same members; but the controversy has arisen between the creditors of the corporation whose assets—their common pledge—are thus attempted to be misappropriated, and a creditor of the other corporation who is the proposed beneficiary of the misappropriation. The law, however, authorizes the same individuals to establish and conduct the affairs of different corporations, vests each corporation, so established, with the capacity to incur debts, and, in effect, pledges the assets of each corporation for the payment of the debts incurred by it. Whilst, therefore, an individual to whom a corporation has incurred a debt may follow the assets of his debtor into the hands of another corporation to which they have been illegally transferred, to his prejudice, the principle upon which that right is based operates also to prevent his obtaining the payment of his debt from the assets of the other corporation, and to enable the creditors of such other corporation to prevent its assets from being thus illegally diverted, to their prejudice.

[2] It appears in this case that in 1905, Babington Bros., Limited, alienated the real

estate here in controversy, constituting part of its assets, in establishing and acquiring a controlling interest in Babington-Bateman Co., Limited; that two years later (in 1907) defendant loaned to Babington Bros., Limited, the \$10,000 that he is now seeking to recover; that the basis of defendant's action is a mortgage, which, in 1912, Robert Babington, Limited (successor in title of Babington-Bateman Company, Limited), without consideration, and to the prejudice of its own creditors, imposed upon said real estate, to secure the debt thus contracted to defendant, in 1907, by Babington Bros., Limited.

The "alternative plea of plaintiff's petition," to which, alone, and in specific terms, defendant's plea of prescription is directed, is merely hypothetical, i. e., plaintiff says, if there was any consideration for the mortgage in question (which he denies), it consisted of a pre-existing indebtedness by the mortgagor to defendant, and that the giving of the mortgage to secure the same was the giving of a fraudulent and illegal preference to one creditor over the others, at a time when the common debtor was insolvent. But the evidence fails to show that defendant was ever the creditor of the mortgagor, or that any part of the money loaned by him to Babington Bros., Limited, inured to the benefit of the mortgagor. Hence there was no consideration for the mortgage; and hence, also, there is no question here of giving a preference to one creditor over the others, and the plea of prescription is without application.

Upon the merits of the case, defendant has no standing to complain of the alienation, by Babington Bros., Limited, of the property in question, for the law declares that:

"No creditor can, by the [revocatory] action given by this section, sue individually, to annul any contract made before the time his debt accrued." C. C. 1993.

And the contract whereby the property was alienated was made before defendant's debt accrued.

[3] The law further declares that:

"If the contract be purely gratuitous, it shall be presumed to have been made in fraud of creditors, if, at the time of making it, the debtor had not, over and above the amount of his debts, more than twice the amount of property passed by such gratuitous contract."

The contract here in question is shown to have been purely gratuitous on the part of the mortgagor, and the evidence satisfies us that the mortgagor did not, at the time it was made, have, over and above the amount of its debts, more than twice the amount of the property passed by such gratuitous contract, which must therefore be presumed to have been made in fraud of creditors.

The judgment appealed from is accordingly affirmed.

(139 La.)

No. 20853.

KLUMPP et al. v. HOWCOTT.

(Supreme Court of Louisiana. March 6, 1916.

Rehearing Denied April 8, 1916.)

*(Syllabus by the Court.)*1. COVENANTS \S 121(2)—WARRANTY—EVICTIO—CONCLUSIVENESS OF JUDGMENT—PARTIES CONCLUDED—PRIVIES.

A judgment of eviction in another state concludes the vendor and warrantor, unless he can show that, had he received notice, he could have proven new facts or filed some peremptory exceptions, which, if presented to the court, would have produced a different result. A warrantor, not notified, cannot assign errors in the judgment of eviction of a competent court.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 222; Dec. Dig. \S 121(2).]

2. "ADVERSE POSSESSION" \S 14, 16(1)—NATURE AND REQUISITES — "ACTUAL POSSESSION."

The Texas statutes of limitation of 3, 5, and 10 years in real actions run only in favor of persons having peaceable and adverse possession of the premises, and "adverse possession" is defined "as an actual and visible appropriation of the land." The circumstance that the claimant made a survey of the tract and marked its boundaries, paid taxes on it, and excluded trespassers, will not constitute actual possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 77-83, 87, 88; Dec. Dig. \S 14, 16(1).]

For other definitions, see Words and Phrases, First and Second Series, Actual Possession; Adverse Possession.]

3. EVIDENCE \S 419(2)—PAROL EVIDENCE AFFECTING WRITINGS—CONSIDERATION.

Where a deed recites that the price is \$500 in cash and "other valuable considerations," the door is left open for evidence to prove the full consideration of the conveyance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1912; Dec. Dig. \S 419(2).]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Julius C. Klumpp and others against W. H. Howcott. From the judgment, plaintiffs appeal, and defendant joins in the appeal. Affirmed.

Louis P. Bryant, of New Orleans, for plaintiffs. Hall, Monroe & Lemann, of New Orleans, for defendant.

LAND, J. The plaintiffs, as the sole heirs of H. F. Klumpp, deceased on July 18, 1911, instituted this their second suit against the defendant on the same cause of action. The first suit was instituted in March, 1909, and discontinued in May, 1911.

The allegations of fact set forth in the petition are substantially as follows:

On December, 1893, the defendant, by notarial act passed in the city of New Orleans, sold and transferred, with all legal warranties, unto the said H. F. Klumpp, two tracts of land, one of 640 acres and the other of 320 acres situated in Leon county, Tex., for the sum of \$500 and "other valuable considerations."

In January, 1906, M. A. Stanley and others instituted suit in the district court of Leon county, Tex., against plaintiffs herein for the possession of the lands described in their petition, including them as defendants with others for other lands which were bought, as well as to try title and for damages.

The case was tried, and at the August term, 1907, the court rendered judgment against plaintiffs herein for said lands; and that the said case was appealed to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, which, in November, 1908, affirmed the judgment of the lower court.

The petition herein represents: "That by virtue of said judgment petitioners were evicted from said lands, by a superior title;" that the "other valuable consideration" mentioned in the said act of sale from Howcott to Klumpp was the further sum of \$1,596.13; and that by reason of said eviction "by a superior title judicially ascertained and decreed," the petitioners demand of the defendant herein the return of the purchase money, to wit, the sum of \$2,096.13, with 8 per cent. interest, the legal rate in the state of Texas, from December 14, 1893, to date of suit.

The petition further represents that plaintiffs and their deceased father had paid all taxes due and exigible on said lands by the state of Texas, to the amount of \$204.72; and that neither the said H. F. Klumpp or petitioners ever took actual possession or used the aforesaid described lands directly or indirectly.

Plaintiffs pray for judgment for \$4,874.42, with legal interest from the date thereof until paid.

To this petition the defendant filed an exception of no right of and no cause of action.

This exception was tried in limine, but was not decided, the court ordering the same to be referred to the merits of the case.

Defendant in no manner waiving the exception, but on the contrary insisting on the same, and filing answer only in the alternative, because ordered to do so by the court, pleaded sundry defenses to the action, among them, no notice of the threatened eviction was given to the respondent; that the alleged eviction was due to plaintiff's failure to properly defend the suit brought against them in Texas; that the plaintiffs would have been entitled to recover any taxes paid by them upon the land from which they were evicted, and their failure to do so should not be visited on the defendant; that the plaintiffs have heretofore judicially admitted that the purchase price of the land in question was \$500, and are estopped from claiming that the consideration was greater; and that plaintiffs could and should have taken possession of the property, and that the improvements thereon were more than sufficient to offset any claim for interest.

When the case was called for trial, the plaintiffs waived their demand for taxes; and the defendant objected to any and all evidence being heard on the ground that the exception of no cause of action filed by the defendant is well taken and should be maintained. Defendant also objected to any and all evidence of eviction by any one, saving the six persons named in the petition. The court ordered that the exceptions go to the effect.

The case was tried, and there was judgment against the defendant for \$500, with legal interest from date of eviction, and for costs.

Plaintiffs have appealed, and the defendant has joined in the appeal and prayed that the judgment below be reversed and the exception of no cause of action be maintained.

[1] The exception of no cause of action raises a question of Texas law, which is stated in the deposition of a Texas lawyer as follows:

"Under the laws of the state of Texas, the children or heirs of the grantee who have been judicially evicted from the possession of the land held by warranty deed to their ancestor, the original grantee, have a cause of action upon said warranty in said deed against the grantor and warrantor."

The same witness testified, in substance, that the plaintiffs, under the laws of Texas, have a cause of action against the defendant, under the warranty deed in question to recover the price paid, with 6 per cent. interest from the date of payment thereof. Another Texas lawyer testified to the same effect.

The alleged judgment of eviction presumed to have been rendered according to the laws of Texas vested in the plaintiffs the right and cause of action set forth in their petition. Under C. O. art. 2518, such a judgment concludes the vendor, unless he can show that, had he received notice, he could have proven new facts, or filed some peremptory exception, which if presented to the court would have produced a different result. See *Volant v. Lambert*, 6 Martin (N. S.) 559; *Rivas v. Hunstock*, 2 Rob. 196. In the last case, the court held that the vendor could not urge error in the judgment of eviction on the record as presented to the court.

As the judgment of eviction is *prima facie* valid, the defendants' exception of no cause of action is bad.

This exception is based on C. C. art. 2502, reading:

"That the warranty should have existence, it is necessary that the right of the person evicting shall have existed before the sale. If, therefore, this right before the sale was only imperfect, and is afterwards perfected by the negligence of the buyer, he has no claim for warranty."

This suit is based on the judgment of eviction, which presumably was rendered on a proper showing that the right of the persons evicting existed before the sale from the defendant to plaintiffs' father. The court in

rendering the judgment necessarily found that the legal title was in the plaintiffs in the eviction suit.

The question whether the title of the plaintiffs in eviction was perfected by the negligence of the defendants in eviction, is a matter of defense in the present suit.

The exception of no cause of action is therefore overruled.

The answer denies particularly that the plaintiffs are the heirs or representatives of H. F. Klumpp as alleged. The heirship is proven by the evidence.

The answer denies that any notice was given defendant of the threatened eviction, and avers that if the plaintiffs had been evicted as alleged, then their eviction was due to their failure to properly defend the suits against them for that purpose.

It is shown that no citation in warranty was served on the defendant.

The record in the case of *M. A. Stanley et al. v. W. F. Klumpp et al.* in the district court for the county of Leon, state of Texas, shows that the court carefully considered the title held by the defendant to the land in question, and decided that his vendor, Annie J. Lester, had no title to the premises. The Court of Appeals of Texas affirmed the judgment of the district court.

[2] Defendant's contention that his vendee, Klumpp, or his heirs, might have defeated the claims of the successful parties to the suit, by pleading prescription under the Texas statutes, is without force, because it is not proven that the defendant, or the plaintiffs or their father, ever had any *actual* possession of the two tracts of land described in the petition. William F. Klumpp, one of the plaintiffs, testified as follows:

"Q. From the time Mr. Klumpp that this purchase was made of this land, did the estate or any one of the Klumpp family ever make use of said land or obtain any revenues by rent, lease or otherwise?"

"A. No, sir."

The extracts from the testimony of the defendant on page 8 of his original brief read as follows:

"Q. Did you have a survey of the land made?"

"A. Yes; I had the county surveyor survey the land and I gave old Mr. Klumpp the original survey and the county survey, and I colored it so he might find it."

"Q. During the period of your ownership of this land had you any one looking over it for you?"

"A. Yes; Mr. Partrick. I think he had a house on the land but I won't be positive about it."

In *Ramos Lumber & Mfg. Co. v. Labarre*, 116 La. 583, 40 South. 906, this court held that:

The "circumstance that the claimant made a survey of the tract and marked its boundaries, or paid taxes on it and excluded trespassers, * * * will not constitute actual possession"—citing 1 Cyc. 990.

The Texas statutes declare that "adverse possession" is an *actual and visible appropriation of the land*, and that the prescription

of 3, 5, and 10 years run in favor of any person having "peaceable and adverse possession" of real estate.

The Texas attorneys who testified in this case deposed that under the laws of that state, prescription did not run against married women, in respect to their separate property, until the year 1896, and that in their opinion the Klumpps could not have successfully urged a plea of prescription in the suit against them. We do not deem it necessary to consider defendant's contention that the Texas lawyers did not consider the Klumpp title, as it is evident that the Klumpps had no *adverse possession* on which a plea of prescription could have been based.

[3] In their answer in the eviction suit, the Klumpps represented that W. H. Howcott had conveyed and sold the two tracts of land to their father "for the sum of \$500 cash paid him by said H. F. Klumpp," and prayed that in the event they were cast in the suit, for judgment against the said Howcott for said sum of \$500.

If Howcott had made himself a party to the eviction suit, judgment would have been rendered against him for \$500 as prayed for in the answer.

The present suit was brought on theory that no cash price was paid, but that the conveyance was a giving in payment for an antecedent debt exceeding the sum of \$2,000. The deed recites a sale of the property for the price of \$500 "and other valuable considerations."

Defendant's explanation of the transaction is that it was a compromise settlement in which Klumpp took the land at the value of \$500 for the debt.

This transfer was made in 1893, and at that time the defendant was financially embarrassed, and was practically insolvent. His note for \$2,096.13, held by Klumpp, had been past due and unpaid since May 19, 1883. According to the testimony of the defendant, Klumpp offered to take \$500 for the note, and the defendant, not having the money, proposed to pay that amount by a transfer of the land in question. Defendant's statement on this point is supported by a copy of an agreement, the original of which he testified was signed by Klumpp and himself shortly before the execution of the deed of conveyance.

The trial judge gave credit to the testimony of the defendant, which certainly gives a good reason for the fixing of the price of the sale at \$500, and which is supported by the answer and call in warranty filed by the Klumpps in the eviction suit.

We assume that the words "and other considerations" were inserted in the deed to cover all business transactions between the parties involved in the settlement.

Judgment affirmed.

MONROE, C. J., takes no part.

(139 La.)

No. 20316.

O'NEAL v. BIG PINE LUMBER CO.
Limited.

(Supreme Court of Louisiana. March 6, 1916.
Rehearing Denied April 3, 1916.)

(Syllabus by the Court.)

RAILROADS §—276(3)—OPERATION—INJURIES
TO TRESPASSERS—LIABILITY.

Where a boy of 12, seated, though as a mere trespasser, on the edge of a flat car in a siding, is seen, at a distance of 75 yards, by the engineer of a locomotive who is backing it into the siding to make a drop switch, and the speed of the locomotive is such as, with its weight, to threaten the car with destruction and the boy with death, the engineer owes the duty, from the moment that he sees the boy, of doing everything that it is possible for him to do to avoid injuring him, and is guilty of negligence in failing to make any attempt to check the speed of the locomotive. And where, in such case, the boy jumps off the car, and in scrambling away from the threatened danger gets upon the main track and is injured by the cars which the locomotive has dropped, and which are running on that track without brakes or brakemen, the company employing the engineer is responsible, in damages, for the injuries received by the boy. It is well settled that one who negligently places another in danger cannot exact of him the exercise of the most deliberate judgment in his attempt to escape therefrom.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 880-883; Dec. Dig. §—276(3).]

Provosty, J., dissenting.

Appeal from Thirteenth Judicial District Court, Parish of Grant; W. F. Blackman, Judge.

Action by John M. O'Neal against Big Pine Lumber Company, Limited. From a judgment for plaintiff, defendant appeals. Affirmed.

John A. Williams and C. H. McCain, both of Colfax, for appellant. W. C. & J. B. Roberts, of Colfax, and Grisham & Oglesby, of Winnfield, for appellee.

Statement of the Case.

MONROE, C. J. Defendant has appealed from a verdict and judgment of \$1,500, awarded as damages for personal injuries sustained, through alleged negligence of its agents, by plaintiff's minor son. Plaintiff has answered the appeal, praying for an increase in the amount of the award.

It appears from the evidence that defendant owned a logging road that ran east and west; that it had a commissary store at a certain point on the road, for about a quarter of a mile in each direction, from which, upon each side of the road, were the quarters of its employes, constituting, with their families, a population of about 200 persons; that to the westward of the commissary, and at about the west end of the little hamlet (or, say, a quarter of a mile distant), there was a switch, from which a spur track branched off on the south side of the main track, ran along about parallel with it, at a distance

from the main track of from 12 to 32 feet, and then led off into the woods, but the rails of which, at some time prior to the accident here in question, had been taken up to a point within, say, 240 feet of the switch, leaving that much of the spur as a storage and switching track; the practice of defendant having been, as we infer, to start in the mornings, from the mill, to the eastward of the commissary, and complete the making up of its trains and the picking up of its employés at or about the commissary and the switch, whence the cars and employés would be conveyed to the places where they were needed for the work of the day. Plaintiff was engaged in getting out railroad ties for defendant under contract, and lived about three-quarters of a mile to the north of its main track, the lane from his house leading to a point on that track about, say, 150 feet to the westward of the switch, and hence a little more than a quarter of a mile to the westward of the commissary, though we infer that the commissary might have been reached from plaintiff's house by taking the hypotenuse, rather than the two sides, of the triangle, and the evidence shows that there were paths leading to that establishment along the sides of, as well as upon, the tracks. Early in the morning of August 2, 1912, plaintiff instructed his son, an intelligent boy, 12 years of age, to go to the commissary and get supplies of some kind, and the boy proceeded down the lane until he reached the tracks, where he found two skeleton logging cars and an open flat car on the siding or spur track, the flat car being to the eastward of the others. He also found another boy, whom he knew, and who was in defendant's employ, on the flat car, and they both knew that an engine would presently come along and take out the flat car, which would be needed for the transportation of the employés. The other boy suggested to young O'Neal that he, too, should get on the flat car and ride to the commissary, and, although both the O'Neals, father and son, testify that the latter had been forbidden to ride on defendant's trains, and had been whipped for disobedience in that respect, he nevertheless got on the car and seated himself on the north side, with his legs hanging over the edge, while the other boy occupied a similar position on the south side. Presently an engine, moving backward and pulling 12 logging cars, passed the commissary and whistled and the engineer, having, in that way, attracted the attention of Stewart, one of defendant's employés who was conveniently situated, gave a signal for a "drop switch," which meant that his purpose was, upon nearing the switch, to uncouple the engine, give it additional momentum sufficient to enable it to run away from the cars and into the switch, and to enable Stewart, then to close the switch so that the cars, being still in motion, would go on down the main track;

the idea being that the engine would pull the flat car, or perhaps, the three cars, out of the switch, and then back down on the main track, get the 12 cars, and have the train made up, and the engine in proper position with the cars behind the tender. Stewart, accordingly, opened the switch, and the engine entered, and he then closed it and the 12 cars passed on down the main track. But the engine entered the switch at a high rate of speed, the circumstances considered, and the engineer did not check it; and the two boys, who were seated on the flat car with which it was threatening to collide, became alarmed, and, at the suggestion of the other boy, who was probably older than O'Neal, they jumped off from the respective sides upon which they were sitting. The testimony conflicts as to whether the main track was 14 feet or 32 feet from the spur; it shows that the space between the tracks was about 2½ feet lower than the surface of the tracks; and that O'Neal, having jumped to escape the approaching engine, kept his attention upon it, whilst scrambling out of its way, with the result that he found himself standing upon the ends of the cross-ties of the main track, looking at the engine, about the time that it struck the car upon which he had been seated, and about that time, also, he was struck by the train of cars which were passing down the main track and received the injuries of which he complains. It is said that the car furthest to the westward of the 3 that were on the spur track had already been partially derailed, and it is shown that the 3 were knocked off the track, down the bank, by the impact of the engine and that the drawhead of the flat car and drawbolt of the engine were broken thereby. The engineer admits that he saw the boys on the flat car, but it does not seem to have occurred to him that it was a matter in which he was at all concerned. His testimony reads, in part, as follows:

Examination in chief:

"Q. When you came into the hole, or on the side track, that morning, what was the speed that you were traveling? A. Something like 8 or 10 miles per hour when I approached the switch. * * * Q. Were you exceeding the speed necessary at that time? A. I was doing the work, and was running at a speed necessary to make the clearance that I speak of. Q. You handled the business out there? A. Yes, sir; I handled the business out there and got out the logs. It is not a very easy matter to handle a log train on log spurs that are newly constructed and rarely ever put up in first-class shape."

Cross-examination:

"Q. Did you notice the boy on the flat car? A. I did. Q. When you saw him on the car, how far do you think that you were from him? A. I suppose I was 75 yards from him, at least. Q. Were you backing down? A. I was backing my engine into the side track. * * * Q. Now you say you saw the boy on the car? A. Yes, sir. Q. You did not do, or cause to be done, anything to have him get off? A. No, sir; I was doing my work; I had the front end of the engine to look after, until we were

in the clear, and then the back end. The boy jumped off I know. Q. He jumped off before you hit the car? A. I judge he did; I was very busy at that time with the engine and was not looking at him. * * * Q. Was there any reason why he should have jumped from that car? A. Nothing that I know of. * * * Q. With what speed did you hit that car? A. It was somewhere between 8 and 10 miles an hour. Q. Did you not think that was too great speed? A. I did not think about it at all. I was working with the engine; the sand was not working, and the engine was new and stiff; hard to stop. * * * Q. You did knock the car off the track? A. I think that I did."

The witness Stewart estimates the speed of the train at 12 or 15 miles an hour, and he says that the drawhead on the tender of the engine was broken. O'Neal, Sr., testifies that he found the three cars that had been on the spur track, "down on the bank; they were knocked off"; that the drawhead of the flat car was broken and also the steel drawbar of the engine (meaning, of course, of the tender); and that the 12 cars had gone down the main track for at least a half a mile beyond the point at which the accident occurred, having, as otherwise appears, neither brakes nor brakemen on board of them. And there is no contradiction of his testimony on either point.

It is shown that instructions were given, and posted, prohibiting the carrying of passengers, other than employes, on defendant's trains, but that they were not generally obeyed by those in charge of the trains. It is also shown that the tracks, about the scene of the accident were as commonly used as highways as the paths on the sides of them, though it does not appear that defendant encouraged that practice.

Opinion.

The boy was, no doubt, at fault in getting on the flat car, but from the moment that the engineer actually saw him, he owed the duty of doing everything that it was possible for him to do to avoid injuring him. According to his own testimony, he knew that his engine was approaching the open flat car (upon the edge of which, with his legs hanging over, the boy was seated) at the rate of 8 or 10 miles an hour, and Stewart, who acted as switchman and saw the engine pass, estimates its speed at 12 or 15 miles an hour. It is beyond dispute that the speed, plus the weight of the engine, were sufficient to knock the car off the track, down the bank. Hence the boy was in imminent danger; and, though it is possible that he might have escaped injury if he had remained where he was, the most deliberate judgment would rather approve the wisdom of his course in attempting to find a safer place. Counsel for defendant argue that he might have stopped in the hollow, midway between the spur and the main tracks, but, if the cars were knocked off the track and down the bank, it does not

appear to us that the hollow, between the banks, would have been a desirable stopping place. In any event, no matter what may be the aspect of the situation after the event, it appeared to him at the time that the danger that threatened was that the car that he was sitting on would be derailed and turned over into the hollow, and hence that it would be better for him to get further away. It is then argued, in effect, that, conceding that such a course was proper, still he should not have placed himself in the way of the on-coming log train, of which he knew, or should have known. Upon that subject, the boy testifies that he saw the engine with the cars following it, at the commissary, but that thereafter his interest was centered upon the engine, which entered the switch, and was coming down upon him; and, in view of the situation brought about by its approach, at a speed that seemed to threaten him with destruction, his explanation is natural enough. Moreover, he says that he did not know about drop switching, at that time, and his testimony leaves the impression that, if he had thought of the cars at all, it would have been to assume that they were following the engine into the switch. If, however, it were shown that he was familiar with drop switching, and had reason to believe, and did believe, when he first saw the engine and cars, that a drop switch was in contemplation, and that the engine would come into the switch whilst the cars would proceed on the main track, we are of opinion that he could not be held responsible for his error of judgment in getting on the main track, since he did so under pressure of an excitement created by the danger which was threatened by the engine, in consequence of the negligence of the engineer, and which he was endeavoring to escape.

The principle is well settled that one who negligently places another in danger cannot exact of him the exercise of the most deliberate judgment in his attempt to escape therefrom.

A good deal of emphasis is laid by plaintiff's counsel upon a rupture from which the boy is shown to have been suffering, and which they attribute to the accident; but the evidence leads us to believe that he had sustained that injury on some previous occasion, probably by jumping off his father's barn. His other injuries consisted of lacerations of the scalp and of the left leg and bruises, from all of which he had pretty well recovered at the time of the trial. He suffered considerably, however, and was on crutches for several months, and we do not find the amount allowed excessive. On the other hand, we find no reason for increasing it.

The verdict and judgment appealed from are therefore affirmed.

PROVOSTY, J., dissents.

(139 La.)

No. 21475.

**WATERHOUSE v. STAR LAND CO.,
Limited, et al.**(Supreme Court of Louisiana. March 6, 1916.
Rehearing Denied April 3, 1916.)*(Syllabus by the Court.)***1. PLEADING** *¶*228—**EXCEPTIONS—HEARING.**

Where the trial and final disposition of an exception will put an end to a case, it should be disposed of before going into the trial on its merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. *¶*228.]

2. PARTIES *¶*1—**PECUNIARY INTEREST.**

One without a pecuniary interest has no judicial standing in the courts.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. *¶*1.]

3. HUSBAND AND WIFE *¶*273(1)—**COMMUNITY—RIGHTS OF PUTATIVE WIFE.**

Where a second marriage has been entered into by a husband during the existence of a previous marriage, and the second wife is in good faith and is ignorant of the existence of the prior marriage, the property acquired by the husband during the existence of the second marriage will be divided between his two wives; and the children of both or either of the marriages are not interested in such property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008, 1009, 1016-1018, 1023; Dec. Dig. *¶*273(1).]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Alice R. Waterhouse against the Star Land Company, Limited, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dart, Kernan & Dart, of New Orleans, for appellant. Wm. Winans Wall, of New Orleans, for appellees.

SOMMERVILLE, J. Plaintiff, in her capacity as natural tutrix of the minor Stanislaus John Arthur Waterhouse, alleged that he is the sole heir of his father, John Edward Waterhouse, who in turn had inherited from his father, John Arthur Waterhouse, a share and interest in the defendant company, which was owned by John Arthur Waterhouse at the time of his death, and, in addition thereto, that the said John Edward Waterhouse was the owner of ten shares of stock, of the par value of \$100 each, of the capital stock of the defendant company. She charges that Mrs. Mary A. Waterhouse, the widow of John Arthur Waterhouse, and their son, James C. Waterhouse, usurped and assumed, without election or appointment, the positions of president and secretary-treasurer, respectively, and members of the board of directors of the said company, and that they have done certain things set forth in the petition which were illegal and fraudulent, with the view to defraud the corporation and minority stockholders thereof; further, that said officers and directors have jeopardized and are jeopardizing the rights

of the minority stockholders, and that they are grossly mismanaging the business of the said corporation, and committing acts ultra vires, and are wasting, misusing, and misapplying the property and funds of the corporation. And she prays that the defendant company, together with Mrs. Mary A. Waterhouse, its president, James G. Waterhouse, the secretary-treasurer, and these same persons as acting members of the board of directors of said corporation, be cited, and for judgment against said persons for the value of the property of the corporation which has been disposed of by them, and that they be dismissed from the offices occupied by them. And she further asks that the defendant corporation show cause why a receiver should not be appointed for it, and that a receiver be appointed thereto.

The three defendants made separate appearances, and for cause why a receiver should not be appointed excepted:

"That the late John E. Waterhouse at the time of death owned no stock whatsoever in the Star Land Company, Limited, defendant herein.

"That at the time of the marriage between John A. Waterhouse, deceased, and exceptor (Mrs. Mary Waterhouse), said John A. Waterhouse, deceased, had no property whatsoever; that all of the property owned by the said John A. Waterhouse, deceased, and in his possession, or in the possession of others for him, at the time of his death, was acquired subsequent to the marriage between exceptor and said John A. Waterhouse, deceased; that at the time of the marriage of the said John A. Waterhouse, deceased, to exceptor, he had a wife to whom he was legally married living; that at the time of said marriage exceptor was ignorant of said previous marriage of said John A. Waterhouse, deceased, and remained ignorant of said marriage up to the time of his death; that all of the property acquired by the said John A. Waterhouse, deceased, after his said marriage to said exceptor belonged to his two wives, and at the time of his death he owned no property whatsoever.

"That for the reasons set forth the said minor, Stanislaus John Arthur Waterhouse, is without any interest whatsoever in the capital of the stock of the Star Land Company, Limited, and is not a creditor of the Star Land Company, Limited, and is absolutely without interest to prosecute this suit and stand in judgment herein."

[1] Two days after filing the exceptions by the several defendants, all of which were to the same effect, the defendants answered severally, after reserving all of their rights under their exceptions, and without in any wise abandoning the same, but insisting thereon, denying the allegations of plaintiff's petition. The defendants were ordered to show cause April 19, 1915, why a receiver should not be appointed to take charge of the affairs of the corporation. The record fails to show what was done on that day; but April 28, 1915, the minutes show that the exceptions to the petition and the rule to appoint a receiver were taken up, heard, and submitted. On that day the trial judge ruled:

"The court will hear evidence upon the exceptions, and, if it finds that the plaintiff, John E.

Waterhouse, has an interest, either as a stockholder or an heir, will then go on and try the balance of the case; of course, if he has no interest, that is the end of the case.

"To which ruling of the court counsel for plaintiff reserves a bill of exceptions."

[2] The bill is without merit. If plaintiff had no pecuniary interest in the defendant company, it would have been idle on the part of the court to have heard testimony on the merits of the cause.

A similar point was presented in the case of Quaker Realty Co. v. Labasse, 131 La. 996, 60 South. 661, Ann. Cas. 1914A, 1073. It was there held that a defendant had no standing to provoke judicial inquiry into a matter in which he had no pecuniary interest, saying:

"Manifestly he has not, if he has no pecuniary interest in the matter. The principle that one without pecuniary interest has no judicial standing runs all through our jurisprudence; it is founded upon simple, plain, common sense; it is formulated in article 15 of the Code of Practice, reading, 'An action can only be brought by one having a real and actual interest which he pursues;' and it has been enforced by this court in a very large number of cases, and among others in cases where parties whose title had been divested by a tax sale were still seeking to litigate with reference to the property."

On her brief plaintiff complains that she was prevented from offering evidence by the ruling of the court on the trial of these exceptions; but this is clearly not the case, for the record shows that evidence was offered by the plaintiff, and the trial of the exceptions was closed with the remark, by counsel:

"That is all I have to offer on this matter now."

It does not appear that plaintiff alleged surprise on going to trial on the exceptions, or that a continuance was asked for, or that he asked for time to produce further testimony. The issue had been tendered some time in advance of the calling of the case for trial, and both parties had announced themselves ready for trial. If plaintiff had evidence which might have been successfully opposed to the evidence offered by the defendant on the trial of the exceptions, such evidence was then in court, or should have been there, if she expected to go to trial on the merits of the cause.

The ruling of the court was correct.

As to the ten shares of stock claimed by plaintiff to have been owned by her deceased husband, John Edward Waterhouse, the evidence is positive that the said John Edward Waterhouse sold said shares of stock to his mother in the year 1912, and that she paid him \$500 for the same. The evidence of the defendant Mrs. Waterhouse to such effect is corroborated by her son, the other defendant, James E. Waterhouse; and it is further corroborated by the possession of the certificate of stock for the ten shares by the defendant Mrs. Mary A. Waterhouse.

As to that portion of the stock which had

been owned by the grandfather, John A. Waterhouse, and said to have been inherited in part by his grandson, the minor ward of plaintiff, the evidence shows that all the property which John A. Waterhouse possessed was acquired during his marriage with his second wife, Mrs. Mary A. Waterhouse. The evidence further shows that at the time of his said marriage Mr. Waterhouse was already married to Mrs. Emma Whitefield, who lived in the Isle of Utila, and that the second Mrs. Waterhouse was ignorant of the fact of the existence of said marriage at the time of her marriage to Mr. Waterhouse, and remained in ignorance thereof until after his death in 1912. There was a son born of the first marriage, and two sons were born of the second marriage. The first marriage was proved by the certificate of marriage of the parties, duly authenticated, and also a certificate of the birth of the son of said marriage. The marriage was also testified to by a citizen of New Orleans who knew the parties.

[3] The second marriage having been entered into in good faith on the part of the second wife, the law declares it a putative marriage; and to the wife and children of the second marriage is given the standing and the rights of a lawful wife and of lawful offspring.

The articles of the Civil Code relative to putative marriages are as follows:

"Art. 117. The marriage which has been declared null produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.

"Art. 118. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor and in favor of the children born from the marriage."

Interpreting these articles, we hold in Clendenning v. Clendenning, 3 Mart. (N. S.) 438:

"A woman who was deceived by a man, who represented himself as single, and his children begot while the deception lasted, are bona fide wife and children, and, as such, entitled to all the rights of a legitimate wife and issue."

In the case of Patton v. Cities of Philadelphia and New Orleans, 1 La. Ann. 98, we hold:

"We agree with the plaintiffs' counsel that the second wife and the children conceived during her good faith have all the rights which a lawful marriage gives. We concur on that subject, in the opinion of the late Supreme Court in the case of Clendenning, already cited. It is because Eleonore Hook had all the rights of a lawful wife that the plaintiffs have no title or claim to lands acquired by their father during the existence of the two marriages. The plaintiffs have taken it for granted that there could not be two communities. This is an error. The laws of Spain recognize in such cases two entire communities. As the wife, under those laws, forfeits her share of the acquets and gains when she is guilty of adultery, so the husband forfeits his share when he has two wives living, and each of the wives takes the undivided half to which the law would entitle her if she was alone. Paz, in his sixty-first Consulta, class 9, states the law as follows, in a case identically the same as the present:

"Out of the acquets and gains the debts must be paid, because what the parties owe during

the marriage cannot form a part of the acquêts and gains, and belongs to the creditors. The balance, after paying the debts, must be divided between the two wives, without any portion of it going to the succession of the husband.

* Lib. 5, Nueva Recopilacion, tit. 9, 1, 1-6. And although the second law of this title requires the cohabitation of the wife with the husband, in order that she be entitled to her share, yet, as the marital cohabitation has not failed through her fault, but, on the contrary, through the fault of her husband, who abandoned her, she is not to lose her rights on account of the fault and misconduct of her husband. *Imputari non debet ei per quem non stat, si non faciat quod per eum fuerat faciendum.* Di Reg. Jur. 6, reg. 41.

"To the second wife the other half is due, because, by virtue of her good faith at the time of her marriage, she is reputed a lawful wife, for the same reason for which the law recognizes her issue as legitimate. This is affirmed by Covarruvias in *Epit. p. 2, cap. 7, sect. 1, No. 7*, Antonio Gomez, 1. 50 de Toro No. 77, and Molina de Just. tract. 2 disp. 433, who all agree that it is the common opinion of the doctors of the law that a woman marrying in good faith, although the marriage may be null, is entitled to one-half of the acquêts and gains. From which it results that one-half goes to each of the wives, and that the husband deceiving the second and doing a grievous wrong to the first refuses unjustly to either the share which belongs to her, and that he is bound to satisfy both out of everything he possesses, because the law favors those who are deceived against those who deceive them. *Cum deceptis et non decipientibus jura subveniunt.* In taking from the father's succession those acquêts and gains, no wrong is done to the inheritance or the legitimate portion of his children, because this is a just debt which he owes to his two wives, and the thing which the father owes is not inherited by his children, but taken by his creditors, as their own."

"Paz, Consultas Varias, pp. 483, 484.

"The lands claimed in this suit formed part of the acquêts and gains, and at the death of Morehouse the title to them vested in his two wives, each for one undivided half, to the exclusion of the plaintiffs. If, therefore, they have now any right to exercise upon these lands, it must be derived from the declaration of Eleonore Hook, made before the parish judge of the parish of Ouachita on the 19th of September, 1813."

To the same effect is the finding in the case of *Hubbell v. Inkstein*, 7 La. Ann. 252:

"In the case of *Patton v. Cities of Philadelphia and New Orleans* [1 La. Ann. 98], in many respects similar to the present, we held that under the former laws of the country, where a man married two wives, and the second wife was in good faith at the death of the husband, each took one-half of the community property. Hubbell died after the repeal of those laws. But the principle upon which they rested appears to us clearly deducible from those now in force; and the reasons of the law, as stated in *Patton's Case*, have equal force under both systems. The wife is now, as under the Spanish laws, entitled at the dissolution of the marriage to one-half of whatever may remain after paying the community debts. This claim may be assimilated to a debt from the succession of the husband to the wife, and, as such, it excludes the right of inheritance of the children. 1 La. Ann. 98."

Again, in the case of *Abston v. Abston*, 15 La. Ann. 137, it is stated in the syllabus:

"Where a man married a second time, while his first marriage was undissolved, and the second wife in contracting the marriage acted in

good faith, held that at his death the lawful wife and the wife de facto will be each entitled to one-half of the community, and the children born of each marriage entitled as legitimate children and heirs at law to succeed to the separate property of their deceased father in equal parts as if they had been born of the same marriage."

The same rulings were made in the Succession of Navarro, 24 La. Ann. 298, and in *Jermann v. Tenneas*, 39 La. Ann. 1021, 3 South. 229.

It is a fixed rule of property in the state of Louisiana that property which has been earned during the existence of a putative marriage belongs one half to the legal wife and the other half to the reputed wife. The children of the respective marriages have therefore no interest in it. Therefore Stanislaus John Arthur Waterhouse, minor, has no interest in the stock owned by his grandfather, John A. Waterhouse, in the defendant corporation; as such stock was acquired by John A. Waterhouse during the existence of the second community, and it must be divided between his two wives.

The exceptions filed by the defendants of want of interest on the part of the minor Stanislaus John Arthur Waterhouse were properly sustained.

Judgment affirmed.

O'NIELL, J. (dissenting). In my opinion, the defendants' so-called exceptions of want of interest on the part of the minor plaintiff was a plea to the merits of the case, putting at issue the truth of the allegations of the petition; and it should have been treated as an answer, and not as an exception.

The evidence adduced on the trial of this plea does not prove to my satisfaction that John Arthur Waterhouse had a wife living and from whom he was not divorced at the time he married the exceptor, Mrs. Mary Waterhouse. No such complaint has been made by the alleged first wife; and I doubt very much that Mrs. Mary Waterhouse should be heard to bastardize her deceased son. I respectfully dissent from the opinion and decree rendered in this case.

(139 La.)

No. 20606.

BOYLAN v. NEW ORLEANS RY. & LIGHT CO.

CAHILL v. SAME.

(Supreme Court of Louisiana. March 6, 1916. Rehearing Denied April 3, 1916.)

(Syllabus by the Court.)

1. TORTS \Leftrightarrow 27—ACTIONS—BURDEN OF PROOF.

In an action of tort the plaintiff is put to prove clearly the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 28; Dec. Dig. \Leftrightarrow 27.]

2. APPEAL AND ERROR ¶999(3) — **NEGLIGENCE** ¶136(2)—**QUESTIONS OF FACT—REVIEW.**

When the question is whether a person has been guilty of negligence, i. e., whether he has used due care under the circumstances, or has acted as a prudent man would have acted, or whatever the form or phrase may be, the evidence is to be addressed to the jury, for them to determine; and, in the absence of some error or mistake, their verdict will not be disturbed.

[Ed. Note.—For other cases, see **Appeal and Error**, Cent. Dig. §§ 3923, 3924; Dec. Dig. ¶999(3); **Negligence**, Cent. Dig. §§ 279, 281; Dec. Dig. ¶136(2).]

3. STREET RAILROADS ¶85(1)—**OPERATION—RIGHT OF WAY OVER STREETS.**

In the use of streets by railroads and street cars, the cars have the right of way over travelers for the reason that the cars are more cumbersome and difficult to stop and control than are vehicles used by travelers on the public highway; but in all other respects the rights to the use of the highway are equal.

[Ed. Note.—For other cases, see **Street Railroads**, Cent. Dig. §§ 193, 195; Dec. Dig. ¶85(1).]

4. STREET RAILROADS ¶85(2)—**OPERATION—RIGHT OF WAY OVER STREETS.**

Where fire apparatus of a city is given the right of way by statute, ordinance, or rule of the railway company, the persons in charge of the street car must yield to the fire apparatus and use every reasonable precaution to avoid collision.

[Ed. Note.—For other cases, see **Street Railroads**, Cent. Dig. §§ 193, 195; Dec. Dig. ¶85(2).]

5. STREET RAILROADS ¶81(1)—**OPERATION—CARE REQUIRED.**

It is the duty of those in charge of a street car, even without notice, to inform themselves of the conditions and circumstances along the line of the railway and to be on the constant lookout so as to avoid collisions and accidents.

[Ed. Note.—For other cases, see **Street Railroads**, Cent. Dig. §§ 172, 173; Dec. Dig. ¶81(1).]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Actions by Mrs. Clara Boylan, wife of George Troyer, against the New Orleans Railway & Light Company, and by John Cahill against the same defendant. From a judgment for plaintiffs, defendant appeals. Modified and affirmed.

Dart, Kernan & Dart, of New Orleans, for appellant. Dinkelspiel, Hart & Davey, of New Orleans, for appellee John Cahill. E. M. Stafford and H. W. Robinson, both of New Orleans, for appellees Mrs. G. H. Troyer and the minors.

SOMMERVILLE, J. In these cases, consolidated for the purposes of trial, the plaintiffs sue defendant for damages to them resulting from a collision of a street car and a fire truck, while the latter was responding to a silent alarm of fire.

Mrs. Boylan, in her own behalf, and as the representative of her two minor children, asks for a judgment of \$20,000 for herself, and for \$10,000 for each child. Mr. Boylan was the tillerman of the fire truck when it

was turned over in the collision, and he was killed. There was judgment for \$10,000 for the widow, and for \$2,000 in her favor as natural tutrix.

Mr. Cahill was the driver of the truck, and he has judgment for \$3,000 for injuries sustained by him.

Defendant has appealed; and plaintiffs have answered, asking for amendments of the judgments by increasing the amounts, and by giving interest.

Defendant first filed a general denial, and subsequently filed a supplemental answer in which it alleged contributory negligence on the part of the driver and tillerman of the truck.

Defendant admits:

"That the fire apparatus has the right of way over all other vehicles, but it denies that when the truck which plaintiff (Cahill) was driving reached St. Charles avenue that the car was sufficiently distant from Calliope street for the driver of the apparatus to undertake to cross the tracks in safety," etc.

On the brief for defendant, it is stated:

"The accident from which these suits arise occurred on the night of November 23, 1913, at about a quarter to 9 o'clock, at St. Charles avenue and Calliope street. A truck of the fire department proceeding in Calliope street from Carondelet street towards the river was struck by a Tulane avenue car running towards Canal street on the track in the neutral ground of St. Charles avenue on the river side thereof, and overturned into the adjoining asphalt roadway. The driver and all the firemen on the truck were more or less seriously injured. Troyer, the tillerman, died at 3 o'clock that night."

Defendant asks for the setting aside of the verdicts in the two cases, and for a reversal of the judgments therein, on the ground that:

"The preponderance of the evidence found in the testimony of those disinterested witnesses who were in the better position to observe establishes:

"(1) That the motorman was careful and did everything a reasonably prudent person in like circumstances would have done to see the danger and to avoid it.

"(2) That the driver of the truck was not careful, that he could have seen the car had he looked and should have known that the car could not be stopped in time to avoid the collision, and that he could not make the crossing safely ahead of the car.

"(3) That the driver of the truck could have avoided the accident by turning around St. Charles avenue, and that he had the last clear chance to prevent collision but failed to act."

"It is the duty of the motorman or other person in charge of a street car to give way to, and to use due precaution to avoid colliding with, a fire engine, truck, or wagon on its way to extinguish a fire and save property therefrom, and to hold himself in readiness to avoid such collision when he has reason to anticipate that such an engine, truck, or wagon may appear, as when he is approaching a house in which they are kept. The exercise of such precaution may be and sometimes is required by a rule or regulation of the street railroad company, or by ordinance or statute." 36 Cyc. 1513.

The state statute provides:

"That the officers and men of the fire department and their apparatus of all kinds, when on

duty, shall have the right of way to any fire and in any highway, street or avenue, over any and all vehicles of any kind except those carrying the United States mail," etc. Section 8, Act No. 58, 1910, p. 100.

[2, 3] Defendant admits that the fire apparatus had the right of way. It further admits that the duties of firemen and motormen on street cars at crossings are matters for the jury to consider, and for the jury to determine whether the care required by the circumstances has been exercised by those in charge of the colliding vehicles; but, as has just been stated, it charges that, while due care was used by the motorman in charge of the car which collided with the truck, those in charge of the truck were negligent, and contributed to the accident which resulted in their losses and damages.

The jury has found to the contrary. They have found the rate of speed of the street car was excessive, under the circumstances; that the motorneer and conductor of the street car were negligent; and that plaintiffs did not contribute negligence, and precipitate the accident of which they complain.

The evidence in the record supports the findings of the jury. The speed of the car was negligence; the motorneer was negligent in acquiring the speed of 8 to 12 miles an hour at the place of collision; and defendant's servants could have avoided the accident by the exercise of reasonable care and diligence. So whether the plaintiffs were negligent to such an extent as to have contributed towards the accident was a question for the jury, and it has decided they were not.

[5] The evidence shows that the motorman was not careful; that he did not inform himself as to the rules of the company; and he did not do those things which a reasonably prudent person in like circumstances would have done to have seen the danger, and to have avoided it.

He disregarded rule 26 of the defendant company, which reads as follows:

"Approaching Cross-Streets. Approach all streets with care; and whenever practicable, with the power off. Gongs should be rung before reaching the intersecting streets, or turning a curve. In approaching paved, or graveled streets, motorman should have his car under control at least one hundred feet before reaching the street, and passing over the same," etc.

The motorneer testifies that Calliope street was not a paved street, although the evidence shows that that street, on the lake side of St. Charles avenue, is paved with Belgian blocks; and that the street on the river side of St. Charles avenue is paved with square blocks. He claims that paved streets are only those which are paved with asphaltum. There is no excuse for such gross ignorance on his part. Because he was not approaching a paved street, in his opinion, he did not approach Calliope street with care, or with the power off. The power was on full as he approached that street, and the car was go-

ing between 8 and 12 miles an hour. He therefore did not have his car under control at least 100 feet before reaching Calliope street, and passing over the same. He also violated rule 26 of the defendant company, which reads:

"All apparatus belonging to the fire department, Charity Hospital ambulances, the police, the fire patrol wagons, have the right of way. When any of these vehicles are seen or heard approaching a track, the motormen must exert their best efforts to stop the car and give them the right of way."

The motorneer testifies that he was ignorant of the fact that a fire engine house was located in Calliope street between St. Charles avenue and Carondelet street, although he had been operating as a motorneer on St. Charles avenue for several years. He should clearly have informed himself of the location of the houses of the fire department, so as to have been in a position to yield the right of way, should they suddenly appear while answering a call or alarm for fire. Not knowing that Calliope street was paved, or that an engine house was located therein, he failed to look for and see the truck as it emerged from Calliope street until the horses attached to the truck were actually on the roadway of the avenue, and he was then unable to slacken the rapid speed of the car in time to avoid striking the truck, which had the right of way. He testifies that he failed to hear the clanging of the gong which was being operated on the truck. This failure on his part was evidently due to inattention; he should have heard it, for it was heard by a passenger on the rear platform of the car, and by a youth who was in a closed store at the corner of Clio street and St. Charles avenue, some 300 feet away. It was also the duty of the conductor on the car of the defendant company to have heard the gong and to have notified the motorneer, who evidently was not paying attention to his duty, so as to have avoided the accident.

The motorneer testifies that he was within about 75 feet of Calliope street when he saw the truck for the first time; and that it was impossible for him to stop his car, going at the rate it was going, before colliding with the truck; and it is argued that rule 26, directing motormen, on approaching paved or graveled streets to have their cars under control at least 100 feet before reaching the street, and passing over the same, was intended for the guidance of motormen, and not in the interest of public safety. In construing this rule we have held that it was "a measure of precaution against collision with travelers upon the cross-street." *Wolf v. New Orleans Ry. & Light Co.*, 133 La. 891, 63 South. 392.

The evidence shows Calliope street to be a well-paved thoroughfare, which is in constant daily use, although that use is not so great at 9 o'clock in the evening.

The law as stated in *Nellie on Street Railways* is:

"Sec. 394. That it is negligence to run a car over a crossing in a much traveled street at a high and dangerous rate of speed, or without being on the lookout and having the car under control, and using the proper means to stop it so as to avoid a collision."

"Sec. 397. It is the duty of the conductor as well as the motorman, if either hears the sound of a gong of a hose-carriage, or by the exercise of ordinary care might have discovered the danger in time to have averted the collision, to use all means at hand to that end; and the company is responsible for the negligence of either."

In the case of *Coles v. N. O. Ry. & Light Co.*, and *Kane v. N. O. Ry. & Light Co.*, 133 La. 915, 63 South. 401, we say:

"The jury decided both cases in favor of defendant. The verdicts were unanimous, and the jurors were better judges of the credibility of the witnesses and of the question of ordinary care than we can be."

And, in these cases, the verdicts were unanimous, and the jurors were better judges of the credibility of the witnesses and of the question of ordinary care than we can be; and, after having reviewed the evidence, we are unable to say that the verdicts are not in accordance with it.

[4] The obligation which rests upon the employees of defendant to be on the lookout for the apparatus of the fire department is more imperative than that of the officers and men of the fire department to be on the lookout for the apparatus of the car company. But, apart from that obligation, we are of opinion that liability for the accident in these cases is fixed upon the defendant, with reasonable certainty, by the testimony, mainly, of its own witnesses. The testimony in the cases satisfies us that the motorneer was not properly attending to his duty. The captain of the truck who was seated beside the driver thereof, the latter having been injured in the accident, testified that he looked and saw the approaching car at a sufficient distance, say about 200 feet, from the crossing, in which space the motorneer might have checked the car, if he had been paying attention to his duty; and the truck would have crossed the track in safety. The motorneer, evidently, was not keeping a proper lookout for pedestrians and other persons using the street crossing. He looked too late to avert the accident, and that was not to look at all. *Shields v. Fairchild*, 130 La. 648, 58 South. 497.

It is the duty of those who operate street cars to keep a vigilant watch for all vehicles and persons on foot, either on the track, or moving towards it, and, on the first appearance of danger, to stop the car within the shortest space of time possible.

[1] The plaintiffs in these cases have proved the nature of their injuries, respectively, and the defendant's share in causing them. The other circumstances, contributory negligence, etc., which would leave them without a claim, are put upon the defendant to prove; and it has failed to prove them.

He (the motorneer) was as careless in his statements as he was in his actions in the

criminal court, where he was being tried on a charge there growing out of this same accident; he testified that his car was some 90 feet from Calliope street when he first saw the horses of the truck; while on the trial of this case, he stated the distance to be 75 feet. And it is evident that he did not know where he was at that time, for he says:

"I imagine that that is the spot where I was when I first seen the truck. * * * That is why I say it was about in front of that church. * * * No, sir; I couldn't say exactly where I was. There isn't a man in the world that could say that, when he is about to meet with an accident of that kind; he couldn't say the exact spot where he was to save his life, because you haven't time to look out to find out where you are, when you see something coming out of a street. * * * I simply judged where I was, but I couldn't state positively. I couldn't tell you exactly that I was right at that corner of the switch. I could not get up here to tell you to a foot of where I was. There is nobody on earth that can say that. I know very well I can't."

Again he testifies:

"Well, I guess I could stop that car, at the speed I was going, in about 95 or 100 feet."

The witness further says that with about 10 feet more space he would have succeeded in stopping the car. It is quite evident that had he been paying attention, and had he seen the truck as it was emerging from Calliope street on to the avenue that he would have had ample time in which to have stopped the car.

The motorman was not careful; he did not see the truck when he ought to have seen it. He was disobeying the rules of the company a moment before the accident happened, as well as the state statute and a municipal ordinance; and he was running the car across a very busy street at a very high rate of speed.

The driver of the truck was careful, for the captain, who was seated beside him, looked up and down the avenue and saw the car approaching; and recognized that there was ample time for the truck to get across the street if the motorman obeyed the rules of the company and the city ordinance on the subject.

Plaintiffs have asked for amendments of the judgment in each case, in the amounts awarded, and by being allowed interest. The judgments will be amended by allowing interest.

George H. Troyer was a man of family, 52 years of age at the time of his death, of good habits, enjoying good health, and earning a salary of \$75 per month as tillerman. He was thrown from the fire truck while in the discharge of his duties, and was rendered unconscious. He died within a few hours after the accident without having been restored to consciousness. By his death, his wife and children were deprived of the love and care of their natural protector and helper; and they are entitled to be restored to

that same condition in so far as money can compensate them for their loss. They also suffered in anguish of spirit and feeling by his untimely death, and they are entitled to damages therefor. The jury's award of \$10,000 to the widow and \$1,000 to each of the minor children is approved.

Mr. Cahill, the driver of the truck, was 29 years of age at the time of the accident. He was thrown violently from his seat on the truck, and was rendered unconscious. He was confined in a hospital and at home for several months, but by skillful treatment he has been restored to health. The judgment for \$3,000 in his favor will not be disturbed.

It is therefore ordered, adjudged, and decreed that the judgments appealed from be amended by allowing interest from the date of said judgments; and, as thus amended, they are affirmed.

(139 La.)

No. 20725.

TEAL v. PHILADELPHIA & G. S. S. CO.
(Supreme Court of Louisiana. March 20, 1916.)

(Syllabus by the Court.)

1. CORPORATIONS \Leftrightarrow 668(1) — PROCESS—SERVICE—SUFFICIENCY.

Where a copy of a citation addressed to a foreign corporation, through its authorized agent in New Orleans, was, according to the sheriff's return thereon, personally served on a certain named person, who was not, and never had been, the agent of the defendant, *held*, that the service was a nullity as to the defendant and its former agent intended to have been served.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2606, 2618; Dec. Dig. \Leftrightarrow 668(1).]

2. PROCESS \Leftrightarrow 146—SERVICE—PROOF—RETURN.

Service of citation must be proved by the sheriff's return, and not otherwise.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 200; Dec. Dig. \Leftrightarrow 146.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Theodore Teal against the Philadelphia & Gulf Steamship Company. From a judgment discharging a rule by plaintiff to show cause why service of citation should not be considered valid, plaintiff appeals. Affirmed.

M. O. Scharff and Rene A. Viosca, both of New Orleans, for appellant. Edward Righ-
tor, of New Orleans, for appellee.

LAND, J. This is a suit for damages for personal injuries alleged to have been sustained on or about August 25, 1912, by the plaintiff, while working as a hatchman on one of the defendant's vessels in the port of New Orleans. The petition, filed on June 18, 1913, described the defendant as a corporation of the state of Delaware, having its principal place of business in Philadelphia, in the state of Pennsylvania, and doing business in the state of Louisiana, with an office

and agent in the city of New Orleans. Plaintiff prayed that defendant be duly cited through its authorized local agent to appear and answer the petition, and be served with a copy thereof. The petition did not give the name of the agent or the location of the office.

Citation was issued, and, according to the return thereon, a copy of the citation and accompanying petition was served on F. M. Knight, defendant's authorized local agent in this state.

Whereupon came Frank Knight through counsel, and averred that service had been made upon him, and that he was neither an officer, agent, or employé of the defendant company.

Thereupon the plaintiff took a rule on the said Frank Knight to show cause why N. F. Knight should not be considered the duly authorized agent of the defendant company for the state of Louisiana, and why the service made on N. F. Knight should not be considered valid and legal service on the defendant company according to law.

The rule was tried and discharged by judgment of the court, from which the plaintiff has appealed.

The evidence adduced on the trial of the rule showed that the citation was served on Frank Knight, son of N. F. Knight, and the latter testified that he no longer was the agent of the defendant company, which prior to the suit had gone into the hands of a receiver, and had ceased doing business in this state. Mr. Knight further testified that he was the general agent of another company, and that his son, Frank Knight, was working for him.

[1] It is obvious that the judge a quo in a rule against Frank Knight could not give any judgment that would affect N. F. Knight or the defendant corporation.

Plaintiffs' counsel say in their brief:

"The corporation discontinued its local office before the institution of this suit, but did not give any notice of the revocation of the powers of its agent, N. F. Knight, whose name had been filed with the secretary of state as agent for Louisiana."

Counsel argue that, despite the discontinuance of its local office, and the consequent discharge of its local agent, the office and agency continued for the purposes of suit against the defendant. Counsel admits that this court has held that no judgment in personam can be rendered against a foreign corporation which has ceased to do business in this state, and has left no agent here. *Gonner v. Missouri Valley Bridge & Iron Co.*, 123 La. 964, 49 South. 657. Counsel cite authorities to show that the *Gonner* case was incorrectly decided. We find it unnecessary, however, to consider this very interesting question of law, because in this suit the former agent of the defendant was not cited, and was not made a party to the rule to

show cause. The sheriff's return shows personal service on F. M. Knight, the authorized local agent of the defendant. The citation was not served on N. F. Knight, the former agent of the defendant.

[2] Service of citation must be proved by the sheriff's return, not by parol evidence. *Gliddon v. Goos*, 21 La. Ann. 682; *Le Blanc v. Perroux*, 21 La. Ann. 26; *Harris v. Alexander*, 1 Rob. 30; *Hobson v. Peake*, 44 La. Ann. 387, 10 South. 762. So it is useless for counsel to argue that the service was an office service, made on a former employé of the defendant who had continued in the service of its former agent.

Judgment affirmed.

(139 La.)

No. 21620.

LISSO et al. v. WILLIAMS.

SAME v. SCHENBERGER et al.

(Supreme Court of Louisiana. March 6, 1916.
Rehearing Denied April 3, 1916.)

(Syllabus by Editorial Staff.)

1. EXECUTION \S 219—SALES OF UNDIVIDED INTERESTS—VALIDITY—"UNDIVIDED."

A sheriff's sale of 65 acres in indivision under a writ of fieri facias under which an undivided one-third interest in 739 acres was seized and advertised for sale was not void, since, while a thing not seized cannot be sold, where the seizure is of an undivided interest, a smaller interest may be sold, and a sale of 65 acres undivided in 739 acres is equivalent to a sale of $\frac{65}{739}$, the qualifier "undivided" showing that no particular 65 acres is meant, but an interest of $\frac{65}{739}$.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 621; Dec. Dig. \S 219.

For other definitions, see Words and Phrases, First and Second Series, Undivided.]

2. EXECUTION \S 15 — NATURE OF WRIT — PROPERTY AGAINST WHICH ISSUED.

There is a clear distinction between the writ of seizure and sale and a fieri facias, the one writ addressing itself to specified property, and directing the sheriff to seize and sell the property thus specified, and no other, while the other addresses itself to the debtor's property in general, and its mandate to the sheriff is to cause the amount of the debt to be made out of the property of the debtor indiscriminately.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 87-40; Dec. Dig. \S 15.]

3. EXECUTION \S 219—SALES OF UNDIVIDED INTERESTS—VALIDITY.

A sale of 65 acres in indivision under a writ of fieri facias under which an undivided one-third interest in 739 acres was seized and advertised was not rendered invalid by the fact that the 739 acres consisted of three different tracts widely separated as the sale conveyed $\frac{65}{739}$ of each tract.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 621; Dec. Dig. \S 219.]

4. EXECUTION \S 222(3)—SALES OF UNDIVIDED INTERESTS—VALIDITY.

As a sale of 65 acres in indivision under a writ of fieri facias under which a one-third interest in 739 acres was seized and advertised amounted to a sale of a $\frac{65}{739}$ interest, there

was no uncertainty or indefiniteness of the description under which the land was sold.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 632; Dec. Dig. \S 222(3).]

O'Niell, J., dissenting.

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

Actions by Sam Lisso and others against Mrs. Mary E. Williams and against S. P. Schenberger and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. S. Wels, of New Orleans, and Foster, Looney & Wilkinson, of Shreveport, for appellants. Blanchard, Smith & Palmer, of Shreveport, T. W. Nettles, of Coushatta, and Alexander & Wilkinson, of Shreveport, for appellees.

PROVOSTY, J. In a suit against a Mrs. M. E. Williams, Lisso & Bros., Limited, caused a writ of attachment to issue, and the one-third interest undivided of the said Mrs. M. E. Williams in 739 acres of land to be seized. The attachment was maintained, and the property seized was ordered to be sold to satisfy the debt. An ordinary writ of fieri facias then issued, and in execution of this writ the same undivided one-third interest of the said Mrs. Williams was seized and was advertised for sale. On the day of the sale a Mrs. Haynes, who was claiming to be owner of a one-half interest undivided in the 739 acres of land, and a Mr. W. P. Haynes, who was claiming to hold a mortgage upon the said one-third interest undivided of Mrs. Williams, made a compromise with the said seizing creditor, Lisso & Bros., Limited, by which the seizure was released, except as to 65 acres in indivision, and W. P. Haynes' mortgage upon this 65 acres in indivision was canceled, and this 65 acres in indivision was sold at the sheriff's sale, and was bought by the plaintiff in execution, Lisso & Bros., Limited, the authors in title of the plaintiffs in the present case. All this was done without obtaining the consent, and, so far as appears, without the knowledge, of the seized debtor, Mrs. Williams.

[1] The contention of the defendants in the present case is that this sheriff's sale was null, for the reasons: First, that the thing sold and the thing seized were not the same; second, that the sheriff was without authority to change for purposes of the sale the description under which he had seized the property; and, third, that the description under which the property was sold, namely, 65 acres in indivision in the land in question, was not sufficient to identify the thing sold.

Certainly a thing that has not been seized cannot be sold; but, where the seizure is of an undivided interest, say, for instance, a half, we do not see why a smaller interest

could not be sold, say, a fourth. To illustrate, why, where the seizure is of a half interest undivided in 100 acres of land, equivalent to 50 acres undivided, a sale could not be made of a fourth interest, equivalent to 25 acres, undivided. As well, in our opinion, might it be argued that, where the sheriff has seized two mules, he cannot sell only one, as that he cannot sell a fourth part undivided where he has seized a half part undivided. Indeed, in a case where a plantation had been seized as an entirety, and a third person enjoined the sale for a one-half undivided interest, this court sanctioned the sale of the other half undivided interest. *Losee v. De Lacey*, 23 La. Ann. 287. See, also, as sanctioning a sale of less than the whole of the property seized, *Clay v. O'Brien*, 24 La. Ann. 232; *Lane v. Succession of March*, 33 La. Ann. 554.

[2] In opposition to this cases involving sales made under executory process are cited; but the distinction between the writ of seizure and sale and the *fi. fa.* is clear: The one writ addresses itself to specified property; its mandate to the sheriff is to seize and sell the property thus specified, and no other; the other writ addresses itself to the debtor's property in general; and its mandate to the sheriff is to cause the amount of the debt to be made out of the property of the debtor indiscriminately. See *Danneel v. Klein*, 47 La. Ann. 928, 17 South. 466.

[3] The learned counsel for defendants say that the expression "65 acres undivided in 739 acres" is not equivalent to, or has not the same meaning as, the expression $\frac{65}{739}$ of 739 acres. They also say that the 739 acres in question consist of three tracts widely separated, and that this makes a difference. For showing that these two expressions are equivalent in meaning the learned counsel for plaintiffs cite *Gratz v. Land & R. Imp. Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393; *Freeman, Coten*, § 96; *Gibbs v. Swift*, 12 Cush. (Mass.) 393; *Battel v. Smith*, 14 Gray (Mass.) 497; *Jewett v. Foster*, 14 Gray (Mass.) 495; *Small v. Jenkins*, 16 Gray (Mass.) 155; *Great Falls Co. v. Worcester*, 15 N. H. 412; *Linnartz v. McCulloch* (Tex. Civ. App.) 27 S. W. 279; *Adams v. Hopkins* (Cal.) 69 Pac. 228-233; *Schenk v. Evoy*, 24 Cal. 104; *Grogan v. Vache*, 45 Cal. 610; *Jackson v. Livingston*, 7 Wend. (N. Y.) 136; *Corbin v. Jackson*, 14 Wend. (N. Y.) 619, 28 Am. Dec. 550; and *Sheafe v. Wait*, 30 Vt. 735. But it appears to us to be plain, without the need of the citation of any authority, that these two expressions are exact equivalents. The addition of the qualifier "undivided" shows unmistakably that no particular 65 acres is meant, but an interest of $\frac{65}{739}$. And, this being the proportion of the interest conveyed, the fact that there are several tracts can make no difference, since an interest in this proportion is conveyed in each of the tracts.

[4] If we are correct in this, the defendants' third ground evidently has no merit, since there is no uncertainty or indefiniteness in a description by which a $\frac{65}{739}$ interest in one or more wholes is sold.

Judgment affirmed.

O'NIELL, J., dissents.

(139 La.)

No. 21621.

PLANTERS' COTTON OIL CO., Limited, v.
TEXAS & P. RY. CO.

In re TEXAS & P. RY. CO.

(Supreme Court of Louisiana. Jan. 10, 1916.
On Rehearing, April 8, 1916.)

(Syllabus by the Court.)

On Rehearing.

1. CARRIERS \Leftrightarrow 135—CARRIAGE OF GOODS—
LOSS OR INJURY—DETERMINATION OF DAMAGES.

There is not and never has been in this state any general law that damage to goods in transit shall be determined by sale at public auction. The few cases apparently so holding were based on special legislation, no longer in force, applicable only to the Port of New Orleans. In cases not covered by such special legislation, this court has followed the common-law rule that the ascertainment of loss or damage to freight in transit "is a matter resting upon the ordinary rules of evidence." *Rathbone v. Neal*, 4 La. Ann. 563, 50 Am. Dec. 579.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 557-559, 599-602, 603½-604½; Dec. Dig. \Leftrightarrow 135.]

2. CARRIERS \Leftrightarrow 135—CARRIAGE OF GOODS—
LOSS OR INJURY—DETERMINATION OF DAMAGES.

Damage to a carload of cotton seed delivered at a way station in a heated and rotten condition may be determined by expert inspection and appraisalment, after notice to the railroad company.

Where a railroad company has been condemned to make good the damage to a carload of seed, the plaintiff cannot also recover the freight charges paid, or any proportion of the same.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 557-559, 599-602, 603½-604½; Dec. Dig. \Leftrightarrow 135.]

Action by the Planters' Cotton Oil Company, Limited, against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant applies for a writ of review. Modified and affirmed.

Breazeale & Breazeale, of Natchitoches, for plaintiff. Howe, Fenner, Spencer & Cocke, of New Orleans, and Wm. H. Peterman, of Marksville for applicant.

PROVOSTY, J. A carload of cotton seed received by the plaintiff company at its oil mill over the railroad of the defendant company was found to be heating and rotting. The plaintiff company caused the local agent of the defendant company to come and see the condition of the seed, and then ran it

through its mill, converting it into various products.

This suit is in damages for the loss alleged to have been sustained from the deterioration of the seed.

In the case of *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352, this court said:

"The measure of damage is the difference between the value of the goods in their damaged state, and their value at the port of destination had they been delivered in good order. That difference in value should have been ascertained by a public sale to the highest bidder."

In *Smith v. Barque W. H. Wall*, 18 La. Ann. 724, this court said:

"No sale of the damaged goods was made to ascertain, with exactness, the extent of their damage. The opinion of this court in the cases, *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352, and *Elkin & Co. v. N. Y. & N. O. Steamship Co.*, 14 La. Ann. 647, was that damages should be established by sale, before a judgment for the recovery of damages could be had against a carrier, for goods damaged while intrusted to his care."

The defendant company, while denying any fault on its part, relies upon these decisions.

The plaintiff company contends that this rule requiring a public sale to be made is not inflexible; and that it was properly disregarded in this case, where the rapidity with which the goods were deteriorating required prompt action; and that, moreover, the defendant company, although fully advised of the situation, did not ask that a sale be made; nor thereafter complain at the course adopted, which was, evidently, the best in the interest of all parties concerned.

The district court adopted that view, and the court of appeal affirmed the judgment. But, we think, in error; the rule thus laid down by the decisions of this court should be followed in all cases in which it is applicable, and certainly in the case of goods with a known market value like cotton seed; a party is not at liberty to disregard it; and we think that the defendant company, occupying an altogether negative and defensive attitude in the matter, was under no legal necessity to suggest to plaintiff what was the legal course to be followed should plaintiff harbor intentions of a lawsuit.

The logical foundation of this rule is that, in any case where an approximately certain mode of arriving at the amount of loss is available to a party, it is not to be disregarded by him for having recourse to opinion evidence, an unsatisfactory kind of evidence which the law accepts only for want of a better. The testimony shows that it is not usual, or, perhaps, practical, to run such damaged seed separately through the mill. Had it been possible to do so, however, and it had been done, perhaps a comparison between the result obtained and that usually obtained from sound seed would have been as certain a mode of arriving at the loss as by a public sale, and legally as acceptable as evidence; but this was not done.

The judgments of the district court and of

the court of appeal are therefore set aside, and the suit of plaintiff is dismissed. Plaintiff to pay all costs.

On Rehearing.

LAND, J. [1] Our original opinion was based on the cases of *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352, and *Smith v. Barque W. H. Wall*, 18 La. Ann. 724, in which the court said:

"The measure of damage is the difference between the value of the goods in their damaged state, and their value at the port of destination had they been delivered in good order. * * * That difference in value should have been ascertained by a public sale to the highest bidder."

The doctrine that damage to goods, while in transit on ships, should be ascertained by public sale, was peculiar to this state. The author of *Cyc.* says:

"Outside of Louisiana there is no general requirement that the owner shall proceed by public sale with damaged goods to have the amount of his damage determined, but he may prove it by any competent manner." 6 *Cyc.* 533, note 96.

"Generally speaking, what property brings at a public sale is a fair test of its value, and in some instances it may be the only available test. * * * It is only one of the means by which the value of the property and the loss may be ascertained." 4 *R. C. L.* § 468, p. 1000.

In *Rathbone v. Neal*, 4 La. Ann. 563, 50 Am. Dec. 579, the plaintiff sued for damages for unreasonable delay in the delivery of merchandise, and the court said:

"The ascertainment of the loss is a matter resting upon the ordinary rules of evidence. *Bowman v. Teal*, 23 Wend. [N. Y.] 306 [35 Am. Dec. 562]."

The *Smith Case*, 18 La. Ann. 724, is based on the *Henderson Case*, 12 La. Ann. 352, and both suits were for the value of the entire shipment, as in case of abandonment. The evidence showed partial damage. Hence there was no total loss, and no right of recovery. In the *Henderson Case*, the court said that the difference between sound and damaged value should have been ascertained by a public sale to the highest bidder, citing *Greenwood v. Cooper*, 10 La. Ann. 796, in which case a reference is made to the duties of port wardens as to the sale of damaged goods at public auction. In that case the damaged goods had been sold at public auction by a licensed auctioneer without the intervention of the port wardens, and the court affirmed the sale on evidence that the goods had brought a fair value, saying that the port wardens "could have done no more than sell at auction." In *Elkin & Co. v. N. O. S. S. Co.*, 14 La. Ann. 647, the court held that, where goods are damaged to such an extent as to be valueless and unsalable, a sale at public auction will not be required, and referred to *Greenwood v. Cooper*, supra, as holding that:

"Either party had the right to require a sale by auction; and, upon an application by defendants, such an order might have been made."

The office of master and wardens of the Port of New Orleans was organized by the

act of March 21, 1805 (2 Martin's Dig. 390), which provided that it should solely belong to said officers or any two of them, to order and direct the sale of damaged goods by public auction, giving notice of such public sale at least two days before, in French and English and in two newspapers published in this city, and at least two of said wardens shall be present at such public sale, etc. In 1851, this provision was construed by the Supreme Court as follows:

"We take this to mean that they have the sole right to order and direct the sale of damaged goods by public auction in the case provided in the section; that is, when called upon by the person commanding any ship or vessel arriving from sea."

See *Master and Wardens v. Ship M. Hawes*, 6 La. Ann. 391. See, also, Acts of 1855, No. 343. Revised Statutes of 1870, §§ 2223 and 2230, give master and wardens the sole power to order sale of damaged goods at public auction. By Act No. 3 of the Extra Session of 1877, the number of wardens was reduced to two, and their duties and functions greatly curtailed, and in 1896 the office was merged into the board of commissioners of the Port of New Orleans.

In an early case it was held that the port wardens were by law judges of the necessity which requires damaged goods to be sold at public auction. *Oakey v. Russell*, 6 Mart. (N. S.) 61. In the *Greenwood Case*, 10 La. Ann. 797, the court said:

"The principal object for which the intervention of port wardens seems to be considered requisite is to determine when there exists a necessity for a sale, but when that fact is once established, as in the case at bar, the actual sale is always made at public auction. Now, it was the right of either party to have insisted upon an auction sale, and, had the whole matter been referred to the port wardens, they could have done no more than sell at auction. We consider therefore that the evidence sufficiently shows, that the defendants have received no damage from the want of notice complained of. See *Rathbone v. Neal*, 4 La. Ann. 567 [50 Am. Dec. 579]."

In the *Greenwood Case*, the port wardens had not been consulted as to the necessity of the sale, and the goods had been sold at public auction without notice to the defendants. In fact, the only requirement of the act of 1905 which had been complied with was a sale at public auction. The *Elkin Company Case*, supra, makes it plain that either party had the right to apply to the port wardens for an order for the sale of the damaged goods at public auction.

The foregoing review of the statutes and jurisprudence makes it evident that the courts of this state held that a sale of damaged goods should always be made at public

auction, because such sale was required by the provisions of act of 1805, cited supra; a purely local law applicable only to the port of the city of New Orleans, and to cargoes imported in ships and other vessels.

In the *Rathbone Case*, supra, the goods had not been damaged, but had depreciated in value, and the court, following the general rule of law, held that the damage might be proved by any competent evidence.

[2] Our conclusion is that the sale at public auction of the damaged cotton seed in question was not required by any law of this state, or by any rule of its jurisprudence. Such a requirement would be utterly impracticable, if applied to damaged goods delivered at railroad stations, where there are no auction exchanges, or auctioneers, or bidders. In the case at bar, the heated and rotting cotton seed were examined by an agent of the defendant company who made no suggestion whatever as to the disposition of the seed or any opposition to their use by the plaintiff. The plaintiffs' agent removed the seed from the heated car, and, after culling out portions that had become "caked" and worthless, used the remainder in the manufacture of fertilizer and soapstock. No more favorable disposition of the seed has been suggested. An expert on cotton seed testified that the carload of seed was damaged from 40 per cent. to 50 per cent.; and another witness testified to the same effect. The seed cost the plaintiff \$22 per ton, at a steam gin in the same parish, and this was the usual price which plaintiff was paying for good seed. The testimony of plaintiffs' witnesses as to the quantum of damage was not contradicted on the trial of the case. Defendant offered no evidence on the subject. The district court gave judgment for plaintiff for \$275 based on the lowest estimate of 40 per cent. of damage. The court of appeal increased the judgment by the sum of \$32.72, being the same proportion of loss on the freight bill of \$81.81.

We think that the court of appeal erred in allowing this additional item for the reasons: First, that it is not claimed in plaintiffs' petition; and, secondly, that if the railroad makes good the damage, it will have earned the freight.

See *Hutchinson, Carriers* (3d Ed.) §§ 799, 800; *Am. & Eng. Enc. Law*, pp. 373, 381.

It is therefore ordered that the judgment of the court of appeal in this case be amended by reducing the amount awarded to \$275.84, and that as thus amended said judgment be affirmed; costs in this court to be paid by the plaintiff.

LOUISVILLE & N. R. CO. v. RHODA.*
(Supreme Court of Florida. April 15, 1912.
Headnotes Filed April 17, 1912.)

(Syllabus by the Court.)

1. DEATH — 16 — INJURIES TO SERVANT — ACTIONS — EMPLOYERS' LIABILITY ACT.

An action by an administrator for the death of his intestate by negligence, under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), will lie, even though the death followed immediately upon the injury inflicted.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 18; Dec. Dig. — 16.]

2. MASTER AND SERVANT — 291(9) — INJURIES TO SERVANT — ACTIONS — INSTRUCTION.

The statutory presumption of negligence from injury done by the running of locomotives, being a local rule of evidence merely, may be given in a charge in a case arising under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1140; Dec. Dig. — 291(9).]

3. DEATH — 18(1) — INJURIES TO SERVANT — ACTIONS — GROUNDS.

Under the amendment of 1910 to the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. 1913, §§ 8662, 8665]), the administrator has the option to sue for the loss to the estate of the intestate generally, or the particular loss to the special beneficiary named in the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. — 18(1).]

Whitfield and Taylor, JJ., dissenting.

Error to Circuit Court, Santa Rosa County; T. E. Wolfe, Judge.

Action by L. M. Rhoda, as administrator, against Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Blount, Blount & Carter, of Pensacola, for plaintiff in error. Reeves, Watson & Pasco, of Pensacola, for defendant in error.

COCKRELL, J. A judgment against the Railroad Company, in the sum of \$5,000 was recovered, upon a count which reads as follows:

"That the said defendant, on the 9th day of February, A. D. 1912, was operating as a common carrier a certain line of railroad between Pensacola, in the state of Florida, and Flomaton, in the state of Alabama; that on the said day plaintiff's intestate was an employé of the said defendant, in its business as a common carrier in interstate commerce; that on said day the said defendant was operating and running an engine in charge of certain of its employes on its said line of railway at and near Flomaton, in the state of Alabama, and at or near the station called Flomaton on its said line of railway, and so carelessly and negligently ran and operated its said engine that they ran it over, upon, and against the said Clarence Rhoda, thereby so greatly wounding and injuring the said Clarence Rhoda that he died from, and as a result of, the said injuries immediately upon their infliction; that at the time of the injury and death of

the said Clarence Rhoda he was employed by the said defendant in interstate commerce and the said injury and death were inflicted upon him while he was performing the duties of such employment; that the plaintiff has been duly appointed as administrator of the estate of the said Clarence Rhoda, who left no widow nor children, but did leave surviving him, who still survive, his mother, Annie Patterson Rhoda, and his father, L. M. Rhoda. And the plaintiff alleges that by reason of the death of the said Clarence Rhoda he has sustained damages, for which he here sues for the benefit of the parents of the said Clarence Rhoda, in the sum of \$20,000."

The action is based squarely upon the federal Employers' Liability Act of 1908, as amended April 5, 1910, the said amendment being as follows:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then to such employé's parents; and, if none, then to the next of kin dependent upon such employé; but in such case there shall be only one recovery for the same injury." U. S. Comp. St. 1913, § 8665.

[1] The plaintiff in error contends that as the death occurred "immediately" upon the infliction of the injury, no cause of action ever existed in the person suffering the injury, and therefore there was no cause of action to survive. The contention is not without authority in the decisions by certain state courts upon state statutes. The courts of Massachusetts at an early date so construed the statutes of that state, and in more recent times Mississippi, Iowa, and other states. See Illinois Cent. R. Co. v. Pendergrass, 69 Miss. 425, 12 South. 954; Major v. Burlington, C. R. & N. Ry. Co., 115 Iowa, 309, 88 N. W. 815. Judge Cooley in speaking to this point, says:

"A question has also been made in some states whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a somewhat nice and technical construction of the statute, it was decided that the action would not lie in such a case. But probably under no existing statute would it be so held now." Cooley on Torts (3d Ed.) 551.

Connecticut refused to follow Massachusetts, Murphy v. New York & N. H. R. R. Co., 30 Conn. 184, and also Broughel v. Southern New England Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404.

The Supreme Court of the United States has not, as yet, construed this amendment to the statute directly, nor, so far as we are advised, has any federal court. In Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, that court, in a case arising before the amendment, declined to follow the Massachusetts courts to the extent of holding that a few hours' survival of the injury destroyed the right of action in the beneficiaries, and to this extent indicated that it would not destroy a right of action by a nice technical construction of a statute, intended primarily to strike down defenses theretofore existing

*Reversed by Supreme Court of the United States, 234 U. S. 608, 35 Sup. Ct. 663, 59 L. Ed. 1487.

in behalf of interstate carriers, in the killing or maiming of their employes.

It will be noted that the declaration alleges the death to have followed "immediately," which the Maine court differentiates from the conception of "instantaneous" death. *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660. Few, if any, deaths may be correctly denominated as instantaneous. The vital spark is so tenacious that it rarely, if ever, leaves the body the moment that fatal blow is inflicted, and if it survive that blow but a mathematical moment, why may it not be logically said that the cause of action for that moment existed in the injured individual, and, if so, then the statute applies and the cause of action survives in the personal representative for the injury thus done. If this be technical reasoning, we are using it in reply to a technical argument, for surely no lawmaker intended to make the severity of a blow a defense to the evil aimed at.

The pleader's use of the word "immediately" may serve a two-fold purpose: First, to show there was no intervening or mediate cause, and, secondly, to apprise the defendant that no claim would be made for physical suffering. We think the count stated a good cause of action.

[2] At the trial the court charged the presumption of negligence from the act of injury done by the running of the locomotives or cars of a railroad company, under the local law. It is argued that this was error, upon the theory that the federal act controls, and that the Florida law has no application. If section 3148 of the General Statutes establish a liability against the railroads, the argument would be unanswerable; but despite the title given to the section, we think the uniform construction placed by this court, as well as by the Georgia court upon the same statute, conclusively shows that the section does not impose a liability, but asserts merely a rule of evidence, to be applied by the local courts. *Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, 32 South. 797; *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290. This rule of evidence, whether based upon a statute or court decision, is founded upon that broader rule requiring the party most likely to possess the proof to produce it, or upon the theory that the instinct of self-preservation presumptively rebuts the idea that the injury was self-inflicted. The railroad companies, through their agents, have complete charge of the operation and equipment of their trains and track, subject only to regulation or supervision by the state, with ample means of investigation into the causes of accidents producing injury to others, while the person injured, or the representative of the person killed, can ascertain the facts only under serious handicap.

We are frank to say that in the case now before us, it is very doubtful if the plaintiff could have proven liability, without the aid

of this local rule of evidence, but the admission does not affect the liability or unduly interfere with or impose local enlargement of an interstate common carrier's liability to its employes.

We must apply our own rules of procedure and evidence, in the enforcement of a liability created or regulated by the Congress, except in so far as the federal statute may interpose.

[3] The court further charged the jury that the measure of damages, if the plaintiff recovered, would be the loss to the estate of the intestate, caused by the injury resulting in his death; that is, the amount he would probably have accumulated, reduced to its present money value. We find no fault in this. Under the amendment, as we construe it, without enlightenment on the subject from the final arbiter, the federal Supreme Court, the administrator, in bringing the action, has the option to seek recovery either for the loss to the estate, as was here done, or for the loss to the beneficiary, the recovery in either case being for the latter's benefit, but he cannot recover for both losses. If the liability of the intestate towards his parents indicated that their loss would probably be greater than the accumulations for himself, the administrator, suing for their benefit, might, upon proper declaration of these facts, recover the larger amount; on the other hand, if nothing or little was contributed to the beneficiaries under the statute, the administrator could recover the larger amount by suing under the survivorship amendment.

We find no error, and the judgment is affirmed.

SHACKLEFORD, C. J., and HOOKER, J., concur.

WHITFIELD, J. (dissenting). The proceedings and judgment herein do not conform to the federal law under which this action is brought.

The federal Employers' Liability Act of 1908 "declares two distinct and independent liabilities," and consequently two separate rights of action, for "damages to any person suffering injury while he is employed by" a railroad common carrier engaged in interstate commerce, "resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier," etc. One liability is to the injured employe, with a right of action to recover "such damages as would compensate him for his expense, loss of time, suffering and diminished earning power." Under the original act of 1908, this right of action given to an injured employe was extinguished with the employe's death. The other liability is that in case of the death of the employe as a proximate result of a negligent injury to give "a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by rea-

son of the wrongful death." This latter cause of action "is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived." *Michigan Central Ry. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *American R. R. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

By an amendment of April 5, 1910, another section was added to the act of 1908, which provides:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then to such employé's parents; and, if none, then to the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury." U. S. Comp. St. 1913, § 8665.

This amendment makes the right of action given to an injured employé survive to his personal representative, and in effect makes the personal representative of the decedent the proper plaintiff and the same classes of persons the beneficiaries in either right of action given by the act of 1908, when the injured employé dies before a recovery is obtained; but the measure of recovery is materially different in the two actions. The damages claimed in an action by the personal representative of a deceased employé, whether under the one or the other of the stated distinct liabilities, should be duly alleged, and should be proven substantially as alleged.

The death in this case is alleged to have been immediate upon the injury, and the declaration does not claim damages for injuries sustained by the decedent before his death, but alleges that "by reason of the death of the" decedent, the administrator "has sustained damages for which he here sues for the benefit of the parents of the" decedent. This clearly indicates that the damages claimed for the stated beneficiaries are those "resulting to them financially by reason of the wrongful death," not damages that could have been recovered by the decedent but for his death. See *Michigan Cent. R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Tiffany, Death by Wrongful Act* (2d Ed.) § 74; *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960; *Illinois Cent. R. Co. v. Pendergrass*, 69 Miss. 425, 12 South. 954; *McVey v. Illinois Cent. R. Co.*, 73 Miss. 487, 19 South. 209; *West v. Detroit United Ry.*, 159 Mich. 269, 123 N. W. 1101. The proofs and charges as to the damages are inapplicable to the cause of action stated. See *G., C. & S. F. Ry. v. McGinnis*, Adm'x, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 78, April 7, 1913; *Thomas v. C. & N. W. Ry.* (D. C.) 202 Fed. 766.

When the federal Employers' Liability Law was enacted by Congress, no rule of evidence was prescribed therein, and it must be assumed that the enactment contemplated the continuance of the common-law rule of evidence in negligence cases which was, at that time, enforced by the federal Supreme Court. The rule then in force was that where an employé is injured in the course of his employment, such injury carries with it no presumption of negligence on the part of the employer; and actionable negligence of the employer is an affirmative fact for the plaintiff to prove substantially as alleged.

In such a case it is not sufficient for the plaintiff to show that the employé may have been negligent; but there must be at least some substantial evidence, either direct or circumstantial, pointing to the fact that the employer was negligent, and that such negligence was a proximate cause of the injury alleged. When the testimony is uncertain, and shows that the injury may have been caused by any one of several things, for some of which the employer is not responsible, the jury is not, by law, authorized to guess which of the several causes proximately resulted in the injury to the employé, and to find that the negligence of the employer was the real cause, when there is no substantial foundation in the testimony for that conclusion. See *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

Sections 3148, 3149, and 3150 of the General Statutes of Florida of 1906 were first enacted as one law in 1891, "defining the liabilities of railroad companies in certain cases." Section 3148 provides that a railroad company shall be liable for any damage done to persons or property by the running of trains, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence. This section was intended to apply only to actions brought against railroad companies on liabilities defined by the statutes of this state. See *Atlantic Coast Line R. Co. v. McCormick*, 59 Fla. 121, 52 South. 712.

The federal Employers' Liability Act is quite different from the state enactments, and is intended to operate uniformly in all the states to the exclusion of local laws on subjects affecting the liability covered by the federal law. To impose or to establish liability by means of a local statutory presumption of negligence is a species of substantive regulation that the Legislature of the state has not attempted to project into actions for damages authorized solely by the federal law, enacted under the paramount and exclusive power of Congress to regulate interstate commerce.

TAYLOR, J., concurs.

KEGGIN v. HILLSBOROUGH COUNTY.
(Supreme Court of Florida. March 28, 1916.)

(Syllabus by the Court.)

1. COUNTIES. ¶1—POLITICAL FUNCTIONS—NATURE AND STATUS.

A county is a political subdivision of the state, created for administrative purposes, is representative of the sovereignty of the state and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the state are exercised.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; Dec. Dig. ¶1.

For other definitions, see Words and Phrases, First and Second Series, County.]

2. BRIDGES. ¶37—DEFECTS—LIABILITY OF COUNTY.

The building of roads and bridges and the maintenance of the same are none the less powers and duties of the state because it delegates the performance of these duties to officers of the different political subdivisions who, in discharging such duties, act as agents for the public at large.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. ¶37.]

3. BRIDGES. ¶37—DEFECTS CAUSING INJURY—LIABILITY OF "COUNTY."

A "county" of this state, being a mere governmental agency through which many of the functions and powers of the state are exercised, partakes of the immunity of the state from liability, and may not be sued in an action ex delicto by one who, in ignorance of the unsafe condition of a county bridge, sustains a damage to his vehicle in crossing the bridge, which the county has permitted to become unsafe and unfit for use.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. ¶37.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by James W. Keggins against the County of Hillsborough. Judgment for defendant, and plaintiff brings error. Affirmed.

H. P. Macfarlane, of Tampa, for plaintiff in error. C. C. Whitaker, of Tampa, for defendant in error.

ELLIS, J. The plaintiff in error brought suit against the county of Hillsborough, to recover damages for injury to a motor truck, which, being driven by the plaintiff over a county bridge in Hillsborough county, was injured by falling through the bridge which spanned a broad and deep creek. The declaration alleged that the plaintiff was not negligent in driving the machine, which was an automobile truck with a rated carrying capacity of five tons and was at the time of the injury loaded with a burden of three tons approximately; that the bridge, by reason of age, decay, and unsafe condition, gave way with the weight of the truck and burden, precipitating the truck into the creek and damaging the machine.

A demurrer to the declaration challenged the right of the plaintiff to maintain such an action against the county. The demurrer was

sustained, and final judgment entered in favor of the defendant. To this judgment the plaintiff applied for and obtained a writ of error.

May a county in this state be sued in an action ex delicto by an individual who, in ignorance of the unsafe condition of a county bridge, sustains a damage to his vehicle in crossing the bridge, which by reason of negligence the county commissioners have permitted to become decayed, unsafe, and unfit for use?

[1] A county is a political subdivision of the state. Article 8, §§ 1, 2, Const. 1885.

It is not a corporation. It may be created by the state without the solicitation, consent, or concurrence of the inhabitants of the territory thus set apart; it is created for administrative purposes; it is the representative of the sovereignty of the state, auxiliary to it, an aid to the more convenient administration of the government. It is purely political in character; its functions are of a public nature, constituting the machinery and essential agency by and through which many of the powers of the state are exercised. 7 R. C. L. "Counties," p. 922; 11 Cyc. 325.

[2] The administration of the criminal laws, the execution of the policy of public education, the construction and maintenance of public roads and bridges, and the collection of taxes are some of the powers of the state government which are exercised through the agency of county organizations. *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; *State ex rel. Bell v. Cummings*, 130 Tenn. 566, 172 S. W. 290, L. R. A. 1915D, 274. Counties, being but political divisions of the state, organized as a part of the machinery of the government for the performance of functions of a public nature, partake of the state's immunity from liability, and may not be sued except in such transactions as the statute designates.

The building of roads and bridges and maintenance of the same is a function or duty of the state. It delegates the performance of it to the officers of the particular political division, and in exercising this power these agents act for the public at large. The payment of taxes by the people of the county for road and bridge construction in the particular county is merely a convenient and just method of distributing the burden which the construction and maintenance of highways necessarily creates. The building of roads and bridges thus becomes a county purpose, the same as the building of courthouses, jails, and schoolhouses are county purposes within the meaning of the Constitution. These powers and duties are none the less the powers and duties of the state, the exercise and discharge of which become and are the purpose of county organization. The power and authority which the county ex-

ercises in reference to roads and bridges is, in its character and nature, governmental rather than corporate. In this respect counties are distinguished from municipal corporations charged with the duty of keeping streets in safe and suitable condition for passage.

By the common law of England, a county, although sometimes regarded as a quasi corporation, could not be subject to a civil action for a breach of its public duty. The common law of England is by statute declared to be in force in this state, therefore unless the statutes of this state change the common law in this respect, counties in this state are not liable to actions of this character. Upon principle and authority, therefore, an action of this character will not lie against the county in the absence of a statute expressly authorizing it.

Many of the authorities cited by counsel in their briefs contain a full discussion of the question; some of them are the following: *Russell v. Devon County*, 2 T. R. 667; *Markey v. County of Queens*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *City of Montgomery v. Ross* (Ala.) 70 South. 634.

It is conceded that the numerical weight of authority is decidedly against the contention of the plaintiff in error, and we are not convinced by the excellent brief of the attorneys for the plaintiff in error that that authority is not also better founded in reason.

[3] While a county may, in some respects, resemble a municipality in that both organizations deal with public interests, their differences are so great that the cases discussing the latter's liability in damages for the negligent omission to perform a public duty are not analogous to those in which such a liability is sought to be imposed upon a county. The one feature which sufficiently distinguishes them is that the counties are under the Constitution political divisions of the state, municipalities are not; the county, under our Constitution, being a mere governmental agency through which many of the functions and powers of the state are exercised. *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621. It therefore partakes of the immunity of the state from liability. Many of the powers exercised by a municipality, such as building and maintaining streets, erecting and operating water supply systems, lighting and power plants, are, in their nature and character, corporate rather than governmental. The corporation being organized voluntarily by the citizens of the locality for the purpose of local government, it is given the power and charged with the duty by the state of keeping the

streets in a safe condition. 2 *Dillon's Munic. Corp.* (4th Ed.) § 1034; *City of Key West v. Baldwin*, 69 Fla. 136, 67 South. 808. The citizens of a municipality have a proprietary interest in the property and funds of the municipality; the citizens of a county have not. It is a matter of very grave doubt whether a judgment against a county, even in those cases where suits are permitted against it, may be satisfied by attaching or levying upon the moneys in any particular fund, as counsel for the plaintiff in error contend, although no authority is cited in support of the proposition. It is also contended in behalf of the plaintiff in error that a municipality is a political subdivision of the state, yet it may be sued for its negligence in permitting defects or obstructions in the streets, resulting in injury to a person lawfully using the streets. We do not agree with the learned counsel that the proposition is correct, if it is intended thereby to announce that in the exercise of all its functions and powers a municipality acts as a political subdivision of the state. *McQuillin on Municipal Corporations* says that:

A "municipal corporation is, in part, a public agency of the state, and in part it is possessed of local franchises and rights which pertain to it as a local personality or entity for its quasi private (as distinguished from public) corporate advantage." 1 *McQuillin on Munic. Corp.* 168.

See, also, *Duval County v. Charleston Lumber & Mfg. Co.*, 45 Fla. 256, 33 South. 531, 60 L. R. A. 549, 3 Ann. Cas. 174. A municipality is organized within certain limits of territory for the local advantage and convenience of the people in the particular locality. Special or additional advantages or conveniences are thus obtained by such organizations. It is when exercising its functions for its quasi private corporate advantage that a city is held to be liable for its negligence in the discharge of its duties, but a county acts only in a public capacity as an arm or agency of the state.

The matter of authorizing suits against a county for damages resulting to one person from the negligent performance by the county of some duty imposed upon it is one for the consideration of the Legislature, to whose wisdom the arguments used by the learned counsel for the plaintiff in error may appeal; but until such action is taken by the legislative branch of this government, we shall follow the lead of the "numerical weight of authority" and principle.

The demurrer was correctly sustained, and the judgment of the court below therefore is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

COE v. ARMOUR FERTILIZER WORKS.*

(Supreme Court of Florida. Jan. 15, 1918.
Headnotes Filed April 17, 1918.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW §43(1) — RIGHT TO RAISE CONSTITUTIONAL QUESTIONS.

Section 2677, General Statutes of 1906, permitting execution against stockholders, will not be held unconstitutional in behalf of one who moves to quash and declines to proceed to protect his rights under section 1624, for illegality of execution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. §43(1).]

Error to Circuit Court, Manatee County; F. A. Whitney, Judge.

Action by the Armour Fertilizer Works against the Parish Vegetable and Fruit Company, in which execution was issued against Henry L. Coe, a stockholder, and from denial of his motion to quash the execution, he brings error. Affirmed.

Sparkman & Carter, of Tampa, for plaintiff in error. Singeltary & Reaves, of Bradenton, for defendant in error.

COCKRELL, J. Upon the return of the mandate of this court upon the former hearing of this case, sub nomine Armour Fertilizer Works v. Parish Vegetable & Fruit Co., 63 Fla. 64, 58 South. 231, a judgment was entered, denying the motion to quash the execution issued against Henry L. Coe, as a stockholder of the Vegetable Company, which had no assets whereon to levy. To this judgment Coe prosecutes his writ of error.

Coe does not claim that he was in fact a stockholder, nor that there remains no balance due upon his stock, nor seek to interpose any of the defenses pointed out as open to him upon the former hearing, but stands boldly on his attack upon the constitutionality of the act and by a proceeding unknown to our practice. There does not appear to have been any forcible seizure of any property of the said Coe, other than the formal levy upon realty, which does not interfere with the owner's possession.

The statute presents many difficulties that may arise as to others not similarly situated, and may, as such, be beyond the power of the Legislature; but the party now before this court has not brought himself within the class who may justly complain, and the judgment as to him, upon the authority of our former holding, is therefore affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

*NOTE.—Judgment reversed by United States Supreme Court, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027.

BARRON v. STATE. (No. 18754.)

(Supreme Court of Mississippi, Division B.
April 17, 1916.)

1. ARSON §37(1)—CORPUS DELICTI.

To establish the corpus delicti of the crime of arson requires proof, not only that the property was burned, but also that the fire originated through a criminal agency.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 71; Dec. Dig. §37(1).]

2. CRIMINAL LAW §535(2) — CONFESSION — ADMISSIBILITY—CORPUS DELICTI.

In a prosecution for arson, a declaration by accused that his brother was guiltier than he was, if intended as a confession, was inadmissible, where the only evidence to prove that the barn was burned by a criminal agency was proof that it was burned at an early hour in the morning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1226; Dec. Dig. §535(2).]

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Will Barron was convicted of arson, and he appeals. Reversed and remanded.

Hilton & Hilton, of Mendenhall, for appellant. Lamar F. Easterling, Asst. Atty. Gen., for the State.

POTTER, J. Will Barron, the appellant, was convicted of the crime of arson and sentenced to the penitentiary, from which judgment he appeals. The indictment charged that the defendant did unlawfully, etc., set fire to a certain barn, the property then and there of Nelson Payne.

[1] The proof in this case is insufficient to establish the corpus delicti. In establishing the corpus delicti of the crime of arson, it is not only necessary for the state to prove that the property of the prosecutor named in the indictment was burned, but to establish, also, that the fire originated through a criminal agency.

[2] The state has failed to establish in this case, beyond every reasonable doubt, as it is required to do by circumstances or otherwise, that the barn in question was burned through a criminal agency. The only testimony with reference to the burning of the barn is that it burned at a very early hour in the morning. There is no word of testimony of any sort to establish a criminal agency. In the trial of the case one witness testified, over the objection of appellant, that appellant had stated that his (appellant's) brother "was guiltier than he was." If this was intended for a confession, it was inadmissible, because the corpus delicti had not been proven.

Reversed and remanded.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

GREEN et al. v. TAYLOR, Sheriff, et al.
(No. 18024.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

JUDGMENT ¶707 — SHERIFFS AND CONSTABLES ¶123—CONCLUSIVENESS—COLLATERAL ATTACK—LIABILITY ON BONDS.

Under Code 1906, § 4670, providing for judgment against the sheriff and his bondsmen, for failure to return an execution in due time, for the amount of the execution and all costs, neither the sheriff nor his bondsmen can avoid liability on the ground that the judgment on which execution issued is invalid, that being a collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ¶707; Sheriffs and Constables, Cent. Dig. §§ 230-235; Dec. Dig. ¶123.]

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action by R. H. Green and others against W. C. Taylor, Sheriff, and others. From an order denying plaintiffs' motion for judgment against defendants, the plaintiffs appeal. Reversed, and judgment rendered.

Appellants brought suit in the court of a justice of the peace of Simpson county against J. L. and Ira Boswell, and recovered a judgment which was duly enrolled in Leflore county, Miss., the home of defendant Ira Boswell, and on the enrolled judgment the circuit court of Leflore county issued execution directed to the sheriff of Leflore county, W. C. Taylor, one of the appellees here. The execution was issued April 27, 1914, and made returnable May 23d before the justice of the peace in Simpson county, in whose court judgment had been rendered. The execution was not returned by Sheriff Taylor until June 24, and did not reach the justice of the peace until June 30, 1914. Because of this failure of appellee Taylor to return this execution promptly a motion was made in the court of the justice of the peace against Taylor and his bondsmen, and upon said motion being denied appeal was taken to the circuit court, where on the hearing the motion was again overruled, from which judgment this appeal is taken.

Section 4670 of the Code of 1906 provides as follows:

"If any Sheriff, Coroner, or other officer, shall fail to return any execution to him directed, on the return day thereof, the plaintiff in execution shall be entitled to recover judgment against the Sheriff, Coroner, or other officer and his sureties, for the amount of the execution and all costs * * * to be recovered by motion before the court to which the execution is returnable, on five days' notice first given thereof."

The defense interposed by appellee Taylor is that the judgment upon which the execution was issued was not valid.

Hilton & Hilton, of Mendenhall, for appellants. Lomax & Tyson, of Greenwood, for appellees.

SYKES, J. The court below erred in not rendering judgment in favor of plaintiffs upon their motion for same. The defense interposed in the court below was but a collateral attack upon the judgment upon which the execution was issued. That this cannot be done has been repeatedly held by this court. See Vicksburg Grocery Co. v. Brennan, 20 South. 845, and authorities therein cited.

Reversed, and judgment here for appellants for amount sued for.

Reversed, and judgment here.

HERRMAN BROS. & CO. v. WATSON et al.
(No. 17631.)

(Supreme Court of Mississippi, Division A.
April 10, 1916.)

PRINCIPAL AND AGENT ¶146(1)—UNDISCLOSED AGENCY—LIABILITY OF AGENT.

Code 1906, § 4784, declares that if a person shall transact business as a trader with the addition of the words "agent, factor, and company, or & Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without such addition, all the property, stock, money, and choses in action acquired in the business shall be treated in favor of his creditors as his property. A father who was the owner of a storehouse in which a mercantile business was conducted purchased goods and placed his son in charge. No sign was placed on the storehouse, and an account was carried at the bank under the name of the son as manager; checks being drawn by the son on such account as manager. Held that, as the son ordered goods in his own name as manager and transacted business generally, such property connected with the business was subject to his debts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521, 527; Dec. Dig. ¶146(1).]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by Herrman Brothers & Company against J. R. Watson, Jr. Execution was levied on property as that of J. R. Watson, Jr., and it was claimed by J. R. Watson. From a judgment for claimant, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Section 4784 of the Code of 1906, referred to in the opinion, is as follows:

Business Sign, and What to Contain.—If a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property.

D. T. Ruff and H. H. Johnson, both of Lexington, for appellant.

SYKES, J. On the 21st day of October, 1912, execution was issued by the circuit clerk of Holmes county on an enrolled judgment in favor of Herrman Bros. & Co., appellants here, against J. R. Watson, Jr., for the sum of \$68.50 and interest. Under this execution a levy was made on a certain stock of goods where J. R. Watson, Jr., had his place of business. The appellee here, J. R. Watson, made a claimant's affidavit to the goods and issue was joined upon the same. From a judgment in favor of the claimant J. R. Watson, this appeal is prosecuted.

The question for decision of this court is whether or not these goods were liable to be seized under section 4784 of the Code of 1906. The uncontradicted facts in the case, in brief, are as follows: The appellee J. R. Watson was the owner of the storehouse in which the mercantile business was conducted. He purchased the goods when the business started, paid the insurance and taxes upon same, and turned the business over to J. R. Watson, Jr., to be managed and controlled by him. There was no sign placed on said storehouse. An account was carried at a bank under the name of "J. R. Watson, Jr., Manager." Checks to defray the expenses of the business were drawn by J. R. Watson, Jr., as manager, on this account. J. R. Watson, Jr., was manager at this place of business, bought goods for the business after the same was started, and, in short, attended to all of the affairs of the said business. One or two of the houses from whom he bought goods are shown to have charged the goods to the real owner, J. R. Watson. These firms, however, shipped any goods ordered by J. R. Watson, Jr. Advertisements of this business were printed and circulated by J. R. Watson, Jr., signed "J. R. Watson, Jr., Manager Store, South Lexington." There was never any accounting between J. R. Watson and J. R. Watson, Jr., of profits or losses arising from this business. The testimony is silent as to whether or not J. R. Watson, Jr., received any stated salary from his father as manager of the store. J. R. Watson never participated in the transaction of the business of the said store, and, so far as the record shows, never even visited the store. In fact, the testimony in this case shows that, after the purchase of the stock of goods, the same was turned over to J. R. Watson, Jr., to manage and control as he saw fit. He was the sole and active manager of the business, and, so far as the outside world was concerned, he was the ostensible owner of the same. This being true, we hold, as a matter of law, that he transacted the business of the concern as a trader, in his name, with the addition of the word "manager," and failed to disclose the name of his principal by a

sign in letters easy to read placed conspicuously at the house where such business was transacted, coming squarely within section 4784, Code 1906.

"A sign which shall proclaim the real owner is required where one owns and another conducts the business, so that the public may be informed how matters are." *Hamblet v. Steen*, 65 Miss. 477, 4 South. 432.

Reversed, and judgment here for appellant.

ALABAMA & V. RY. CO. v. STINGILY. (No. 17720.)

(Supreme Court of Mississippi, Division B.
April 17, 1916.)

1. EVIDENCE \Leftrightarrow 69—PRESUMPTIONS—TITLE.

Where a railroad company had occupied and operated its railroad over a track of land for 40 or 50 years, it will be presumed that it properly acquired the land for railroad purposes at the time the road was built.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 90; Dec. Dig. \Leftrightarrow 69.]

2. RAILROADS \Leftrightarrow 113(2)—CONSTRUCTION—LATERAL SUPPORT OF LAND—DAMAGES.

Where a railroad company properly acquired a parcel of land for a right of way and the contour of the land rendered a cut necessary, the railroad is not liable to the grantee of the owner of the land for injuries occasioned by the slipping of the land into the cut, the lateral support being removed, for the original grant of the right of way necessarily included a right to make the cut and remove the lateral support.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 353; Dec. Dig. \Leftrightarrow 113(2).]

Appeal from Circuit Court, Rankin County; A. J. McLaurin, Judge.

Action by J. W. Stingily against the Alabama & Vicksburg Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

R. H. & J. H. Thompson, of Jackson, for appellant. Stingily & McIntyre, of Brandon, for appellee.

COOK, P. J. Appellee's declaration avers that he is the owner of a certain described tract of land lying adjacent to and adjoining the right of way of the appellant railway company; that the defendant owed the plaintiff the duty to so maintain and use its right of way and railroad track as not to injure the plaintiff; that in disregard of this duty, defendant did dig away, grade, cut, and remove away from its right of way, dirt adjacent to plaintiff's land, and thereby caused plaintiff's land to cave in and slide into the cut of the defendant's right of way. To this declaration, defendant pleaded the general issue, and a special plea setting up a release executed by plaintiff's predecessor in title. The case was fought out on the facts, a verdict of the jury rendered against defendant, and a judgment entered accordingly. From this judgment, defendant prosecutes this appeal.

[1] It seems that the railway company has occupied and operated its railway over the tract of land for some 40 or 50 years, and it will be presumed that they properly acquired the land for railroad purposes at the time the road was built.

[2] When the alleged injury to plaintiff's land occurred, the railroad company had made a cut through a hill; in fact, the cut was made when the railroad was built. The adjoining land was of a "crawling," "walking," and "sliding" kind, and it seems on account of rains, and other unknown causes, a small strip of plaintiff's land had slipped off into the cut.

The sliding soil was threatening the railway track whereupon the company removed the soil, thereby removing the lateral support of plaintiff's land, which caused more of his land to slide into the cut. There is no contention that there was any invasion of plaintiff's land; on the contrary, the plaintiff's land invaded defendant's right of way, and if the invasion had not been met at the frontier, the railroad would have been put out of business.

As to whether the railroad company, in the absence of negligence, is liable for the damages accruing in the present case is a subject upon which the decisions are in sharp conflict. We think, however, that it has always been held by this court that the landowner adjoining the right of way of a railroad company cannot recover damages for injuries caused by a proper use of the railroad property. "For all of this he is supposed to have been paid in the proceedings by which the land was condemned for the right of way. * * * For anything wrong or improper done by the railroad company * * * he should recover, but for nothing else." *Railroad Co. v. Brown*, 64 Miss. 479, 1 South. 637.

The right to lateral support may be lost by a grant inconsistent with its continuance. *Hortsman v. Covington R. Co.*, 18 B. Mon. (Ky.) 218; *Ryckman v. Gillis*, 57 N. Y. 68, 15 Am. Rep. 464; *Ludlow v. Hudson River R. R. Co.*, 4 Hun (N. Y.) 239.

As we understand the trend of the decisions of this court, it has always been held that when a right of way for a railroad company is condemned or bought, the right to do any and all things necessary and proper in the use of same is presumed to have been paid for. The landowner is supposed to have been compensated for all damages incidental to a proper use of the land; he, of course, must have taken into consideration all of the injuries which might flow from the proper operation of a railroad over his land, and demanded and received compensation for the land taken, not as a separate tract, but as a part of the entire tract. He could and should have received compensation for damages to the whole tract which

would follow from a maintenance of the right of way.

In the instant case it was known that the cut would be necessary, and that the excavation of the cut would remove the lateral support of the other land adjacent to the tract sold, and for this prospective damage the owner was paid. There is nothing in the record to suggest any negligence or wrongful use of the right of way, or negligent construction of the road.

Reversed and dismissed.

JOHNSTON, State Revenue Agent, v. PUFFER MFG. CO. (No. 18918.)

(Supreme Court of Mississippi, Division B.
April 17, 1916.)

TAXATION \S 406—IMPOSITION OF TAXES—
"ASSESSMENT"—JURISDICTION OF COURT.

"Assessment," which is the listing and valuation of property liable to taxation according to law, is a condition to all ad valorem taxes, and can be made only by the officer designed to make it; therefore, where no taxes were assessed against a foreign corporation, which it was claimed did business in the state, a court of chancery is without jurisdiction to both assess and equalize the omitted taxes rendering personal decree therefor; it not being authorized to assess taxes.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. \S 406.

For other definitions, see *Words and Phrases*, First and Second Series, *Assessment*.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Bill by J. C. Johnston, State Revenue Agent, against the Puffer Manufacturing Company. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Jas. R. McDowell and F. M. West, both of Jackson, for appellant. W. C. Wells, of Jackson, for appellee.

POTTER, J. This is an appeal from the chancery court of the first district of Hinds county sustaining a demurrer to appellant's bill filed against appellee.

The state revenue agent exhibited his original bill against the Puffer Manufacturing Company, a nonresident, seeking to recover state, county, and municipal taxes alleged to be delinquent for the years 1908 to 1915, both inclusive. The appellee is a corporation domiciled at Boston, Mass., and is engaged in the manufacture and sale of soda water fountains in the state of Mississippi and elsewhere, and has been so engaged for many years previous to the filing of this suit. The appellee sold fountains, according to the allegations of the bill in this state, during the years above mentioned, on contracts whereby the title to the property was retained by it and all payments, under the terms of the contracts, were to be considered rent until the entire purchase money was paid. In oth-

er words, the contracts for the sale of the fountains in question were the usual so-called "lease contracts" by which the sales of personal property are made and the title retained in the seller until the purchaser pays the entire contract price to the seller in installments, whereupon the property, upon the payment of the last installment, becomes the property of the lessee or purchaser.

The bill alleged that many sales of the kind above mentioned were made by the defendant company in the state of Mississippi; that a number of such fountains had been leased in the state of Mississippi during the years mentioned; that the property was the property of the appellee until the terms of the lease were complied with; that no taxes had been paid thereon; that such taxes were debts lawfully owing from appellee, and that it was liable therefor; that some of the contracts of lease were recorded, but that many of them were not, and a copy of the form of lease was made an exhibit to the bill.

The bill prayed: (1) For a discovery setting out in detail the names of all persons who had contracts with the defendant throughout the state and the several counties and municipalities therein, beginning with the year 1908, and ending with the year 1915; (2) the date of said contracts; (3) the amount named as consideration in each contract; (4) the duration of the said contracts and the installments called for therein; (5) a description of the property so hired or leased; (6) the residence of each of the lessees in said contracts; (7) the amounts paid said manufacturing company under said contracts; (8) the present location of each soda fountain and appurtenances thereto appertaining, and the location of each fountain on the 1st day of February of each year since it was brought into the state of Mississippi, and, after discovery, for an accounting and a decree for the full amount adjudged to be due the state, counties, and municipalities as taxes for the years mentioned.

A demurrer was filed to this bill setting out, first, that the court has no jurisdiction of the matters set forth and alleged in said bill of complaint, and other grounds of demurrer unnecessary to be set out herein, as this case may be determined, in so far as the correctness of the decree of the chancellor is concerned upon the first ground alone.

It will be noted that this is not a bill seeking a discovery of facts upon which the revenue agent might proceed to have property assessed for back taxes in the usual way and through the properly constituted authorities. If the bill was of that nature, it would present quite a different case from the one we are now called upon to determine.

The bill of complaint under consideration seeks a decree for taxes without any assess-

ment whatsoever. It seeks to have a personal decree rendered against the defendant company for unpaid back taxes; the amount to be determined by an accounting in the chancery court. The chancery court, under the prayer of this bill, would both assess and equalize the taxes sought to be collected. The question presented in this case has already been clearly settled in this state in the very able opinion of Justice Cooper, in the case of *State Revenue Agent v. Tonella*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 346, and we quote from his opinion the following:

"Unquestionably the Constitution contemplates and requires an assessment of property as a condition of its taxation. Assessment is the listing and valuation of property liable to taxation according to law. It is essential for the apportionment of all ad valorem taxes. *Cooley on Taxation*, 259. And an assessment can only be made by the officer designated by law to make it. *Welty on Assessments*, par. 10. When the Constitution devolves that duty upon a particular person, the Legislature may not substitute another. *Welty on Taxation*, par. 10; *People v. Kelsey*, 34 Cal. 473; *People v. Hastings*, 29 Cal. 450; *People v. Sargent*, 44 Cal. 434; *Houghton v. Austin*, 47 Cal. 649; *Richmond & Danville Railroad Co. v. Commissioners*, 74 N. C. 506; *Railroad Co. v. Commissioners*, 72 N. C. 10."

In the case of *Delta Pine Land Co. v. Adams*, 93 Miss. 340, 48 South. 190, the opinion begins by stating that the revenue agent had caused the appellant to be back-assessed for taxes for the years 1889 to 1905, inclusive. In that case section 4256, Code of 1906, is properly applied. After an assessment is properly made, a suit may be brought for the recovery of the taxes as a debt due by the person or corporation owning the property, or doing the business upon which the tax is levied or imposed, but before an ad valorem tax is recoverable, under the provisions of our Constitution, an assessment must first be made.

The decree of the chancellor sustaining the demurrer to the bill filed by the revenue agent is therefore affirmed.

Affirmed.

PROVIDENCE-WASHINGTON INS. CO. v. KENNINGTON. (No. 17659.)

(Supreme Court of Mississippi, Division B. April 17, 1916.)

INSURANCE — 575—FIRE INSURANCE.

A fire insurance policy provided that in event of disagreement as to the amount of loss or damage it should be determined by competent and disinterested appraisers before recovery could be had, that the insured and insurer should each select an appraiser, and the two should select a competent and disinterested umpire, and in the event of their failure to agree as to the damage the matter should be submitted to the umpire. Insured in good faith selected an appraiser, but he and the appraiser selected by the insurer were unable to agree on the amount of the damage or as to an umpire, the insurer's appraiser offering for umpire names suggested by the insurer's adjuster. Held that, as the insured acted in good faith, and as the

policy did not provide for a second effort at appraisal, insured might institute an action without any second offer of appraisal; for, the provision being to the benefit of the insurer, it should be most strongly construed against it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1435; Dec. Dig. ¶ 575.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Special Judge.

Action by R. E. Kennington against the Providence-Washington Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McLaurin & Armistead, of Vicksburg, for appellant. Watkins & Watkins, of Jackson, for appellee.

STEVENS, J. Appellee, as plaintiff in the court below, instituted this suit against appellant upon a contract of fire insurance covering a certain automobile owned by appellee in the city of Jackson. The policy of insurance, among other provisions, contained the following:

"In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The insured and this company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. * * *

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the insured shall have fully complied with all the foregoing requirements."

There was a loss by fire, and the parties, being unable to agree upon the amount of damages, entered into an agreement for an appraisal in accordance with the provisions of the policy, Mr. Kennington selecting one H. C. Lawrence and the insurance company selecting Mr. Charles McDonnell, both of Jackson, Miss. The appraisers selected signed an appraisal agreement, and, being unable to agree as to the measure of damages, undertook to agree upon an umpire, but utterly failed to agree upon or to select an umpire under the terms of the policy. When the appraisers so selected failed to select an umpire, they abandoned their efforts toward executing the appraisal agreement, and each went about his own business. Mr. Kennington thereafter instituted this action to recover on his policy, and the defendant filed pleas challenging the right of the plaintiff to maintain this action until there has been appraisal and award in accordance with what the defendant contends to be the true meaning of the provisions of the policy above quoted. It appears that after the failure to agree upon an umpire neither party to the

contract demanded new appraisers. It further appears from the evidence that the principal difference between the appraisers selected was whether the umpire should be selected from citizens in or around Jackson, Miss., where Mr. Kennington lived and the loss occurred, or should come from another city or vicinity, and thereby should not be subject to local influence. It appears that the appraiser selected by Mr. Kennington submitted the names of several citizens of Jackson as also the name of one Mr. Lee, operating an automobile repair shop at Crystal Springs, Miss. The appraiser for the company submitted the names of several who lived in other cities in the state of Mississippi, as also the names of two residing in Jackson. The appraiser for Mr. Kennington found objections to the proposed umpire living in Jackson suggested by the company's appraiser, and objected generally to accepting an umpire from a distant city. There was evidence that many of the names suggested by the company's appraiser were suggested by appellant's adjuster, and that at the time these names were submitted appellant did not disclose to appellee's appraiser the fact that it had through its agents suggested any of these names.

The proof in this case shows that Mr. Kennington entered into the agreement for an appraisal in good faith; that he selected a disinterested and competent appraiser; that he left to his appraiser the responsibility and job of selecting an umpire; and that the failure to make an award was occasioned by no fault or negligence on the part of appellee. Under these circumstances, therefore, did appellee have the right of action on his policy? Under the terms of the contract here sued on we answer this question in the affirmative. In reference to the arbitration clause here in review there is conflict in the authorities. Many of the leading authorities hold that there must be a demand for arbitration before the insurer can complain of the other party's default in failing to seek appraisal and award. *Winchester v. North British & Mercantile Insurance Co.*, 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404, and authorities there cited. Additional authorities on this point are collated in the elaborate brief of counsel for appellee. In the instant case there was an effort in good faith on the part of the plaintiff in the court below to arbitrate. The policy does not contain an express provision for an appraisal in the event the appraisers first selected failed to agree; and this provision of the policy, being one of the many printed provisions prepared by the insurance company and for its benefit, should not be enlarged or extended by any construction of this court. We prefer to adopt the more reasonable view that the insured, when he selects a competent and disinterested appraiser, discharges the obligation placed upon him. By his contract he agrees in event of loss to select for himself an appraiser who,

in connection with the company's appraiser, determines the amount of the loss, or, failing to agree, selects an umpire. In estimating the loss the insured has no connection with the business except to furnish needed information or evidence. He has nothing to do with selecting the umpire. If the appraisers fail to agree upon an umpire, then the appraisalment has miscarried through no fault of the insured. The insured has suffered a loss, and has a right to a speedy recovery. If, therefore, there is no express provision in the policy for a second appraisalment, or rather a second effort at appraisalment, then the provisions in review should not defeat the right of the insured to enter the open door of the court for relief. The action is upon the policy contract, and the main inquiry is not whether there has been an appraisalment, but whether there has been in deed and in fact a loss for which recovery should be had. Any provisions of a fire insurance policy seeking to impair the right of the insured to resort to the courts must be strictly construed against the company, and in the present case these provisions, in our judgment, do not require the insured to initiate a second effort at appraisalment. If there must be a second effort at appraisalment, there might be a third, and in the meantime justice might be delayed. Mr. Clement, in his work on Fire Insurance, vol. 1, pp. 159, 160, lays down as a part of rule 38:

"Where appraisers, or a majority of them, fail to agree upon an award, plaintiff, unless he is shown to have acted in bad faith in selecting his appraiser, is not compelled to submit to another appraiser and another delay, but he may forthwith bring his action."

In the case of *Western Assurance Co. v. Decker*, 98 Fed. 381, 39 C. C. A. 383, the court says:

"The contention of the company is that, when the arbitrators failed to agree, it was the duty of the insured to propose a new selection of arbitrators, and that, not having done so, and not having appointed an arbitrator a second time, he cannot maintain this action. The terms of the policy are satisfied when the assured, acting in good faith, appoints an appraiser. If the appraisal falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed"—citing *Insurance Co. v. Traub*, 83 Md. 524, 35 Atl. 18; *Pretzfelder v. Insurance Co.*, 116 N. C. 491, 21 S. E. 302, 44 L. R. A. 424. "One of the fundamental and essential constitutional rights of the citizen is the right to appeal to a court of justice for a redress of his grievances. One of the chief ends of government is to secure this right to the citizen. While some of the courts hold that the citizen may by contract bargain away this right, the agreement to do so will not be extended by construction or implication. Even if a second appointment of arbitrators was required by the terms of the policy, there is nothing in the policy, as contended by the defendant in error, which imposes upon the insured the obligation to be the first to propose another selection of arbitrators and appoint a second arbitrator. * * * There is not a line or a word in the

policy, making it the duty of the insured any more than the company to demand an appraisalment and appoint an appraiser."

This announcement was afterwards reaffirmed by the same court in the case of *Spring Garden Ins. Co. v. Amusement Syndicate*, 178 Fed. 519, 102 C. C. A. 29. There is force in the suggestion made by the court in the case of *Winchester v. North British & Mercantile Ins. Co.*, supra, that the insured submits his claim under oath, and that the insurer is the only party who can determine whether there are any differences, and therefore the only party in position effectually to demand an arbitration. It is certainly a provision which the company might waive.

"It has been held, on what seems to be the better reasoning, that where the insured has appointed an appraiser, and without his fault the appraisers fail to agree, he may maintain an action." *Jerrils v. German Ins. Co.*, 82 Kan. 320, 108 Pac. 114, 28 L. R. A. (N. S.) 104, 20 Ann. Cas. 251.

Counsel for appellant relies upon the case of *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419. The terms of the policy and the facts of that case, however, differentiate it from the case now before us. Indeed, the court, in that case by its concluding sentence, expressly reserved the question which here confronts us. The court says:

"If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented."

Aside from the question whether an award in this case was prevented by the wrongful or arbitrary conduct of the insurance company or its appraiser, a question which, in fact, was submitted to the jury under proper instructions, we rest an affirmance of this case upon the views above expressed. Affirmed.

NORTHERN DRAINAGE DIST. v. BOLIVAR COUNTY. (No. 17589.)

(Supreme Court of Mississippi, Division B. April 17, 1916.)

1. BRIDGES ⇐9(1)—CONSTRUCTION BY COUNTY—LIABILITY OF DRAINAGE DISTRICTS.

Prior to 1912 a drainage district performed work on natural water courses which required the removal and replacing of highway bridges, though it had no authority to do so. By Laws 1912, c. 196, the Code provisions relating to drainage districts were amended so as to authorize such districts to work natural water courses, and section 13 of that statute legalized all expenditures made for any work on natural water courses in good faith. The same statute imposed on the county the duty to replace bridges at its expense. *Held*, that the validation of the work was retrospective, while the requirement to replace bridges was prospective, so that the county could recover from the drainage district the cost of replacing the bridges.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 17, 19; Dec. Dig. ⇐9(1).]

2. COUNTIES \Leftrightarrow 121—CONTRACTS—ENTRY ON MINUTES.

A contract by the county board of supervisors to pay for replacing bridges over water courses removed for the work of a drainage district not made by an order spread on the minutes is invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 183; Dec. Dig. \Leftrightarrow 121.]

3. DRAINS \Leftrightarrow 2(1)—DISTRICTS—POWER OF LEGISLATURE.

A drainage district is a creature of the Legislature, and the Legislature can prescribe the terms of its organization, so that the district does not necessarily have the same rights to the use of natural water courses as drains, as against highways and railroad crossings, than that riparian owners would have.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 2(1).]

Appeal from Circuit Court, Bolivar County; W. D. Cutrer, Special Judge.

Action by Bolivar County against the Northern Drainage District. Judgment for the plaintiff, and defendant appeals. Affirmed.

Thomas S. Owen, of Cleveland, for appellant. Green & Green, of Jackson, and Fontaine Jones, of Rosedale, for appellee.

COOK, P. J. This action was instituted by board of supervisors of Bolivar county against the appellant drainage district for the purpose of recovering the amount expended by the board of supervisors for removing and replacing public bridges which crossed the drainage canals and ditches of the drainage district.

The defendant pleaded the general issue and two special pleas. The first special plea averred that the board of supervisors agreed with the drainage commissioners that, if they would not assess the public roads of the county, the board of supervisors would remove and replace all bridges on the public roads where the canals crossed the roads. The second special plea averred that the bridges mentioned in the declaration were built across natural water courses, and that defendant was not liable for the costs of replacing the same. Demurrers were filed to the two special pleas, and were sustained by the court.

At the trial it was agreed in an agreed statement of facts that the bridges were built at the expense of the board of supervisors; that they were built prior to January 1, 1912; that all of the bridges were built on public roads and across natural water courses, that is, where the public roads cross natural water courses which were being dredged by the drainage commissioners for the two drainage districts; that all of the bridges were on public roads of the county.

[1] Appellant insists that the court erred in sustaining the demurrer to the second plea. This contention is based upon the fact that prior to January, 1912, the drainage commissioners organized under chapter 39, Code

1912, had no authority to do any work on natural water courses, citing *Ex parte Drainage Commissioners of Leflore County*, 100 Miss. 821, 57 South. 223.

We think section 13, c. 196, Laws 1912, validated the work theretofore done on natural water courses, and the expenditures made in furtherance of such work. But it is said that the same law that validated work on water courses also imposed upon the counties the duty to replace bridges at the expense of the county. We believe that the validation of the work was retrospective, while the requirement that counties should replace bridges at their own expense is prospective. Undoubtedly the obligation to pay for replacing bridges had been incurred, and in contemplation of the statute this was an expenditure made in good faith which the statute legalized.

[2] As to the first special plea, we think the court below was right in sustaining the demurrer to same. It is very doubtful whether the board of supervisors were authorized to enter into the agreement set up in the plea, even had the agreement been spread at large upon the minutes of the boards. But it is not contended that the contract was made by an order upon the minutes, and, if it was not, it was as ineffectual as if it had never been entered into. The so-called contract has no legal existence. But it is stated in the brief for appellant that the real and important question for this court's decision is this:

"Independent of this position, the real question which it is important to decide is this: Does a public highway or a railroad acquire such an easement over a natural water course by condemnation or otherwise that is superior to the natural easement of the adjacent land owners and the public, or is the right acquired by the easement of the public highway or the railroad subject to the superior right or rights of the riparian land owner in the natural water course to use it for drainage purposes, for which nature created it?"

As we view this question, we may hold with appellant that the right of the riparian landowner is superior to that of the county to construct bridges across natural water courses, and yet this would not dispose of the real question presented by this record.

[3] It is true, in a sense, the drainage commissioners represent the riparian owners. In other words, the riparian owners have, by authority of law, pooled interests by organizing themselves into a drainage district—a municipal corporation. It is only by authority of the Legislature that this organization is made possible, and it is clearly within the power of the Legislature to impose conditions upon this grant of power. The riparian owners did not possess the right of eminent domain, the power of taxation, and many other powers given to drainage districts, and so it was that the Legislature imposed the burden of paying for the cost of removing and

replacing county bridges where it became necessary to remove same in the prosecution of the work the Legislature empowered drainage commissioners to do.

Of course, the Legislature could have refused to provide for drainage districts at all, and it follows that it could authorize the forming of such districts upon such terms as to it seemed best.

Affirmed.

MITCHELL v. ÆTNA INS. CO. (No. 17653.)
(Supreme Court of Mississippi, Division B.
April 17, 1916.)

INSURANCE — 390 — INVENTORY — CONDUCT OF
AGENT — ESTOPPEL.

Where plaintiff, at the request of defendant's agent, furnished the agent an inventory of his stock of goods and merchandise in his store, containing the different articles of merchandise and the gross value of each, but not specifying the numbers, quantities, or prices, and the policy was issued upon such inventory, and the agent informed the insurer that it was all right and said nothing to plaintiff about its insufficiency, it was too late after the insurer had issued the policy, received the premium, and the insured property had been destroyed, for the insurer to say that the inventory did not satisfy a covenant and warranty contained in the policy as to an inventory; as it was estopped from doing so by its own conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.]

Appeal from Circuit Court, Winston County; C. L. Dobbs, Judge.

Action by J. T. Mitchell against the Ætina Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. McLaurin & Armistead, of Vicksburg, for appellee.

POTTER, J. The appellant in this case, J. T. Mitchell, was plaintiff in the court below, and the Ætina Insurance Company was defendant.

This was a suit on a policy of insurance dated June 14, 1912; said policy being for \$1,700. This policy was issued through defendant's agent, insuring plaintiff's stock of goods against loss by fire. At the request of appellee's agent, the appellant furnished him an inventory of his stock of goods and merchandise in his store in the town of Union, before the policy was issued. This inventory contained the different articles of merchandise carried by the appellant in his store, and the gross value of each article, but did not specify numbers, quantities, or prices. For example, the inventory read:

Stock food	\$ 50.00
Poultry food	6.25
Patent medicines	150.00, etc.

The defendant insurance company set out in the notice of affirmative matter under its plea of the general issue that the inventory above mentioned did not satisfy the following

covenant and warranty contained in said policy:

"The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned."

The above-mentioned inventory was prepared by the plaintiff for the defendant insurance company at the request of its agent, a Mr. Cole. The plaintiff testified that when the inventory was completed he carried it to Mr. Cole, and when he presented it to him that Mr. Cole said it was "all right." The insurance company contended in the court below that this was not a waiver on the part of the insurance company of the provisions of the policy requiring a complete itemized inventory of all of plaintiff's stock of goods, but that it was furnished its agent only as a basis of writing the policy of insurance in conformity with the three-fourths value clause contained in all standard policies. The court below accepted the defendant company's view of this question, and gave a peremptory instruction in its favor.

We think this was error. The plaintiff was requested to furnish an inventory of his stock of goods. He made out the inventory as requested, and presented same to the defendant's agent. The policy of insurance was issued upon this inventory, and the agent informed the defendant that it was "all right." The agent knew that the plaintiff was furnishing him with a list of merchandise in his store upon which he desired to obtain insurance; and the agent knew that the plaintiff was undertaking to furnish him with an inventory thereof. When the policy was issued, the agent said nothing to plaintiff about the insufficiency of the inventory. It is too late now, after the company has issued the policy, received the premium, and plaintiff's property has been burned, upon which the insurance was carried, for the defendant company to say that the inventory in question is insufficient. It is estopped by its own conduct.

The judgment of the circuit court is therefore reversed and remanded.

McKENZIE v. BOYKIN. (No. 18850.)

(Supreme Court of Mississippi. April 17, 1916.)

1. ELECTIONS — 27 — STATUTES — CONSTITUTIONALITY.

Code 1906, § 4160, providing that in the event of the death of any candidate whose name shall have been printed on the official ballot the name of the candidate duly substituted may be written in the blank space by the voter, which was a rescript of section 2 of the election ordinance adopted by the convention which framed the Constitution of 1890, cannot be held to

violate section 250 of that Constitution, which provides that all qualified electors and no others shall be eligible to office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 17; Dec. Dig. ¶27.]

2. ELECTIONS ¶5—RIGHT TO VOTE—RESTRICTIONS.

The right to vote is one which under both federal and state Constitutions, can be bestowed on some and denied to others, and can be reasonably regulated by the Legislature with reference to the conduct of elections.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 4; Dec. Dig. ¶5.]

3. ELECTIONS ¶159 — STATUTES — VOTE FOR CANDIDATE NOT NOMINATED.

Code 1906, § 4160, providing that in the event of the death of any candidate whose name shall have been printed on the official ballot, the name of the candidate duly substituted may be written in the blank space by the voter, when construed in accordance with the maxim, "Expressio unius est exclusio alterius," and in view of the provisions of the statutes for nominating nonpartisan candidates by petition, and of Code 1906, § 4175, making it criminal for a voter to place any identifying mark on his ballot, authorizes voters to write on the official ballot the name of a candidate not nominated only in the event of the death of a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 124; Dec. Dig. ¶159.]

4. STATUTES ¶206—CONSTRUCTION—FAVORING VALIDITY.

A statute should not receive such a construction as would render any of its provisions vain and useless.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. ¶206.]

In Banc. Appeal from Circuit Court, Smith County; W. H. Hughes, Judge.

Election contest by W. E. McKenzie against N. B. Boykin. Judgment for the contestee, and contestant appeals. Affirmed.

Watkins & Watkins, of Jackson, for appellant. S. L. McLaurin, of Brandon, and T. J. Wills and Guthrie & Tullios, all of Raleigh, for appellee.

POTTER, J. This is a contested election suit, instituted by W. E. McKenzie, the appellant, against N. B. Boykin, the appellee, under section 4186, Mississippi Code 1906, by petition in the circuit court of Smith county, to contest the election of appellee, who now holds the office of supervisor of the fifth district of said county, by virtue of a general election held in said county on the 2d day of November, 1915. The appellant alleged in his petition that he was a citizen of said district and county at the time of the general election above mentioned, and that he was eligible to be voted for in said election for the office of member of the board of supervisors of said county from said fifth supervisor's district, by reason of his being a qualified elector of said county, a resident freeholder of said district, and the owner of the requisite real estate; that the official ballot printed and distributed for use in said election had only the name of the appellee printed thereon as the person to be voted for in said election for the aforesaid

office of member of the board of supervisors, and that 277 of the qualified electors of said county and said district cast their ballots in said election for supervisor, of which number 108 voted for the appellee by marking an "X" opposite the name of appellee, and that 142 of the electors wrote on the face of the official ballot the name of appellant for said office and marking an X mark opposite his name, and also 27 voted for appellant by writing his name on the official ballot without putting the X mark opposite thereto; and it was alleged that, exclusive of the 27 who had voted for the appellant by simply placing his name on the ticket, appellant had been elected by a majority of 34 votes, counting only those ballots upon which the appellant's name was written and an X mark placed opposite to it. It was further alleged that the local managers who held said election in said district excluded the aforesaid 27 votes, but counted the 250, showing a majority in appellant's favor of 34 votes, and that the election commissioners met to declare the result of said election, and rejected all the votes for appellant, and declared appellee elected to said office, and so returned to the secretary of state. To the petition appellee filed two pleas, the plea of general issue and a special plea in bar in confession and avoidance. The special plea set out that appellant and all of the qualified electors who participated in said general election in said district participated and voted in the primary elections in 1915 of the Democratic party, by which party appellee was nominated as the candidate of said party to said office in said general election, and that no other person was nominated in said year by any party as its candidate for said office in said election, and that the name of no other person than appellee was printed on said ballot as a candidate for said office, and that there was no death of any candidate for said office in said general election. To this special plea appellant demurred on the ground that it set forth no legal defense, and showed that appellant was eligible to be voted for in said election for said office.

The question to be determined in this case is whether or not an elector in a general election can vote for any person for office other than one whose name is printed on the official ballot, by writing thereon the name of his choice for the office, except in case of the death of a candidate. It is urged that, unless qualified electors are permitted to write the name of their choice on the official ballot and put the X mark opposite same to indicate their choice, the provisions of section 250 of the Constitution of 1890 would be violated. Section 250 is as follows: "All qualified electors and no others, shall be eligible to office, except as otherwise provided in this Constitution."

[1] The present election laws are practically rescripts of the election ordinance of the

constitutional convention of 1890. The election ordinance was to be in force until 1896, and thereafter the Legislature had the power to enact laws not violative of the Constitutions of the state and the United States with reference to the holding of elections. The election ordinance was adopted by the convention itself, and it would not be contended, therefore, that it is violative of the state Constitution, and it is not contended that this ordinance in any way violates the Constitution of the United States. The validity of the franchise laws of the Constitution of 1890 was vigorously assailed as being unconstitutional in both the United States Senate and the Supreme Court of the United States. The enactment of the franchise sections of the Constitution of this state by that convention, and the defense of them by the late Senator James Z. George, and the final adjudication of the Supreme Court of the United States upholding said franchise laws, mark an epoch in the history of our state—in fact, of the entire South. The genius of Senator George in conceiving the franchise sections of our Constitution, eliminating the ignorant and vicious from the exercise of the franchise, has thus been vindicated, and our state restored for all time to come to the control of a capable and intelligent electorate.

The purpose of the election ordinance was to carry out and enforce the franchise sections of the Constitution, the machinery whereby the franchise laws of the Constitution were put into operation. The sections of the Code involved in the case at bar, being practically rescripts of the election ordinance, take its place, and the election ordinance itself was violative of no constitutional provision; likewise the statutes in question do not violate any constitutional provision.

As stated by counsel on both sides in their oral argument of this case, the right of Mr. Boykin or Mr. McKenzie to hold the office of member of the board of supervisors of the fifth supervisor's district of Smith county is only an incidental question in this case; a greater question to be determined is the proper construction of the laws dealing with the right of franchise of our citizens.

[2] In our government it is not every one upon whom the right to vote is bestowed. For instance, under our laws one-half the population are excluded from the right to exercise the ballot because of sex; no male person is permitted to vote until he has reached the age of discretion, fixed by our law at 21 years of age. Not only is it permissible under both federal and state Constitutions to bestow upon some the right of franchise and to deny it to others, but the Legislature of the state has the authority, beyond question, without violating any constitutional provision, to make such reasonable regulations with reference to the manner in which elections shall be conducted, and upon what rea-

sonable conditions and under what circumstances a citizen may vote, and in what way, as in its discretion it deems proper.

[3] Section 4160, Code 1906, itself a rescript of a portion of election ordinance, section 2, expressly provides that:

"One blank space under the title of each office to be voted for, and in the event of the death of any candidate whose name shall have been printed on the official ballot, the name of the candidate duly substituted in the place of such deceased candidate, may be written in such blank space by the voter."

Applying the rule of construction, "*Expressio unius est exclusio alterius*," we conclude that the section means that this space can be used only in case some candidate dies and another be substituted in his place. By necessary implication, the statute negatives the right of the voter in any case to write the name of a candidate upon the official ballot and vote for him except in case of death. To hold otherwise would, in effect, destroy the secrecy of the ballot, and put the timid voter at the mercy of those who might coerce him, and put the corrupt voter within the easy grasp of the bribe giver; for, as illustrated, the voter could easily agree beforehand that he could write the name of some particular person on the ballot for any particular office, and the man who has the power to coerce him, or the man who bought his vote, would know whether or not the ballot had been cast according to his behest. The law provides, a simple expedient whereby the names of candidates who are not party nominees may be placed upon the ticket in district offices by requiring a petition to be signed in the case of election of beat officers by only 15 qualified electors. This restriction is placed upon the electors in order that the Australian ballot may be preserved in its integrity.

It is urged, however, in the argument of counsel that if the Legislature required the names of 15 electors to have printed the name of a no-party candidate upon the ticket, for member of the board of supervisors, a fortiori, the number could be increased by the Legislature to such an extent that elections would be placed entirely in the hands of political parties, and that the right of the voter to vote for whom he pleases, and the right of the nonpartisan to run for office, would be denied. The answer to all this is that the Legislature has not done that, but that the restriction provided is a reasonable restriction, and one that does not arbitrarily restrict the voter's right of choice, and is therefore constitutional. It would be an entirely different question if the restrictions placed upon the voter were unreasonable, and were such as to practically deny him the exercise of his legitimate choice.

The appellant in this case insists that in the case of *Mayor v. State*, 102 Miss. 663, 59 South. 873, Ann. Cas. 1915A, 1213, and *State v. Ratliff et al.*, 66 South. 538, this court found, as a matter of law, that the voter had

the right to write the name of a candidate other than a party nominee on the official ballot and vote for him.

In the case of *City of Jackson v. State*, 102 Miss. 663, 59 South. 873, Ann. Cas. 1915A, 1213, a different statute and a different question entirely is presented. No official ballot is provided for in the act, and in that case and the statute under consideration did not provide for any other method of placing names on the ballot than through party nominations, and, not having provided for any other method than party nominations, the voter retained undoubtedly the right to write the name of his choice upon the ballot, for the voter has a constitutional right to express his choice, and if no other reasonable method is provided by law, he has the right to write the name of his choice on the ballot.

In the case of the *State v. Ratliff*, 66 South. 538, Timberlake was the nominee of the Democratic party, and the election commissioners failed to print his name on the ticket. The right of the electors to vote for him could not be denied by the failure of the election commissioners to place his name on the ballot—that was all really involved in that case.

[4] Section 4175, Code of 1906, makes it a criminal offense for a voter to "place any mark upon his ballot by which it can afterwards be identified as the one voted by him." This provision is constitutional, having been a part of the election ordinance of the constitutional convention of 1890.

"A statute should not receive such a construction as would render any of its provisions vain and useless." *Martin v. O'Brein*, 34 Miss. 21; *Swann v. Buck*, 40 Miss. 268; *Adams v. Y. & M. V. R. R. Co.*, 75 Miss. 275, 22 South. 824.

To hold that the voter has a right to write the name of his choice on the ballot would render this section absolutely unenforceable. We are therefore of the opinion that the ballots upon which appellant McKenzie's name was written were illegal, and were properly excluded by the election commissioners of Smith county in certifying the returns in said election to the secretary of state.

Affirmed.

SMITH, C. J. (specially concurring). I am in thorough accord with the views expressed in the opinion in chief, except with its attempt to distinguish the present case from the case of *Mayor, etc. v. State*, 102 Miss. 663, 59 South. 873, Ann. Cas. 1915A, 1213, and the later case of *State v. Ratliff*, 66 South. 538, decided upon the authority thereof without any further discussion of the question here and there involved. These cases, in so far as the point here under consideration is concerned, are squarely in conflict with the views expressed in the opinion in chief, were wrongly decided, are by the opinion in chief necessarily, and, in my judg-

ment, in order that they may no longer mislead, should be expressly, overruled. An examination of these cases will disclose that the questions there presented to the court were not those set out in the opinion in chief, but were the identical questions involved in the case at bar.

In the brief of counsel for appellee it is stated that that portion of the opinion in the case of *State v. Ratliff* dealing with the question here under consideration was obiter dicta for the reason that Bailey did not join in the appeal. It is true that from the report of the case, contained in 66 Southern Reporter, it appears that Bailey did not appeal, but this is in error. He did appeal, the record thereof being separate from the record containing the state's appeal, but all of the cases were argued at the same time, no briefs whatever being submitted with Bailey's record.

DICKERSON v. WESTERN UNION TELEGRAPH CO. et al. (No. 18695.)

(Supreme Court of Mississippi, Division B.
April 17, 1916.)

1. APPEAL AND ERROR ~~844~~—DISMISSAL—FAILURE TO PROSECUTE.

In an action against two telegraph companies, where demurrer was interposed to the declaration by the first company and by the court sustained on May 16, 1913, and judgment in favor of the second company on trial against it was not entered until April 8, 1915, plaintiff's petition for appeal and the appeal bond being filed in August, 1915, the appeal as to the first company was not open to dismissal as not having been prosecuted within two years after sustaining of its demurrer, as an appeal will not lie unless there has been a final disposition of the case as to all of the parties, while the final judgment contemplated by the statute limiting the time for appeals is the judgment terminating the suit and granting or denying relief prayed for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889-1896, 1896; Dec. Dig. ~~344~~.]

2. APPEAL AND ERROR ~~78(3)~~—FINALITY OF JUDGMENT APPEALED FROM—JUDGMENT SUSTAINING DEMURRER—"FINAL JUDGMENT."

A judgment sustaining a demurrer, in the absence of an application to amend, is a final judgment, so far as the interests of the demurrant are concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 465-469; Dec. Dig. ~~78(3)~~.]

For other definitions, see Words and Phrases, First and Second Series, Final Judgment.]

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action by J. L. Dickerson against the Western Union Telegraph Company and the Postal Telegraph Cable Company. From a judgment for defendants, plaintiff appealed. On motion to dismiss appeal as to the first-named defendant. Motion to dismiss overruled.

W. D. & J. R. Anderson, of Tupelo, for appellant. J. A. Sykes, of Aberdeen, for appellees.

STEVENS, J. [1] Appellant instituted this action for damages against Western Union Telegraph Company and Postal Telegraph Company jointly. The complaint is based upon alleged gross negligence and delay in delivering a telegram. A demurrer was interposed to the declaration by the Western Union Telegraph Company and by the court sustained May 16, 1913. The cause then proceeded to trial against the Postal Telegraph Company, but judgment in favor of the latter defendant was not entered until the 3d day of April, 1915. The petition for appeal and the appeal bond were filed in August, 1915. The Western Union Company has moved to dismiss the appeal as to it because same has not been prosecuted within two years, contending that the statute of limitation began to run in favor of the Western Union Company when the demurrer as to it was sustained and the suit finally dismissed as to the company.

In our judgment, the two years contemplated and provided for by the statute did not begin to run in this case until final judgment was entered by the court in favor of the last defendant and terminating the entire suit. When the demurrer on the part of the Western Union Company was sustained, plaintiff had a right to proceed with his case against the other defendant charged to be jointly liable, the right to recover the demand sued on from the remaining defendant, and until the cause was finally tried between plaintiff and the Postal Telegraph Company, plaintiff was still endeavoring to recover the full demand sued for. If plaintiff had recovered against the Postal Telegraph Company, then his demand would have been satisfied and he would have been, so far as he was concerned, at the end of the law. Having lost his case against the last company, he brings the whole record on appeal and still seeks to hold both companies in accordance with his original conception of the case. If the motion is well taken in this case, then a plaintiff seeking to recover against several defendants would be in many instances obliged to split his cause of action on appeal and to prosecute two or more appeals, when one appeal can take care of the interests of all parties. The general rule is stated as follows:

"As a general rule a judgment or decree is not final which settles the cause as to a part only of the defendants. Thus an order or decree which dismisses a suit as to a part only of the defendants named, all of whom are charged to be jointly liable, has been held not to be final, nor appealable as such." 2 Ruling Case Law, § 24, and cases in notes.

"An appeal or writ of error will not lie, as a rule, unless there has been a final disposition of the case as to all of the parties." 2 Cyc. 588, cases in note 84.

"A judgment or decree dismissing as to one of several defendants sought to be jointly charged is not final so as to permit an appeal." 2 Cyc. 589."

[2] It may be conceded that as a general proposition of law a judgment sustaining a demurrer in the absence of an application to amend is a final judgment so far as the interests of the demurrant are concerned; but the final judgment contemplated by the statute limiting the time for appeals to the Supreme Court is the judgment that terminates once and for all time the suit filed by the plaintiff or complainant, and grants or denies the relief prayed for.

The motion to dismiss is therefore overruled.

ALLEN v. YAZOO & M. V. R. CO.

(No. 17529.)

(Supreme Court of Mississippi, Division B. April 17, 1916.)

1. NEGLIGENCE §32(1) — INJURY ON PREMISES—INVITATION—LIABILITY.

A railroad's bare permission to persons to enter upon its private premises does not render it liable for injuries to them on account of the condition of the premises; but, if it expressly or impliedly invites or induces a person to go upon its premises, it is liable in damages for injury from the unsafe condition of the premises, if such condition was the result of its failure to use ordinary care to prevent it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 42; Dec. Dig. §32(1).]

2. NEGLIGENCE §32(1) — INJURY ON PREMISES—"IMPLIED INVITATION."

A railroad may induce another to enter its premises by providing an easy and convenient pathway across the premises apparently intended for the use of the public and constantly used by the general public. The term "implied invitation" imports knowledge by the defendant of the probable use of its property so situated and conditioned as to be open and likely to be subjected to such use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 42; Dec. Dig. §32(1).]

For other definitions, see Words and Phrases, First and Second Series, Implied Invitation.]

3. NEGLIGENCE §134(3)—DANGEROUS PREMISES—QUESTION FOR JURY—IMPLIED INVITATION.

Evidence held to warrant a finding that the situation created by the defendant was such as would import its knowledge of plaintiff's probable use of its property so situated and conditioned as to be open to and likely to be subjected to such use.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. §134(3).]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action by Ida Allen against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

N. B. Feld and Jas. D. Thames, both of Vicksburg, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

COOK, P. J. This is an appeal by the appellant, plaintiff below, from a judgment en-

tered by the circuit court against her. The suit was for personal injuries inflicted, as she claimed, by the negligence of the railroad company. After the close of the evidence, the court, at the request of defendant, directed the jury to return a verdict for the defendant.

We here take from the brief of appellant what we believe to be a fairly accurate statement of the facts presented to the jury by plaintiff's evidence, viz.:

"At the time the appellee, the Yazoo & Mississippi Valley Railroad Company, and for a long time prior thereto, built its machine and repair shops and constructed its yards and switch tracks in the city of Vicksburg, Klein street extended east and west to the Mississippi river. The city of Vicksburg granted to appellee part of Klein street and also a part of Depot and Levee streets, both of which ran north and south and at right angles to Klein street, in order that it might build and construct its machine shop, yards, and tracks thereon. Prior to the building by appellee of its shops, yards, and tracks, the public used the parts of Klein, Levee, and Depot streets on which appellee built its shops, yards, and tracks, as it did the other streets of the city of Vicksburg. There is a hill or sharp declivity on Klein street, extending about 200 or 250 feet in a westerly direction to the right of way of appellee, which formerly extended to Levee street. After the construction of the shops, yards, and tracks of appellee, the public continued to use Klein street as a way for pedestrians from the top of the hill down to the right of way of appellee at or near the foot of the hill. At the foot of the hill where Klein street intersected the right of way of appellee, there was a pathway or footway running north on the right of way of appellee, which was used by those pedestrians who came down the hill on Klein street, as above stated, and who desired to go to the stores, warehouses, and places of business on Levee street. This route was generally used by the public in going from Klein street north to Levee street, from the time the shops, yards, and tracks of appellee were built and constructed, until after the injury complained of by appellant. About 15 years prior to the injury to appellant, the citizens of Vicksburg in the neighborhood of Klein street petitioned the board of mayor and aldermen to erect a flight of steps at or near the top of the hill or declivity on Klein street going down to the right of way of appellee. In response to that petition, the city of Vicksburg erected in Klein street a flight of 15 steps, which was east of the right of way of appellee, and the place where appellant was injured. At that time there was a gradual slope down the hill on Klein street that led directly from the flight of steps erected by the city to the pathway on the right of way of appellee which ran north from Klein street and which had been used by the public for many years in going from Klein street to Levee street, and to other portions of the city north of Klein street. Some time subsequent to the building of the flight of steps by the city of Vicksburg on Klein street on the hill, appellee made an excavation up to the line of its right of way on Klein street for the purpose of laying tracks, thereby leaving a perpendicular embankment at the intersection of Klein street and its right of way, about 4½ feet high. After making this excavation, which left a perpendicular embankment at the intersection of Klein street and its right of way, appellee erected a flight of wooden steps 6 feet wide leading over the perpendicular embankment caused by the excavation to the pathway or passageway on its right of way going north to Levee street, which had been previously used by the public for that purpose for many years.

"After appellee made the excavation on Klein street, and erected the flight of steps 'on which appellant was hurt and injured,' leading from Klein street to the pathway or passageway on its right of way going north to Levee street, the public generally continued to use Klein street and the flight of steps erected by the city thereon, and the flight of steps erected by appellee at the foot of Klein street, and on its right of way, and connecting Klein street with the pathway or passageway on the right of way of appellee going north from Klein street, in order to reach Levee street, for many years prior to the injury of appellant, as it had always done prior to the excavation of its right of way and the erection of the steps over the embankment caused thereby, by appellee. The footpath or passageway leading from the flight of steps erected by appellee on its right of way at the foot of Klein street, and going north to Levee street, was east of the railroad track in the yard of appellee, and, in order to use this pathway or passageway, pedestrians were not compelled to cross any of the tracks of appellee, or to assume any dangerous risks whatever in going to Levee street or that part of the city north of Klein street.

"The evidence shows that Klein street and the two flights of steps, one erected by the city of Vicksburg on Klein street, and the other constructed by appellee on its right of way at the foot of Klein street, were generally used by the public in going from Klein street north to Levee street, as was also the pathway or passageway leading from the steps constructed by appellee on its right of way at the foot of Klein street and leading north to Levee street, and had been so used by the public for that purpose for many years, and that appellee during all the years it had been so used by the public had made no objection, or given any notice to the public not to use either the steps on its right of way or the way leading therefrom to Levee street.

"The testimony further shows that the flight of steps erected by appellee on its right of way at the foot of Klein street about 15 years prior to the injury of appellant thereon had been repaired and maintained by appellee during all the years. That Ida Allen, the appellant, moved into the neighborhood near Klein street about two weeks before her injury, and desiring to go to Leofoldt's store on Levee street, north of Klein street, she went to Klein street, which was the usual way and her most direct route, thence down Klein street to the flight of steps erected by the city of Vicksburg, and down this flight of steps erected by the city to the flight of steps at the foot of Klein street erected, repaired, and maintained on its right of way by appellee, intending to proceed down this flight of steps to the passageway leading therefrom on the right of way of appellee, north to Levee street, which was the usual way the public traveled in going to Levee street, and the way that she had seen others go; and, while going down the flight of steps erected and maintained by appellee on its right of way at the foot of Klein street, one of the steps being out of place thereon, she fell with great force and violence, receiving from the fall serious and permanent injuries."

[1] If there is nothing in the evidence as a whole to warrant a jury in finding that plaintiff was induced to go upon the steps by the invitation or procurement, express or implied, the railroad company is not liable for her injuries.

This question has come before the courts in many cases of varying facts, and there seems to be no difference in the decisions upon the rule of law controlling the subject; but the facts of each case determine the lia-

bility of the person or corporation charged with negligence.

"The bare permission of the owner of private ground to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly or impliedly invites, induces, or leads them to come upon his premises, he is liable in damages to them (they using due care) for injuries occasioned by the unsafe condition of the premises, if such condition was the result of his failure to use ordinary care to prevent it."

[2] This excerpt from the opinion of the Supreme Court of Arkansas, in *St. L., I. M. & S. R. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789, states the governing rule for this case in plain and comprehensive terms. One may invite another to his home by asking him to come to see him at some indefinite time. One may influence or induce another to enter his premises by providing an easy and convenient pathway across the premises which seems to be intended for use of the public in going from one point to another, and which provides a near cut and is constantly used by the general public as a public thoroughfare.

This court, in *Lepnick v. Gaddis*, 72 Miss. 200, 16 South. 213, 26 L. R. A. 686, 48 Am. St. Rep. 547, thus defines "implied invitation":

"The phrase, 'implied invitation,' in its real value and significance, as derived from its application in the adjudged cases, imports knowledge by the defendant of the probable use by the plaintiff of the defendant's property so situated and conditioned as to be open to, and likely to be subjected to, such use."

[3] The city of Vicksburg seems to have assumed, without question on the part of appellee, the right to provide a thoroughfare for pedestrians at the head of this incline, and it seems to be justly inferable that the railroad company recognized that the general public would use this way as a matter of supposed right, and this inference is deducible from the company's act in restoring its end of the way by erecting the steps after it had cut away its end of the incline.

According to the record, the city assumed jurisdiction over the eastern part of the path which led down to the foot of the incline, and from thence into and through the private yards of the company. When it became necessary for the company to destroy the western terminus of the hill path, it seems to have believed that it was under obligations to provide another way for those who desired to use the path, and so it immediately put in the steps. It may be true that the company was under no duty to put in the steps; but it nevertheless did put them in, and we think the public had a right to take its acts as an invitation to the public to use the steps. Here was a public pathway, if constant, long-continued, and unquestioned use can establish a right. What did the erection of the steps imply, under the circumstances? The irresistible conclusion is that

this was an implied invitation to continue the use of the way.

The jury were warranted in finding that the situation, created by the defendant, was such that would import "knowledge by the defendant of the probable use by the plaintiff of the defendant's property so situated and conditioned as to be open to, and likely to be subject to, such use." *Lepnick v. Gaddis*, supra.

This being our view of the record, the peremptory instruction should not have been given.

Reversed and remanded.

D. ROSENBAUM'S SONS et al. v. DAVIS & ANDREWS CO. et al. (No. 17305.)

(Supreme Court of Mississippi, Division B. April 17, 1916.)

1. ATTACHMENT \S 279—WRONGFUL ATTACHMENT—ATTORNEY'S FEES.

Though a suit begun by attachment in chancery was maliciously brought without reasonable or probable cause, attorney's fees cannot be awarded in favor of the defendant on dismissal of the bill, not being contemplated by the statute and being recoverable as damages only after judgment in an action for malicious prosecution.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 983-985; Dec. Dig. \S 279.]

2. SALES \S 161(1)—RIGHTS OF PURCHASER—DELIVERY OF GRAIN.

Where a shipper consigned grain to its order attaching a draft to the bill of lading and directing a bank to which the same was sent not to deliver the bill of lading until the draft was paid, the bank became the shipper's agent, and, where the grain was badly damaged when delivered, the shipper did not fulfill its obligation of delivering sound and merchantable grain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. \S 161(1).]

3. SALES \S 425 — REMEDIES OF SELLER — RIGHT TO RETAIN PROPERTY.

Where grain delivered does not fulfill the implied warranty that it should be sound and merchantable, the buyer may retain it and recover damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. \S 425.]

4. SALES \S 437(1)—ACTION—PLEADING.

In an action against a seller for breach of an implied warranty, an answer admitting the sale of the grain, but denying any implied warranty and denying that the grain delivered was not good and merchantable, does not raise the issue that the contract was made with a broker of limited authority and that the minds of the parties did not meet.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248-1250; Dec. Dig. \S 437(1).]

5. SALES \S 272 — IMPLIED WARRANTIES — SALE TO RETAIL MERCHANT.

Where grain is sold to a retail merchant by a wholesaler, there is an implied warranty that it is good and merchantable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 747; Dec. Dig. \S 272.]

6. SALES \S 17—CONTRACTS—CONSTRUCTION.

Where a retail merchant purchased a carload of grain, the contract being made in his name and the draft being drawn on him, the

fact that others were interested in the purchase, and that they paid a proportionate share of the purchase price, does not show that there was no contract between the seller and the retail merchant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 26-80; Dec. Dig. ¶17.]

7. SALES ¶179(4)—ACCEPTANCE—WHAT CONSTITUTES.

Where a railroad company allowed complainants to open a car and take the grain before they had paid the draft attached and received a bill of lading, but the condition of the grain was not discovered until after it had been removed, the indulgence on the part of the railroad company did not constitute an acceptance by complainants, precluding them from recovering damages because the grain was unmerchantable; it being understood by the railroad company when the grain was removed that complainants would pay the draft, procure the bill of lading, and satisfy the freight charges.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 460-463; Dec. Dig. ¶179(4).]

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Jr., Chancellor.

Suit by D. Rosenbaum's Sons and others against the Davis & Andrews Company and others, begun by attachment. From a decree for defendants, complainants appeal. Reversed and remanded.

Easterling & Bailey, of Meridian, for appellants. Amis & Dunn, of Meridian, for appellees.

STEVENS, J. Appellants, as complainants in the court below, sued out an attachment in chancery against appellee, a nonresident corporation doing a milling and wholesale grain business in the city of Memphis, Tenn. It appears that one W. S. McCallum, a broker in the city of Meridian, received certain quotations by wire from Davis & Andrews Company as follows: "Three cars each natural chops and corn \$1.12, \$.77, if kiln dried \$1.17, \$.81." Mr. McCallum upon receipt of this telegram undertook to sell a carload of the chops and corn and offered to appellants 100 sacks of chops at \$1.12 and 75 sacks of corn at 77 cents per bushel. To make out a carload, Mr. Wells, a merchant of Meridian, agreed to buy 100 sacks of chops at \$1.12 per sack, and Mr. McCallum himself agreed to take 100 sacks of chops and 75 sacks of corn at the price named. It was agreed between Wells, McCallum, and appellants that the carload thus agreed to be taken should be shipped direct to appellants. The broker wired in the order as follows: "Ship Rosenbaum 300 sacks chops \$1.12, 75 sacks corn 77 cents. Rush please." On receipt of this telegram, Davis & Andrews Company consigned the car of chops and corn to its own order at Meridian and received from the railroad company "shipper's order notify" bill of lading. Appellee attached this bill of lading to a sight draft upon appellants and turned the sight draft and lading over to the Bank of Commerce & Trust Company of Memphis for collection.

The Memphis bank forwarded the draft to a bank in Meridian, which subsequently collected the proceeds of the draft and turned the bill of lading over to appellants. It is the proceeds of this draft in the hands of the Meridian bank which appellants by their attachment impounded and seek to hold liable for damages alleged to have been sustained by appellants on account of rotten, unsound, and unmerchantable grain covered by the shipment in question. It appears that, when the shipment arrived in Meridian, appellants were notified and, without first paying the draft, they opened the car and proceeded to unload the grain. McCallum and Wells were also notified and, in unloading the car, received their pro rata of the cargo. After the chops and corn had been unloaded and placed in the store of appellants, they claim to have noticed that the grain was damp and decaying from overheating, and on further inspecting they notified the broker, and he in turn notified appellee. After the shipment was unloaded, appellants collected from Mr. Wells and from Mr. McCallum their part of the purchase price and then went to the bank and paid the sight draft in full and received the bill of lading. Several days elapsed between the time of the arrival and the time appellee actually received notice from its agent of the complaint or alleged damages. It appears, however, that the broker on examining the shipment admitted the fact that the shipment was damaged, and the evidence afterwards introduced by appellants on the trial of this case sustained the allegations of the bill that the grain was in fact damp, unsound, and unmerchantable. The only evidence offered by appellee to contradict this testimony was the evidence of Mr. Davis, the secretary and treasurer of appellee company, who, by deposition, testified that the grain was checked out by him in Memphis, and at that time was in sound condition. Mr. Wells also made complaint in reference to his portion of the shipment, and he, as well as appellants in an effort to liquidate their damages, advertised the grain which they had received to be sold at public auction at the storehouse of each on April 1, 1912, and at this auction sale appellants purchased themselves the damaged grain at a price of 50 cents per sack for the chops and 20 cents per bushel for the corn. Mr. Wells purchased 46 sacks of his chops at his own auction sale at 55 cents per sack.

The bill of complaint filed by appellants seeks recovery, not only for the corn and chops purchased by them for their own store, but also for the shipment received through them by Mr. Wells. The bill was answered by appellee and the cause set down for hearing on bill, answer, and proof. The chancellor dismissed the bill, and in his decree taxed appellants not only with the costs of

court, but with an attorney's fee allowed the defendant in employing solicitors to defend the suit. From this decree, appellants prosecute this appeal.

[1] Regardless of any other question in the case, the action of the trial court in awarding solicitors' fees constitutes to that extent error. *Bonds v. Garvey*, 87 Miss. 335, 39 South. 492. Our statute authorizing this proceeding makes no provision for an award of attorney's fee and the allowance of this fee cannot be justified under the argument of counsel for appellee that this suit was maliciously brought without reasonable or probable cause. Even if the proof justified the serious charges of appellee, the damages, if any, would only be recoverable in a separate action based upon a decree terminating in its favor the present suit, and after proper pleadings and proof showing malicious prosecution of the present action.

[2, 3] But on the whole record we are driven to the conclusion that the chancellor is manifestly wrong. It is the theory of the bill that appellants, a mercantile establishment, had a right to expect from appellee sound and merchantable grain. Appellee at least undertook to deliver "natural chops and corn" in accordance with its quotation. The testimony on behalf of appellants abundantly shows that it had received grain, a part of which was wet, rotten, and worthless, and a part of which was slightly damaged. It cannot be said that this testimony, delivered by reputable witnesses in Meridian, is contradicted. It is true that Mr. Davis, an officer of the appellee company, and a Mr. Betts, foreman of the grain elevator and warehouse, gave testimony of the sound condition of the shipment when it was loaded. This grain, however, was consigned by appellee to its own order at Meridian, and the bank was constituted the agent of the shipment in making delivery. If the proof shows the grain was badly damaged when it was delivered, then appellee has not discharged its obligation of delivering sound and merchantable grain, and, when appellants received unsound and unmerchantable grain, they had a right to retain the shipment and sue appellee for consequent damages.

[4, 5] It is contended by counsel for appellee that McCallum was an independent broker with limited authority to make contracts binding appellee, and that Rosenbaum and Wells testified that McCallum sold them kiln dried chops and corn, the price for which was in excess of that for natural chops and corn, and that therefore the minds of the parties never met, and there is no valid and binding contracts between appellants and appellee. The pleadings and proof, in our judgment, do not sustain this argument. The answer admits the sale of the carload of chops and corn to appellants, but denies that appellee contracted to furnish good, sound, and merchantable chops and corn, and de-

nies that it in fact delivered corn and chops that were not good and not merchantable. The answer does aver that W. S. McCallum was a broker with limited authority and instructions. Conceding that either Rosenbaum or Wells, or both of them, expected to receive kiln dried chops, the complaint here is not on account of the chops not being kiln dried, but on account of their being rotten and unmerchantable. We think that the authorities fully sustain the proposition of law that appellee in this case as a vendor was under an implied duty of furnishing to merchants contracting with it grain that was sufficiently sound to be merchantable. It is not the case of a merchant selling to his customer grain purely for feeding animals. It is a case of a retail merchant dealing with a wholesale concern in the business of shipping and furnishing grain for merchantable purposes.

[6] Appellants certainly had a contract with appellee for the shipment of that portion of the grain which appellants themselves agreed to take. McCallum was a broker receiving private quotations from his house. He undertook to sell as an agent representing appellee. Appellee accepted the order and undertook to fill it. Its delivery was made direct to appellants, and its sight draft was upon appellants. It dealt directly and immediately with appellants, and it is idle to say that no contract in fact exists.

We do not, however, hold that appellant may recover damages for that portion of the grain delivered to Mr. Wells. Inasmuch as the case must be remanded for a new trial, we deem it proper only to suggest that probably Mr. Wells, in agreeing to take a portion of the grain, was a joint purchaser with appellants, and for any damages sustained by him he must institute his own suit and that against appellee.

The testimony shows that Wells has not demanded any damages from appellants, and that appellants have not paid Wells anything on account of his portion of the shipment, and, under any view of the contract, appellants have suffered no damages growing out of the shipment delivered Mr. Wells.

We are not prepared to say that appellants had a right to purchase the damaged grain at their own auction sale and thereby liquidate or fix the amount of their damages. The fact of this sale might be treated as a circumstance to be considered by the chancellor in arriving at the proper measure of damages. For the purposes of this opinion, it is really unnecessary for us to pass on this question.

[7] There is no force in the contention that appellants, by taking possession of the car and unloading the corn before they paid the sight draft, thereby accepted the shipment and estopped themselves from complaint. In the first place, the premature unloading of the car was made possible through the indulgence or grace of the railroad com-

pany, which had a right to expect and receive from appellants, not only the freight on the shipment, but the bill of lading then in the hands of the bank. In the next place, the proof shows that the damage was not fully detected until after the grain had been unloaded and placed in appellants' store.

The decree of the court below will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

HOWARD v. KELLY, Sheriff, et al.
(No. 17698.)

(Supreme Court of Mississippi, Division B.
April 17, 1916.)

1. MARRIAGE §40(9) — CEREMONIAL MARRIAGE—PRESUMPTION OF VALIDITY.

Where a husband contracts a ceremonial marriage before his first wife has been absent seven years, the presumption in favor of the validity of the second marriage overcomes the presumption that the first wife was still alive when it was contracted.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 67; Dec. Dig. §40(9).]

2. MARRIAGE §40(6) — CEREMONIAL MARRIAGE—PRESUMPTION—BURDEN OF PROOF.

Where a duly solemnized second marriage is shown, the presumption arises that the first wife was either divorced or dead; the burden of proof being upon the person claiming rights inconsistent with such presumption.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 64; Dec. Dig. §40(6).]

3. MARRIAGE §13—COMMON-LAW MARRIAGE—VALIDITY.

Prior to the adoption of the Code of 1892, a common-law marriage was recognized as lawful and binding as one contracted pursuant to license and the usual ceremony.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 4; Dec. Dig. §13.]

4. MARRIAGE §40(1) — COMMON-LAW MARRIAGE—PRESUMPTION OF VALIDITY.

Every presumption will be indulged in favor of the legality of a common-law marriage in the same way and to the same extent as the law indulges them in favor of a ceremonial marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 58; Dec. Dig. §40(1).]

5. MARRIAGE §40(4) — COMMON-LAW MARRIAGE—MERETRICIOUS RELATIONSHIP—PRESUMPTION OF CONTINUANCE.

A meretricious relationship between a man and woman is presumed to have continued until the adulterous cohabitation changed from an unlawful to a lawful relationship.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 61, 62; Dec. Dig. §40(4).]

6. MARRIAGE §20(1) — COMMON-LAW MARRIAGE—MERETRICIOUS RELATIONSHIP.

Where a man and woman living in adultery changed the unlawful character of their cohabitation by public announcement that they are man and wife and assumed all the burdens incident to matrimony, especially of maintaining a home and of rearing their children, there was a valid common-law marriage between them.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 12, 14; Dec. Dig. §20(1).]

7. DEATH §101 — WIDOW'S ACTION FOR DEATH—RIGHT TO PROCEEDS.

Where the widow of a railroad employé killed in service, suing for his death under Code 1906, § 721, as his lawful widow, asked for the usual instruction that she was entitled to recover such damages as the jury might determine, "taking into consideration all the damages to the decedent and all damages of every kind to any and all parties interested in this suit," she conceded the legitimacy of the children of decedent by his former marriage by seeking to enlarge her recovery on their account, and could not deny their right to an undivided interest in the proceeds of the suit on the ground that they were illegitimate; their right to the fund being based on their judgment against the road, and not on the judgment alone recovered by the widow.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 132-140; Dec. Dig. §101.]

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Bill for interpleader by R. M. Kelly, Sheriff, against Allena Howard and others. From the decree, the named defendant appeals. Affirmed.

W. C. Wells, of Jackson, and Theo. McKnight, of Vicksburg, for appellant. Mayes, Wells, May & Sanders, of Jackson, and Brunini, Hirsch & Griffith, of Vicksburg, for appellees.

STEVENS, J. This is a second appearance of this case in the Supreme Court, the former appeal having been prosecuted from a decree sustaining a demurrer to the bill of interpleader. The case, as made by the pleadings, was fully stated in the opinion as reported in 98 Miss. 562, 54 South. 10, Ann. Cas. 1913B, 229, reference to which is here made for a statement of the material facts. After the cause was reversed and remanded the present controversy arose over the distribution of the fund. The present appeal challenges the correctness of the decree of the lower court finding that Henrietta, Robert, and Samuel Howard are the legitimate children of Henry Howard, deceased, for whose death through the negligence of the railroad company recovery was had under section 721 of the present Code. The proof shows that Henry Howard was first married to Sarah Riley at Port Gibson in February, 1891; that he lived with his wife only a few days, when he left her and went to Leland, Miss. A few days afterwards Sarah also left Port Gibson with the purpose of following her husband, but she has never been seen nor heard of since. In the fall of the year 1891 Henry had a regular job as fireman of the Yazoo & Mississippi Valley Railroad Company, was making Leland his home or headquarters, and there and then began what appears at first to be a meretricious relationship with one Fannie Banks. Shortly afterwards, however, Henry Howard and Fannie Banks proclaimed themselves to be married, and in the spring of 1892 moved to Rolling Fork, where they openly lived together as man and wife, and where they

were regarded by the community as sustaining the relationship of husband and wife. From the early part of 1891 to the year 1903 there is abundant evidence that they lived together as man and wife; that Henry opened accounts with merchants for the benefit of his family; that three living children, whose interests are involved in this litigation, were born to them; that one of their children died and was buried at the expense of Henry; that the services of physicians were engaged by Henry from time to time for his reputed wife and children; and that in all respects a home was maintained with Henry as the head of the family and Fannie as the wife and mother until the latter's death in 1903. Some time after the death of Fannie Howard Henry began to live with Allena Howard, the plaintiff herein, and afterwards married Allena in due form. In November, 1908, Henry was killed in a railroad accident, and for his alleged wrongful death Allena Howard instituted the suit against the railroad company, which resulted in a judgment for \$7,500, the proceeds of which was paid over to R. M. Kelly, sheriff of Warren county, who filed his bill of interpleader to have the chancery court to determine the conflicting claims to the fund. We are now called upon to determine whether the action of the chancellor in finding that there was a marriage between Henry Howard and Fannie Banks was warranted by the testimony. There is no proof of a ceremonial marriage between Henry and Fannie. Their children are compelled to rely upon a common-law marriage.

[1, 2] Counsel for appellant concede that, if the proof showed a ceremonial marriage, one "solemnized according to the forms of law" between Henry Howard and Fannie Banks that every presumption would be indulged in favor of its validity, and that this presumption would overcome the presumption of law that Sarah Riley the first wife, was still alive, although she had not been absent seven years at the time Henry first began cohabiting with Fannie Banks. If a ceremonial marriage had been shown between Henry and Fannie, then the question would be put at rest by many previous holdings of this court. *Spears v. Burton*, 31 Miss. 555; *Hull v. Rawls*, 27 Miss. 471; *Wilkie v. Collins*, 48 Miss. 496; *Railway Co. v. Beardsley*, 79 Miss. 417, 30 South. 660, 89 Am. St. Rep. 660; *Sullivan v. Grand Lodge*, 97 Miss. 218, 52 South. 360; *Bennett v. State*, 100 Miss. 684, 56 South. 780. The proposition is settled beyond doubt that, where a second marriage, duly solemnized, is shown, the presumption arises that the first spouse has been either divorced or is dead, and that the burden of proof is upon him who claims rights inconsistent with such presumption. The question that now confronts the court is whether this presumption arises in favor of a common-law marriage or must it be confined to what might be termed statutory or ceremonial marriages contracted and solemnized according to the

forms expressly prescribed by law. In connection with this question is the further inquiry, viz.: In the event the union claimed to be a common-law marriage was meretricious in its beginning, is the burden upon him who relies upon the common-law marriage to show affirmatively that the impediment to a lawful marriage has been removed, or in other words, can the presumption of innocence under such circumstances still arise in such way as to overcome and overthrow the presumption that the first spouse yet lives? This exact point has not been decided by our court.

[3, 4] In every expression of our own court in the cases mentioned the court refers to the second marriage as one solemnized according to the forms of law or solemnized in due form. It cannot be doubted, however, prior to the adoption of the Code of 1892, that a common-law marriage was recognized as lawful and binding as one contracted in pursuance of a license and the usual ceremony. We are persuaded that every presumption should then be indulged in favor of the legality of a union thus shown in the same way and to the same extent as the law indulges in favor of a ceremonial marriage. The contract of marriage is one and the essential thing; the ceremony giving utterance to and public evidence of the contract is an incident. In making this declaration we do not wish to be understood as discounting the wisdom or propriety of the usual ceremonies by which marriages are solemnized. We are not to be understood either as interpreting the meaning of our present statute requiring licenses to be issued. We simply assent to the holding repeatedly announced, not only by our own court, but by the courts of other jurisdictions, that the law favors marriage and indulges the presumption that a marriage once shown is legal until the contrary is established by competent testimony. The law encourages marriage, and the courts have repeatedly announced that the law will presume in favor of marriage and legitimacy, and not concubinage and bastardy. This presumption of innocence is a strong presumption, and throws the protecting arms of the law around innocent children, the issue of a marriage clearly established, and casts a burden upon him who would take away the good name of a child or defeat its property rights on the ground and charge of illegitimacy. In the instant case the proof abundantly shows the common-law marriage between Henry Howard and Fannie Banks. The fact of this relationship so clearly exists that the reputable white citizens of Rolling Fork, including the family physician who had known Henry from his boyhood days, never had occasion to question the legality of the union. It appears that the burdens and responsibility which marriage casts upon the head of the family were patiently and continuously borne by Henry until the death of his wife, Fannie, in 1903. It will be remembered that no wit-

ness undertook to say that Sarah Riley was alive either at the time Henry and Fannie lived together as husband and wife in Rolling Fork or at the time of the institution of the present litigation, and Sarah, the first wife, has not been heard of now these 20-odd years. This fact, we think, strengthens the presumption in favor of the legality of the second marriage.

[5, 6] But it is contended that this second union or common-law marriage should not be upheld because the cohabitation of Henry and Fannie was meretricious in its inception. It may be conceded that this meretricious relationship is presumed to have continued until this cohabitation changed from an unlawful to a lawful relationship, or, in other words, until the cohabitation became, in the eye of the law, matrimonial. The proof, however, is overwhelming that at some period of time either before or just after the parties moved to Rolling Fork the relationship was open and to all intents and purposes lawful. We do not think the court is called upon to determine just the day or the month when it could safely be said the marriage existed. The common law of the states generally assumes that a contract "per verba de presenti or per verba de futuro cum copula" constitutes a complete marriage. A common-law marriage is generally held to be good unless the statute expressly renders it void. We think the proof justifies the conclusion that Henry and Fannie passed as husband and wife before the Code of 1892 became effective. In Scotland a common-law marriage is generally determined by "habit and repute." If this be the test, then the issue of the union between Henry and Fannie must be protected. It is said by the Illinois court, in the case of *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322, that the unlawful character of the cohabitation may be shown by the proof to have changed and to have become "matrimonial in its intent and character, which intent and character may be shown by direct or circumstantial proof." This question was dealt with also in the case of *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568. The court, through Sanborn, J., says:

"The true rule and the great weight of authority is that, inasmuch as the law itself and all its presumptions deprecate illegal, and favor lawful relationships, slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and that proof of its time or place is not indispensable."

The Supreme Court of Georgia, in the case of *Drawdy v. Heesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190, announces that:

"The presumption that cohabitation shown to have been illicit in its inception so continued may be overcome by direct or circumstantial evidence that during the cohabitation the parties agreed to become husband and wife."

The same result is announced in the note to *Chamberland v. Chamberland*, 6 Ann. Cas. 486, where the rule is stated as follows:

"It has been held that, although cohabitation between a man and woman is meretricious in the beginning, a valid marriage may be shown by proof that the parties sustained the relation of husband and wife after the impediment to their marriage was removed, and that it is not absolutely essential to prove a ceremonial marriage."

We conclude, therefore, that the unlawful character of the cohabitation is shown by the proof to have changed by the public announcement of the parties that they were man and wife and the assumption of all the burdens incident to matrimony, especially the burdens of maintaining a home and of bearing, caring for, and rearing the very children whose interests were put in jeopardy by the contention of the widow Allena Howard in the present litigation.

[7] There is another question, the answer to which must lead to an affirmance of this case. The action against the railroad company for the death of Henry Howard was instituted by Allena as his lawful widow under section 721, Code of 1906. In the former opinion of the court in this case this court expressly held that:

The suit in question "fixes the interest of all parties, and nothing that the court can do can eliminate their interest. So far as the widow and children are concerned, they derive their title from the same source."

The court further said:

"If Henrietta, Robert, and Sam Howard are children of Henry Howard, deceased, as they claim to be, they were by law plaintiffs in the suit of Allena Howard against the Yazoo & Mississippi Valley Railroad Company just as though their names appeared in the declaration."

It appears that on the trial of the damage suit the widow, as plaintiff, asked for the usual instruction that the plaintiff was entitled to recover such damages as the jury might determine, "taking into consideration all the damages to the decedent and all damages of every kind to any and all parties interested in this suit." In other words, the widow, in prosecuting the damage suit, conceded the legitimacy of the children and sought to enlarge the recovery on that account. Testimony of the existence and ages of these children was given upon the trial, and the fact that the decedent left children is bound to have influenced the jury in their award. The plaintiff was expressly authorized to prosecute the suit in her own name for the benefit of all parties in interest. We think she has in her damage suit treated the children as coplaintiffs, and, this being so, the children, as coplaintiffs, should in equity be regarded as having title to an undivided interest in the proceeds. Their right to the fund is based upon their judgment against the railroad company, and not the judgment alone recovered by Allena Howard. It was competent for the railroad company in that suit to challenge their interest or their right to recover anything. This the railroad company did not undertake to do. If the widow therefore in that action conceded the interests of the minors, and the railroad did

not contest the legitimacy of the children, and the judgment was, in fact, enlarged on account of the decedent leaving children, then certainly the widow should not now be allowed to reverse positions and claim all the fruits of the previous litigation. Let us suppose that the widow, in filing her declaration, has expressly joined the names of the minors as coplaintiffs by her as next friend, and the recovery was had on the face of the record for all parties plaintiff, could she then be heard to claim the whole judgment? We think not. By the proof and the presentation of the case to the jury the result is the same as if the names of these minors had been written on the face of the declaration as coplaintiffs.

The decree of the chancellor, in our judgment, is eminently correct, and should be, and is hereby, affirmed.

Affirmed.

BARR v. FOSTER. (No. 17918.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Pontotoc County; T. L. Lamb, Chancellor.

Action between Elizabeth A. Barr and Mrs. Florence Foster. From the judgment, Elizabeth A. Barr appeals. Dismissed.

Fontaine & Fontaine, of Pontotoc, for appellant. Mitchell & Mitchell, of Pontotoc, for appellee.

PER CURIAM. Appeal dismissed.

NEW ORLEANS, M. & C. R. CO. v. WOOD, Sheriff, et al. (No. 17272.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Pontotoc County; J. Q. Robins, Chancellor.

Action between the New Orleans, Mobile & Chicago Railroad Company and W. H. Wood, Sheriff, and others. From the judgment, the Railroad Company appeals. Affirmed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. Mitchell & Roberson, of Pontotoc, for appellees.

PER CURIAM. Affirmed.

EASTERLING v. EASTERLING et al. (No. 17734.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Action between Thos. S. Easterling and Mrs. Seletia Easterling and others. From the judgment, Thos. S. Easterling appeals. Affirmed.

Wyatt Easterling, of Meridian, for appellant. Geo. C. Tann, of Hickory, for appellees.

PER CURIAM. Affirmed.

MOORE BROS. GROCERY CO. v. McDANIEL et al. (No. 18016.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Forrest County; J. M. Stevens, Chancellor.

Action between the Moore Bros. Grocery Company and W. H. McDaniel and others. From the judgment, the Grocery Company appeals. Affirmed.

T. C. Hannah and Jno. T. Haney, both of Hattiesburg, for appellant. J. C. Ross, of Gulfport, and Tally & Mayson, of Hattiesburg, for appellees.

PER CURIAM. Affirmed.

RISER v. HANSEN. (No. 17499.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Hinds County; E. L. Brien, Special Judge.

Action between I. T. Riser and O. C. Hansen, receiver. From the judgment, Riser appeals. Affirmed.

W. C. Wells, and Green & Green, all of Jackson, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

NEW ORLEANS, M. & C. R. CO. v. CARTER et al. (No. 17700.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Special Judge.

Action between the New Orleans, Mobile & Chicago Railroad Company and E. H. and E. L. Carter. From the judgment, the Railroad Company appeals. Affirmed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. McLaurin & Armistead, of Vicksburg, for appellees.

PER CURIAM. Affirmed.

WALL v. NAIL. (No. 17701.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, De Soto County; N. A. Taylor, Judge.

Action between Mrs. Mina B. Wall and Van W. Nail. From the judgment, Mrs. Wall appeals. Affirmed.

Tipton & Wall, of Hernando, for appellant. Holmes & Logan, of Hernando, for appellee.

PER CURIAM. Affirmed.

EDWARDS v. CITY OF MERIDIAN. (No. 18779.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Lauderdale County; G. O. Tann, Chancellor.

Action between Chestine Edwards and the City of Meridian. From the judgment, Chestine Edwards appeals. Dismissed.

Cochran & McCants, of Meridian, for appellant. Amis & Dunn, of Meridian, for appellee.

PER CURIAM. Appeal dismissed.

WESTERN UNION TELEGRAPH CO. v. DOWDLE. (No. 17872.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

Action between the Western Union Telegraph Company and Miss Sammie Dowdle. From the judgment, the Telegraph Company appeals. Affirmed.

Sykes & Sykes, of Aberdeen, for appellant. Paine & Paine, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

ADMORE v. MERIDIAN LIGHT & RY. CO. (No. 17697.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between Jim Admore and the Meridian Light & Railway Company. From the judgment, Admore appeals. Affirmed.

Fewell & Cameron, of Meridian, for appellant. Baskin & Wilbourn, of Meridian, for appellee.

PER CURIAM. Affirmed.

BOGUE HASTY DRAINAGE DIST. v. BOLIVAR COUNTY. (No. 17590.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Bolivar County; W. D. Cutrer, Special Judge.

Action between the Bogue Hasty Drainage District and Bolivar County. From the judgment, the Drainage District appeals. Affirmed.

Sillers & Owen, of Cleveland, for appellant. Green & Green, of Jackson, and Fontaine Jones, of Rosedale, for appellee.

PER CURIAM. Affirmed.

THAMES v. THAMES. (No. 17732.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Action between John Thames and Ora Thames. From the judgment, John Thames appeals. Affirmed.

W. I. Munn, of Newton, for appellant. Day & Day, of Decatur, for appellee.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. HARRIS.

(No. 17492.)

(Supreme Court of Mississippi. April 17, 1916.)

Appeal from Circuit Court, Copiah County; D. M. Miller, Judge.

Action between the Illinois Central Railroad Company and R. R. Harris. From the judgment, the Railroad Company appeals. Affirmed.

H. J. Wilson, of Hazlehurst, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

WALTON v. STATE. (No. 18625.)

(Supreme Court of Mississippi. April 17, 1916.)

In Banc. Appeal from Circuit Court, Harrison County; J. H. Neville, Judge.

Tom Walton was convicted of carrying concealed weapons, and appeals. Affirmed.

Mize & Mize, of Gulfport, for appellant. Lamar F. Easterling, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

COOK and POTTER, JJ., dissenting.

(189 La.)

No. 20407.

BURNECKE v. O'NEAL et al.

(Supreme Court of Louisiana. March 6, 1916.)

On Application for Rehearing, April 3, 1916.)

(Syllabus by the Court.)

ASSAULT AND BATTERY §2—CIVIL LIABILITY.

Damages will be allowed where the preponderance of evidence shows that defendant destroyed the sight of one of plaintiff's eyes by a blow of the fist, and that there was not provocation for the assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 1; Dec. Dig. §2.]

O'Niell, J., dissenting.

Appeal from Second Judicial District Court, Parish of Bossier; J. N. Sandlin, Judge.

Action by A. C. Burnecke against J. B. O'Neal and another. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Murff & Roberts, of Shreveport, for appellant. Hall & Jack, of Shreveport, and Joannes Smith, of Benton, for appellees.

SOMMERVILLE, J. Plaintiff sues defendants, husband and wife, for damages in the sum of \$6,000, for willfully and maliciously beating him in the face and eyes; and for the loss of the sight of his left eye.

Defendant O'Neal answers that plaintiff provoked the attack upon him by calling him a damned liar in the presence of his (defendant's) wife. He admits having shoved plaintiff down twice, and having beaten him once with his fist, all on the spur of the moment of this sudden provocation. Mrs. O'Neal did not answer.

There was judgment in favor of the defendant O'Neal, and plaintiff has appealed.

The trial judge, in his reasons for judgment, says that:

The "plaintiff has lost the use of his eye, and that it is a permanent loss cannot be denied. * * * As to who provoked the difficulty, or what caused the injury to the eye, will to a great extent have to be shown by the evidence of the plaintiff. The question then arises: Is he worthy of belief? The record shows that he has been convicted of the crime of obtaining money under false pretenses, and quite a number of witnesses testified that his character is such that he is not worthy of belief. * * * Taking into consideration the evidence relative to the character of the plaintiff as to his truthfulness, and the number of difficulties he has engaged in, it is easy to believe the statement of the defendant that the plaintiff started the row

in which he received the blow. Before the plaintiff would be entitled to recover it would be necessary that he prove by a preponderance of the evidence that the defendant caused the injury complained of, and also that he (the plaintiff) was free from fault in provoking the difficulty; this the court does not think he has done."

There were but two witnesses to the fight, other than the participants. The wife of the defendant, who witnessed it, who did not testify; and the only disinterested witness was a carpenter in the employ of the defendant at the time of the difficulty. He witnessed the entire affair, except for about a minute when he left the store of the defendant where the fight took place.

The testimony of the plaintiff and the defendant agrees as to the origin of the difficulty. It appears that they had had some money transaction, amounting to about \$100, and that plaintiff was in the store of defendant to pay the last \$5.50 due on that debt. At that time, defendant charged plaintiff with having violated a contract between them not to open another establishment like the one which he (the defendant) had bought from him, or to work for any other person in a similar establishment within a certain period. Plaintiff denied the accusation, and defendant insisted that he had violated the contract and threatened him (the plaintiff) saying:

"I can prove you are the biggest rascal in the whole country. * * * I had just as soon give you a mauling as not."

The defendant testified to the use by plaintiff of the opprobrious epithet set forth in the answer, and plaintiff denied that he had used it. The plaintiff was, in his denial, corroborated by the only witness to the fight who testified on the trial. This witness says that if the epithet was used that he did not hear it, and that he would have heard it if it had been used; that he was absent for only one minute from the room, and defendant testified that the epithet was not used at that stage of the quarrel. So that the preponderance of the evidence shows that the epithet was not used. And, even if it had been, it was not sufficient to have justified defendant in beating plaintiff in the way that he beat him. Plaintiff was an old man, weighing about 125 pounds, and was maimed in both hands. He was not prepared to fight the very vigorous man that the testimony shows the defendant to be, weighing about 180 or 190 pounds, and he begged to be permitted to leave the store without fighting. He carried some money in one of his hands with which to pay his debt to defendant at the time he was knocked down and beaten. This fact would go far to show that he had not assumed a threatening attitude towards defendant.

It is quite clear that plaintiff was attacked by defendant without sufficient cause or provocation, and in the manner testified to by plaintiff, as corroborated by a disinterested

witness. The plaintiff's statement is therefore entitled to be believed.

It is true that the evidence shows that the plaintiff had drawn a check on a bank where he had not sufficient funds to meet it, and that he had been convicted for so doing in the criminal court. The evidence also shows that he had many enemies, and had had many difficulties. But these things are not sufficient to justify defendant in beating him. The state and certain individuals had punished him for the commission of those offenses.

The witnesses called by defendant to testify that plaintiff's reputation for truthfulness and veracity was bad in the community in which he lived were unable to give the names of but very few persons who had been heard to discuss the reputation of plaintiff. It was not sufficient to discredit his testimony, particularly where it was corroborated by a disinterested witness.

Will Whisenant was the name of the only witness to the fight. After detailing the wordy discussion between the parties, he says that Burnecke fell among some dishes. Defendant said that he pushed Burnecke among them. He further testified:

"O'Neal went on him, run between me and Burnecke, and bent over him and beat and knocked him around there; could not swear how many licks he hit him; might have hit at him and missed him. * * * But from the looks of the old man, he hit him; from the blood on his face, I suppose he had been hit. Mr. Burnecke was trying to get up and O'Neal had hold of him, and he either got up or he pulled him up, and he threw him around towards the door, and as old man Burnecke fell, he fell forward and O'Neal kicked at him, and I followed them up. Mr. Burnecke fell on the screen door, and O'Neal run up and got down over him again and was hitting at his head, and I ran up behind O'Neal and grabbed him, as I saw there was no fight to it. I did not like to see a one-sided thing, and told O'Neal—I says, 'Quit; you have done enough; you give him enough.'"

The witness was asked:

"Did you see Burnecke strike him or try to do him any harm? A. No, sir; nothing, only when O'Neal went up to him in the front door he threw both hands up."

And again:

"Q. When you took O'Neal off of Burnecke, what did Burnecke do? A. Burnecke got up and wiped his face, and I turned around and followed O'Neal around the counter and took the ring off of his finger."

The ring, according to O'Neal, was of gold and a fraction over a quarter of an inch in width. The witness testified that the ring had cut into O'Neal's finger. O'Neal says that the ring cut Burnecke in the forehead.

O'Neal, in answer to questions, answered:

"Yes, sir; pushed him down twice. It may be possible that I pushed him down three times; I know twice. I know the third time he tried to get up he kicked and struck me, and I struck him over the left eye, and this ring cut a gash over the left eye. I stood and looked at it good. * * * I hit him one lick with my right hand above his eye, and Whisenant came up. If he had left me alone, I do not think there would have been any case in court; * * * I would have given him a plenty, and he never

would have bothered me; he needed a whipping."

Immediately after the fight, plaintiff consulted a specialist, who examined his eye. The latter stated that he saw that the eye was bruised and bloodshot, and that the lens was displaced, or floating in the eye. That he treated plaintiff's eye, but was never able to restore the sight. That the eye is permanently disabled, and the sight destroyed, though the ball does not show any injury or defect to the common observer, except that the cornea, or center of the eye, is very much enlarged, and discoverable easily on close inspection. He would not say whether the injury to the eye, that is, the dislocation of the lens, was of recent occurrence or not. He said that there was nothing in the eyeball that showed that the dislocation had been recent or had not been. Further, such an injury could have been produced by a blow about the eye, or by any violent striking of the head on or near the eye.

The evidence is clear that defendant struck plaintiff in the eye and drew blood, and that the blow was sufficient, especially with the heavy gold ring on the small finger of the defendant's hand, to have injured the eye in the manner testified to by the physician and plaintiff.

Defendant offered some testimony going to show that prior to the difficulty plaintiff had complained of one of his eyes, and that one eye was partially closed at that time. But there is no testimony in the record going to show that plaintiff was blind in one eye before the assault made upon him by the defendant. The conclusion is irresistible that defendant destroyed the sight of the left eye of the plaintiff by striking it with a forcible blow, without sufficient cause for having done so. He is therefore responsible in damages to plaintiff.

The eyeball is in place, and the defect in it is not discoverable by a casual observer, but the real value of the eye is destroyed. Plaintiff was 68 years of age at the time of the trial, of a weak physique, and crippled in his hands. The damages to him by defendant will be fixed at the sum of \$3,000.

It is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be judgment in favor of plaintiff and against defendant in the sum of \$3,000, with interest from the date of judgment, and costs in both courts.

O'NIELL, J. (dissenting). The only questions involved in this case are questions of fact, which were resolved in favor of the defendant by the trial judge. The reasons assigned by him for holding that the plaintiff was unworthy of belief and failed to make out his case are, in my opinion, borne out by the record. I see no good reason for taking

issue with the district judge on his conclusion from the disputed questions of fact, of which I am, perhaps, not as capable or as sure of arriving at a correct conclusion as he was. I respectfully dissent from the opinion and decree handed down in this case.

On Application for Rehearing.

PER CURIAM. The court having observed that a nonsuit had been entered as to Mrs. O'Neal, codefendant, the judgment was rendered against J. B. O'Neal, represented by his executrix, Mrs. Edith O'Neal. Rehearing refused.

RUSSELL v. BUSH. (1 Div. 894.)

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

1. PLEADING \Leftrightarrow 8(6)—PLEAS—CONCLUSIONS.

In an action for commission on the sale of defendant's property to the government, a plea, alleging that the defendant in making the sale resorted to lobbying to bring personal influence to bear on the officers so as to render the contract voidable at the election of the government, states conclusions of the pleader, and not the facts relied on as required by Code 1907, § 5330.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 17; Dec. Dig. \Leftrightarrow 8(6).]

2. PLEADING \Leftrightarrow 194(3)—PLEA—SUFFICIENCY.

A plea directed to the whole complaint must be a complete answer to every count, or it is subject to demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 449; Dec. Dig. \Leftrightarrow 194(3).]

3. BROKERS \Leftrightarrow 65(6)—COMMISSIONS—COMPLETION OF CONTRACT.

Where plaintiff negotiated a sale of defendant's property to the government, but the title was rejected, and it was agreed between the parties that the government should condemn the land and that the agreed price should be found as the value, which agreement was carried out and the amount paid to defendant, the transfer was not voidable at the option of the government, even though plaintiff used improper influence to induce the sale, since the judgment became final by the payment, and defendant therefore could not resist an action for plaintiff's compensation by a plea that he had used improper means to influence the government to enter the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 48; Dec. Dig. \Leftrightarrow 65(6).]

4. EMINENT DOMAIN \Leftrightarrow 254—RIGHT OF APPEAL—ESTOPPEL—PAYMENT OF AWARD.

Where the party condemning takes possession of the property and pays the award, he is estopped from objecting thereto and waives his right of appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 665; Dec. Dig. \Leftrightarrow 254.]

5. WORK AND LABOR \Leftrightarrow 14(1)—RIGHT OF RECOVERY—PARTIAL PERFORMANCE.

Though recovery upon a special contract cannot be had without showing substantial performance, where a partial performance has resulted in benefits accepted by the other party, and the contract was abandoned by mutual consent, or was rescinded or extended by some act or failure of the defendant, a recovery may be had therefor under a quantum meruit for the

value of the work performed or services rendered.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 31; Dec. Dig. ¶14(1).]

8. EVIDENCE ¶368(12)—DOCUMENTARY EVIDENCE—FAILURE TO PRODUCE—EFFECT.

Under Code 1907, § 4058, authorizing the court on motion in an action at law to require parties to produce books, documents, or writings in their possession which contain evidence pertinent to the issue under circumstances where they might be compelled to produce them by the rules of procedure in chancery, and providing that, if a plaintiff fails to comply with such order, the court may on motion give judgment for defendant as in cases of nonsuit, and, if the defendant fails to comply with the order, the court may give judgment against him by default, nonsuit cannot be rendered against a plaintiff for failure to produce a letter where no notice to produce was given, and it appeared that he had destroyed the letter, even though it was done to avoid the necessity of producing it, since the relief can only be granted when the document, to produce which the notice was given, was in court or in the possession of one of the parties before the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 444, 1555; Dec. Dig. ¶368(12).]

7. DISCOVERY ¶70 — STATUTORY PROCEEDINGS—ANSWERS—EFFECT OF INSUFFICIENCY.

Under Code 1907, § 4055, providing that, when the answers to interrogatories are not full or are evasive, the court may either attach the party and cause him to answer fully in open court, or tax him with so much of the costs as may be just and continue until full answers are made, or direct a nonsuit or judgment by default, it was within the discretion of the court to select any one of the three penalties, and not error to refuse a motion insisting that a nonsuit be granted.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 84-86; Dec. Dig. ¶70.]

8. EVIDENCE ¶78, 178(1) — PRESUMPTION — DESTRUCTION OF EVIDENCE.

Where plaintiff intentionally destroyed a letter concerning which he was interrogated, there was a strong presumption that its contents were detrimental to his case, and he cannot introduce secondary evidence of its contents to rebut such presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100, 580; Dec. Dig. ¶78, 178(1).]

9. EVIDENCE ¶187—SECONDARY EVIDENCE—MATERIALITY.

Where plaintiff intentionally destroyed a letter to avoid producing it in court, claiming that it contained private matters not relating to the case, it was error for the court to sustain an objection to a question as to the contents of the letter and to require plaintiff to state only so much of the contents as related to the issue on trial, since that left it to him to determine the materiality of the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 674, 675; Dec. Dig. ¶187.]

10. TRIAL ¶138, 139(1), 140(1) — QUESTIONS FOR COURT AND JURY—EVIDENCE.

The relevancy and competency of the evidence is for the court; the credibility of the witnesses and weight of the evidence is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 322, 332-334, 338-341; Dec. Dig. ¶138, 139(1), 140(1).]

11. APPEAL AND ERROR ¶231(7)—PRESENTING QUESTIONS IN LOWER COURT — OBJECTIONS—REASONS.

Where defendant in objecting to plaintiff's attorney exhibiting to plaintiff his answers to interrogatories stated no reasons for the objection, the ruling of the court thereon cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶231(7); Trial, Cent. Dig. §§ 194, 195, 198.]

12. APPEAL AND ERROR ¶232(2)—PRESENTING QUESTIONS IN LOWER COURT—VOLUNTEERED STATEMENT—MOTION TO EXCLUDE.

Where a witness was shown his former deposition and asked whether he had made a copy of a certain letter, and he then volunteered to state the contents of the letter, an objection to the question does not entitle the court to review the volunteered statement to which no objection or motion to exclude was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. ¶232(2); Trial, Cent. Dig. § 211.]

13. EVIDENCE ¶159 — ADMISSIBILITY — SECONDARY EVIDENCE—PRELIMINARY QUESTION.

It was not error to overrule an objection to a question, asked plaintiff as a witness, whether he had made any copy of a letter which he destroyed to avoid producing it in court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471, 474; Dec. Dig. ¶159.]

14. TRIAL ¶208—RECEPTION OF EVIDENCE—WITHDRAWAL—INSTRUCTIONS—NECESSITY.

Where defendant's counsel offered his answers to interrogatories in evidence, but withdrew them before they were read to the jury, no instruction to disregard such evidence was necessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 504; Dec. Dig. ¶208.]

Appeal from Circuit Court, Mobile County; Norvelle R. Leigh, Special Judge.

Action by Albert P. Bush against Julia F. Russell. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 180 Ala. 590, 61 South. 373.

Harry T. Smith & Caffey and Gregory L. Smith, all of Mobile, for appellant. Stevens, McCorvey & McLeod, of Mobile, for appellee.

THOMAS, J. On the former appeal the law of this case was stated (Bush v. Russell, 180 Ala. 590, 61 South. 373), and defendant's pleas 5 and A were held insufficient.

[1] At the last trial the same matter of defense was stated as follows:

"A. The plaintiff's said cause of action as sued upon in the complaint is based upon the written contract entered into by and between the plaintiff and the defendant which was fully described in the third count of the plaintiff's complaint and to which reference is now made, and a part of the consideration for the promise which was sued upon was a promise on the part of the plaintiff to assist the defendant in her efforts to sell to the United States government the property on the northwest corner of St. Joseph and St. Michael streets, and it was one of the implied stipulations of said contract that the plaintiff in rendering such assistance would not resort to such unlawful methods as would render said sale voidable at the election of the United States government; but the defendant avers that, instead of complying with said conditions of said contract, the plaintiff resorted

to lobbying in order to bring personal influence to bear upon the officers of the United States government in making such purchase in such manner as to render such contract voidable at the election of the United States government."

The point is well taken by demurrer that the allegation, in this plea, that plaintiff's acts in making said sale were such as to render said contract voidable at the election of the United States government, was in effect a mere legal conclusion, and was not "a succinct statement of the facts relied on," as required by section 5330 of the Code. The authorities on this point were collected by Mr. Justice Somerville in *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 301, 56 Am. Rep. 31, to which may be added *Tennessee, etc., Co. v. Herndon*, 100 Ala. 451, 456, 14 South. 287; *Kolsky v. Enslen*, 103 Ala. 97, 100, 15 South. 558; *Johnson v. Ry. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; *Lawton v. Ricketts*, 104 Ala. 430, 436, 16 South. 59; *St. Louis, etc., Co. v. Phillips*, 165 Ala. 504, 51 South. 638; *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 351, 53 South. 176, Ann. Cas. 1912B, 461.

Without a statement of the facts relied on to defeat plaintiff's suit, how could the plaintiff know what the real defense was? The plea fails to disclose what act or acts of the plaintiff rendered the contract voidable at the election of the government. It cannot be said that the allegation, that "plaintiff resorted to lobbying in order to bring personal influences to bear upon the officers of the United States government," was sufficiently specific to point out the officers so sought to be influenced, or to amount to an averment that an officer of the United States government having the authority at the time to determine the site of the post office in Mobile was influenced by an improper act of the plaintiff to locate the post office on defendant's lot. It would have been impossible for the plaintiff to prepare to meet such a defense. The defendant, by her plea, declined to give this specific information relied upon, preferring rather to state her conclusion that the contract of sale was voidable at the instance of the United States government, because of the existence of facts, known to her.

[2] It is fundamental that, if a plea is directed to the whole complaint, it must be a complete answer to every separate count thereof; if pleaded to less than the whole complaint, it must be a complete answer to the count or counts to which it purports to reply. Falling in this, it is subject to demurrer; for a plea must go as far as it professes to go. 1 Chitty, Pl. 476; Arch. Civ. Pl. 168, 173; Gould's Pl. 159, c. 4, § 6; Id. c. 6, §§ 98-9; Stephen's Pl. (Tyler) pp. 215, 216; Heard's Civ. Pl. 161; Adams v. McMillan, Ex'r, 7 Port. 73; Deshler v. Hodges, 3 Ala. 509; Standifer v. White, 9 Ala. 527; Mills v. Stewart, 12 Ala. 90; White v. Yarbrough, 16 Ala. 109; Tomkies v. Reynolds, 17 Ala. 109; Wilkinson v. Moseley, 30

Ala. 562; Galbreath v. Cole et al., 61 Ala. 141; Foster v. Napier, 73 Ala. 595; Werth v. M. L. & I. Co., 89 Ala. 374, 7 South. 198; Smith v. Dick, 95 Ala. 311, 10 South. 845; First Nat. Bank of B'ham v. First Nat. Bank of Newport, 116 Ala. 520, 22 South. 976; Snedecor v. Pope, 143 Ala. 275, 39 South. 318.

[3] The complaint contains four counts. The first is on account; the second is for work and labor done; the third is a special count upon the contract therein set forth at length, in which the defendant conditionally agreed to pay the plaintiff for service to be rendered in assisting her to sell certain of her properties to the United States government, and the performance of the service by plaintiff, and the happening of the contingency upon which the agreement to pay the \$30,000 was based, are alleged; and the fourth is a special count upon the same contract, but alleging more in detail the things done by appellee in performing his promise to assist appellant in her efforts to sell to the United States certain property which she owned. Among other things, it is alleged in this count that, after appellee had succeeded in having the United States to select and agree to purchase said property upon the condition that the title be found to be satisfactory, the officials of the United States government in charge of the matter decided that defendant's title was defective; that it was then agreed by all the parties at interest that the United States should condemn the property as a site for the post office building; and that in the condemnation proceedings the value of the property should be fixed at the amount which the United States had agreed to pay therefor and which appellant had agreed to accept therefor. It is further alleged that condemnation proceedings were instituted and prosecuted to a final decree condemning the property without objection on the part of the defendant, the value being fixed at the amount for which she had agreed to sell, which amount was paid by the United States, to her, in pursuance of said condemnation proceedings; and that appellant then conveyed the said property to the United States pursuant to the decree.

This condemnation was instituted and conducted in the proper court, as a convenient method of taking over the defendant's property according to the agreement of purchase, and of curing any possible defect in defendant's title thereto; at the same time its actual and legal result was a final judgment of condemnation of the property, by a court of competent jurisdiction, rendered at the instance of the United States government against the defendant and said property. A final judgment of such character not appealed from, procured by, and acquiesced in by, the United States government, and fully satisfied by the payment on its part of the damages or purchase price so assessed and adjudged, could not thereafter be disturbed nor vacated.

The judgment, being in all things regular and final, precluded inquiry into the preliminary negotiations. The plaintiff may have resorted to lobbying, in the initial proceedings, to bring the property to the attention of the government authorities, and so might have caused an executive officer of another department of the government to suggest such condemnation of the defendant's real property; and yet the United States, by resort to this extraordinary power of government, had taken defendant's said property for its legitimate needs, paid the damages therefor as determined by the rules of law governing such cases, and the defendant owner had received said damages so assessed for the condemned property. Thereafter the United States had no right of appeal or of review, and no right of rescission, for all the negotiations and incidents of purchase, together with the agreement, were merged into the binding judgment, and the judgment was fully discharged, and, so far as the pleadings disclose, the defendant was enjoying the full benefits of plaintiff's services, and no effort on the part of the United States government was being made, or even threatened, to disturb the enjoyment of the proceeds of the condemnation proceedings.

[4] In *Lewis on Eminent Domain*, vol. 2, § 783, it is declared that if the party condemning takes possession of the property under the proceedings (*Wilmington & Susq. R. Co. v. Condon*, 8 Gill & J. [Md.] 443), or pays the damages awarded (*Marquette, H. & O. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788), this will constitute an estoppel from prosecuting objections to the report or the proceedings, and a waiver of the right of appeal. On the same principle, in *Endicott Petitioners*, 24 Pick. (Mass.) 339, it is held that an acceptance of the sum awarded or decreed as damages will preclude an appeal by the defendant in condemnation. *Elliott*, App. Prac. § 150; *People v. Mills*, 109 N. Y. 69, 15 N. E. 886; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrall*, 19 Conn. 142; *F. W. I. Co. v. Chicago Co.*, 11 Tex. Civ. App. 600, 33 S. W. 159; *Matter of Woolsey*, 95 N. Y. 135; *Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Test v. Larsh*, 76 Ind. 452; *Byer v. New Castle*, 124 Ind. 86, 24 N. E. 579; 1 *Elliott on Streets and Roads*, § 305. In his Appellate Procedure (section 151), Judge Elliott says:

"It will be observed that, in the cases in which it has been held that an estoppel exists, the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property."

In *Holland v. Spell*, *supra*, Chief Justice Hackney observes:

"We can conceive of no good reason why he should, in good conscience, be permitted to receive all the benefits of the (condemnation) proceeding, and, while holding them, deny that the

proceeding is effectual to create the burdens corresponding to such benefit."

In *Garrison v. New York*, 21 Wall. (U. S.) 196, 208, 204, 22 L. Ed. 612, the court says:

"In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The state, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the Constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure."

It follows therefore that plea A was no answer to the fourth count of the complaint.

[5] Although recovery upon the special contract cannot be had without showing substantial performance, yet where a partial performance has resulted in benefits that were accepted by the other party, and the contract was abandoned by mutual consent, or was rescinded or extended by some act or failure of the defendant, a recovery may be had therefor under a quantum meruit, for the value of the work performed or services rendered. 2 Greenl. Ev. (16th Ed.) § 104, and authorities; *Thomas et al. v. Ellis et al.*, 4 Ala. 108; *Merriweather v. Taylor*, 15 Ala. 735; *Hawkins v. Gilbert*, 19 Ala. 54; *Kirkland v. Oates*, 25 Ala. 465; *Davis v. Badders & Britt*, 95 Ala. 348, 10 South. 422; *Florence Gas. Co. v. Hanby, Rec'r*, 101 Ala. 15, 13 South. 343; *Watson v. Kirby & Sons*, 112 Ala. 436, 20 South. 624; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Matthews v. Farrell*, 140 Ala. 298, 311, 37 South. 325; *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 South. 579; *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 South. 46; *Smith v. Sharpe et al.*, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; *Dees v. Self Bros.*, 165 Ala. 225, 51 South. 735. In *Montgomery County v. Pruett*, 175 Ala. 391, 395, 57 South. 823, 824, this court declared that a plea setting up the plaintiff's breach of a special provision of the contract is not "a sufficient answer to the common counts, though it may be to a count on the contract." It follows that a plea setting up an implied condition of the contract is no answer to the common count for services rendered.

Appellant's next assignment of error challenges the ruling of the court in declining to compel the plaintiff, Bush, as a witness, to give the contents of a letter that had been destroyed, and in refusing defendant's motion for a nonsuit, because of Bush's failure to set out the letter in *extenso* in his response to interrogatories propounded to him under the statute.

[6] The court may, on motion and due notice, on the trial of actions at law, require the parties to produce books, documents, or writings in their possession, custody, control, or power, which contain evidence pertinent to the issue, in cases and under circum-

stances, where they might be compelled to produce the same by the ordinary rules of procedure in chancery. Code 1907, § 4058. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit, and, if the defendant fails to comply with the order, the court may on motion give judgment against him by default. Code, § 4058. Before the passage of this statute, it was held that a court of law could not compel production, but courts of equity might. *V. & A. Min. Co. v. Hale & Co.*, 93 Ala. 542, 9 South. 256; *Golden v. Conner*, 89 Ala. 598, 8 South. 148. In *Sherrill v. Merchants' & Mechanics' Trust & Savings Bank*, 70 South. 723, this court held that the plan of the statute must be followed, to entitle one to its benefits; and that it must be made to appear that the subjects of the notice to produce were in court or in the possession of one before the court. *McDuffee v. Collins*, 117 Ala. 487, 23 South. 45.

In the case before us the record does not contain a "motion and due notice thereof" to require the party to produce the letter under section 4058 of the Code. The question for decision arose on the cross-examination of the plaintiff, Bush, while a witness in his own behalf. He was asked by defendant's counsel for certain letters and telegrams received and sent, as to the proposed post office site. The witness admitted that he had sent a telegram to one Armbrecht, and exhibited a copy thereof to counsel. He was then asked: "Will you produce the letter that you received from Mr. Armbrecht?" Witness answered: "No, sir; I could not do it." When asked what he did with the letter, witness answered: "It has been destroyed. There were some matters of a personal nature in that, that had no bearing on this proposition." When questioned as to the date of its destruction, witness answered to the effect that he "could not even approximate it." Counsel then asked: "Don't you know it was, Mr. Bush, * * * you destroyed that letter when I propounded interrogatories calling for it? * * * Was that when I called on you to produce Armbrecht's letters, you tore them up and destroyed them?" Witness answered: "That one letter, yes; I declined to produce it. There were one or two matters of a personal nature in that letter." When asked, "Tell us the contents of that letter, please," witness answered, "No, sir." The defendant then moved the court to compel the witness to give the contents of the letter from start to finish. The plaintiff interposed an objection to this, and, the objection being sustained, defendant excepted, and here assigns this ruling as error. The court, however, then stated that the witness could detail the contents of the letter relating to the case, but not matters of a personal nature.

Obviously, the letter could not have been

produced, upon motion and due notice for its production, under the terms of the statute; since the witness stated that "it was destroyed for the purpose of preventing my having it here in this trial."

[7] The defendant thereupon moved the court to enter a nonsuit or a dismissal of the cause, on the ground that the defendant had propounded interrogatories to the plaintiff in October 31, 1910, amongst other things calling for the contents of a letter, and for the production of a copy of a letter from Wm. H. Armbrecht to the witness, referred to in the telegram just read, from Mr. Bush to Mr. Armbrecht, and "it now appears from Mr. Bush's testimony that he deliberately destroyed that letter to prevent revealing its contents in answer to those interrogatories, and did so without keeping a copy of that portion thereof which related to this matter, or reciting the contents even so far as that part which related to this matter was concerned." The court overruled the motion, and the defendant excepted. This ruling is assigned as error.

By section 4055 of the Code of 1907, when the answers to interrogatories propounded under the statute "are not full, or are evasive," the court may either (1) attach the party and cause him to answer fully in open court, or (2) tax him with so much of the costs as may be just, and continue the cause until full answers are made, or (3) direct a nonsuit or judgment by default, or enter such decree as would be appropriate if such defaulting party offered no evidence. The court has the discretion which mode to adopt in order to compel full and direct answer. *Goodwin v. Harrison*, 6 Ala. 488; *Pool v. Harrison*, 18 Ala. 514; *Ex parte Grantland*, 29 Ala. 69; *Ex parte McLendon*, 33 Ala. 276; *Culver v. Ala. Mid. Ry. Co.*, 108 Ala. 330, 18 South. 827. A movant cannot deprive the court of this discretion by limiting his motion to the request for a nonsuit. Whenever the motion so limits the action of the court, it may be refused, even though the trial judge may believe the party against whom the motion is directed was in default and should be compelled or punished by one or the other of the methods provided in the statute. In short, the court, in its discretion, may pursue any one of the three courses provided by the statute, and no error can be predicated upon the refusal of a motion specifically insisting that the court adopt a particular one of the three alternatives, selected and pointed out to the court therein. The exercise of such discretion is not the subject of review. *City of Bessemer v. Southern Railway Co.*, 157 Ala. 423, 48 South. 106.

[8] The important question presented by the assignment of errors is the court's failure, on motion of defendant, to compel the witness to state the contents of the letter, that the court might judge of its competency,

and not leave it to the witness to "state the contents of the letter as relating" to the issue on trial.

In *Broadwell v. Stiles*, 8 N. J. Law, 58, the Chief Justice declared that the fact of destruction excites suspicion and unfavorable presumption, and that he who voluntarily, without mistake or accident, destroys primary evidence, thereby deprives himself of the production and use of secondary evidence; that to admit such evidence "under such circumstances is as repugnant to principle as to deny a party the cross-examination of the witness of his adversary."

In *Juzan et al. v. Toulmin*, 9 Ala. 682, 691, 44 Am. Dec. 448, this court declared, touching the admission of secondary evidence, that "if any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its nonproduction" before secondary evidence will be admitted of its contents. *Agee v. Messer-Moore, etc., Co.*, 165 Ala. 291, 51 South. 829.

An unfavorable inference may be drawn against one who suppresses or destroys evidence. A familiar illustration given of this presumption is found in the case of *Armory v. Delamire*, 1 Stra., 504; s. c., 93 Eng. Reprint, 664. Commenting thereon, Mr. Justice Sherwood (*Pomeroy v. Benton*, 77 Mo. 64, 87) said:

"It is easy to see that the chimney sweep's boy would have been in but a sad case, if he had been required to show by 'secondary evidence' what the contents of the empty socket were; something which he knew not; something which the spoliating defendant alone knew."

So in 1 Phillips' Evidence (3d Ed.) 422, the author says it is held in the Queen's Case (*Vincent v. Cole*, M. & M. 258) that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the court in possession of a part only of the contents of a written paper. In *Winchell et al. v. Edwards et al.*, 57 Ill. 41, 49, it is stated that when a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his integrity, and that his conduct is attributable to his knowledge of the circumstances. The general rule is, *Omnia presumuntur contra spoliatores*. 1 Phillips on Ev. c. 10, p. 602, 2 Note 177 (2); 1 Jones, Ev. §§ 17, 18, 18a; 1 Wigmore, Ev. 278, 291; 2 Chamberlayne, Ev. 1070 A. Mr. Greenleaf (Ev. [16th Ed.] vol. 3, § 34) says that the presumption in such cases "is strong against the party," but is not conclusive, "because innocent persons, under the influence of terror from the danger of their situation, or induced by bad counsel,

have sometimes been led to the simulation or destruction of evidence. But the burden of proof in these cases is on the party to explain his conduct to the satisfaction of the jury." 1 Greenl. Ev. (16th Ed.) § 37; *Best on Presumptions*, §§ 145, 149. In *Kyle v. Slaughter*, 158 Ala. 109, 48 South. 343, where the question of inquiry was the effect of a proviso under a certain deed, Mr. Justice Anderson said:

"If the deed contained this clause, its preservation by A. H. Slaughter would have established beyond dispute his title to the property and his right to convey it to his second wife. Sane and reasonable people do not, as a rule, destroy evidence favorable to the establishment of their own title. A party who destroys the evidence by which his claim or title may be impeached thereby raises a strong presumption against the validity of his claim."

Though there was no formal motion to produce the letter, the record shows that, when testifying as a witness in his own behalf, and cross-examined by defendant's counsel, Bush was producing his correspondence with many parties relating to the location of the post office on Mrs. Russell's lot; that a copy of a telegram from him to Armbrecht showed that the letter in question had been received and that it was important. At this point witness was asked by defendant's counsel to repeat the contents of the letter received from Armbrecht; but witness declined to do so. It was made clear to the court that the plaintiff had destroyed the letter, to prevent being required to produce it on the trial, and that it was destroyed after defendant had propounded, under the statute (Code, §§ 4049, 4057), interrogatories to the plaintiff, Bush, and after the latter had prepared his answers thereto.

If the presumption is against one who suppresses or destroys documentary evidence, and such party may not introduce secondary evidence of the contents of the paper, it is also true that the opposite party may show its contents, to support the unfavorable presumption that the jury may draw from its suppression or destruction. This may be shown by the testimony of any competent witness knowing its contents.

[9, 10] In this case the defendant sought to establish the contents of a letter, by requiring the recipient to state to the court what the letter contained, to the end that its relevancy might be passed on by the court. The court required the witness to detail only such portion of the contents of the letter as the witness deemed relevant to the issue. This was permitting the witness to pass upon the relevancy of the testimony. 1 Jones, Ev. §§ 173, 174; *De Graffenreid v. Thomas*, 14 Ala. 681; *Western Un. Tel. Co. v. Rowell*, 153 Ala. 295, 315, 45 South. 73; *Dominick v. Randolph*, 124 Ala. 557, 27 South. 481. The judge passes upon the admissibility, materiality, or relevancy, of the evidence offered; the jury decides upon the weight of the evidence. The judge passes upon the compe-

tenacy of evidence and of the witnesses. *Domnick v. Randolph*, supra. The jury passes upon the credibility of the witnesses. *Venable v. Venable*, 165 Ala. 621, 51 South. 833.

After service on plaintiff of the interrogatories propounded under the statute, calling for the correspondence, the plaintiff cannot successfully maintain that the document called for in the interrogatories and destroyed by him was not material evidence, or that he had disclosed the material portions thereof. Nothing short of the judgment of the court upon the relevancy of the contents of the letter will satisfy the reason for the rule of the authorities we have cited. For this error of the trial court in substituting the judgment of the witness for that of the court, touching the materiality of portions of documentary evidence, the cause is reversed.

[11] The fifth and sixth assignments of error challenge the ruling of the court allowing the plaintiff's attorney to exhibit to plaintiff, as a witness, his answers to interrogatories which had been propounded to him by the defendant. The defendant, objecting to this ruling, assigned no reasons for the objection. There is, then, nothing for us to review. *Rutledge v. Rowland*, 161 Ala. 114, 123, 49 South. 461; *B. R., L. & P. Co. v. Landrum*, 153 Ala. 200, 45 South. 198, 127 Am. St. Rep. 25; *L. & N. R. R. Co. v. Banks*, 132 Ala. 471, 31 South. 573; *Williams v. Gallyon*, 107 Ala. 443, 18 South. 162.

[12] Aside from this, no error was committed. Assignment of error numbered 5 asserts that the trial court erred in thus permitting the plaintiff, while a witness, to be shown his answers to the interrogatories theretofore propounded by defendant; and assignment numbered 6 is predicated upon the court's permitting plaintiff, as a witness, to refresh his recollection by inspecting his answers to said interrogatories. *Riley v. Fletcher*, 185 Ala. 570, 64 South. 85; *Council v. Mayhew*, 172 Ala. 295, 55 South. 314; *B. R., L. & P. Co. v. Seaborn*, 168 Ala. 658, 53 South. 241; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Mims v. Sturdevant*, 36 Ala. 636; *Bondurant v. Bank*, 7 Ala. 830; 1 Greenl. Ev. (16th Ed.) 543, § 439, C. The exhibition of the interrogatories to witness was not for the purpose of refreshing his recollection as to the contents of the letter or of his former deposition, but on the question whether the witness had made such a copy of the letter or extracts therefrom. No part of the contents of the letter or deposition was called for by the question propounded. When, however, the witness had answered, and volunteered to give the substance of the letter, the defendant should have interposed an objection, or a motion to exclude, as to so much of the answer as was not responsive. The defendant, failing in this, cannot now

maintain that prejudicial error was committed. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 308, 56 Am. Rep. 31; *B. R., L. & P. Co. v. Barrett*, 179 Ala. 274, 290, 60 South. 262; *Forrester v. May*, 3 Ala. App. 281, 57 South. 64.

[13] The seventh assignment of error is based on the action of the court in overruling defendant's objection to the following question propounded to plaintiff as a witness, by his counsel:

"You were asked the question as to whether or not, at or prior to the time of the destruction of this letter of Mr. Armbricht, you made any copy of that part of it which related to this case. Now, I ask you whether or not you had made, or had had made, any memorandum or writing of the substance of that letter in so far as it related to the post office site matter."

The question went no further than to ask whether or not a memorandum of the substance of the letter, in so far as it related to the post office site, had been made by witness, or at his request—which was competent.

[14] The eighth assignment of error is to the overruling of defendant's objection to the introduction by the plaintiff of that portion of his answers, and the interrogatories propounded by the defendant, which had been shown plaintiff as a witness. The bill of exceptions expressly states that the part of the answers so offered in evidence was never read to the jury. Later, plaintiff's counsel stated to the court that he would withdraw the offer of that part of the answers to the interrogatories which had been offered in evidence by the plaintiff and which had reference to the letter which had been destroyed. The testimony so erroneously offered (*Acklen's Ex'r v. Hickman*, supra; *Riley v. Fletcher*, supra) not having been read to the jury, there was no reason why the court should instruct the jury on its withdrawal. They did not know its contents and could not have been prejudiced by the erroneous admission as evidence, of the deposition. If, however, the document had been read to the jury and subsequently withdrawn, appellant would have been entitled to some specific instruction by the court to the jury, on its exclusion, that they should in no wise consider the testimony so withdrawn, in reaching a verdict. No rule of common sense would require that the jury be so instructed touching a matter of testimony that had not in fact come to their knowledge. The question here presented, on the exclusion of evidence erroneously admitted, is not the same as that in *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 480, 16 South. 538, on which this court declared the rule.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. GARDNER, J., not sitting.

**SOVEREIGN CAMP OF WOODMEN OF
THE WORLD v. WARD. (3 Div. 215.)**

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

1. INSURANCE — 815(1) — ACTIONS — COMPLAINT.

In a suit on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1996; Dec. Dig. — 815(1).]

2. INSURANCE — 815(1) — FRATERNAL BENEFIT INSURANCE — COMPLAINT — SUFFICIENCY.

A complaint, claiming from a fraternal benefit company the sum due on a certificate of insurance issued by defendant on a certain date by which defendant agreed to pay to plaintiff the sum of \$2,000 upon the death of insured, and averring that the insured died on a certain date, which was within eight months of the issuance of the certificate, that the defendant had notice of his death, and that the certificate of insurance was the property of the plaintiff, is not demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1996; Dec. Dig. — 815(1).]

3. JURY — 88 — QUALIFICATIONS OF JURORS — INTEREST — MEMBERSHIP IN ORDER.

In an action on a fraternal benefit certificate, a member of the order has an interest which disqualifies him as juror upon the objection of the defendant.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 409, 410; Dec. Dig. — 88.]

4. EVIDENCE — 185(4) — SECONDARY EVIDENCE — FOUNDATION — NOTICE TO PRODUCE.

Secondary evidence of the contents of a document is not admissible, where the notice to produce it given the adverse party as required by Code 1907, § 4058, did not give sufficient time to procure it from where it had been sent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 646; Dec. Dig. — 185(4).]

5. WITNESSES — 204(1) — CONFIDENTIAL COMMUNICATION — ATTORNEY AND CLIENT — OFFER OF COMPROMISE.

In an action on a fraternal benefit certificate, where the defense was suicide, a letter written by the attorney of the order to its head office, stating that the order was not liable, but recommending a compromise, was not admissible to show formal proof of loss or waiver thereof, since it was a confidential communication by an attorney containing privileged matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 759, 760; Dec. Dig. — 204(1).]

6. EVIDENCE — 317(8) — HEARSAY.

In an action on a fraternal benefit certificate, where the defense was suicide, testimony that "they said he died from taking carbolic acid" was properly excluded as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1181; Dec. Dig. — 317(8).]

7. EVIDENCE — 183(3) — SECONDARY EVIDENCE — FOUNDATION — LOSS OF DOCUMENT.

Where a physician testified that he took a note from the clothing of assured alleged to have committed suicide and gave it to another witness, who testified that he had laid it aside and had not seen it since, the foundation was sufficient

to authorize the admission of secondary evidence as to the contents of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 612; Dec. Dig. — 183(3).]

8. EVIDENCE — 472(11) — OPINION EVIDENCE — FACT IN ISSUE.

In an action on a fraternal benefit certificate where the defense was suicide, a statement by a physician that assured committed suicide was a statement as to the material fact in inquiry and was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2195; Dec. Dig. — 472(11).]

9. INSURANCE — 818(4) — FRATERNAL BENEFIT INSURANCE — ADMISSIBILITY OF EVIDENCE — SUICIDE.

In an action on a fraternal benefit insurance certificate where the defense was suicide, evidence that deceased was addicted to drinking immediately preceding his death was competent, in connection with evidence as to his efforts and purpose to abstain therefrom.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2003; Dec. Dig. — 818(4).]

10. INSURANCE — 825(3) — FRATERNAL BENEFIT INSURANCE — SUICIDE — QUESTION FOR JURY.

In an action on a fraternal benefit certificate, evidence *held* sufficient to take to the jury the question whether assured committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. — 825(3).]

Appeal from Circuit Court, Butler County; A. E. Gamble, Judge.

Action by Nettie B. Ward against Sovereign Camp of the Woodmen of the World. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

The defenses were the general issue, the suicide clause, and the by-laws of the order relative thereto. The matter relative to the jurors sufficiently appears. There was some controversy between attorneys as to the forwarding of notice and proof of death to the office in Omaha, Neb., but it appears that it was forwarded by a local clerk, and it appeared that notice to produce these writings had been given about 24 hours before trial, and that the notice was waived, but defendant's attorney insisted the notice was not sufficient in point of time to get the original documents from Omaha, Neb., and the court, over defendant's objection, permitted proof to be made thereof, and also permitted plaintiff to introduce a letter directed to J. S. Kern as clerk of the camp, and signed by A. H. Burnett, general attorney, the contents of which were substantially that the report indicated that Mr. Ward committed suicide, and that, not having been a member for five years, he was not entitled to anything, but under the circumstances the attorney expressed a willingness to recommend a small amount in compromise. The witnesses Pierce and Kern testifying said they knew Ward, that he died about 6 o'clock in the evening, and that they said he died from taking carbolic acid, that it smelled like acid, and that he had a sore on his mouth. On motion of plaintiff, the court excluded statement

that they said it was carbolic acid. The witness Hawkins testifying as a physician relative to his examination of the body of Ward, stated that he examined his pockets, and in an inside vest pocket found a note, which he gave to Mr. Waller, Ward's father-in-law, and that Mr. Waller had it the last time he saw it, and that he did not know where the note was now. Waller, testifying, stated that he was served with a subpoena to bring in the papers or writings in his possession found on the body of Ward, but that he did not know what had become of the note, that he laid it aside, and had not seen it since. On this proof, the defendant reintroduced Dr. Hawkins, and asked for the contents of the note. Upon plaintiff's objection, the court refused to permit witness to testify.

C. H. Roquemore and E. T. Graham, both of Montgomery, and C. F. Winkler, of Greenville, for appellant. Powell & Hamilton, of Greenville, for appellee.

THOMAS, J. [1] In a suit on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy. *Eminent Household, etc., v. Gallant*, 69 South. 884; *U. S. H. & A. Ins. Co. v. Savage*, 185 Ala. 232, 64 South. 340; *Pence v. Mutual, etc., Co.*, 180 Ala. 583, 61 South. 817; *U. S. H. & A. Ins. Co. v. Veitch*, 161 Ala. 630, 50 South. 95.

[2] The complaint was not subject to the demurrers directed against it. The complaint alleges:

"Nettie B. Ward, Plaintiff, v. Sovereign Camp of the Woodmen of the World.

"The plaintiff claims of the defendant the sum of two thousand and 00/100 dollars, due on a certificate of insurance issued by the defendant to J. R. Ward on, to wit, the 6th day of May, 1914, in and by the terms of which the defendant agreed to pay to the plaintiff, who was the wife of the said J. R. Ward, the sum of two thousand dollars upon his death.

"Plaintiff avers that the said J. R. Ward died on, to wit, the 15th day of December, 1914; that the defendant has had notice of his death; and that said certificate of insurance is the property of the plaintiff."

[3] Assignments of error numbered from 2 to 12, inclusive, challenge the ruling of the trial court as to the competency of jurors Douglas, Kirkpatrick, Dees, and Mills, for that, in response to questions propounded to the jurors upon their voir dire to ascertain if any of them were members of the defendant order, said jurors on the panel answered that they "were members of the defendant order"; and one of these jurors, Dees, against defendant's objection and exception, became a member of the jury trying the cause.

In *Calhoun County v. Watson*, 152 Ala. 554, 44 South. 702, a suit against the county to recover *ex officio* services by the clerk of the circuit court, challenges were sustained of jurors who were in the employment of the

county commissioners as such. The court held that trial judges cannot be too zealous in ridding the jury of men whose interest and environment is calculated to sway them in the slightest degree. The fact that the jurors excused by the court were employed by the commissioners might be but slight incentive to bias, yet it was the action of the commissioners that was being assailed by this suit. *Louisville & Nashville R. Co. v. Young*, 168 Ala. 551, 53 South. 213; *Stennett v. City of Bessemer*, 154 Ala. 637, 45 South. 890.

In *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006, questions were propounded to the jurors to ascertain if either was a member of the defendant order, and the exception was reserved by the defendant to such qualification by the court. It was held that the question touching such membership and, of necessity, their qualification, was proper.

In *Stennett v. City of Bessemer*, supra, it was held that the court was justified in excusing a juror who had a similar case against the defendant, because "the law implies a bias"; and in *L. & N. R. Co. v. Young*, supra, the jurors in question were employes of the defendant, and the rule of bias implied by the law was sustained. In *Calhoun v. Hannan & Michael*, 87 Ala. 277, 6 South. 291, the court declined to put the trial court in error for refusing to sustain the challenge of a juror on the ground that he was "an employe of another party who had a similar suit in court." This case is clearly distinguishable from *Stennett v. City of Bessemer*, supra. The right of neither party, to a jury free from bias or interest, is lost or subjected to chance or peril, because a struck jury is demanded. *Dothard v. Denson*, 72 Ala. 541; *Lewis v. State*, 51 Ala. 1; *Davis v. Hunter*, 7 Ala. 185.

We are of opinion that the trial court committed error in not excluding the juror Dees upon the reasons controlling in the adjudged cases herein cited. It is true that in these cases the appeal was to review the action of the trial court in excusing jurors from the panel, or in sustaining challenges of jurors; but the same good reason upon which those decisions turned underlies the objection made in the case at bar. *Martin v. Farmers' Mut. F. I. Co.*, 139 Mich. 148, 102 N. W. 656; *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Pennewill (Del.) 160, 39 Atl. 1008.

[4] To authorize secondary proof of documentary evidence, a proper predicate must be laid, or due notice to produce be given under the statute. Code 1907, § 4058; *Russell v. Bush*, 71 South. 397; *Golden v. Conner*, 89 Ala. 598, 8 South. 148. The rule is that such notice be given as will enable a compliance therewith. The documents relating to the proof of death, in *Omaha, Neb.*, could not be produced in *Greenville* on one day's notice.

The defendant will be prepared on another trial to comply with the demand for the production of these documents.

[5] The letter from defendant's general attorney may have tended to show notice of proof of loss received, or a waiver of formal proof, yet it was not competent to introduce the same in evidence for that purpose, over the objection and exception of defendant. It was a confidential communication between defendant or its agents and the general attorney of defendant, containing privileged matter. *Ganus & Co. v. Tew*, 163 Ala. 358, 50 South. 1000; 7 Mayfield's Digest, 331.

[6] There was no error in the refusal of the court to admit the hearsay declarations of witness Kern and witness Pierce.

[7] The predicate was sufficiently laid for the admission of the secondary evidence of the contents of the note taken from the body of the deceased by the attending physician, and given to the witness. He had the subpoena duces tecum, and stated in response thereto that he did not have the paper after carrying it home and laying it aside. 7 Mayfield's Digest, 331.

[8] No error was committed in excluding that part of the answer of Dr. Hawkins that "he committed suicide." This was the question of fact made a material inquiry in the case—the manner and cause of decedent's death. Whether by accident or suicide was the issue, and the fact could not be shown by such declarations.

[9] The inquiry was pertinent whether the decedent was addicted to drink immediately preceding his death. Under the plea setting up the suicide exemption of the contract of insurance, this evidence should have been allowed for the consideration of the jury in connection with any recent declarations of decedent, sought to be shown, relative to this unfortunate habit, if such existed, and his effort and purpose to abstain therefrom.

[10] The affirmative charge was properly refused. These were questions of fact, for the decision of the jury. *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD and SOMERVILLE, JJ., concur. ANDERSON, C. J., concurs in the conclusion and opinion, except in the holding that there was reversible error in not excusing the juror Dees, because a member of the defendant order. He thinks that the court could well have excluded this juror, but that the defendant was not prejudiced by having a juror who was a member of its order, and whose bias, if any there was, was favorable to the defendant.

UNITED STATES CAST IRON PIPE & FOUNDRY CO. v. McCOY. (6 Div. 176.)

(Supreme Court of Alabama. Feb. 3, 1916.
Rehearing Denied March 23, 1916.)

1. MASTER AND SERVANT ⇐258(20)—ACTION FOR INJURY—PLEADING—NEGLIGENCE OF SUPERINTENDENT.

A count of a complaint, alleging that plaintiff was employed as a machine shop helper and was injured in proximate consequence of the negligence of defendant's superintendent in permitting plaintiff to be sent to work with men incapable of assisting plaintiff in the work which he was required to do, or in sending men to assist plaintiff who were inexperienced and incompetent, or in sending an insufficient number of men to assist plaintiff, stated a cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 835; Dec. Dig. ⇐258(20).]

2. MASTER AND SERVANT ⇐258(10)—ACTION FOR INJURY — PLEADING — SUFFICIENCY OF COMPLAINT—SUPERINTENDENT'S NEGLIGENT ORDER.

Under Employer's Liability Act (Code 1907, § 3910, subd. 2), making the master liable to his servant for injury caused by the negligence of a superintendent, count of a complaint, alleging that plaintiff's injury was proximately caused by another employé, intrusted with superintendence, in ordering plaintiff to assist him in lowering or tightening down a steady rest, under the arm of a crane, that in doing so he was compelled to stand under the chains and blocks which were being raised by the crane runner, and that it was the duty of the superintendent to notify him that the blocks were being jammed by the runner, but that he failed to give such notice or to stop the runner, before the chains and blocks fell upon plaintiff, stated a cause of action; and the allegation that the superintendent ordered plaintiff to do what he was doing at the time of the injury did not necessarily bring the count exclusively within subdivision 3, making the master liable when the servant is injured by obeying a negligent order of a superior.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 824; Dec. Dig. ⇐258(10).]

3. MASTER AND SERVANT ⇐258(10)—INJURY TO SERVANT—NEGLIGENCE OF SUPERINTENDENT—STATUTE.

Employer's Liability Act (Code 1907, § 3910), making the master liable to the servant for injury caused by the negligence of a superintendent, and subdivision 3, making the master liable for injury while obeying a negligent order of a superior, cover in common the cases in which a superintendent gives a negligent order, and in such cases the complaint may be framed under either subdivision.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 824; Dec. Dig. ⇐258(10).]

4. MASTER AND SERVANT ⇐279(1) — INJURY TO SERVANT—NEGLIGENCE OF SUPERINTENDENT—EVIDENCE.

In a servant's action for injuries on the ground of the negligence of defendant's superintendent in permitting him to work with inexperienced and incompetent men, or in not sending sufficient men to assist him in his work, evidence held not to sustain a verdict against the defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 973; Dec. Dig. ⇐279(1).]

5. MASTER AND SERVANT ¶177—INJURY TO SERVANT — MASTER'S LIABILITY — FELLOW SERVANT.

A master is not liable for injury to a servant occasioned by the negligence of a fellow servant in the absence of any negligence in furnishing incompetent and inexperienced fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. ¶177.]

6. MASTER AND SERVANT ¶279(2)—INCOMPETENCY OF SERVANT—EVIDENCE.

In a servant's action for injury, the single act of negligence on the part of an experienced fellow servant, operating a crane, on the occasion of plaintiff's injury, was not sufficient to warrant a finding that he was unskilled or incompetent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 974; Dec. Dig. ¶279(2).]

7. MASTER AND SERVANT ¶264(7)—ACTION FOR INJURY—EVIDENCE—COMPLAINT.

In an action for injury while employed in defendant's pipe shop where it appeared that any one with very little training could operate the crane whose runner jammed the chain and blocks until they fell and injured plaintiff, that plaintiff, one of the common laborers, had himself operated the crane, and in the absence of evidence that the operator was incompetent, evidence that plaintiff had complained generally to his foreman about the manner in which the crane was operated and of complaints of its operation by persons other than the operator were inadmissible, as the issue was limited to the competency of the operator at the time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 867; Dec. Dig. ¶264(7).]

8. MASTER AND SERVANT ¶287(8)—ACTION FOR INJURY — QUESTION FOR JURY — NEGLIGENT ORDER OF SUPERINTENDENT.

In a servant's action for injury, evidence as to alleged negligent order of a superintendent held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1064; Dec. Dig. ¶287(8).]

9. MASTER AND SERVANT ¶288(1) — ACTION FOR INJURY—ASSUMPTION OF RISK—QUESTION FOR JURY.

On such evidence, held that it could not be said that plaintiff assumed the risk of injury from the negligence of his superintendent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068, 1069, 1087, 1088; Dec. Dig. ¶288(1).]

Appeal from City Court of Bessemer; J. O. B. Gwin, Judge.

Action by Ben McCoy against the United States Cast Iron Pipe & Foundry Company, for damages for injuries while in its employment. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

In the second count of the complaint, after alleging that defendant was operating a pipe shop, and that plaintiff was employed therein as a machine shop helper, and while in such service or employment, and engaged in the discharge of his duties as such employé, plaintiff received the wounds and injuries described, it is alleged that the said wound and injuries were the proximate consequence of,

and caused by the reason of, the negligence of one Ike Jones, who was in the service or employment of defendant, and who had superintendence intrusted to him, while in the exercise of such superintendence, and that said negligence consisted in this: That said person negligently permitted the plaintiff to be sent to work with men incapable of safely assisting the plaintiff in the work which he was required to do, or said person negligently sent men to assist plaintiff in his work who were inexperienced, and who were not sufficiently skilled workmen to safely aid the plaintiff in the work which he was required to do, or said person negligently furnished incompetent men to assist the plaintiff in the work that he was required to do, or said person negligently failed to furnish a sufficient number of men to assist plaintiff in the work which was required. The third count, after stating the same facts as to employment, etc., alleges that the injuries and wounds were proximately caused by reason of one C. J. Jarrett, who was in the service or employment of defendant, and who had superintendence intrusted to him, whilst in the exercise of such superintendence, and that said negligence consisted in this: That the said C. J. Jarrett was engaged in putting a pipe into a lathe; that while so engaged it became necessary to use a crane; that the said C. J. Jarrett had instructed the crane runner to hoist the chains which had been attached to the pipe; that the said C. J. Jarrett then ordered the plaintiff to assist him in lowering or tightening down a steady rest; that it was the duty of the plaintiff to obey the orders of the said C. J. Jarrett, and while so conforming to the said order, he was compelled to stand under the chains and blocks which were being raised by the crane runner; that the plaintiff's back was turned toward the crane runner, and it was the duty of the said C. J. Jarrett to notify the plaintiff of the fact that the chain blocks were being jammed by the crane runner, which he failed to do, or it was the duty of the said C. J. Jarrett to stop the crane runner before the blocks were jammed, or to have the crane mold so that the blocks and chain would not be over or above plaintiff, which he negligently failed to do, and the plaintiff, being unaware of his peril, continued to labor until the chain and blocks fell upon him and injured him, as aforesaid. Demurrers were interposed and overruled to these counts. The following is charge 7, refused to defendant:

The court charges the jury that if you believe and find from the evidence that the risk of the injuries received by plaintiff was as open and obvious to him, or as well understood by him, as it was by the defendant, then I charge you that he assumed the risk of the injuries he received, and he is not entitled to recover.

Estes, Jones & Welsh, of Bessemer, for appellant. Etheridge & Lamar and Ben G. Perry, all of Bessemer, for appellee.

SAYRE, J. [1] The trial court's ruling on the second count of the complaint may be sustained on the authority of *A. G. S. Ry. Co. v. Choate*, 184 Ala. 636, 64 South. 78.

[2, 3] The third count stated a cause of action under the second subdivision of the Employer's Liability Act (section 3910 of the Code), which makes the master or employer liable to his servant or employé for injury caused by the negligence of a superintendent. The allegation that defendant's superintendent, whose orders it was plaintiff's duty to obey, and did obey, ordered plaintiff to do what he was doing at the time of his injury did not necessarily bring the count under the exclusive influence of that subdivision of the section (subdivision 3) by which the employer is made liable when the employé is injured by reason of conforming to the negligent order of a superior to whose order he is bound to conform. These subdivisions cover a certain field in common, viz., cases in which a superintendent gives a negligent order. In such cases the complaint may be framed under either subdivision. However, the count in question was framed under the superintendence subdivision, since its gravamen is to be found in the allegation that defendant's superintendent failed to notify plaintiff that the chain blocks were being jammed by the crane runner, as it was his duty to do, or negligently failed to stop the crane runner before the blocks were jammed, or to have the crane moved, so that the block and chain would not be over or above plaintiff. The demurrer points out the fact that the count does not aver in terms that defendant's superintendent negligently failed to notify plaintiff that the chain blocks were being jammed; but we think the demurrer was correctly overruled, since the count avers that it was his duty to give such notice, intending, on fair construction, that such was his duty in the presence of the particular emergency alleged. An averment of that duty and of the superintendent's failure to perform it is the equivalent of an averment that the failure was negligent.

[4-6] There was no evidence to sustain a verdict against defendant on the second count of the complaint. Clearly and without contradiction or adverse inference, the negligence of one Curl was the immediate cause of plaintiff's injuries. Plaintiff was at his proper place, helping the machinist Jarrett adjust and fasten an iron pipe in a lathe operated by the latter. An electric crane had been used to lower the pipe into its place in the lathe, and the block, chains, and hooks, by means of which the crane moved the pipe, had been detached, it remaining only for the crane runner, Curl, to raise them out of the way. Curl sat upon a platform next to the mast of the crane, and all he had to do was to move a lever this way or that, in order to raise or lower the blocks, chains, and hooks. After the pipe had been placed in position and the hooks detached, Jarrett

was attempting to throw over a "steady rest," which would hold the pipe safely in its place on the lathe, while plaintiff stood on the other side of the lathe to receive and fasten it down. But the "steady rest" was rather heavy for Jarrett, and a number of employes, who witnessed the operation, were standing about laughing and jeering at his efforts to throw it over. Curl had set his machine in motion to raise the block, etc., but instead of watching its movement to stop it at the proper place, he gave his attention to Jarrett, and joined in the general merriment at his expense. It resulted that when the block reached the housings of the crane's arm, the continued motion of the motor or engine broke the cable on which the block was suspended, thus causing the block and its attachments to fall upon plaintiff. Curl was plaintiff's coemployé, and for his negligence defendant was not answerable to plaintiff, in the absence of the co-operating principle invoked by the second count of the complaint.

Now the second count sought a recovery on the allegation, in substance, that one Jones, defendant's superintendent, negligently permitted plaintiff to be sent to work with men incapable of safely assisting him in his work, or negligently sent inexperienced and unskilled, or incompetent, workmen, or an insufficient number of workmen, to assist plaintiff in the work he was required to do. We have read the record, without finding evidence that Curl lacked that measure of experience, skill, or competence required to operate the crane, or, however that may have been, that Jones was negligent in employing or retaining him in the service. Curl had had experience, and his single act of negligence on the occasion of plaintiff's injury was not sufficient to warrant a finding that he was unskilled or incompetent. *Conrad v. Gray*, 109 Ala. 130, 19 South. 398; *First National Bank v. Chandler*, 144 Ala. 286, 29 South. 822, 118 Am. St. Rep. 39. Defendant was due the general charge on the second count as requested.

[7] It was in undisputed proof that any one with very little training could operate the crane, and that, after the discharge of an Italian boy, whose steady job it had been, various persons about the shop had operated it as occasion required. Plaintiff, who belonged to the "floating gang"—that is, the body of common laborers employed to help about the shop whenever and wherever they were directed, among the rest—had operated the crane. In this state of the proof, and in the absence of evidence going to show that Curl was incompetent, plaintiff's testimony to the effect that he had complained generally to Hatten, foreman of the machinists' helpers—i. e., the "floating gang"—about the manner in which the crane was operated should have been excluded. A fortiori, complaints of the operation of the crane by named persons other than Curl were irrele-

want. Such complaints did not competently tend to prove negligence or incompetence on the part of any one; but, had incompetence been shown by evidence sufficient to carry that question to the jury, it may be, by evidence of repeated acts of negligence or otherwise, complaints would have been competent only to trace knowledge to the employer. In this case the competence vel non of Curl alone was within the issue defined by the count and the undisputed evidence that he was operating the crane at the time of plaintiff's hurt.

[8] Whether the defendant was entitled to the general charge as to count 3 of the complaint is not so clear. It has already appeared that this count attributed plaintiff's injury to the negligence of Jarrett, the machinist in charge of the lathe, and exercising superintendence over helpers, for that he failed to notify plaintiff that the chain block was being jammed by the crane runner, or to have the crane moved so that the block and chain would not be over or above plaintiff. This last alternative of the count meant, in the light of the evidence, that Jarrett should have directed that the crane be swung to one side before the block and chain was raised, this in anticipation that the negligence of Curl, the crane runner, might force them from their attachment to the arm of the crane. But this hypothesis of negligence was wholly unreasonable. In reason the count and the evidence offered in support of it were resolved into this proposition: That it was the duty of Jarrett to direct the operation of the crane after it had served its purpose by placing the pipe on the lathe, or, more specifically, that he should have watched the operation of the crane thereafter and given Curl, the crane runner, a signal when to stop. The evidence for defendant went to show that the arm of the crane and the block suspended therefrom were, at all times, in full view and under complete control of the crane runner; that Jarrett, being concerned only to see that the pipe was properly laid upon the lathe, gave the order to the operator of the crane to hoist up the disengaged block and chains and get them out of the way, after which no rule promulgated by the master nor any rule of reasonable care in conducting the operations of the shop required that his attention should further follow the crane, or that he should do what was more conveniently and safely intrusted to the crane runner. Had this theory of the respective duties of Jarrett and Curl found acceptance with the jury, defendant should not have been found liable under the third count of the complaint. But plaintiff adduced some testimony which perhaps the jury may have construed to mean that it was the practice of the shop for the machinist in charge of the lathe to follow all the movements of the crane and give orders for its every operation, and upon this construction

of the evidence the third count was properly submitted to the jury, for, from such practice duty may have been inferred; and if there was the duty on the part of Jarrett to notify or direct the crane runner when to stop the raising of the block and chain after they had been detached from the pipe, then his neglect of that duty would result in defendant's responsibility for its consequences.

[9] If Jarrett's superintendence of plaintiff and the crane runner extended as far as plaintiff seems to have contended it did, then it cannot be said that plaintiff assumed the risk of injury by the negligence of Jarrett, whose duty it was, on this hypothesis, to care for the safety of plaintiff, his subordinate coemployee. *L. & N. R. R. Co. v. Handley*, 174 Ala. 598, 603, 56 South. 539, and cases there cited. We cannot say, therefore, that there was error in the refusal of charge 7, requested by defendant. We have said enough to indicate our view of all questions raised by the assignments of error.

Reversed and remanded.

ANDERSON, C. J., and MCLELLAN and GARDNER, JJ., concur.

METROPOLITAN LIFE INS. CO. v. GOODMAN. (3 Div. 193.)

(Supreme Court of Alabama. Jan. 18, 1916.
Rehearing Denied March 23, 1916.)

1. INSURANCE — 640(2) — ACTION — ANSWER — LIFE INSURANCE — BREACH OF WARRANTY.

Under Code 1907, § 4572, providing that no misrepresentation or warranty shall invalidate a policy of life insurance unless made with intent to deceive or unless it increased the risk, it is not enough for the plea to allege that the assured falsely warranted that he had not been attended by a physician for a serious disease for a given period; neither of the statutory conditions being thereby fulfilled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618, 1628; Dec. Dig. 640(2).]

2. INSURANCE — 250(1) — LIFE INSURANCE — MISREPRESENTATION — REGULATORY STATUTES — CONSTRUCTION.

Code 1907, § 4572, relating to sufficiency of false representations or warranties to vitiate the policy, must be given a liberal construction in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 539; Dec. Dig. 250(1).]

3. INSURANCE — 640(2) — LIFE INSURANCE — ACTIONS — DEFENSES — PLEADING.

A plea alleging that the insured fraudulently suppressed the fact that he had been attended by a physician for a serious disease, though good under Code 1907, § 4299, relating to suppression of truth, is demurrable where it fails to allege intent to deceive as required by section 4572.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618, 1628; Dec. Dig. 640(2).]

4. TRIAL — 143 — DIRECTION OF VERDICT — CONFLICT IN EVIDENCE.

Where there is a conflict in the evidence, refusal of an affirmative charge is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. 143.]

5. APPEAL AND ERROR §=1006(2)—PRESUMPTION—REVIEW—SUCCESSIVE VERDICTS.

The order denying new trial after two trials with the same result will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of evidence against the verdict clearly shows it to be unjust. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3951; Dec. Dig. §=1006 (2).]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by Nancy E. Goodman against the Metropolitan Life Insurance Company to recover upon the policy issued on the life of Louis M. Goodman under which she was the beneficiary. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 449. Affirmed.

The pleas are as follows:

(6) The policy sued on contained the following condition: "Unless otherwise stated in the blank space below, in a waiver signed by the secretary, this policy is void if the insured, before its date, has been attended by the physician for any serious disease or complaint." And defendant says there is no statement in said policy signed by said secretary waiving such condition; that before the date of said policy the insured had been attended by a physician for a serious disease or complaint, to wit syphilis, which increased the risk.

(7) Same as 6.

(8) Same as 6, except the disease named is gonorrhea instead of syphilis, named in plea 6.

(9) Same as 8.

(15) Defendant for further plea says the insured under the policy insured on had syphilis, to wit, from April, 1907, and continuing for about two years and a half thereafter, and was treated for such disease by Dr. A. H. Montgomery, and when said insured applied for policy of insurance sued on said insured suppressed the fact that he had had the disease above named and had been treated therefor by a physician for the time averred, and defendant says this plea is accompanied by payment into the court of the sum of \$22.40, premiums received under said policy.

(13) Same as 6, and adds that insured had said disease when so attended, and said disease increased the risk of loss. This is also accompanied by a plea of tender.

(14) Same as 13.

Steiner, Crum & Well, of Montgomery, for appellant. Letcher, McCord & Harold, of Montgomery, for appellee.

GARDNER, J. This is the second appeal in this cause. For a report of the former appeal, see *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 South. 449. The first assignment of error insisted on by counsel relates to the action of the court in sustaining demurrers to pleas 6, 7, 8, and 9. These pleas were given consideration on the former appeal, but the assignments of demurrer sustained by the court below were not then presented, and the questions now argued were not, therefore, called to the attention of that court.

The provision in the policy held by the Court of Appeals to be a warranty, and

which constituted much of the substance of the said pleas, was as follows:

"This policy is void if the insured before its date had been attended by a physician for any serious disease or complaint."

Section 4572 of the Code reads as follows:

"No written or oral misrepresentation, or warranty therein made, in the negotiation of a contract or policy of life insurance, or in the application therefor or proof of loss thereunder, shall defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increase the risk of loss."

[1, 2] It is therefore to be noted that under this statute a policy cannot be defeated by the making of a warranty unless the matter misrepresented increased the risk of loss. The court below held the plea subject to demurrer because it did not appear therein that the deceased was afflicted with the disease mentioned in the pleas as having increased the risk, at the time when he was attended by a physician. Counsel for appellant insist that it was sufficient for said pleas to have averred merely that the insured was attended for a serious disease, and that this averment was entirely sufficient without any additional averment to the effect that the insured had such disease at the time he was being attended by a physician. To quote from their brief:

"The provision, it will be noted, is not that the insured did not have a serious disease or complaint, but that he had not been attended by a physician for a serious disease or complaint."

We cannot agree in this insistence. As said by the Court of Appeals on the former appeal of this case:

"The statute is to be liberally construed as to advance the legislative intent and suppress the mischief aimed at."

The construction of the provision of the policy and of the above-quoted statute, which must be read in connection therewith, contended for by counsel for appellant, would by no means meet the standard of liberal construction, but, on the contrary, it is too narrow to meet with the favor of the court. Indeed, the provision of the policy itself may be construed, at least inferentially, to concede that the insured had a serious disease for which a physician was attending him. In *Mutual Life Ins. Co. v. Allen*, 174 Ala. 511, 518, 56 South. 568, 570, is the following:

"The fact, standing alone, that the insured represented that he had not consulted a physician, when in fact he had done so, does not show either 'intent to deceive' or increase of 'risk of loss'; and, unless the misrepresentation was made with such intent, or unless it had the effect to increase the risk, then the statute expressly says it shall not 'defeat or void the policy.' It is neither the natural nor the necessary effect of such misrepresentation to show intent to deceive or to increase of risk; hence the intent or the effect required by the statute must be averred, or facts must be alleged from which the intent or effect must necessarily follow. * * * It is not sufficient under our statute to aver merely that this misrepresentation 'increased the risk.' It may or may not have done so, depending upon the attending facts,

which are not averred. Suppose that the physician consulted had found no disease or disorder, and had so advised the insured and the insurer; in such case certainly the misrepresentation could not have increased the risk. In order for the plea to be good under this alternative, it should have averred the facts from which the conclusion is deducible. 4 Mayf. Dig. 467."

As previously stated, this defect in the pleas was not pointed out by appropriate assignments of demurrer on the first trial of the cause, and therefore was given no consideration on the former appeal. We conclude there was no error in sustaining the demurrer to these pleas.

[3] The next insistence is that there was error in sustaining the demurrer to plea 15. It is urged that this plea is wholly unlike the others in that it rests upon the affirmation of fraud in the suppression of a fact by the insured when making application for the insurance, and that it was drawn so as to comply with section 4299 of the Code. It need not be conceded that said plea would be sufficient under said section without reference to any other; but in any event the plea would not be held free from attack unless it also met the requirements of section 4572 of the Code of 1907, which relates specifically to the subject here under review, and wherein it is required that the misrepresentation, to be of any avail, must be made with the actual intent to deceive. As said by this court in *Empire Life Ins. Co. v. Gee*, 171 Ala. 435, 439, 55 South, 166, 168:

"Where fraudulent representations are pleaded in defense to an action on a policy of insurance, it must be shown that false statements have been made with intent to deceive, that they related to matters intrinsically material to the risk, and that the insured relied on them. This rule has not been changed by statute or decision."

See, also, in this connection *Mutual Life Ins. Co. v. Allen*, 166 Ala. 159, 51 South. 877; s. c., 174 Ala. 511, 56 South. 568; *Penn-Mutual L. I. Co. v. Mechanics' Sav. Bk.*, 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692; *Id.*, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L. R. A. 38, 70.

There is no averment in the plea either as to the materiality of the representations or as to any intention on the part of the insured to deceive. The court properly held the plea bad.

[4] The cause proceeded to trial upon the general issue and special pleas 13 and 14, which said pleas, in addition to the averments contained in the special pleas 6, 7, 8, and 9 above referred to, alleged that the insured had such disease when attended by the physician, and which said disease increased the risk of loss. Two physicians were examined by the defendant and one on behalf of the plaintiff. The evidence was in conflict, and the affirmative charge was properly refused.

[5] Much stress is laid by counsel upon the action of the court in denying the motion for

a new trial on the ground that the verdict was contrary to the evidence. The case has been twice before a jury, each trial resulting in a verdict for the plaintiff. The evidence was in conflict. The court below had the witnesses before it, and denied the motion. Under the familiar rule announced in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, this ruling will not be reversed, unless after allowing all reasonable presumptions of its correctness the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. This we are not prepared to do after a most careful examination of the record. *Cont. Cas. Co. v. Ogburn*, 186 Ala. 398, 64 South. 619.

We have here given consideration to the questions argued in brief of counsel for appellant, and, finding no reversible error in the record, it follows that the judgment of the court below must be affirmed.

Affirmed.

ANDERSON, O. J., and McCLELLAN and SAYRE, JJ., concur.

MARSHALL v. LISTER et al. (7 Div. 758.)
(Supreme Court of Alabama. Feb. 10, 1916.
On Rehearing, March 30, 1916.)

1. TRUSTS \Leftrightarrow 81(2). 357(1) — PURCHASE OF LAND WITH WIFE'S MONEY.

Where a husband purchased land with money of his wife, taking title in his own name, a resulting trust arose, but such trust cannot under Code 1907, § 3413, be set up as against creditors of the husband who instituted action and levied on the land without notice of the trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 116, 539-542, 550-552; Dec. Dig. \Leftrightarrow 81(2), 357(1).]

On Rehearing.

2. ATTORNEY AND CLIENT \Leftrightarrow 104—OFFICE OF ATTORNEY—SCOPE OF AUTHORITY.

Where a husband notified his creditor's attorney that his wife owned land, title to which stood in his name, but it did not appear that the notice was given before the creditor instituted suit or when it was given, such notice is not notice to the creditor of the wife's equity; notice to an attorney or knowledge acquired by him not being notice to his client, unless given or acquired after the relation began.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 92, 93; Dec. Dig. \Leftrightarrow 104.]

Appeal from Chancery Court, Etowah County; W. W. Whiteside, Chancellor.

Bill by Julia Hill Marshall against John P. Lister and others to enjoin the advertising, selling, or offering for sale of certain lands. Decree for respondents, and complainant appeals. Affirmed.

The bill alleges that Julia Hill Marshall is in the peaceable possession of certain lands therein described, that she is the sole owner of said lands, and is in the peaceable possession thereof, and that her title thereto or a part thereof is denied or disputed by the de-

fendants. The bill further avers that John P. Lister was sheriff of Elmore county on the 2d day of April 1914, under an execution issued out of the city court of Gadsden wherein M. Starnes, doing business, etc., had obtained judgment against one P. W. Marshall in the sum of \$500 and costs, levied on the property under said execution and for the satisfaction of said judgment, and advertised the same for sale, and unless enjoined will sell the same. Complainant avers that she is not in any wise connected with nor a party to said suit or judgment; that the sheriff made the levy upon her property at the instance of the attorney of record of said M. Starnes, doing business, etc., the plaintiffs in the judgment, but that P. W. Marshall, who is defendant in such execution, was not in possession of said land, and did not own any right, title, interest or claim therein. The defense set up is the recovery of the judgment referred to in the bill, the filing of a certificate of the judgment in the office of the judge of probate, and title in P. W. Marshall as shown by the records of said county at the time and subsequent to the filing of said certificate of judgment, and later the conveyance by P. W. Marshall by deed to his wife, Julia Hill Marshall, of all the lands described in the bill. There was decree holding the land subject to the lien of the judgment.

W. J. Boykin and J. M. Miller, both of Gadsden, for appellant. Inzer & Inzer, of Gadsden, for appellees.

ANDERSON, C. J. [1] It may be conceded only for the purpose of deciding this case that the land in question was bought with the complainant's money by her husband, who took the deed in his own name, and that there was therefore a resulting trust in favor of the wife, this appellant; yet this trust was inoperative and void as against the judgment lien of M. Starnes, doing business in the name of the New South Rubber Tire Company, which said judgment was obtained and certified to the probate office before the registration of the deed from the husband, P. W. Marshall, to his wife, this appellant, and there is no proof in this record of notice to the said M. Starnes of the existence of the equity attempted to be enforced by the original bill of complaint. Section 3413 of the Code of 1907; *Preston v. McMillan*, 58 Ala. 84; *John Silvey Co. v. Cook*, 68 South. 37.

The appellant contends that the possession of the land by the husband, or of the husband and wife jointly, will be referred to the wife, or to the husband's representative capacity, and that such a possession is equivalent to notice of said equity. This contention finds support in the case of *Robison v. Robison*, 44 Ala. 227, but this case is in direct conflict with the latter case of *Preston*

v. McMillan, 58 Ala. 84, and is out of line with many of the decisions of this court, and is not sustained by the authorities there cited. The correct rule is that, when husband and wife live together on land—that is, have a community of possession—the possession will be referred to the one who has the legal title, and which was not only in the husband in the case at bar, but his deed was upon the records of the county. *Anglin v. Thomas*, 142 Ala. 284, 37 South. 784; *Larkin v. Baty*, 111 Ala. 308, 18 South. 666, and cases cited.

The case of *Gwynn v. Hamilton*, 29 Ala. 233, cited in the *Robison* Case, supra, does not support the holding in said *Robison* Case in point or by analogy. The other case cited, *Michan and Wife v. Wyatt*, 21 Ala. 813, is opposed to the holding in said *Robison* Case. There the wife, and not the husband, had the title, and it was said in the opinion:

"In such case the possession will be referred to the title and the husband will be regarded as the trustee for the wife."

The *Robison* Case, supra, has been, in effect, overruled by the decisions of this court, but in order to remove all doubt in the future as to the soundness of same upon the point at issue it is hereby expressly overruled.

We do not think that the chancery court committed reversible error in not sustaining the complainant's objection to proof of the exhibits to the answer and cross-bill.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur.

On Rehearing.

[2] It is now suggested for the first time that the respondent M. Starnes had notice of the equity of Julia Hill Marshall in the land, or of facts to put him upon inquiry. Counsel insist that P. W. Marshall testified that he told Starnes' attorneys, Inzer & Inzer, before the judgment was obtained that his wife owned the land. We find the following statement in the testimony of P. W. Marshall, on page 66 of the record:

"But it is a fact that I told J. C. Inzer prior to the institution of said suit that I had no property; that what I had control of belonged to my wife."

Whether or not this would be notice of the claimed equity of the wife we do not decide; for this may be conceded, and still it does not show notice to the respondent M. Starnes. The record does not disclose who J. C. Inzer was, or, if a member of the firm of Inzer & Inzer, respondent's solicitors, that he was attorney for Starnes in the claim in question when the statement was made to him. It was made before the institution of the suit, and may have been made before Inzer & Inzer became Starnes' lawyers for the collection of this claim.

"Notice to an attorney or knowledge acquired by him is not notice to his client, unless given

or acquired after the relation began." 2 Ency. Dig. Ala. Rep. § 57, p. 121, and Alabama cases there cited.

The application for rehearing is overruled.

JEFFERSON PLUMBERS & MILL SUPPLY CO. v. PEEBLES. (6 Div. 154.)

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

1. MECHANICS' LIENS \Leftrightarrow 129—PERFECTION.

Where a materialman simultaneously furnished materials for the plumbing and the heating of a building, his lien will not be lost because both items were included in a single account; the parties to both contracts and the building being the same.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 188, 202, 203; Dec. Dig. \Leftrightarrow 129.]

2. CONTRACTS \Leftrightarrow 170(1)—CONSTRUCTION—CONSTRUCTION BY PARTIES.

Where the parties to a contract have given it a particular construction, such construction should usually be adopted by the courts.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. \Leftrightarrow 170(1).]

3. MECHANICS' LIENS \Leftrightarrow 129—CONTRACTS—CONSTRUCTION.

Where defendant's agent purchased materials from complainant, there being two orders for different classes of materials, but the items were entered on one account and the contract treated by the parties as a single one, the account must for the purpose of perfecting a mechanics' lien be accepted as a single one including various items.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 188, 202, 206; Dec. Dig. \Leftrightarrow 129.]

4. MECHANICS' LIENS \Leftrightarrow 182(1)—FILING OF LIEN—TIME FOR FILING.

Where a materialman furnished two classes of goods on a single contract and items for one class were furnished within the four months and six months periods prescribed by Code 1907, §§ 4758, 4777, for filing the lien statement and instituting action, he may have a lien on both classes of items.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 193; Dec. Dig. \Leftrightarrow 182(1).]

5. MECHANICS' LIENS \Leftrightarrow 157(4)—CLAIMS—UNINTENTIONAL CLAIMS.

Where a materialman included in the lien claim an item for materials not used in the building, but there was no evidence of fraud or of intent to claim more than he was entitled, such fact will not prevent the materialman from obtaining a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 271; Dec. Dig. \Leftrightarrow 157(4).]

6. PAYMENT \Leftrightarrow 39(6)—APPLICATION OF PAYMENT—RIGHT TO APPLY.

Where a materialman furnished materials which were not used in the building on which he perfected a lien he may apply a payment, no application being specified, to such unsecured items.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 111; Dec. Dig. \Leftrightarrow 39(6).]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by the Jefferson Plumbers & Mill Supply Company against Mrs. Alice L. Peebles.

From a decree for defendant, complainant appeals. Reversed, rendered, and remanded.

Francis M. Lowe and Nisbet Hambaugh, both of Birmingham, for appellant. Samuel B. Stern, of Birmingham, for appellee.

GARDNER, J. By this bill the complainant (appellant here) seeks a foreclosure of materialman's lien upon a certain lot and a four-story brick structure thereon, known as the "Manhattan Hotel," situated in Birmingham, Ala., and which is the property of the respondent to the bill. The bill shows that during a series of months in the years 1913-14 the complainant as the original contractor furnished to the defendant plumbing and heating materials used in the construction of said building, the last item being furnished on March 30, 1914, and that the balance of the account and the entire indebtedness accrued on April 1, 1914. The filing of the affidavit and claim of lien in the probate office of Jefferson county is shown to have been done on May 16, 1914. The answer contains a general denial of all the allegations of the bill and also special pleas of the statute of limitations.

[?] The chancellor dismissed the bill for the reason, as given in his opinion, that he found from the record that the material for the plumbing and that for the heating was furnished under separate and distinct contracts; that in order to fix a lien there should have been filed separate accounts in the probate office; and that complainant acquired no lien by filing the account in which the two classes were blended. This seems to be the only objection urged against the sufficiency of the account filed in this cause, so far as its substance is concerned.

The evidence discloses that the materials for the plumbing and for the heating were furnished the defendant for the said building practically simultaneously and while the building was in course of construction. Here the parties are the same; the same property is improved, and the rights of no third person are shown to be involved. In such a situation, we cannot agree that the lien would be lost by a failure to file separate accounts. Indeed, such was the holding of this court in *Ala. State Fair Ass'n v. Ala. Gas, etc., Co.*, 181 Ala. 256, 81 South. 26, wherein the opinion concludes with the following statement:

"Nor is the lien prejudiced either in whole or in part by the fact that the demand includes work and material furnished under two separate agreements, since the same property was included under both agreements, and the rights growing out of the same are identical in character and as to parties."

Such, is, also, the holding of the Supreme Court of Missouri, under a statute very similar to ours, the decisions of which court find frequent reference in our cases upon this subject. In *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118, speaking to this subject it was said:

"There is no provision of the statute requiring a separate account to be filed for each separate contract, under which material may have been furnished, though the material may be entirely different and the contracts independent. The statute requires the account filed to be 'a just and true account of the demand due him or them after all just credits have been given.' The statute evidently contemplated filing only one account, and no reason can be seen for adding anything to its requirements."

There is nothing in the case of *Lane & Bodley Co. v. Jones*, 79 Ala. 156, holding to the contrary. The language of the opinion relied upon by counsel for appellee was dealing with the question as to the time within which the claim must be filed, and was to the effect that, when the material is furnished under separate contracts, the statement must be filed within the time limited after delivery upon each separate contract. And such was also the holding of the Missouri court in *Grace v. Nesbitt*, *supra*.

[2, 3] From the view which we take of the case, however, the question just discussed is not one of controlling importance here. We are not persuaded that these materials were furnished under separate and distinct contracts, but are inclined to the view, rather, that the orders were, for all practical purposes and as understood by the parties themselves, merely items of one and the same transaction.

No indication is found in the answer of respondent that insistence would be made that the materials for which the lien was sought to be established were furnished under separate contracts, and, as the answer to the bill was but a mere general denial of its allegations, it may be seriously questioned whether such a defense is available to respondent. An examination of the evidence does not disclose that this was a question given serious consideration by the respective parties on the trial of the cause. However, as the question of the sufficiency of the answer in this respect is not pressed upon us by counsel for appellant, we pass it by and determine the cause upon its merits.

Aside from the question we have here discussed, and that of the statute of limitations insisted on by counsel for appellee, there is very little by way of defense to this bill that needs consideration here. While the husband of the respondent, who was confessedly her agent, in these matters, seems to doubt that some of the material went into the building and questioned the authority of some of the laborers to receive the same, yet an examination of the evidence discloses that the insistence for the complainant remains practically without dispute, and that its claim, so far as the merit of the situation is concerned, is fully and completely established.

It appears from the evidence that, when the building was in the course of construction, the husband of respondent made inquiries as to prices on plumbing and heating materials for it, and that complainant in

this cause was negotiated with. Arrangements for the furnishing of same were made by him, for respondent, and it appears that the understanding in regard to the plumbing was reached a few days prior to that for the heating materials. This is indicated by the facts that on December 4, 1913, the complainant wrote out an order for the respondent to sign, directing that the plumbing material be furnished as ordered by the contractors; and that a similar order as to the heating material and fixtures was signed on December 16, 1913. The two orders are practically the same, and in each the respondent agreed to pay for the material on the Saturday following each delivery of same. Materials for the heating and plumbing for this building were furnished by complainant as needed and ordered, and amounted to a considerable sum. The indebtedness was kept on the books as one account, and the bills rendered to respondent were likewise of one account. Payments were not made on the Saturday following each delivery, but were made from time to time on the account as a whole. Upon the completion of the building, there was some plumbing and heating material left over which was returned and credited on the account. As previously shown, the claim was filed in the probate office as one account or claim, and after the filing of the same the respondent made several payments thereon, amounting to a considerable sum. Indeed, the evidence satisfactorily discloses to our minds that the parties to this suit in fact contemplated and treated the entire matter as one and the same continuous transaction, and that the separate orders given were merely for the convenience of the respective parties and for their protection as to the proper delivery of materials.

"Where the parties to a contract have given it a particular construction, such construction would generally be adopted by the court in giving effect to its provisions, and the subsequent acts of the parties, showing the construction they had put upon the agreement themselves, are to be looked to by the court and in some cases may be controlling." 9 Cyc. 588.

Speaking to this subject of the entirety of contracts, Mr. Phillips, in his work on *Mechanics' Liens* (section 229, p. 405), said:

"But when work or material is done or furnished, all going to the same general purpose, as the building of a house or any of its parts, though such work be done or ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be treated as a unit, or as being but a single contract."

The following cases recognized and applied the foregoing principle: *Joplin S. & D. Wks. v. Okla. College*, 36 Okl. 547, 129 Pac. 40, 43 L. R. A. (N. S.) 158; *Miller v. Batchelder*, 117 Mass. 179; *Kiser Lbr. Co. v. Mosely*, 58 Ark. 544, 20 S. W. 409; *Page v. Bettes*, 17 Mo. App. 366; *Matthews v. Waggenhaeuser*

Ass'n, 83 Tex. 604, 19 S. W. 150; *Jones, etc., Co. v. Murphry*, 64 Iowa, 185, 19 N. W. 898; *Hooven, etc., Co. v. Featherstone*, 111 Fed. 81, 49 C. C. A. 229.

We do not think that what is said in *Lane & Bodley v. Jones*, *supra*, conflicts with this principle, or with the conclusion we have here reached. What is there said must, of course, be read in the light of the facts in that particular case, which disclose that the respondent had several mills situated in separate counties, for which material was furnished indiscriminately, and one account was kept of the whole; and, in addition thereto, the rights of third parties intervened. But in that case it was said:

"If the materials were furnished in pursuance of a single continuing contract, such as to furnish materials for a building about to be erected, or in process of construction, the period within which the statement must be filed with the judge of probate commences to run from the delivery of the last items."

Nor do we find any conflict in the conclusion here reached and the holding of the court in *Cutcliff v. McAnally*, 88 Ala. 507, 7 South. 331.

[4] It is insisted by counsel for appellee that, according to the account filed, the last fixture or material for the heating was furnished on a date which was more than eight days beyond the six months' statute of limitation for bringing this suit, and hence that all items for heating material are thus barred. Again, passing by the question of pleading that the answer fails to thus separately set up this particular defense of the statute of limitation as to these particular fixtures, we still conclude that the contention is without merit, as we have above stated our opinion that the contract was, within the contemplation of the parties, one continuous transaction. Such being the case, the time limit dates from the period when the last item was furnished (March 30, 1914), and both the filing the claim in the probate office (May 16, 1914) and the bringing of the suit (September 25, 1914) were well within the limit. Code 1907, §§ 4758, 4777.

[5, 6] The inclusion in the claim filed of items furnished the respondent on October 17, and 24, 1913, for material not used in this building, amounting in the aggregate to something over \$56—there being no indication of any fraud on the part of the complainant, nor of any intentional act on its part to claim more than it is justly entitled to—does not affect the validity of said claim. *Ala. & Ga. Co. v. Tisdale*, 139 Ala. 250, 36 South. 618. And these being the oldest items on the account, the cash payment of \$200, made on December 13th, without its application being specified, would be held to apply to and balance them. *Winston v. Farrow*, 40 South. 53. Their inclusion was without effect upon the result here.

Upon careful consideration, we have reach-

ed the conclusion that the complainant was entitled to the relief it sought. From the statement of the account, attached as Exhibit F', of J. J. Lee, witness for complainant, the balance due by respondent on August 1, 1914, was the sum of \$1,331.93, which we conclude is correct.

The decree of the court below will be reversed, and one here entered declaring the complainant entitled to the relief it seeks and to a foreclosure of the lien upon the property described in the bill, for the enforcement of payment of said sum of \$1,331.93, with interest at the legal rate of 8 per cent. from August 1, 1914; and the cause will be remanded to the court below for a further decree foreclosing said lien in accordance with the practice of the chancery court in such cases.

Reversed, rendered, and remanded. All the Justices concur.

JOHNSON v. JOHNSON. (6 Div. 208.)

(Supreme Court of Alabama. Jan. 13, 1916.

Rehearing Denied March 23, 1916.)

1. DIVORCE ⇄240(3) — ALIMONY — AMOUNT — EVIDENCE.

Where there is evidence that the husband received money for the sale of land, and that his earning power is a given sum, it cannot be said that there is no basis for a decree of alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 677; Dec. Dig. ⇄240(3).]

2. DIVORCE ⇄239 — ALIMONY — AMOUNT — EVIDENCE — REFERENCE.

The question of the amount of compensation to be awarded for the wife's attorneys may properly be referred to the register; such fees being allowable to the wife in her suit for alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 673, 674, 683; Dec. Dig. ⇄239.]

3. DIVORCE ⇄245(1) — ALIMONY — ACTIONS — RETENTION OF JURISDICTION.

Proceedings for the award of alimony should always be kept within control of the court so that proper changes to conform with the circumstances may be made.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 692, 695; Dec. Dig. ⇄245(1).]

Appeal from Chancery Court, Lamar County; James E. Horten, Jr., Chancellor.

Suit by Minnie Johnson against W. J. Johnson. Decree for plaintiff, and order of reference, from which defendant appeals. Affirmed.

Walter Nesmith, of Vernon, for appellant. Kelley & Young, of Vernon, for appellee.

GARDNER, J. Suit by the wife against the husband for alimony alone. The sufficiency of the bill's averments was tested on the former appeal in this cause, *Johnson v. Johnson*, 67 South. 400. From a decree finding the complainant entitled to relief, and ordering a reference to ascertain what would be a reasonable sum to be paid her as alimony, and what a reasonable sum to be paid as compensation for her solicitors, respondent prosecutes this appeal.

The decree directed the register to take into consideration the amount of property owned by respondent, his earning capacity, the amount of his annual income, the circumstances of the parties, and any children the respondent had, dependent upon him for support, as well as to take into consideration the age and health of the complainant, her earning capacity, and what property she might have. The evidence discloses that the complainant left the home of the respondent in June, 1913; the marriage having occurred in 1911. That complainant is without property of any character is without dispute.

The finding of the chancellor that the complainant was entitled to relief discloses his conclusion that the abandonment, by the wife, of the husband, was through the fault of the latter. The evident desire on the part of the respondent that his wife should leave his home, and his confessed unwillingness for her return thereto, in the light of all the testimony in the cause, lends color and support to the theory of the complainant. But we are not disposed to discuss the evidence, for it would serve no good purpose. Suffice it to say, it has been given careful consideration, and we find no fault with the conclusion reached in the court below.

[1] It is insisted that proof fails to show any property owned by respondent, or any income therefrom, and therefore that there can be no basis for a decree of alimony. There is evidence, however, justifying a very reasonable inference that respondent has some means. In 1912 he sold some property to his son for \$1,800, which sum has been paid; and there is evidence tending to show some other means. A further inquiry into his financial condition will doubtless be made by the register, in the reference which has been ordered. In addition to this, there is evidence tending to show that the earning capacity of respondent, at the time of the separation, was \$50 per month, which amount he earned as clerk in a store, although he is not now so employed, but is engaged in other labor. That earning capacity is to be taken into consideration, was determined by this court in the recent case of *Ex parte Whitehead*, 179 Ala. 652, 60 South. 924.

[2] The question of reasonable compensation for complainant's solicitors was also properly referred to the register. *Rast v. Rast*, 113 Ala. 319, 21 South. 34; *Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110. "It has long been the practice in this state to allow such fees in proper cases. They may be regarded as a part of her temporary alimony, necessary for the maintenance of her suit." *Rast v. Rast*, supra. Upon this question, the case of *Brindley v. Brindley*, 121 Ala. 429, 25 South. 751, wherein it was disclosed that counsel for the wife were to get, under their agreement, half of what was procured by the wife

as alimony, is without application to the instant case, as no such agreement, nor anything in the slightest way tending in that direction is shown by this record.

[3] Cases of this character should always be left open and within full control of the court for any change therein which the circumstances or the necessities of the situation may demand. The chancellor, in his decree of reference, was careful to give full scope to the inquiries by the register as to the situation of the parties, that justice may be done, and no hardship result. We find no error in the decree, and it is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

STATE ex rel. BROWN v. SLAUGHTER, Probate Judge. (1 Div. 915.)

(Supreme Court of Alabama. Feb. 23, 1916. Rehearing Denied March 30, 1916.)

STATUTES \S 76(4), 89, 101(1)—SPECIAL LEGISLATION—TIME OF ELECTION—CONSTITUTIONAL PROVISION.

Local Acts 1915, p. 394, \S 1, creating a board of revenue for Monroe county, is not unconstitutional under Const. 1901, \S 104, subd. 29, forbidding special legislation providing for the conduct of elections, or changing county boundaries, nor under Const. 1901, \S 105, forbidding a local law in a case provided for by a general law, as it merely provides that the appointees shall hold office until 1920, when their successors shall be elected, and makes no attempt to provide how or in what manner they shall be elected.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 75 $\frac{1}{2}$, 97, 113; Dec. Dig. \S 76(4), 89, 101(1).]

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Petition by the State of Alabama, on the relation of J. E. Brown, for mandamus to I. B. Slaughter, Judge of Probate, to require said judge to file the committee selected by petitioner, together with the committee's acceptance, in accordance with the Corrupt Practice Act. From a decree denying relief, petitioner appeals. Affirmed.

The petition alleges that I. B. Slaughter is judge of probate of Monroe county; that petitioner is over the age of 21 years and a qualified elector in Monroe county; that on December 14, 1915, petitioner made a public announcement of his candidacy for membership on the board of revenue of Monroe county, to be held at the general election which will be held throughout the state of Alabama during the year 1916, and in connection therewith, and in pursuance of the Corrupt Practice Act, he presented in writing to said Slaughter, as judge of probate, to be filed, the name of his committee and the acceptance and agreement of such committee to act for him in the management and control of such

funds, as may be used in and about the candidacy of his said office, a copy of which was attached, but that said I. B. Slaughter, as such judge of probate, refused to file such statement, selection, or nomination, on the ground that the last Legislature of Alabama provided that the next election to the office of board of revenue of Monroe county should be postponed until 1920. Petitioner alleges that the act aforesaid was a local act, and provided for the conducting of an election in violation of section 104, subd. 29, Const. 1901, and for the further reason that it is violative of section 105 of the Constitution, as the time of election to such office is provided for by a general law.

Charles Hybart, of Monroeville, for appellant. Hare & Jones, of Monroeville, for appellee.

PER CURIAM. Section 1 of the act of 1915 (Local Acts, p. 394), creating a board of revenue for Monroe county, etc., merely creates a board of revenue in lieu of county commissioners, prescribes the duties thereof, and provides for the term of office. It does not attempt to deal with elections, county boundaries, etc., as forbidden by subdivision 29, § 104, of the Constitution of 1901.

Nor is said section 1 repugnant to section 105 of the Constitution upon the idea that the thing done or the relief sought is provided by a general law. Said section 1 merely provides that the appointees shall hold office until 1920, when their successors shall be elected, and makes no attempt to provide how or in what manner they shall be elected, and they will naturally and properly be elected in 1920, under the general election law. Section 334 of the Code of 1907. The law and equity court did not err in sustaining the demurrers to the petition for mandamus and in denying said petition, after the petitioner declined to amend or plead further, and the judgment is affirmed.

Affirmed.

ANDERSON, O. J., and SAYRE, GARDNER, and THOMAS, JJ., concur.

STATE ex rel. MELTON v. SLAUGHTER,
Probate Judge. (1 Div. 914.)

(Supreme Court of Alabama. Feb. 1, 1916.
Rehearing Denied March 30, 1916.)

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Petition for mandamus by the State, on the relation of J. A. Melton, against I. B. Slaughter, Judge of Probate. From a decree denying relief, petitioner appeals. Affirmed.

Charles Hybart, of Monroeville, for appellant. Hare & Jones, of Monroeville, for appellee.

PER CURIAM. Affirmed on the authority of *State ex rel. Brown v. Slaughter*, 71 South. 416.

ANDERSON, O. J., and SAYRE, GARDNER, and THOMAS, JJ., concur.

KYLE v. JORDAN. (7 Div. 688.)

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

1. DEEDS — SEPARATE WRITINGS — CONSTRUING TOGETHER.

Whether or not a supplemental writing, not referred to nor identified in the executed deed, can be offered and received in evidence as a part of the deed must depend upon the considerations: (1) It must be written contemporaneously with the deed by the grantor or his draftsman; (2) it must be physically before the grantor when he executes the deed; (3) it must be delivered to the grantee or his agent along with and as a part of the deed; (4) it must not contradict any of its expressed terms; and (5) it must, upon its face, be continuous, coherent, and consistent with that part of the deed which it purports to supplement, that is, there must be internal evidence of the identity and unity of the two writings as constituting a single transaction.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 261-265; Dec. Dig. ¶ 99.]

2. DEEDS — SEPARATE WRITINGS — CONSTRUING TOGETHER.

A supplemental writing on a separate piece of paper, containing matter of description additional to that in the deed, but contradicting the deed both as to parties and consideration, *held* not properly received in evidence as a part of the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 261-265; Dec. Dig. ¶ 99.]

3. DEEDS — SEPARATE WRITINGS — CONSTRUING TOGETHER.

The rule is not absolute that a deed and a supplemental paper claimed to be a part of it shall, on their face, indicate a reference to each other and in some cases parol evidence of contemporaneous facts may be admissible to show their connection; but to allow such proof there must be internal evidence of the identity and unity of the writings as constituting a single transaction.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 261-265; Dec. Dig. ¶ 99.]

4. FRAUDS, STATUTE OF — REAL PROPERTY.

The great controlling purpose of the statute is the requisition of written evidence of all contracts for the sale of lands.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 113-139; Dec. Dig. ¶ 71.]

McClellan, Somerville, and Gardner, JJ., dissenting.

Appeal from City Court of Gadsden; John H. Disque, Judge.

Ejectment by S. E. Jordan against R. B. Kyle. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. J. Boykin and George D. Motley, both of Gadsden, for appellant. Hood & Murphree, of Gadsden, for appellee.

MAYFIELD, J. [1] When this case was here on former appeal, we ruled that the supplemental writing, on a separate piece of paper, containing additional matter of description to that in the deed, was admissible in evidence as a part of the deed, under the evidence as it then appeared of record. See 187 Ala. 355, 65 South. 522. The authorities

on the subject of the admissibility in evidence of separate writings, not signed, as parts of deeds or wills, were reviewed at some length; and in holding the separate writing in this case to be admissible as supplementing the deed in question, the following rule, to which we yet adhere, was laid down:

"We hold that whether or not a supplemental writing, not referred to nor identified in the executed deed, can be offered and received in evidence as a part of the deed must depend upon the considerations: (1) It must be written contemporaneously with the deed by the grantor or his draftsman; (2) it must be physically before the grantor when he executes the deed; (3) it must be delivered to the grantee or his agent along with and as a part of the deed; (4) it must not contradict any of its expressed terms; and (5) it must, upon its face, be continuous, coherent, and consistent with that part of the deed which it purports to supplement, that is, there must be internal evidence of the identity and unity of the two writings as constituting a single transaction."

[2] On further consideration we are now convinced that we were wrong in holding the separate writing admissible as a part of the deed. We now hold that the record in this case does not bring the separate writing within either the fourth or the fifth qualification of the rule above quoted from the opinion on the former appeal. There are contradictions, in express terms, between the recitals in the deed and those in the separate writing, as to both the parties to, and the consideration for, the deed. In the deed proper the grantee is described as M. Clonninger, and the consideration is stated to be \$15 per acre, cash in hand paid; while in the separate writing the recital is that L. Clonninger is to pay \$15 per acre. These are certainly contradictions in express terms. We are now of the opinion that there is no internal evidence of the identity and unity of the two writings as constituting a single transaction, sufficient to dispense with a reference in the deed to the separate writing. The deed on its face indicates no reference to this or any other separate writing as being supplementary thereto. While it is possible, or even probable, that both the deed and the separate writing may relate to, or attempt to describe the same piece of land, yet there is no reference in the deed to any separate writing necessary to complete it, and nothing on the face of the papers to show that one is contemporary to the other. The evidence to this end is wholly oral, and therefore inadmissible and unavailing to unify the two writings.

[3] We still adhere to the former holding of this court that the rule is not absolute that the several papers shall, on their face, indicate a reference to each other, and that parol evidence may be admissible, in some cases, of contemporaneous facts, to show connection between the several writings; but to allow such proof, there must be some internal evidence of the identity and unity of the several writings as constituting a single

transaction. This question was discussed, and the authorities were reviewed at some length, in *Bryan's Appeal*, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393, it was there said:

"First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: 'But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear and explicit and unambiguous as to leave its identity free from doubt.' *Estate of Young*, 123 Cal. 337, 342, 55 Pac. 1011. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: 'But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained.

* * * The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document.'"

[4] While the rule has probably been relaxed, in this state, to the extent that there need not be an express reference in the deed, will, or other writing to the separate extrinsic document, yet we hold that there must be internal evidence of the identity and unity of the two writings as constituting a single transaction. To allow parol proof to unify such writings, when there is no direct reference in one to the other, and no internal evidence of the identity and unity of the two writings, would tend to do away, in a degree, with the statute of frauds, and to make the effect of all documents required to be in writing indefinite and uncertain. The great controlling purpose of the statute is the requisition of written evidence of all contracts for the sale of lands.

"The meaning of the statute," said Lord Hardwicke, in *Welford v. Beazley*, 3 Atk. 503, "is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and therefore, both in this court and the courts of common law, when an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon."

We therefore adhere to what was said in *Jenkins v. Harrison*, 66 Ala. 360:

"The rule is general that several papers, relied on to meet the requirements of the statute of frauds, should, on their face, indicate a reference to each other. *Carter v. Shorter*, 57 Ala. 253; *Knox v. King*, 36 Ala. 367. The rule is not absolute, and there are cases in which parol evidence of contemporaneous facts, and of the circumstances in which the parties were when the writings were signed, will be received to show their connection. *Thayer v. Luce*, 22 Ohio St. 62; *Salmon v. Goddard*, 14 How. (U. S.) 446 [14 L. Ed. 493]; *Beckwith v. Talbot*, 95 U. S. 289 [24 L. Ed. 498]. As said in the case last cited: 'There may be cases in which it would be a violation of reason and common sense to ignore a reference which derived its

significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But, when there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud."

A close inspection of this record certainly leaves no ground for doubt, and the general rule should be here enforced.

It is also now made to appear that the deed proper was recorded, but that the slip of paper claimed to be a supplement or part thereof was not recorded as a part of the deed. If the separate slip was a part of the deed, it would seem that it should have been recorded with the deed.

As we have held that parol evidence was not admissible to show that the slip of paper in question was a part of the deed, it is unnecessary to decide whether or not M. Cloninger was a witness competent to testify as to that question.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and THOMAS, JJ., concur. McCLELLAN, SOMERVILLE, and GARDNER, JJ., dissent.

HUNDLEY v. HEWITT. (6 Div. 146.)

(Supreme Court of Alabama. Jan. 13, 1916.
On Application for Rehearing, March 23, 1916.)

1. CORPORATIONS — 624 — STOCKHOLDERS — LIABILITY OF.

Under Code 1907, § 3509, the assets of an insolvent corporation constitute a trust fund for the payment of creditors, which fund may be marshaled and administered in a court of equity while section 3744 declares that a judgment creditor of a corporation, with execution return "No property found," may by bill in equity subject to the payment of his judgment the unpaid subscription of one or more stockholders, without regard to whether the corporation has called for such subscription or could maintain suit. A corporation to whose stock defendant subscribed became insolvent, was dissolved, and a receiver was appointed. Held, that in such case the receiver might maintain an action on unpaid stock subscriptions for the benefit of creditors, though such creditors had not recovered judgment which was returned unsatisfied; the insolvency and the dissolution of the corporation obviating the necessity of such procedure.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. 624.]

2. CORPORATIONS — 624 — RECEIVERS — UNPAID SUBSCRIPTIONS.

Where a corporation became insolvent, was dissolved and a receiver appointed, a court of equity having general jurisdiction to collect all corporate assets may authorize the receiver to sue to enforce unpaid stock subscriptions due the corporation, though the corporation had, by resolution of stockholders, canceled the subscription, the order of cancellation being one which would be subject to impeachment by creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. 624.]

On Application for Rehearing.

3. CORPORATIONS — 90(5) — SUBSCRIPTION CONTRACTS — LIABILITY — BILL.

Where a bill to enforce defendant's liability on a contract for subscription to the stock of a

corporation alleged that the corporation was insolvent, and that its debts exceeded the amount due on such contract, the bill, though averring cancellation of the contract or a release to defendant by a majority of the shareholders of liability on the contract, is not demurrable for the reason that any surplus would be distributed to such shareholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 406-410; Dec. Dig. 90(5).]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by R. G. Hewitt, as receiver, against O. R. Hundley. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed.

The fifth and eighth paragraphs of the bill sufficiently appear. The third paragraph sets up the declaration of dissolution of the corporation, and the appointment of Hewitt as receiver. The sixth paragraph sets up the subscribing by Hundley in its original articles of incorporation for 140 shares of the capital stock of the par value of \$100, the payment of \$1,000 thereon, and that he owes a balance of \$13,000. The seventh paragraph sets out the declaration of incorporation filed in the office of the judge of probate, showing the subscription for certain shares of stock, all of said stock subscription being payable in money, or its equivalent in commercial paper upon the approval of the board of directors, and this shows O. R. Hundley 140 shares. The affidavit of the person designated to receive the subscription shows that all the capital stock was paid in in cash, except \$1,000, as paid by Hundley in cash, and his commercial paper for the balance taken and approved by the stockholders. Paragraph 8 sets up, in addition to what is set up in the bill, that Hundley executed his negotiable note in the sum of \$13,000, payable to said company, and then sets up that at an irregular meeting of the stockholders on May 8, 1914, said Hundley fraudulently procured or caused a motion to be made and carried, ordering said insurance company to cancel said note of Hundley, and to return the same to him, and that knowing the whole matter was irregular and out of order Hundley had the motion spread upon the minutes of the company, well knowing that the consideration for which the note had been given had not proved ineffective, but that the said 130 shares of stock for which said note was given were issued to said Hundley, and that he kept said stock many months in his possession, but if mistaken in that, then it is charged that it was always subject to the demand of said Hundley. A similar action at a later meeting of the stockholders is set up, wherein the note was cancelled and discharged. It is charged on information and belief that this last motion was made by the wife of Hundley, Mrs. Bossie O'Brien Hundley, the holder of 5 shares, and that Hundley and

his wife voted their shares in favor of said resolution, and that the other holders of shares either refused to vote for the adoption of this resolution or voted against its adoption, and that at the time the resolution was adopted, there were 98 shares outstanding, and that only 15 shares voted for the resolution, and that exclusive of the vote of Hundley and his wife, less than the holders of 36 shares of the capital stock voted for the adoption of said resolution, thus showing that it was not adopted by a majority of the stockholders.

C. C. Nesmith and Luke P. Hunt, both of Birmingham, for appellant. Beddow & Oberdorfer, of Birmingham, for appellee.

GARDNER, J. The bill in this case is filed by the appellee as receiver for the Sun Life Insurance Company of America, for the purpose of subjecting the unpaid subscription of appellant, a stockholder in said insurance company, to the payment of debts due by said company. The bill shows the organization of the Sun Life Insurance Company of America as an Alabama corporation on October 4, 1913, and its dissolution by a decree of the city court of Birmingham on December 22, 1914, in a suit wherein the state of Alabama, upon the relation of the Attorney General, was complainant and said corporation was respondent. In that cause it was adjudged that the said insurance company had forfeited its right to do business, that it was an insolvent corporation, that its property and assets constituted a trust fund for the payment of its creditors, and that the said corporation be dissolved; and it was further decreed that R. G. Hewitt be appointed receiver of the said company and be authorized and directed to take charge of all its assets and proceed to collect, by suit or otherwise, all claims and indebtedness, and especially all unpaid subscriptions. Code 1907, § 4552.

In the fifth paragraph of the bill it is averred that said insurance company is insolvent and has not property and assets sufficient to pay its creditors; the discrepancy between its assets and its liabilities being the sum of \$20,000. It is further alleged that the respondent, Hundley, subscribed in the original articles of incorporation for 140 shares of the capital stock of the said insurance company of the par value of \$100 a share, paying therefor \$1,000, and that he owes for the balance of said stock the sum of \$13,000. The bill further shows that for the balance due the respondent executed his note, payable to said insurance company, in the sum of \$13,000, bearing date of October 2, 1913, and the affidavit of two persons authorized by the incorporators of said insurance company to receive payment for subscriptions to the capital stock—a copy of which is made a part of the bill—shows that said note was approved by the stockholders

and accepted as the equivalent of cash. It is further alleged that the said note has not been paid, and that respondent, with full knowledge that the said insurance company was financially involved and losing money, and that the value of its stock was depreciating, fraudulently and in violation of the rights of the stockholders and policy holders procured the passage of a resolution, at an irregular meeting of the stockholders on May 8, 1914, authorizing the cancellation of the said note and its return to the respondent; and that he still retains the same or has destroyed it.

A summary of the other averments of the bill, charging fraud in the said note, will appear in the report of the case. The eighth paragraph of the bill shows that the 130 shares of stock for which the note was given were either delivered to said respondent or were always subject to his demand. In the concluding paragraph of the bill it appears that the respondent was the president of said insurance company up to within a month of its dissolution, and that he organized the company and had dominated its affairs up to that time.

[1] Under the provisions of section 3509 of the Code the assets of insolvent corporations constitute a trust fund for the payment of creditors, which sum may be marshaled and administered in a court of equity; and under section 3744 of the Code it is provided that a judgment creditor of a corporation with execution returned 'no property found' may, by a bill in equity, subject to the payment of his judgment the unpaid subscription of one or more stockholders, without regard to whether or not the corporation has called for such subscription or could maintain suit therefor against the stockholder.

The bill in this case shows no judgment against the corporation, but alleges its insolvency and its dissolution by a court of competent jurisdiction in conformity with the statute. The following quotation from *Drennen v. Jenkins*, 180 Ala. 261, 60 South. 856, is therefore applicable here:

"While section 3744 of the Code of 1907 only authorized a judgment creditor of a corporation, having an execution returned 'no property found,' to file a bill in equity to subject to the payment of his judgment the unpaid subscriptions of one or more stockholders, without joining the other stockholders, * * * or could maintain a suit therefor against the stockholders, yet the averments of the bill in this case relieve the complainant from the necessity of complying with the provisions of this section before filing the bill; or, in other words (as was held in the case of *Dickinson v. Traphagan*, 147 Ala. 442, 41 South. 272), they showed this section was not applicable, because it would be impracticable to get judgments. The averment of this case brings the bill within the protection of the rule declared by this court in *McDonnell v. Insurance Co.*, 85 Ala. 401 [5 South. 120]; *Spence v. Shapard*, 57 Ala. 598, which cases are referred to in the *Dickinson Case*, supra. In *Spence v. Shapard*, it is said, referring to the New York decision only, 'that when a corporation is dissolved, the liability of stock-

holders to the creditors became primary and absolute; that it was not then necessary to first sue the corporation, or to aver or prove its insolvency.' * * * It was said in the case of *Dickinson v. Traphagan*, supra, that if the corporation had been dissolved, the creditor could not get judgment on a service in a court of law, and therefore his only remedy is by a bill in equity. The bill in this case avers that the corporation had in effect been dissolved, and that therefore his only remedy would be by a bill in equity."

So, also, is the following excerpt from the more recent case of *Pankey v. Lippman*, 187 Ala. 204, 65 South. 773:

"As to the second phase of the bill, namely, wherein it is sought to enhance the assets of a dissolved corporation by compelling payment of unpaid subscriptions for stock, the authority of *Drennen v. Jenkins*, 180 Ala. 261, 60 South. 856, concludes against the appellant's contention that a judgment at law is a condition precedent to the equity of a creditor's bill to exact of stockholders the satisfaction of their liability on unpaid subscriptions for capital stock. The status of a trust established by the statute * * * brings into play the general doctrines and practices of equity in the administration of a trust brought within its jurisdiction, and to justify—indeed, to require—the full exercise of its powers to the end that complete adjustment and relief may be made and awarded. Equity's customary thoroughness so requires."

In *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, it is said:

"It is now * * * well settled that courts of equity may enforce the payment of stock subscriptions, where the directors have neglected or refused to make assessments and calls for them in the exercise of their proper fiduciary duty."

See, also, in this connection, *Hall & Farley v. Ala. Co.*, 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363; *Sherrill v. Hutson*, 187 Ala. 189, 65 South. 538; *Pickering v. Townsend*, 118 Ala. 351, 23 South. 703; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Dill v. Ebey*, 27 Okl. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440, and note; *Hall & Farley v. Ala. T. Co.*, 173 Ala. 398, 56 South. 235.

An examination of the authorities therefore discloses that the general equity of the bill is well settled and need not be rested upon the theory of a fraudulent transfer of the chose in action. The averments of the bill in regard to the cancellation and surrender of the respondent's note seem to have been thrown in by way of anticipation of the defense, and for the purpose of showing that there had been in fact no bona fide settlement or discharge of said obligation. While these averments might disclose a greater necessity for resort to a court of equity, yet they are not essential to the equity of the bill, as above stated. As said by the court in *Hall & Farley v. Ala. T. Co.* supra:

"After extended and mature consideration of the question we * * * now hold that fraud in the transfer or in the withholding of the amounts from the creditors is not necessary to equity jurisdiction in cases like this."

[2] It is strenuously insisted by counsel for appellant that the bill shows that by resolution of the stockholders the respondent

was released from said obligation, and that, therefore, this is binding upon the corporation, and that the question of liability could be raised only by a creditor of the corporation; and the insistence is that the present action could be prosecuted only by the creditors. They then argue that the complainant in this cause is but a statutory receiver, without express authority to institute this character of suit, and that as such he represents only the corporation itself, and perhaps its stockholders, but not its creditors, and that therefore he is without authority to maintain this bill. The case of *Republic L. I. Co. v. Swigert*, from the Supreme Court of Illinois, reported in 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328, relied on by counsel for appellant, lends support to their argument; but we are unwilling to follow it. The decision was not by the full court, one of the Associate Justices taking no part and the Chief Justice dissenting. The power to maintain a suit of this character need not be expressly conferred by statute upon the receiver, but if it can be fairly implied, either from the general scope and purpose of the statute or as an incident to a power expressly given, there is sufficient warrant for its exercise. High on Receivers, § 322.

See, also, section 324, and note, for numerous instances of suits of this character brought by receivers; also note to *Dill v. Ebey*, supra, 46 L. R. A. (N. S.) 452; *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; 34 Cyc. 390; *Merchants' Nat. Bk., Chicago, v. N. W. Mfg. Co.*, 48 Minn. 361, 51 N. W. 119; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Stillman v. Dougherty*, 44 Md. 380.

The Sun Life Insurance Company of America was dissolved and the complainant in this cause appointed receiver therefor by the city court of Birmingham, a court exercising equity jurisdiction, in conformity with the provisions of section 4552 of the Code of 1907. That section provides, among other things, that:

Such court "may make all orders and decrees needful in the premises, and may appoint agents or receivers to take possession of the property and effects of the company, and to settle its affairs, subject to such rules and orders as the court may from time to time prescribe according to the course of proceedings in equity."

The receiver is appointed not only for the purpose of taking possession of the property, but to settle its affairs under the rules and orders of the court from which he receives his appointment, and the statute clearly shows that the court is vested with full power and jurisdiction over the subject-matter for the purpose of winding up the affairs of the dissolved corporation.

In the case of *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368, 61 South. 951, the first assignment of demurrer to the bill challenged the right and authority of the superintendent of banks to maintain the bill in that case. There was no express author-

ity in the statute, under which the superintendent of banks was proceeding, for him to maintain a suit of the character there involved, yet he was authorized to collect all debts and claims belonging to the bank and "to do such acts as are necessary to conserve its assets and business." This court in that case found no difficulty in holding that the superintendent of banks had authority to maintain suit. So here, a receiver is appointed by a court having full jurisdiction, and in conformity with the statute, which directs the court to make all orders and decrees needful in the premises and appoint receivers to take possession of the property and to settle its affairs under the orders of said court.

The statute clearly looks to a final settlement of the affairs of the corporation, and certainly its affairs could not be settled until its debts are collected. In *Cartwright v. West*, 173 Ala. 202, 55 South. 918, this court, speaking of the rights and duties of a trustee in bankruptcy, said:

"The trustee in bankruptcy in a sense is a representative of both the bankrupt and the creditors. As such he succeeds in right and title to the bankrupt's estate for the benefit of his creditors. He may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the bankrupt's estate that the bankrupt himself, but for the bankruptcy, could have maintained. Even more, he may maintain an action the bankrupt could not, where, as in the present case, he seeks to avoid conveyances made by the bankrupt in fraud of his creditors. In this latter instance it cannot be said that the trustee is a representative of the bankrupt, for he [the bankrupt] could not maintain such a bill, nor in any legal or equitable proceeding become a beneficiary of his own fraudulent act."

We are of the opinion that the receiver appointed in this case, acting under orders of the court appointing him—a court of competent jurisdiction, with full power to settle the affairs of a dissolved corporation—has rights and duties of a kindred character to those of a trustee in bankruptcy so far as the question here concerned is involved, and that the above-quoted language is applicable to the receiver in this cause. We are therefore clearly of the opinion that the suit is properly brought by this receiver. There is nothing in *Drennen v. Jenkins*, supra, at all in conflict with the conclusion we have here reached. In that case it was merely held that in the absence of a suit by the receiver the creditors could maintain the bill; and the opinion shows expressly that the receiver interposed no objection to the maintenance of the bill, but on the contrary that his counsel joined with the attorneys of the creditors and insisted upon the right of the creditors to maintain suit. It was expressly stated in the opinion as follows:

"We do not hold, in this case, that the receiver of the corporation could not maintain a bill

to subject the assets of the corporation sought to be subjected by the creditors in this bill."

We have treated the important questions presented by this appeal and argued by counsel for appellant, and our conclusion is that the decree of the chancellor overruling the demurrer is correct, and the same is here accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

On Application for Rehearing.

GARDNER, J. [3] It is earnestly insisted by counsel for appellant upon this application for rehearing that the bill is demurrable for that it shows a release of appellee from liability by a majority of the stockholders, who, under the averments of the bill, might share in the proceeds of any surplus funds.

As appears from the opinion rendered in this cause, we have treated the bill as one filed for the benefit of the creditors, and, so considered, we are still of the opinion that it is free from any defect pointed out by the demurrer.

The demurrer is addressed to the bill as a whole. The bill clearly alleges the insolvency of the company and shows a judicial ascertainment of such insolvency and a decree of dissolution of the corporation. In addition to this, it is further averred that:

"Said insurance company is insolvent and has not property and assets sufficient to pay its creditors, the discrepancy between its assets and its liabilities being the sum of \$20,000."

Under the averments of the bill, therefore, here confessed by demurrer, there is no occasion to enter into a discussion of the insistence here urged. Should there result, contrary to the averments of the bill, any surplus fund for distribution to the stockholders, there would then be presented ample opportunity for the questions argued to be determined. As the bill is framed, as construed by us, it is a creditor's bill and one in which the stockholders as such are without interest.

As to the right of the complainant as receiver to maintain this suit, we are content with what was said in the original opinion in this cause.

The application is overruled.

BEATTY v. PALMER. (6 Div. 201.)

(Supreme Court of Alabama. Jan. 13, 1916
Rehearing Denied March 23, 1916.)

1. EVIDENCE \Leftrightarrow 82—PRESUMPTIONS—CONDUCT OF COUNSEL.

In the absence of tangible indication to the contrary, good faith of counsel will be presumed. [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. \Leftrightarrow 82.]

2. TRIAL ⚡127 — CONDUCT OF COUNSEL — QUALIFICATIONS OF JURORS.

The mere allowance of a request in an action for injuries in a street collision that the jurors be qualified on the point whether they were interested in any indemnity company, the plaintiff's attorney stating that he understood an indemnity company was interested in the case, is not erroneous, since it was insufficient to create bias.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. ⚡127.]

3. APPEAL AND ERROR ⚡232(1) — SCOPE OF REVIEW — PRESERVATION OF EXCEPTIONS — SUFFICIENCY.

An argument on appeal as to the sufficiency of a replication raising questions not made on the demurrer thereto will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338, 1430; Dec. Dig. ⚡232(1); Trial, Cent. Dig. § 211.]

4. RELEASE ⚡52 — RESCISSION — TENDER OF MONEY PAID—TIME.

Where plaintiff, injured in a crossing accident, made a release, and thereafter in a suit for damages alleged mental incapacity and that so soon as he reasonably could after discovery of the alleged settlement he made a tender to defendant of the sum paid, he sufficiently alleged tender at the earliest practicable moment.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92; Dec. Dig. ⚡52.]

5. RELEASE ⚡52 — RESCISSION — ACTIONS — PLEADING—SUFFICIENCY.

In an action for the recovery of damages for personal injuries in a street collision, a replication alleging that at the time of the making of a release, by reason of plaintiff's weak mental and physical condition and the use of medicine in the treatment of his injuries, he did not have the mental capacity to make said settlement, and he was incapable of knowing and appreciating the extent of his injuries, sufficiently alleges that he did not know and appreciate the contents of the release, so as to show fraud in securing it.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92; Dec. Dig. ⚡52.]

6. APPEAL AND ERROR ⚡1078(3) — SCOPE OF REVIEW—RECORD OF APPEAL—SUFFICIENCY.

Objections raised by demurrer below, but not argued in the brief on appeal, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258; Dec. Dig. ⚡1078(3).]

7. RELEASE ⚡24(2) — RESCISSION—TENDER OF MONEY PAID—EFFECT.

An offer to return money paid under an alleged fraudulent release, if within a reasonable time after discovery of the fraud, though rejected, is as effectual to rescind the contract as if accepted, if the plaintiff so considers it, and if, in his subsequent action the compromise was sustained, he would hold the sum by a valid transaction, and, if declared invalid, the sum so held would be set off against the amount allowed.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. ⚡24(2).]

8. RELEASE ⚡56 — RESCISSION—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for damages for personal injuries brought after attempt to rescind a release by tender of money paid thereunder, it is immaterial what plaintiff did with the money after rejection of the tender.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 101-105; Dec. Dig. ⚡56.]

9. WITNESSES ⚡268(3) — CROSS-EXAMINATION.

In an action for personal injuries brought after attempted rescission of a release by tender

of the money paid thereunder, in which plaintiff alleged that the release was fraudulently obtained, he was entitled to great latitude in examining the agent who obtained the compromise on the issue whether he represented the defendant or an indemnity company, where he had stated that he represented the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 933; Dec. Dig. ⚡268(3).]

10. RELEASE ⚡58(4, 6) — QUESTION FOR JURY — EVIDENCE.

Evidence held to present a question for the jury whether a release was fraudulently obtained and whether the plaintiff was at the time incapable of making such a contract.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 112, 114; Dec. Dig. ⚡58(4, 6).]

11. RELEASE ⚡56 — RESCISSION — ACTIONS — EVIDENCE—ADMISSIBILITY.

In an action for personal injuries brought after attempted rescission of an alleged fraudulent settlement by tender of the money paid thereunder, admissibility of the character of the agency and of the identity of his principals must be tested, not by its intrinsic force, but by its tendency, in connection with other evidence, to show an interest in such agent in securing the alleged fraudulent settlement.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 101-105; Dec. Dig. ⚡56.]

12. RELEASE ⚡55 — RESCISSION—TIME—BURDEN OF PROOF.

The burden is on the plaintiff, who sues for personal injuries after attempted rescission of a release of his claim by tender of money paid under the settlement, to show the reasonable promptitude of his offer to rescind, if it is denied by the defendant.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 94-100; Dec. Dig. ⚡55.]

13. RELEASE ⚡56 — RESCISSION — PROMPTITUDE—EVIDENCE—ADMISSIBILITY.

Where it is shown that defendant and her husband were absent from their residence for some time after the negotiation of a release of plaintiff's claim, letters from plaintiff's attorney to them seeking to make a rescission of the settlement are admissible on the issue of promptitude of the rescission.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 101-105; Dec. Dig. ⚡56.]

14. TRIAL ⚡85 — RECEPTION OF EVIDENCE — OBJECTIONS—PORTIONS OF LETTERS ADMISSIBLE.

Where a portion of a letter is irrelevant, a general objection to the admission of the entire letter is insufficient to present the question of admissibility of the particular portion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225; Dec. Dig. ⚡85.]

15. EVIDENCE ⚡155(1) — ADMISSIBILITY — MATTERS INTRODUCED BY ADVERSE PARTY.

Defendant, who pleaded a release from liability for injuries in a crossing accident, negotiated by the agent of an indemnity company in which she was insured, could not complain when the plaintiff's attorney inquired whether she was insured in such a company, having opened up that issue herself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445, 446, 457, 458; Dec. Dig. ⚡155(1).]

16. RELEASE ⚡56 — RESCISSION—TENDER OF MONEY PAID—EVIDENCE—ADMISSIBILITY.

Testimony of plaintiff's agent as to his authority in making a tender of money paid in at-

tempted rescission of a release was properly admitted.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 101-105; Dec. Dig. ¶¶ 56.]

17. RELEASE ¶24(2)—RESCISSIION—TENDER—TIME OF ACCEPTANCE.

Where the defendant frequently rejected tender of money in attempted rescission of an alleged fraudulent release, she could not alter her status by offering on the trial to accept it and demanding its return.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. ¶¶ 24(2).]

18. EVIDENCE ¶536 — OPINION EVIDENCE — TRACKING AUTOMOBILES — KNOWLEDGE OF WITNESS.

Where a witness has given special attention to tracking automobiles by the marks of their tires, the admission of his opinion as to the identity of an automobile which he tracked is not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347; Dec. Dig. ¶¶ 536.]

19. TRIAL ¶139(1)—QUESTIONS FOR JURY.

The weight and value of opinion evidence is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. ¶¶ 139(1).]

20. TRIAL ¶295(4) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

Although some expressions, when isolated from the remainder of the charge, are in the abstract and somewhat misleading, they are not erroneous, where the charge as a whole correctly and fairly submitted the matters in controversy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 707; Dec. Dig. ¶¶ 295(4).]

Appeal from City Court of Birmingham; A. H. Alston, Judge.

Action by J. B. Palmer against Mrs. Mabelle Beatty. Judgment for plaintiff, and defendant appeals. Affirmed.

It appears that plaintiff was a traveler along the street on a motorcycle, and that defendant was driving in an automobile, possibly on the wrong side of the street, and ran into plaintiff, inflicting the injuries alleged; some of the counts stating the cause in simple negligence, and some as for willful or wanton injuries. The pleas of contributory negligence were, in effect, that plaintiff, while riding a motorcycle, negligently and without looking, ran the motorcycle on or against defendant's automobile, thereby proximately contributing to the injuries complained of. The release signed by the plaintiff was in consideration of \$200, and was set up by special plea; the relief being set out in full. The substance of the replication sufficiently appears. The objections to the qualifications of the jurors, and the questions propounded, and the action of the court thereon sufficiently appear. The evidence of the witness Bodeker was asked relative to his experience in attempting to track criminals on paved streets.

Percy, Benners & Burr and Whitaker & Nesbit, all of Birmingham, for appellant. Allen, Bell & Sadler, of Birmingham, for appellee.

SAYRE, J. Much of the brief for appellant, defendant in the court below, has been addressed to the alleged error of the trial court in allowing the plaintiff to parade before the jury the fact that defendant was protected by an indemnity policy in an insurance company; the inference being that by reason of such indemnity the jury, prone to discriminate between corporations and parties of flesh and blood to the prejudice of the former, would be inclined to treat the insurance company as the real defendant in the case. We have been unable to find from the record that plaintiff was allowed to travel outside the bounds of propriety or strict right. And with reference to the closely connected subject of the court's action in overruling a motion for a new trial, made on the ground, among others, that the trial was conducted in a way to prejudice the rights of defendant, we will say just here that, while the record discloses some friction between the court and counsel for defendant, the truth concerning its origin and the manner of its demonstration on either part is so obscurely reflected by the cold type before us that it would require an exercise of the imagination to hold that it probably affected the jury unfavorably to defendant, or at all. On the evidence plaintiff's case was clearly one for jury decision, and, if plaintiff was entitled to recover, the amount awarded by no means appears to be an exaggerated compensation for the injuries suffered. There is nothing in the verdict or elsewhere in the record to show that defendant had not a fair trial, or that the result was affected by passion, prejudice, or other improper influence operating upon the jury.

[1, 2] At the opening of the trial plaintiff's attorney stated to the court in the presence of the jury that he understood some indemnity company was interested in the case, and requested that the jury be qualified on the point whether or not any of them had any interest in any such company. Defendant objected to the statement of what plaintiff's attorney understood, and, her objection being overruled, she duly excepted. She also objected to the jury being qualified as proposed, and, this objection being overruled, she again excepted. Thereupon the court asked the jury whether any of them were interested in any indemnity company. No reply coming from the jury box, the court pronounced the jury qualified.

Defendant complains here that this proceeding was improper altogether, as calculated to prejudice her defense, and that in any event there was error in qualifying the jury by this inquiry without some proof that an indemnity company was interested. In *Citizens' Company v. Lee*, 182 Ala. 561, 62 South. 199, this court held that it was not improper to qualify the jury in respect of their connection with or interest in any indemnitor

the defendant might have; due care being exercised that nothing be done or said to create bias or excite prejudice in the minds of jurors who were not disqualified. In that case plaintiff made proof that defendant had an indemnity contract with an insurance company. We are disposed to be careful on this point; but, the right conceded, and the good faith of counsel presumed, as it must be in the absence of some tangible indication to the contrary, we hardly see how the right to have the jury qualified could have been more inoffensively asserted. The taking of proof, the examination of witnesses, could only have served to press the point upon the jury's attention, and thus more fully to develop the bias or prejudice against which defendant thought it necessary to take precaution by the objections she interposed. Counsel might well have omitted the statement that he understood some indemnity company was interested in the case. But in view of the ruling in *Citizens' Company v. Lee*, supra, where proof was taken, we think this statement could hardly have been understood by court or jury as anything more than an offer to introduce testimony, if demanded; and, if the court at that stage of the case had gone into the question whether defendant was protected by an indemnity contract, plaintiff would have been entitled to prove that his understanding as to the fact was correct, and later developments made it highly probable that he would have offered the evidence to which, when offered later in another connection, defendant interposed strenuous objection. Upon the whole we do not see that this matter could have been better managed in the trial court.

Plaintiff's suit was for damages for personal injuries alleged to have been inflicted by defendant in the negligent operation and management of her automobile on a public highway. Defendant pleaded the general issue, contributory negligence, and a plea of composition and release. To this last plea plaintiff replied, specially alleging, in effect, that at the time of said composition and release, by reason of his weak mental and physical condition and the use of medicines in the treatment of his injuries, (replication 2) he did not have the mental capacity to make said settlement, (replication 3) he was incapable of knowing or appreciating the extent of his said injuries, and (both replications) that defendant's agent, knowing his condition, induced and unduly influenced plaintiff to make said settlement and accept a sum grossly less than would have been a fair and just compensation—a species of fraud. These two pleadings also alleged that plaintiff, so soon after the discovery by him of the alleged settlement as he reasonably could, tendered or caused to be tendered to defendant the sum so received, which defendant refused to accept.

[3, 4] The argument against these replications is more searching than the questions

stated in the demurrers filed in the court below. It is said here that the third replication, while alleging that plaintiff was incapable of knowing or appreciating the extent of his injuries, fails to allege that he did not know and appreciate the contents of the release. Without intending to intimate that there was any merit in this contention, it will suffice to say that the demurrer did not take the point. It is further said of both special replications that they did not show that the right to rescind was exercised at the earliest practical moment. The demurrer was that plaintiff did not appear to have acted promptly in rescinding the contract of settlement. In *Stephenson v. Allison*, 123 Ala. 439, 26 South. 290, the language of the court, adopted from the Supreme Court of New York, was that the party defrauded must disaffirm at the "earliest practical moment" after discovering the fraud. At one point in *Birmingham Ry. Co. v. Jordan*, 170 Ala. 530, 54 South. 280, this phrase was repeated, but at another place in the same opinion the expression was "reasonable time." In *Barnett v. Stanton*, 2 Ala. 181, a case involving the rescission of a contract of sale of personal property by an offer to return the chattels sold, the court said that the party who would rescind must act promptly, or, as the court put it elsewhere in the opinion, and as our other cases and the authorities generally put it, the right to rescind must be exercised within a reasonable time; i. e., with due promptitude after the fraud is discovered, or might have been discovered by the use of due diligence. *Whitworth v. Thomas*, 83 Ala. 308, 3 South. 781, 3 Am. St. Rep. 725; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Hayes v. Woodham*, 145 Ala. 597, 40 South. 511; *Comer v. Franklin*, 169 Ala. 573, 53 South. 797; 9 Cyc. 435, and note 69. We consider that there is no substantial difference between the cases on this point, nor any between the measure of promptness alleged in the replications and that asserted by the demurrers.

[5] These replications also sufficiently showed that plaintiff's mind was in such unsound condition as to render him incapable of making a binding contract. *L. & N. R. R. Co. v. Huffstutler*, 162 Ala. 619, 50 South. 146.

[6, 7] Defendant also demurred to these special replications on the ground that the alleged tender was not shown to have been kept good. The assertion of the demurrer is reiterated in the brief, where it touches the sufficiency of the replications, but there is no argument, and under our rule we might premit consideration of it; but much the same question was raised by objections to evidence, which have been argued, and may as well be disposed of at this point. These replications did not plead the tender—it may be more aptly designated as an offer to return the money—as a discharge of debt or liability in which case a tender must be kept good, since the debt or liability remains though the tender be refused. They

set up the tender as a fact sufficient in itself to effect a rescission of the contract of release and to restore plaintiff's original cause of action. The offer, if made within a reasonable time after the discovery of the fraud, though rejected, was just as effectual to rescind the contract of release as if the defendant had accepted it, if the plaintiff chose to so consider it. *Barnett v. Stanton*, supra; *Samples v. Guyer*, 120 Ala. 611, 24 South. 942; *Hayes v. Woodham*, supra; *Comer v. Franklin*, supra. Thereafter the capacity in which plaintiff held the money depended upon the result of his suit. In the event the compromise was sustained, he would retain the money by virtue of a valid transaction. If the settlement was rescinded, the amount received in the settlement might be deducted from the damages assessed, as the court directed—in effect, a return of the money paid for the release; or, if by any chance the sum so paid had exceeded the amount of recoverable damages, then plaintiff would hold the difference as an involuntary bailee for the defendant. In these circumstances, though it be assumed that defendant could have shown that plaintiff used the money for his own benefit after defendant refused to accept it as upon a rescission of the release, it would be contrary to justice to regard such use as conclusive against plaintiff, if, as he alleged, there had been no intelligent and valid settlement of his claim for damages. Cases cited in the brief for defendant (appellant) will be found on analysis to hold nothing to the contrary. In *Birmingham Ry. Co. v. Jordan*, supra, there was never any rescission, for the reason that there was never at any time an offer to restore the money plaintiff had received in settlement of the claim she was suing. So in *Harrison v. Ala. Midland*, 144 Ala. 256, 40 South. 394, 6 Ann. Cas. 804, and *Birmingham Ry. v. Hinton*, 158 Ala. 470, 48 South. 546. In *Kelly v. L. & N. R. R. Co.*, 154 Ala. 576, 45 South. 906, the tender had been delayed for years. Other cases dealt with the right to rescind, and the question of waiver, after the discovery of fraud, but before the offer to restore, by delay or dealing with chattels the title to which passed by the transactions in litigation. We have also some cases in which the party offering to rescind waived the rescission, once accomplished on his part by a seasonable proper offer, by subsequently dealing with the property as his own. But these cases, involving the passage of the legal title to specific chattels back and forth between the parties—not money, in which case one dollar is in law the equivalent of any other dollar—and depending for solution upon the final situs of the title as determined by the conduct of the parties, were not complicated by any questions as to the compromise and release of mere monied demands.

[8] Assignments of error from 38 to 42, both inclusive, are based upon rulings by which the court denied to defendant the right to go into the question as to what plaintiff

did with the money after he had offered to return it and defendant had refused to receive it. Under the foregoing principles of law these rulings were free from error.

[9-11] On cross-examination of a witness for defendant plaintiff was allowed to develop the fact that at the time of the alleged contract of compromise and release the witness had in that matter represented the General Accident & Fire Insurance Company. This is assigned for error. The witness had negotiated the alleged settlement with plaintiff. On his direct examination he had testified that he had told plaintiff that he represented Mrs. Beatty and her husband; that they regretted the accident, and were willing to assist him in bearing his expenses at the hospital to which he had been removed for treatment. But defendant, testifying as a witness in her own behalf, had denied that witness had any authority at the time to represent her in that transaction. A plea had been filed alleging that the cause of action had been settled and released by plaintiff in consideration of \$200 paid by Mr. and Mrs. Beatty. To this, as we have seen, plaintiff replied that the release had been procured by fraud in legal effect. There was evidence from which the jury may have found that plaintiff was at the time incapable of making an intelligent agreement. The jury may have inferred also that the witness negotiated the settlement, whomsoever it was intended to benefit, under circumstances that urgently suggested the propriety of its postponement to a more convenient season. These, under the evidence, were questions for the jury. On the issue of fact thus presented plaintiff was entitled to great latitude in the production of evidence, especially so in the cross-examination of this witness. *Mann v. Darden*, 171 Ala. 142, 54 South. 504. The admissibility of the fact elicited was not to be tested by its own intrinsic force, but by its bearing in connection with all other evidence in the cause having any relation to the same point. *Snodgrass v. Branch Bank*, 25 Ala. 174, 60 Am. Dec. 505; *Nelms v. Steiner Bros.*, 113 Ala. 562, 22 South. 435. Plaintiff not only was entitled to show that the witness did not represent the defendant, but to show that he was acting for some person having an interest to be affected as tending to shed light upon his motive and purpose in negotiating the compromise under the circumstances in evidence. Defendant, though she denied that the witness had acted by her authority in procuring the release, was relying upon the instrument, and the jury were entitled to know every circumstance tending to disclose the true inwardness of that transaction. Defendant might have avoided any involvement with the motive and purpose of the person for whom the compromise was negotiated by refusing to plead the release. Having pleaded it, she assumed the burden of every infirmity that attached to it by reason of the circumstances in which it was negotiated.

[12-14] Under the pleadings the burden was on plaintiff to show the reasonable promptitude of his offer to rescind. In connection with proof of the absence of Mr. and Mrs. Beatty from their place of residence shortly after the accident the letters addressed by plaintiff's attorneys to them, and offered in evidence, were properly admitted as tending to show diligence in the offer to rescind. If the last expression contained in the letter to defendant was considered to be irrelevant and hurtful, defendant should have moved to exclude that part of it. Instead, her objections were taken to the letters in their entirety. *L. & N. R. R. Co. v. Britton*, 163 Ala. 168, 50 South. 350. Many cases might be cited to this point.

[15] *Watson v. Adams*, 187 Ala. 490, 65 South. 528, to which counsel for appellant gratefully refers as a return after many days of bread cast upon the waters, does not sustain their position here. In that case it was held for reversible error that the court permitted a cross-examination of the defendant which, as the court found, had for its object the introduction to the jury of wholly illegal evidence to the effect that an indemnity company was defending, in defendant's name, against liability for the wrong of which the plaintiff complained; whereas in the case at bar defendant opened the way for every question asked by plaintiff on the point when she pleaded, and relied upon a release purporting to have been executed to her, but which was, in fact, negotiated by the indemnity company without her authority or knowledge and under circumstances, according to tendencies of the evidence for plaintiff, that impeached its validity. The record here does not show that plaintiff laid any greater stress upon the subject than the legitimate needs of his case justified.

[16, 17] We do not think it is to be doubted that offers were made to return the money to defendant, to her husband, and to the indemnity company, plaintiff being then in doubt as to whom the tender should be made, or that the tender was refused on every hand. Nor do we see that there was error in allowing the witness Sadler, who made these tenders, to state what authority he had for making them from the head of the firm of attorneys having charge of plaintiff's case. Defendant's offer at the trial to accept the money, and her demand for its return came too late to affect the status of right fixed by her previous refusal, if, indeed, she had color of right to it in any aspect of the case.

[18, 19] No error was committed in the examination of the witness Bodeker. The matter about which he gave his opinion was an ordinary one; but he had given special attention to the subject, and it was quite possible for him to have a better knowledge of it than the average man who had given it no thought. *Staples v. Steed*, 167 Ala. 241, 52

South. 646, Ann. Cas. 1912A, 480. The value of the witness' opinion was a matter for consideration by the jury.

[20] Exceptions to parts of the court's oral charge to the jury do not require separate treatment. They have been examined with due care without finding reversible error. If it may be said that some expressions which have been culled from the charge were abstract, as where the court, when stating the law of plaintiff's alleged contributory negligence, said, in effect, that plaintiff's contributory negligence would bar a recovery, "even though defendant was not on the proper side of the street," and if some fragmentary expressions thus isolated from their context be found to have involved some misleading tendencies in their statements of the law of the case, still the charge, when considered as a whole, laid the case and all its issues very fairly before the jury, and we find in it no sufficient reason for a reversal.

We have stated our consideration of all matters of importance assigned for error. Finding no reversible error, the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

STATE v. DOSTER-NORTHINGTON DRUG CO. (6 Div. 255.)

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

1. TAXATION — 526 — ASSESSMENT — TIME OF MAKING.

The tax year commences October 1st and ends September 30th.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 969; Dec. Dig. — 526.]

2. TAXATION — 446 — ASSESSMENT — NATURE.

The assessment and valuation of property is a determination in its nature judicial, and is final, unless impeached for fraud or lack of jurisdiction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 784-786; Dec. Dig. — 446.]

3. TAXATION — 362 — ASSESSMENT — STATUTORY PROVISIONS — ESCAPED TAXES.

Code 1907, § 2260, expressly confers upon the county tax commissioner authority to make assessments for escaped taxes not more than five years preceding.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 601; Dec. Dig. — 362.]

4. TAXATION — 446 — CORRECTION OF ASSESSMENT — TIME OF MAKING.

Where the county tax commissioner has duly assessed escaped taxes, and the taxpayer has concurred and the taxing authorities seek no annulment or review within the tax year, the assessment becomes final and binding on the taxpayer and taxing authorities after the expiration of the tax year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 784-786; Dec. Dig. — 446.]

5. TAXATION ⚡476—POWER OF STATE TAX COMMISSION.

Although the right of general and complete supervision is given to the state tax commission in Code 1907, § 2223, yet, in view of section 2260 and other statutes, its power to set aside tax valuations and assessments must be exercised before the end of the current tax year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 845-849; Dec. Dig. ⚡476.]

6. TAXATION ⚡362—ESCAPE TAXES—WHEN PAYABLE.

After an escape assessment is made, it becomes due and payable and enforceable, except only that under the terms of Code 1907, § 2266, 10 per cent. penalty is added.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 601; Dec. Dig. ⚡362.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by the State of Alabama against the Doster-Northington Drug Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

W. L. Martin, Atty. Gen., and J. P. Mudd, Asst. Atty. Gen., for the State. E. J. Smyer and Charles E. Rice, both of Birmingham, for appellee.

THOMAS, J. The appellee, a corporation conducting its business in Jefferson county, Ala., was assessed by the county tax commissioner of said county on its escape solvent credits and credits of value, for the tax years running from October 1, 1908, to September 30, 1912, inclusive, to the amount of \$10,000, and for the year beginning October 1, 1913, to the amount of \$20,000.

This aggregate assessed value, for these years, of \$70,000, was fixed on August 5, 1914, in pursuance of the provisions of section 2260 of the Code of 1907, by the county tax commissioners, and was agreed to by the taxpayer, appellee; and said assessment was thereafter filed by the county tax commissioner with the tax collector of Jefferson county for collection.

On November 3, 1914, the state tax commission disregarded this assessment made and returned to the tax collector, and made a revaluation and reassessment of the same "solvent credits and credits of value" of appellee, for each of said years, fixing the escape value for each year at \$25,000. In pursuance of such reassessment the state tax commission issued notice to said appellee company to appear before said commission on December 7, 1914, to show cause why the assessment should not be enforced, as on the valuation so fixed by that body.

By its attorney the Doster-Northington Drug Company, on December 7, 1914, made a special appearance before the state tax commission, and moved for the dismissal of the cause on the ground that the tax year in which the assessment was made by the county tax commissioner had expired on the 30th day of September, 1914, that the assessment became final on October 1, 1914, and that the

state tax commission had no jurisdiction, power, or authority, after the expiration of the tax year (on November 3, 1914) to set aside and hold for naught the assessment made by the county tax commissioner. On December 28, 1914, the state tax commission overruled appellee's motion, and entered an assessment against it of \$15,000 a year for each of said years, on its solvent credits and credits of value, making an aggregate valuation for said years of \$90,000.

Appellee thereupon filed bond and appealed to the circuit court of Jefferson county, where the state filed a complaint containing two counts, setting up the facts in substance as we have stated them. In the second count of the complaint, in addition to the stated facts, there were allegations on the part of the state, by which it sought to raise appellee's assessed value over the amount so assessed by the state tax commission, to the extent of \$5,000, or to the total sum of \$95,000 for the years in question, whereas the total assessed valuation by the state tax commission, for such period, was \$90,000.

Defendant demurred to each count of the complaint, and assigned as grounds, in substance, that the assessment made by the county tax commissioner became final on the 1st day of October, 1914, and that thereafter, and on November 3, 1914, the state tax commission had no jurisdiction or power to set aside the assessment made by the county tax commissioner, and reassess or revalue the property. The court sustained the demurrer. The state excepted, and takes this appeal.

[1] This court has held that the tax year commenced on October 1st and ended with September 30th. *Frost v. State*, 153 Ala. 654, 45 South. 203; *Hooper v. State*, 141 Ala. 111, 37 South. 662. There are many statutes that fix this demarcation of the tax year. Taxes are declared to be due and payable on the 1st day of October of each year (Code, § 2091; Acts 1915, p. 892, § 8, page 399, § 18); and all property brought into the state after the 1st day of October, and before the assessor has completed his assessment, is subject to taxation, the same as if it had been held or owned in the state on the 1st day of October (Code, § 2092); the lien of state and county, for taxes, is fixed from and after the 1st day of October (Code, § 2093); and the tax assessments must commence on the 1st day of October in every year (Code, § 2102). When the Constitution required the payment of poll tax for the year 1901, before February 1st, it referred to the tax year as fixed by the statute of 1900-01—this poll tax having become fixed on October 1, 1900, and due on October 1st, succeeding. Const. § 178.

[2] If the state through its duly constituted officers has exercised the final power of assessment and valuation of property, the de-

termination is in its nature judicial (*State Tax. Comm. v. Bailey et al.*, 179 Ala. 620, 627, 60 South. 913; *Orr v. State*, 3 Idaho [Hasb.] 190, 28 Pac. 416); and unless impeached for fraud or lack of jurisdiction, or reviewed by appellate authority, it is final (*Anniston City Land. Co. v. State*, 185 Ala. 482, 487, 64 South. 110; 37 Cyc. 1071).

[3] The authority to make the assessment for escaped taxes was expressly conferred on the county tax commissioner by section 2260 of the Code of 1907; and it was his duty to assess, for "any preceding year not more than five years before that time," and to forthwith deliver the assessment to the clerk of the court of county commissioners, or other court of like jurisdiction, for hearing the taxpayer, unless the taxpayer, upon being notified by the tax commissioner that he had made such assessment, agreed with the tax commissioner upon the same, and paid over to the collector of the county the amount of taxes and fees due by him.

[4] The power of the county tax commissioner having been duly exercised, and his findings concurred in by the taxpayer, the assessment became final after the expiration of the tax year. If the action of the county tax commissioner was final as to the taxpayer, it must of necessity have been of like binding force on the tax official.

The fact that the assessment was of escape properties for five years, would not differentiate it from any other assessment, or from an escape assessment for any one year in question. If the state tax commission had the jurisdiction and authority to set aside this assessment on November 3, 1914, it would have like authority, after the expiration of the tax year and before the payment of taxes on the given assessment, to set aside any assessment made by a taxpayer during the preceding year. It could not be said with reason that such power was conferred on the state tax commission, as to all taxpayers who had not paid their taxes on October 1st, but not as to taxpayers who had paid their taxes on or before that date, or before the date of the attempted revaluation. If this were the rule, owners and purchasers of property would be subjected to inconvenience, uncertainty, and changing financial obligation, to the state and the county.

The reasonable construction of the power of assessment of taxes, and of the review thereof, should be to the end that a stable and uniform system prevail in the state; and so, when annulment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the taxpayer and on the taxing authorities. Of course, it could not be maintained that a proper proceeding, begun within the tax year by the duly constituted authority, to assess, or cause to be assessed, or to set aside and hold for naught the assessment upon, a given valuation for taxation, may not be conducted and concluded beyond

the expiration of the tax year; nor that escape taxes, coming to the knowledge of the taxing authority, may not be assessed, or resisted, beyond the period of any one tax year within the limitation of the statute.

The power of the state tax commission has been discussed by Chief Justice Anderson in *State Tax Commission v. Bailey et al.*, 179 Ala. 620, 628, 629, 60 South. 913, 916, and in that case he expressly reserved the question now here for decision, by the use of this language:

"As to whether or not an assessment may be set aside, after the 1st of October succeeding the expiration of the tax year, we need not decide, as the order of the commissioners' court, in the present instance, was set aside before the expiration of the tax year, and after this was done there was no existing assessment to become final upon the expiration of the said tax year. Nor did the setting aside of this order reinstate the assessment made by the tax assessor. * * * This board was created for the purpose of exercising a general superintendence and supervision over the assessment and collection of taxes throughout the entire state, and it was not contemplated that dereliction on the part of their subordinates would result only in a single county, or that the state commission could exercise its revisory powers in all the counties between the determination of the county commissioners and the 1st of the succeeding October; and, while it may be that said orders had to be set aside before the 1st of October, it is not required that the reassessment and revaluation by the state commission should be made before that date."

In the instant case, the valid assessment made by the county tax commissioner, and agreed upon, after notice, by the taxpayer and the commissioner, and returned to the tax collector of the county, and no action for review begun by the state tax commission, or by its authority, during the current tax year, constitute a state of facts that distinguishes this case from that of *State Tax Commission v. Bailey et al.*, supra.

[5] The two provisions of the statute (Code, §§ 2223, 2260), when considered with the whole system of taxation provided for the state, and with due regard for the property rights of the citizen, as well as for the right of the state to equalize the burdens of taxes and to provide its revenues, can only mean that the right of general and complete supervision given in section 2223 to the state tax commission must be reasonably exercised.

If section 2223 can be construed to confer authority on the state tax commission, at any time after the expiration of the tax year, to set aside and hold for naught any valuation of assessment of property made by the owner of any of the officers authorized by law to make assessments, it might become the source of great vexation, and of even oppression, to the taxpayer, and render uncertain property rights, and subject the taxpayer and his property to unreasonable and uncertain claims and tax liens.

A proper construction, therefore, of section 2223, in connection with section 2260 and with the general taxing system of the state,

would require that this power "to set aside and hold for naught" tax valuations and assessments be exercised by the state tax commission before the end of the current tax year. This is in consonance with the holding in *State Tax Commission v. Bailey et al.*, supra.

[6] The assessments in question, made on August 5, 1914, grew out of the decision in *State v. Alabama Fuel & Iron Co.*, 188 Ala. 487, 66 South. 169, L. R. A. 1915A, 185, holding solvent credits a subject of taxation. After the decision, and before the expiration of the tax year, the state tax commission had the authority, and had ample time, to give to the several county tax commissioners needful instruction, in the premises, as to this class of escape assessments. Not having done so in this case, it had no authority, after the expiration of the tax year, to *begin proceedings* for annulment, for after an escape assessment is made, it in fact and in law, as any other assessment, becomes due and payable and enforceable, except only that 10 per cent. penalty is added thereto. Code of 1907, § 2266.

The cause is affirmed.

Affirmed. All the Justices concur.

HORST et al. v. PAKE. (1 Div. 869.)

(Supreme Court of Alabama. Jan. 13, 1916.
Rehearing Denied March 23, 1916.)

1. APPEAL AND ERROR ⇨931(1) — REVIEW — FINDING BY CHANCELLOR — PRESUMPTIONS.

Under Code 1907, § 5955, subsec. 1, providing that in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the Supreme Court shall weigh the evidence and give judgment as they deem just, and section 6072, providing that any action or conclusion of the register in proceedings relating to express trusts for the security of debts may be reviewed by the chancellor without any presumption in favor of such action or conclusion, on appeal from a decree of the chancellor finding that an assignee for the benefit of creditors was not guilty of fraud or gross negligence which deprived him of his right to compensation, which finding was contrary to the finding of the register, the facts are to be determined by the Supreme Court without any presumption as to the correctness of the findings of either the register or chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. ⇨931(1).]

2. EQUITY ⇨401 — REFERENCE TO REGISTER — FRAUD OF TRUSTEE.

The denial of compensation to a trustee because of fraud or gross neglect, like the question of the removal of the trustee on such grounds, is a judicial question which the chancellor, acting within his general equity powers, should determine for himself without necessity for the services of the register.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869-873; Dec. Dig. ⇨401.]

3. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR CREDITORS — COMPENSATION OF ASSIGNEE — REMOVAL.

The removal of the assignee for the benefit of creditors from his trust, because, since his

appointment, the necessity of bringing actions against certain stockholders with whom the assignee was on intimate personal relations to recover payments made by him to them as preferred creditors renders it to the interest of the estate to intrust such matters to a mere disinterested trustee, does not deprive the assignee of his right to compensation for services theretofore rendered in the absence of a showing of bad faith, willful deceit, or gross neglect.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. ⇨78.]

4. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR CREDITORS — COMPENSATION OF ASSIGNEE — FRAUD — BURDEN OF PROOF.

Under Code 1907, § 6071, allowing assignees for the benefit of creditors 5 per cent. commission and empowering the court to increase or diminish the amount, the burden is on creditors of a bank which has made an assignment for their benefit to show that an assignee, who has kept and made an ostensibly full and fair account of his acts, was guilty of fraud or such gross neglect in the execution of his trust as to be denied all compensation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. ⇨78.]

5. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR CREDITORS — COMPENSATION OF ASSIGNEE — FRAUD — SUFFICIENCY OF EVIDENCE.

On objection by the creditors of a bank which made an assignment for their benefit to an allowance of compensation to the assignee, evidence held not to show any fraud or gross neglect by the assignee in paying as preferred claims deposits by stockholders which were the proceeds of dividends declared after the insolvency of the bank, and by a relative of the stockholder which was in fact an interest deposit made in the form of a general deposit to entitle it to preference where those facts did not obviously appear on the books of the bank, but were only determined after a thorough expert examination.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. ⇨78.]

6. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR CREDITORS — COMPENSATION — COMMISSION.

Under Code 1907, § 6071, giving an assignee for the benefit of creditors a 5 per cent. commission on the amount of money with which he is charged, an assignee of a bank is not entitled to commission on securities which had been hypothecated by the bank with other banks and which were collected by the latter and appeared on the assignee's books as cross-entries.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. ⇨78.]

7. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR BENEFIT OF CREDITORS — COMPENSATION — FRAUD — EXCESSIVE CLAIM.

The fact that the assignee claimed a commission on such collections does not, in the absence of showing a fraudulent intent, require a disallowance of all compensation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. ⇨78.]

8. BANKS AND BANKING ⇨78 — ASSIGNMENT FOR CREDITORS — SETTLEMENT OF ACCOUNTS — CHARGES — INTEREST ON COMPENSATION.

Under Code 1907, § 6074, which, though relating especially to the powers of an assignee to sell real estate, was enacted in contemplation of the court's power with reference to all powers granted by the deed of assignment, and

which provides that nothing therein contained shall prevent the assignee from exercising the powers of sale or other powers conferred by the deed of assignment, unless specially restrained from so doing by an order of the chancellor, an assignee of a bank for the benefit of creditors under an assignment which authorized him to retain a reasonable compensation cannot be charged with interest on 5 per cent. commissions retained by him from all collections, though not specifically authorized by the court to retain such commissions as would have been the better practice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

9. BANKS AND BANKING 78—ASSIGNMENT FOR CREDITORS—SETTLEMENT OF ACCOUNT—CHARGES—IMPROPER PAYMENTS—EXPENSE OF RECOVERY.

A bank's assignee for the benefit of creditors, who paid, without strict compliance with the statutory requirements, claims by certain stockholders as preferred creditors which were not entitled to preference, cannot be charged with the attorney's fee in the suit to recover such payments from stockholders where there was no fraud shown in making the payments, and no showing that they would not have been made had the statute been strictly complied with.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

10. BANKS AND BANKING 78—ASSIGNMENT FOR CREDITORS—SETTLEMENT OF ACCOUNTS—CHARGES—INTEREST ON UNDISTRIBUTED FUNDS.

In determining whether a bank's assignee for the benefit of creditors is chargeable with interest on undistributed funds, where there was no question as to the amounts on hand, but the whole course of administration was involved, the chancellor and the Supreme Court on appeal can look to the whole record as well as to the register's report.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

11. BANKS AND BANKING 78 — ASSIGNMENT FOR CREDITORS—FINAL SETTLEMENT—CHARGES AGAINST ASSIGNEE—INTEREST ON UNDISTRIBUTED FUNDS.

Where a bank's assignee for the benefit of creditors attempted to appeal from a decree removing him and was granted supersedeas, he was not chargeable with interest on the funds on hand prior to the dismissal of his appeal, since during that time he could not have made any payments to the creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

12. BANKS AND BANKING 78 — ASSIGNMENT FOR CREDITORS—FINAL SETTLEMENT—CHARGES AGAINST ASSIGNEE—INTEREST ON UNDISTRIBUTED FUNDS.

A bank's assignee for the benefit of creditors is not chargeable with interest on undistributed funds retained by him with permission of the court, after declaring a dividend which gave him a liberal, but not unreasonable, margin to meet certain uncalled-for preferred claims, contested claims, a large undetermined claim of his counsel, and the costs of administration yet to accrue.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

13. BANKS AND BANKING 78 — ASSIGNMENT FOR CREDITORS—FINAL SETTLEMENT—CHARGES AGAINST ASSIGNEE—INTEREST ON UNDISTRIBUTED FUNDS.

Creditors do not, by accepting the payment of a dividend from a bank's assignee for the benefit of creditors, waive their right to claim that the payment was unnecessarily delayed so as to charge the assignee with interest thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

14. BANKS AND BANKING 78 — ASSIGNMENT FOR CREDITORS—FINAL SETTLEMENT—CHARGES AGAINST ASSIGNEE—INTEREST ON UNDISTRIBUTED FUNDS.

Under Code 1907, § 6069, requiring an assignee for benefit of creditors to account within 3 months after the expiration of the time for the filing of objections to claims and every 6 months thereafter, which was enacted after the rendering of a decision that an assignee should not be chargeable with interest prior to the expiration of 12 months after the creation of the trust, an assignee of a bank who failed to ask for an order declaring a dividend for 17 months when the funds on hand were constantly increasing, and he should have paid 10 per cent. dividends 7 and 13 months previously, and still had a safe margin, he can be charged with interest on the amounts of such dividends.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

15. ASSIGNMENTS FOR BENEFIT OF CREDITORS 321—DUTY OF ASSIGNEE—APPLICATION FOR DIVIDEND.

An assignee for benefit of creditors cannot excuse delay in paying dividends on the ground that creditors have not resorted to compulsory proceedings against him.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 938-941; Dec. Dig. 321.]

16. ASSIGNMENTS FOR BENEFIT OF CREDITORS 320—PAYMENT OF CLAIMS—DIVIDENDS.

No hard and fast rule can be laid down as to when partial distribution should be made by an assignee for benefit of creditors, but dividends need be declared only when the collections suffice for a substantial reduction of the estate's indebtedness with some regard for the cost and inconvenience of distributing a small sum among a great number of creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 935-937; Dec. Dig. 320.]

17. BANKS AND BANKING 78 — ASSIGNMENT FOR CREDITORS—COMPENSATION OF ASSIGNEE—TERMS—REMOVAL OF ASSIGNEE.

A bank's assignee for benefit of creditors, who was removed because of his relationship to persons to whom he made payments without fraud or gross neglect as preferred claims which were not entitled to rank as such, should not be allowed a commission on the funds turned over by him to his successor, who would also be entitled to a commission thereon, since the change of trustee was made necessary by his own situation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183; Dec. Dig. 78.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Proceedings by Harry B. Pake, as assignee for the benefit of creditors of an insolvent bank, for the administration of the trust, in which Henry A. Horst was substituted as trustee. From a decree of the chancellor

sustaining exceptions to the report of the register denying the original assignee any compensation, the substituted trustee and others appeal. Affirmed in part, reversed in part, and rendered.

Gregory L. & H. T. Smith and Charles W. Tompkins, all of Mobile, for appellants. Hanaw & Pillans and R. T. Ervin, all of Mobile, for appellee.

SAYRE, J. On March 20, 1911, the Leinkauff Banking Company, a corporation under the laws of this state, executed to appellee, Pake, a deed of general assignment for the benefit of its creditors. Three days later the assignee filed in the law and equity court of Mobile his bill for the administration of the trust, and on the same day the court made an order assuming jurisdiction. On January 27, 1913, after distribution had been made to preferred creditors, that is, to depositors who had not stipulated for interest, and after a reference had been held to hear and pass upon an account filed by the assignee, but before any action on the register's report had been taken by the court, certain nonpreferred creditors filed their petition alleging various derelictions on the part of the assignee, and praying that the matters covered by the account be referred again to the register, and that the assignee be removed. Upon this petition the court, on January 31, 1913, decreed a reference in accordance with its prayer, directing the register, among other things, "to take such further testimony as may be offered before him, relative to the question as to whether or not Harry B. Pake has faithfully performed his trust, and whether or not he should be removed from the further administration thereof and a successor appointed for further administration of said trust." It is to be observed of that part of this decree which we have quoted that, very properly, it merely directed the register to take evidence, not to report his conclusions as to its effect. The register, however, reported, among other things, his conclusion that appellee had willfully and fraudulently mismanaged his trust and should be removed. Among other things in this connection, his report included the following finding which we will quote at this point:

"The register finds and reports to the court that at the time of the assignment there stood to the credit of Herman W. Leinkauff, who was president of the Leinkauff Banking Company, upon the books of that company, as a current deposit, the sum of \$5,552.40; there also stood to the credit of the cashier of the bank, Alfred Proskauer, \$1,609.01, as a current deposit; there stood to the credit of Rebecca Proskauer the sum of \$10,156, as a current deposit; and there stood to the credit of Mrs. Caroline Leinkauff, as a current deposit, the sum of \$10,000. All of these accounts were paid by said assignee as preferred claims against the trust without question. The moneys paid to Herman W. Leinkauff, Alfred Proskauer, and Rebecca Proskauer as current depositors were erroneously paid to them, for the reason that said balances were made up largely of dividends declared by the

Leinkauff Banking Company on the stock held by them while said company was insolvent, and each of said parties was indebted to said trust in sums much larger than their respective claims for dividends upon stock that had been fraudulently declared and paid to them as stockholders while the corporation was insolvent, and it was the duty of said trustee to have applied the balances shown to be due to them upon said current deposit accounts to the repayment of said fraudulent dividends as far as such balances would go. * * * In addition to this a large part of the said current deposit account of said Rebecca Proskauer consisted of moneys for which she held certificates of deposit drawing interest, but which had been carried into the current deposit account for the purpose of conferring upon her an apparent right of preference, although the Leinkauff Banking Company continued to pay her interest thereon. The \$10,000 so paid to Caroline Leinkauff as a current deposit account was in fact and in truth not a current deposit, but merely represented an indebtedness of said bank to the said Caroline Leinkauff for a certain note of the Vinegar Bend Lumber Company, which was purchased from her at its face value at a time when the Vinegar Bend Lumber Company was financially embarrassed, and the indebtedness thus created to the said Caroline Leinkauff placed to her credit as a current deposit because the bank did not have the funds with which to pay said amount and for the purpose of making her a preferred creditor."

There has been no admission as to the correctness of the foregoing finding so far as it undertakes to state purposes and motives, but its statements concerning the origin of the sums standing to the credit of the several accounts mentioned, the condition of these accounts at the time of the deed of assignment, the legal effect of the transactions thus shown, and the payment by appellee of these accounts as preferred, are admitted, and these things furnish the basis for the most serious charge brought against appellee, Pake. The register further reported his conclusion, the right and justice of which the appellee denies, that:

"These payments, aggregating \$27,317.41, were all made by the said Harry B. Pake as upon preferred claims in bad faith toward said trust and for the purpose of favoring and protecting the stockholders of an insolvent bank that had made an assignment, and the said Caroline Leinkauff, who is the mother of the said Herman W. Leinkauff, who, in turn, was the president of the Leinkauff Banking Company."

The register also reported his conclusion that the trustee had in bad faith or with gross carelessness violated his trust in other respects; that he should be removed; and that no compensation should be allowed to him for his services in administering the trust.

Complaining creditors then filed a separate motion for the removal of appellee from his trusteeship on the ground that he had violated his trust and was an unsuitable person to execute said trust, and upon the further ground that he had been guilty of gross negligence in the administration of his trust, and that thereby said trust had been put to great loss. Some account of what followed upon this motion may be found in *Ex parte Jones*, 186 Ala. 567, 64 South. 960, and *Pake v.*

Leinkauf Banking Co., 186 Ala. 307, 65 South. 139. Pake was removed and appellant Horst was appointed in his place; but the chancellor, as we find by consulting his opinion which has been incorporated in the transcript (Wood v. Wood, 134 Ala. 557, 33 South. 347; National Foundry v. Oconto Water Supply Co., 183 U. S. 216, 22 Sup. Ct. 111, 48 L. Ed. 157), noting the fact that it had not been referred to the register to find or report whether the assignee should be removed because he had been guilty of bad faith or should be denied all compensation, but only to take and report the evidence touching those questions, referring to the fact that the books of the banking company on their face showed that these persons were current depositors to the amount of their respective current deposit accounts, stating his opinion that the reported evidence did not show that when the assignee made these payments he had any knowledge of the fact, found by the register, that these deposit accounts were made up in whole or in part of dividends which had been declared and paid to these persons on their shares of the capital stock of the banking company at times when the company was insolvent, and finding that such knowledge was obtainable by the assignee only by a close scrutiny into the affairs of the company prior to its assignment and into the solvency of its debtors, held that the evidence did not show that Pake had been guilty of bad faith, willful default, or gross negligence in the administration of his trust, and placed his decree of removal expressly upon the ground that, since it might become necessary to institute suit or take other steps to recover moneys belonging to the trust "which certain persons may have received wrongfully, and because of the assignee's intimate personal relations with these persons and the fact that his selection as assignee was due to them, it would be to the interest of the estate to intrust these matters to some other trustee." It was then referred to the register to state an account under sections 6070 and 6071 of the Code for the final settlement of appellee's administration. The register reported, charging the appellee with sundry items to be noticed hereafter, again finding that appellee had been guilty of fraud in his management of the assignment, and denying him any compensation on account of services rendered as trustee. The court, however, sustained exceptions to this report, and from that decree this appeal is taken.

[1, 2] We are of opinion that all the questions presented by this record come before us for original review on the evidence without presumption for or against the rulings of the judge of the law and equity court sitting as chancellor. Subsection 1 of section 5955 of the Code provides that:

"In deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the Supreme Court shall weigh the evidence, and give judgment as they deem just."

71 SO.—28

It has been deemed to follow from this statute that in the ordinary case the report of a register, although it has been disallowed or modified by the chancellor, comes before us on appeal attended by the same presumption of correctness that waited on it before the chancellor, and that it should not be disturbed here unless, that presumption to the contrary notwithstanding, it appears to us to be clearly erroneous. Pollard v. American Freehold Land Mortgage Co., 139 Ala. 183, 35 South. 767; Andrews v. Frier-son, 144 Ala. 470, 39 South. 512. But for this case a different rule has been provided. This proceeding has been conducted under and by virtue of article 2 of chapter 145 of the Code relating to express trusts for the payment or security of debts, and section 6072, a section of that article, provides that any action or conclusion of the register may be reviewed by the chancellor without any presumption in favor of the correctness of the action or conclusion of the register. And besides, so far as concerns the denial of all compensation to the trustee on account of bad faith and fraud, that broad question, like the question as to whether the trustee should have been removed for bad faith, fraud, or gross neglect, was one wholly judicial in character, not involving any necessity for the labors of the register as to the court's accounting officer, and one which the chancellor, acting within his general equity powers, very properly, so far as procedure is concerned, determined for himself in the first place, subject sooner or later to be reviewed in this court under section 5955 of the Code, and we are not disposed to deny that in such determination the chancellor may not have properly taken cognizance of the entire history of the cause as shown by the record and proceedings in the cause. The same questions were raised upon the reference for a final settlement, by objections to the assignee's account, but we have not found that the evidence then taken shed any appreciable additional light upon the specific charge of fraud, bad faith, or gross neglect, against which the previous decree had found.

[3] It is urged in brief for appellant that the removal of the trustee was enough to justify and require the denial of all compensation. This would be true had he been removed for fraud, willful default, or gross negligence. As we have seen, this trustee was not removed on any such ground, but because his relations with the stockholders of the insolvent corporation, in view of the new question that had been brought into the case, rendered it probable that his feelings, and perhaps his interest also, would conflict with his duty in any action to recover dividends that had been paid to them as depositors; and it has not yet been adjudicated by any competent tribunal that he was guilty of fraud, willful default, or gross negligence. On this showing, without more, we think the

assignee must be treated like a trustee who, for good reasons and of his own accord, asks leave to lay down his office. *Matter of Rauth*, 10 Daly (N. Y.) 52.

[4] But it remains to inquire whether on the record before us it satisfactorily appears that appellee has been guilty of fraud, willful default, or gross neglect in the management of his trust. It was the duty of the assignee to keep and make a full and fair account of all his dealings with the trust estate. Ostensibly, he has done this. Looking to the face of the account rendered and its own records, the court may deal appropriately with shortcomings and errors there appearing. But it is customary in this state to allow trustees reasonable compensation for services rendered to a trust where no express provision has been made, and under the statute governing express trusts for the payment or security of creditors, assignees are allowed the costs and expenses of administration, "including five per cent. commission to the trustee on the amount of money with which he is charged"; but, "upon application to the register by the assignee or any party in interest, such compensation of the assignee may be increased or diminished by the register for good cause shown." Code, § 6071. We take it then that the attacking creditors assumed the burden of proof when, going behind the accounts rendered and the records of the court, they moved the court to deny all compensation on account of alleged misconduct. They must cause it to appear that the assignee was guilty of fraud or "such gross neglect in the execution of the trust, as to be evidence of a corrupt intention." *Smith v. Kennard's Executor*, 38 Ala. 695, 702.

[5] It has already appeared that appellee filed his bill for the administration of the trust under the direction of the court within 3 days of the execution of the deed of assignment. He did not, however, incorporate in his bill any statement of the value of the trust estate as shown by an appraisal, nor did he allege the names and residence of creditors, as contemplated by section 6060 of the Code. Under section 6058 the assignee has 10 days in which to prepare and file an inventory of property and a list of creditors. Section 6061 directs that on the filing of the petition for administration in chancery the chancellor must make an order designating a day, not less than 2 nor more than 12 months from the date thereof, by or on which day all claims against the trust estate must be presented, verified by affidavit. Objections to the allowance of any claim filed may be taken at any time within 3 months after the expiration of the time allowed for the presentation of claims. Section 6066. The chancellor at first allowed made no order fixing a time for the presentation of claims. But on March 29th, 9 days after the deed of assignment, appellee filed

an inventory and list of creditors, showing that, along with stocks, bonds, bills receivable and other property of the assignor, he had received \$53,382.84 in cash, and that the estate was indebted on current deposit accounts, preferred under the Constitution, in the sum of \$193,403.64. The list of current depositors and their credits on the books of the bank showed as simple current accounts the items reported by the register in his report from which we have heretofore quoted. At the same time—that is, on March 29, 1911—appellee filed his sworn petition, to which the inventory was attached as an exhibit, stating in effect that the inventory and list had been correctly taken from the books, and praying that appraisers be appointed if deemed advisable by the court, that he be directed to exercise the powers conferred by the deed of assignment, subject to the control of the court, to the end that he might avoid delay by compromising and settling doubtful claims due the estate, asking for authority to pay a dividend of 25 per cent. to preferred depositors as they appeared upon the books, and that the register be required to publish notice in accordance with section 6062 of the Code. In the same petition the assignee offered to give such reasonable bond and security for the faithful performance of the trust as might be required by the court. This petition was signed by the assignee and by his attorneys, who no doubt prepared it. This petition was ordered to lie over for a day, and then the chancellor decreed that the assignee might exercise the powers vested in him by the deed of assignment, that notice be given for the filing of claims on or before June 10th, following, and that the assignee have leave to distribute ratably among the depositor creditors who had not stipulated for interest such portion of the cash moneys on hand as could be safely distributed at that time, provided there should be filed with him by each depositor an affidavit, to be by him filed with the register, showing the amount of such claim, and provided the same accorded with the books of the Lein Kauf Banking Company in his hands. Between that date and the first of November, following, all uncontested current deposits shown by the books, including those appearing to the credit of Lein Kauf, Proskauer, and others, *supra*, were paid in full, the distribution being concluded by a dividend of 35 per cent. These circumstances, which we have thought it well to state thus at length, show that, if appellee at any time conceived a scheme to defraud nonpreferred creditors by allowing Lein Kauf, Proskauer, and others, rank as preferred creditors to which they were not entitled, the scheme must have been coeval with the creation of the trust.

The legal operation and effect of the order allowing this distribution was to leave upon the assignee full responsibility in the matter

of determining whether persons to whom distribution should be made were in fact entitled to preference, and of that fact the face of the order carried notice to all parties in interest. It cannot be assumed that the court intended that it should operate differently; and if the proceedings from which it resulted were intended by the assignee to lead inquiring nonpreferred creditors to the belief that the status of all creditors claiming to be preferred depositors had been adjudicated and fixed by the court, it was a lame device. The decree, to the extent it gave color to the distribution, was ill-advised and premature in that it assumed the correctness of the books and approved distribution in advance of the time within which creditors might file objections. But if it be assumed that the assignee, though a knave, was not a fool, we should say that he would have known, certainly so after consulting his lawyer, that the course adopted, by its radical departure from that marked out by the statute, and the decree, which followed the prayer of the petition, but purported to adjudicate nothing at all, were more likely to arouse than allay suspicion, and were in any case ineffectual to forestall inquiry. It seems probable that an assignee, having plenary power under his deed of assignment to deal with the estate committed to him, and that without bond, if bent upon aiding and further concealing fraud, though it already lay behind a mass of bookkeeping, would not so promptly and of his own motion go into court with his trust and offer to secure the faithfulness of his administration. And it seems likely also that, if these proceedings were intended to cover fraud, they would have been made to conform, superficially at least, to the course pointed out by the statute. But however the thing were done, if it fell short of unearthing the wrongs that lay buried in the books, ingenuity would have been able after the fact to find objection to the manner of its doing.

Counsel who prosecute this appeal came into the case as heretofore stated in January, 1913. The motion then made to reopen the account previously passed by the register and to remove Pake was evidently based upon information received from George T. Rosson, an expert accountant who had assisted the register in preparing the report of December 11, 1912, by making what the register referred to as "a critical examination" of the books of the bank. He was present when the motion was dictated by counsel, and made affidavit to the facts therein stated, and further deposed to his opinion that a thorough examination of the books would show that the bank had been insolvent at the time its last dividend was declared, within 90 days of the assignment, and during the 5 years next preceding that event. But nothing of these facts appeared in the register's report of December, 1912, unless they were blindly

referred to in the closing paragraph, which was as follows:

"Because of the fact that the ex officio register has not ascertained the assignee's solicitors' compensation, he is unable to declare a dividend on the net balance in the hands of the assignee at the time of the making of his report, and owing to the further fact that there are several claims which are contested and which are still undecided as to priority."

The record does not inform us in terms what contested claims of priority the register then had in mind; but we infer from subsequent proceedings, including Rosson's affidavit, that his reference was to dividends which during 5 years had been credited to the current deposit accounts of stockholders. In the same way we infer that, while the insolvency of the bank during that time was strongly suspected, a further examination by an expert, involving "enormous labor," would be necessary to develop full proof of the fact.

At that time it does not appear to have been noted that \$10,000 had been passed to the current deposit account of Mrs. Leinkauff (who was not a stockholder) as the result of a transaction by which she sold to the bank an obligation of the Vinegar Bend Lumber Company due or to become due to her, nor does it appear that any one at that time suspected the existence of a rule of law that would deny to her rank as a current depositor to that extent. *State v. Corning State Bank*, 136 Iowa, 79, 113 N. W. 500; *State Savings Bank v. Foster*, 118 Mich. 268, 76 N. W. 499, 42 L. R. A. 404.

It is clear on these facts that the illegality affecting the preferences shown prima facie by the accounts standing to the credit of Leinkauff and others lay not at all near the surface of the books, and as yet there is nothing to show that appellee knew the fact upon which that illegality depended. It devolved then upon appellants to show that appellee, by his dealing with the estate after it came into his hands, evinced a desire to conceal these accounts from investigation, and thereby gave evidence of a previous knowledge of their true status.

After the ground of the attack upon these accounts had been developed, appellee testified on the reference ordered for a review of the first reference that he had never examined the books, except to transfer the footings of the accounts there shown to the books he opened on taking charge. His idea seems to have been that he might take the books as he found them. This may be said to have demonstrated some undeserved confidence in the honesty of the bank's management, but the bank had enjoyed a good reputation, and we are unable to see in appellee's acceptance of its books as correct evidence of corrupt intent on his part. At the time he took over the affairs of the bank he employed one Lockwood, an accountant, for the limited purpose, as he testified, of verifying his transfer of the balances shown by the books of the bank. He testified, and this

was not denied, that he did this at the suggestion of his counsel, and that these footings were made the basis of the first inventory filed with the register. But it is argued that he attempted to get a false certificate from Lockwood to the effect that he had audited the books which was to be presented to the court as showing a complete investigation and statement of all the affairs of the bank shown by the books. Lockwood was not satisfied to stop with this verification of appellee's books. He desired, and persisted in the effort, to make a complete audit. But appellee stopped him, saying that he had not been employed for that purpose. Lockwood then went for authority to the judge of the court in which the trust was pending; but the judge turned him away with the remark that he was Pake's employé. Nearly 2 years later, testifying as a witness at the review reference, Lockwood, stating his reasons for desiring to make a complete audit, said that it had occurred to him that creditors would depend on his audit and that he should be perfectly free from interference. Another reason for his persistence and for the assignee's veto, aside from the contradiction as to the scope of his original employment, is suggested with considerable force by the fact that Rosson charged the estate more than \$2,500 for the two examinations of the books afterwards made by him. Appellee subsequently spoke in his testimony of Lockwood's work as an audit; but meanwhile the books had been examined by Rosson, and if appellee's reference to Lockwood's work as an audit was inaccurate, it is difficult to see how, in the circumstances, he could have expected to mislead the court by that statement. Upon the whole we are impressed also with the idea that Lockwood's testimony, wherein it contradicts Pake, is not as definite and positive as we would expect it to be had he at the time of the transaction conceived the notion, as he later intimated, that Pake was engaged in an effort to practice a fraud upon the court and the creditors whose interests were in his keeping. Some evident feeling had developed from the friction between Pake and Lockwood, and it appears to have found reflection in the latter's testimony.

Pake employed Leinkauf to assist him in his management of the trust. But there was no secrecy about that. Leinkauf is shown to have enjoyed good reputation as a business man, and we believe we can understand how his assistance may have been honestly and naturally considered as of great value in unraveling out the complicated details of a business which showed balances of more than three-quarters of a million at the time of the assignment.

Long after Leinkauf and others had received their dividends in full as preferred depositors, after charges had been brought against the assignee, and after proceedings

had been put on foot against Leinkauf and others to recover the dividends paid to them by the assignee and other dividends on stock they had received from the bank during its life, this assignee attended a conference between Leinkauf and others and their attorney in reference to their defense against the proposed proceedings. We do not know, except by this general reference to its purpose what passed at this conference. Pake admits his presence, but denies he took any part. We have no commendation for his course at that point, but it is not improper to consider that he was then charged as an accessory after the fact to the fraud charged against them, that necessarily the entire question of their liability was to be determined by what the books then in the possession of the register would disclose, or had already disclosed, in respect to the bank's insolvency during the period in which these dividends had been declared by the bank and passed to the current deposit accounts of its stockholders, and that concealment was then out of the question. Nothing remained but the legal aspect of the case, and probably that is what was discussed. His presence then at this conference had little or no bearing on the issue as we have stated it.

[6, 7] It is further charged that appellee claimed compensation on a statement of funds handled by him which was fraudulently swollen by the inclusion of amounts that had never come into his possession and by thus leading his counsel to prefer an excessive claim for their services rendered to the estate. This charge rests in the main upon the fact that as considerable quantities of the insolvent bank's securities, which had been hypothecated with creditor banks, were collected by those banks, these transactions were shown by cross-entries on appellee's books, and so with some other transactions of a similar nature, appellee claiming commissions on the total amounts thus shown to have been collected. It is not perceived that this claim by appellee sheds any appreciable direct light upon the question at issue, but we will state our conclusions as to its propriety. This was good bookkeeping, but not an allowable claim. Appellee's theory seems to have been that he was chargeable with the amounts thus shown, and hence entitled to commissions as "on the amount of money with which he is charged," as the statute puts it. Cases arising under statutes allowing administrators and executors commissions on receipts and disbursements or on money collected and paid out, some of which have been cited by appellants, are not strictly in point here because the language of the statutes applicable in the two classes of cases is different. However, we think the statute in this case contemplates that the assignee shall be allowed commissions, *eo nomine*, only on moneys received, and fixes the commission at 5 per cent. Com-

pensation, however, may be increased or diminished for good cause shown. The matter of the commissions in this case was submitted to the court on statements and claims, showing an exaggerated idea as to the amount of compensation to which the assignee was entitled, but in which we have been unable to find evidence of fraudulent intent, and the decree under review has made proper disposition of it to this extent at least: it disallowed any compensation in excess of 5 per cent. on moneys received.

[8] Pake retained and used amounts approximating 5 per cent. on collections as he went along. We find in this no evidence of initial or other fraud. But the matter needs some further statement. On the final accounting the register charged these amounts to the assignee with interest from the dates of their withdrawal. We presume this was done in pursuance of the register's opinion that the assignee had forfeited all right to commissions by misconduct. This ruling was overturned by the chancellor, and, for aught appearing, correctly so. The deed of assignment authorized the assignee to pay and retain to himself reasonable compensation, and by the order made at the outset of the case this right and power was left undisturbed in the assignee, not specifically, but by a general provision concerning the powers and privileges conferred by the deed of assignment. The concluding clause of section 6074 of the Code, though framed with special regard to powers of sale of real estate, was enacted in contemplation of the court's power to make such a decree to operate upon all the powers that may be granted by the deed of assignment. It reads:

"But nothing herein contained shall prevent the assignee from exercising the powers of sale or other powers conferred by the deed of assignment, unless specially restrained from so doing by an order made in writing by the chancellor and filed in court."

It would have been the better course, nevertheless, for the assignee to apply to the court for leave to withdraw his commissions; but his withdrawals were not excessive, and in any event were subject to the court's approval as proper credits on final settlement. We have found no sufficient reasons for disallowing these commissions as of the dates of their withdrawal, and it follows of course that interest on them should not have been charged against the assignee.

On the general proposition that this assignee should not be allowed any compensation whatever on the ground that he was guilty of bad faith or gross negligence resulting in loss to the trust, we have been referred to several matters that appear, or are said to appear, in the evidence. We cannot further extend this opinion by a detailed discussion of these matters. We will state our conclusions in a general way. It is charged that there was negligence in the compromise of a large claim held by the bank against the

Vinegar Bend Lumber Company, and in the management of a claim against Yll Vega & Co., of Santiago, Cuba, which was transferred to the assignee, by the Vinegar Bend Lumber Company, the proceeds to be applied to the debt of the company; that at one time this appellee questioned the right of the register to demand the production of the books of the bank; that some of the books were conveniently lost; and that this appellee was brought to Mobile for the purpose of aiding the officers and stockholders of the insolvent bank to perpetrate a fraud upon its creditors. After full examination of the record we have found: That there is nothing to indicate that the claim against Yll Vega & Co., which was handled by appellee's attorneys at Mobile with the assistance of attorneys in Cuba, or the claim against the Vinegar Bend Lumber Company, then itself insolvent, could have been made by any degree of diligence to produce better results; that there was nothing vitally wrong in appellee's demurrer to the demand for the books, he referring the matter to his legal advisers; that while some of the books, of which there were a great number showing the business of the bank for many years, were left in the vault on the premises where the bank had carried on its business and were probably destroyed or otherwise disposed of by the landlord to whom the premises were delivered after a while, this was after the register had received such books as the expert Rosson at first thought necessary and such as were in fact enough to show the bank's business for 5 years next before the assignment, and under circumstances that may very well have led appellee to think that the old books and papers were of no account; that, as to the charge that appellee was brought to Mobile for the purpose of aiding a fraud upon creditors, this inference is drawn by appellants from the several circumstances to which we have heretofore adverted and from the following additional facts, viz.: That appellee was related by affinity to one of the attorneys of the bank, afterwards retained by appellee to advise him in the management of the assignment, the attorney being related by affinity to one of the stockholders, the stockholders being related by affinity among themselves. This no doubt accounted for appellee's selection as assignee by the owners of the bank, but it has not sufficed by itself or in combination with the other facts, to raise in our minds the belief that appellee was in the beginning given to understand the true nature of their accounts which on the surface of the books of the bank appeared fair enough. The circumstance of appellee's presence in Mobile at the time has been explained by a statement of facts that has not been contradicted. In short, the chancellor's reasons for his conclusion, appearing in our summary of his opinion, *supra*, are satisfactory to us, and we think the conclusion he reached on this

branch of the case should not be disturbed on account of circumstances which may have called for a very careful investigation, but which at last appear to be consistent with reasonable diligence and honest purpose.

[9] The register charged appellee with \$4,000, the reasonable compensation awarded to attorneys for appellee's successor for recovering from Leinkauf and others the payments above referred to and some other items of similar character. These other items, however, had not been carried into the current deposit accounts shown by the books at the time of the assignment, and appellee had made no distribution on their account. The whole recovery amounted to \$30,000, a sum arrived at by compromise under an order of the court. Appellee's exception to this charge was sustained, and in this we are unwilling to say the court erred. There being in our opinion no evidence that appellee knew or had any reason to suspect what lay behind the accounts on which he made payment, their true status having been discoverable and discovered only after prolonged expert investigation, and it not appearing that the case in this respect would probably have been anywise different had the statute been followed to the letter, we have not seen our way clear to a holding that these moneys were temporarily lost to the estate by negligence deserving specific punishment. Appellee was not an insurer, and in view of all the circumstances we think it more reasonable to say that, so far as concerns this charge, appellee probably brought to the service of the trust that measure of diligence which an ordinarily prudent man bestows on his business transactions of a similar character. *Alexander v. Steele*, 84 Ala. 332, 4 South. 281. We have found, therefore, that there was no error in allowing this fee to come out of the trust estate rather than charge it against the personal estate of the trustee.

[10] The register charged appellee with interest on average monthly cash balances in the hands of the assignee from November 1, 1911, a date shortly after the final dividend to preferred creditors, down to April, 1914, the month in which appellee's administration was terminated by the rulings of this court—this on the ground, we may assume, that there had been unreasonable delay in distribution to the nonpreferred creditors. As to this, the chancellor sustained appellee's exception to the register's report.

The propriety of this charge involved not so much a question as to any item of the account, for there was no dispute about the monthly balances, but involved the whole course and conduct of the assignment during the period in question; was a question of broad equitable consideration arising out of the general management of the trust, and we have no doubt that the chancellor had the right, if he concluded the justice of the matter so required, to look to the "face of the

proceedings" including the whole of the undisputed record before him as well as the register's report and the evidence noted in support of the exceptions thereto, as he did, and that we have the same right in final review. *Faulk v. Hobbie Grocery Co.*, 178 Ala. 254, 59 South. 450.

[11] On November 22, 1913, the court rendered its decree removing the assignee for causes that have been stated. This decree required appellee forthwith to turn over to his successor all books, accounts, papers, money, and other remaining assets in his hands. From this decree appellee attempted to prosecute an appeal, the court below allowing a supersedeas; but this court held, April 14, 1914, that the order of removal would not support an appeal. Accordingly, April 21st, the court below vacated the supersedeas and ordered Horst to proceed with the administration. On April 25th, appellee complied with the terms of the decree. On these facts it is quite clear to us that appellee was properly relieved of any charge of interest for the time after the decree of removal. Indeed, he could not have made payments to creditors during that time without violating the terms of the decree.

[12] On November 1, 1911, appellee had on hand \$35,432.98. By April 1, 1913, this cash balance, deducting commissions retained, had grown to \$57,374.48. On April 25, 1913, he applied to the court for permission to declare a dividend of 20 per cent. At that time the estate owed an ascertained nonpreferred indebtedness of \$175,429.79, not including \$10,202.73 made up of amounts due to some preferred creditors who had not called for their dividends and some contested claims of preference. Objections taken by some of the creditors, that the petition did not sufficiently show the condition of the estate or whether a dividend of 20 per cent. was proper and sufficient, deferred action until May 7th when, the petition, having been amended by the addition of a schedule, the 20 per cent. dividend, amounting to \$35,085.96, was ordered by the court. This left a balance on hand of \$23,576.66 to care for the contested claims referred to above, and besides a large undetermined and contested claim of appellee's counsel for compensation, as well as court costs and expenses of administration to accrue. The margin of safety thus reserved by appellee and allowed by the court, we will say without going further into the figures, was liberal, but not unreasonable in view of the condition of the estate at that time. We have therefore thought it proper not to charge appellee with interest for the period between April and November, 1913, during which the cash on hand, not including the amount of the dividend declared, was reduced to some extent by the excess of proper expenditures over collections.

[13-16] But whether the distribution applied for on April 25, 1913, was unduly de-

layed is another question, and we do not agree with the chancellor that creditors by accepting the dividend declared on May 7th, waived their right to complain of that delay or estopped themselves to contend on final settlement that the assignee should be required to pay interest down to the day of the dividend. During the 17 months between the last dividend to preferred creditors and the application to distribute among nonpreferred creditors the money on hand grew as we have stated. This money was not used by appellee, but it was kept on deposit with various banks with which appellee had had no previous relations, and the record is not without indications that during this time he was receiving favors from some of them on account of his large credit balances which otherwise would not have been extended to him. Appellee filed a statement of account on March 16, 1912, on which the register reported December 11th, following, the report to which we referred at the outset, and all along at intervals of 6 months, approximately, he filed supplemental statements; but at no time within these 17 months did he suggest distribution. The statute provides that the assignee shall account within 3 months after the expiration of the time allowed for the filing of objections to claims and every 6 months thereafter. Code, § 6069. This statute, which was enacted after the decision in Royall's Adm'r v. McKenzie, 25 Ala. 363, in which it appears to have been considered that an assignee should not be charged with interest prior to the expiration of 12 months after the creation of the trust, was intended to expedite the settlement of trusts falling under its influence. It contemplates that the assignee must become the actor in proceedings for settlement and distribution, and that once at least in every 6 months an account must be filed in order that the condition of the trust may be ascertained and its purpose, the payment of debts, accomplished to what extent it reasonably can in the circumstances appearing at each recurring period. The assignee cannot excuse delay on the ground that creditors have not resorted to compulsory proceedings against him. He has no right to keep money from creditors when by reasonable diligence he can secure an order for their benefit. Clark v. Knox, 70 Ala. 607, 45 Am. Rep. 93; Manhattan Cloak Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L. R. A. 369. No hard and fast rule can be laid down as to when partial distributions should be made. Each case must depend upon its own circumstances which are to be considered in the light of the plan and purpose of the statute. The assignee ought to be allowed a safe margin to cover contingencies, and on partial settlements we would say that dividends need be declared only when collections suffice for a substantial reduction of the estate's indebtedness and with some regard for

the cost and inconvenience of distributing a small sum among a great number of creditors. After considering all the circumstances of this case our judgment is that the assignee should have applied for the allowance of dividends of at least 10 per cent. of the uncontested claims on or about the 10th of March and September, 1912. Interest will therefore be charged on the amounts such dividends would have produced from those dates respectively to April 25, 1913, the date of his application to the court for the allowance of a dividend of 20 per cent. This charge comes to \$2,455.95.

[17] Appellee was allowed in the court below 2½ per cent. on \$16,751.28, the amount he paid over to Horst, his successor in the trust. Horst will be entitled to commissions on this amount. Two commissions should not be allowed, and we see no sufficient reason for dividing the statutory commissions between them. The change of trustees and this delivery of funds to his successor having been made necessary by appellee's payment of dividends to Leinkauf and others as preferred creditors, the fund just here in question may be properly put in the same category with the sums paid to Leinkauf and others, upon which no commissions were allowed, although they came into the hands of appellee properly in the first place and were recovered to the trust by appellee's successor. Commissions are allowed upon collections or moneys received on the theory that they will be completely administered and applied in the payment of the debts of the trust estate. None should have been allowed on this fund which he was compelled by the awkwardness of his situation to deliver unadministered to his successor, a situation for which nobody but himself was in the slightest degree responsible. This commission amounted to \$418.78. The total error in the decree in favor of appellee amounted to \$2,874.73. A decree will be here rendered as of this day against appellee and his bond for this sum in favor of his successor in the trust.

Affirmed in part, reversed in part, and rendered.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

LOWY et al. v. ROSENGRANT. (1 Div. 875.) (Supreme Court of Alabama. Jan. 20, 1916. Rehearing Denied March 30, 1916.)

1. WORK AND LABOR ⇐14(1)—CONTRACT—RECOVERY FOR EXECUTED PART—QUANTUM MERUIT.

Recovery on a quantum meruit can be had for the balance due for the executed part of a contract, subject to recoupment for resulting damages, from failure to complete performance, that can be calculated with any degree of certainty.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 81; Dec. Dig. ⇐14(1).]

2. SALES \S 117, 170—FAILURE TO DELIVER—EFFECT.

The failure of a seller of goods to deliver on time gives the buyer the option to treat the contract as terminated, or to waive the time limit and insist on delivery within any reasonable time; and, having done the latter, he cannot put the seller in default without first giving notice of his desire to receive the goods, with the offer of reasonable time for making the delivery after notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 291, 424; Dec. Dig. \S 117, 170.]

3. SALES \S 127—FAILURE TO DELIVER—RESCISSIION—NOTICE.

When the seller of goods fails to deliver, and time is of the essence of the contract, the buyer is under no duty to give notice of his rescission for nondelivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 318, 319, 321; Dec. Dig. \S 127.]

4. SALES \S 129—FAILURE TO DELIVER—RESCISSIION BY BUYER.

When the buyer of goods gives notice of his rescission of the contract for nondelivery, he must rescind the whole contract unequivocally and without reservation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 295; Dec. Dig. \S 129; Contracts, Cent. Dig. \S 1194.]

5. SALES \S 176(1)—FAILURE TO DELIVER—LIMIT OF TIME—EFFECT.

Where the buyer of goods, to whom delivery has not been made within the stipulated time, does not treat the contract as broken, but evidences to the seller a purpose to continue it in force, or to reserve to himself the right to insist on its further performance at some future time, he waives the time limit for delivery, and for a reasonable time thereafter buyer and seller are bound by the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 436, 438, 443, 444; Dec. Dig. \S 176(1).]

6. CONTRACTS \S 317—BREACH—ELECTION.

A party to a contract, upon breach by the other party, must elect between treating the contract as dissolved in toto and insisting on further performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1508-1527; Dec. Dig. \S 317.]

7. CONTRACTS \S 305(1)—WAIVER OF STIPULATION AS TO TIME.

Where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made, as where he recognizes the contract as still in force after the time for performance is past.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1398-1400, 1467-1475; Dec. Dig. \S 305(1).]

8. PLEADING \S 236(6) — AMENDMENT—PLEAS—DISCRETION.

In assumpsit by the seller of staves for the balance due for the executed part of the contract, it was discretionary with the court to allow defendant's pleas, in substance amendatory statements of the defense, to be filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601; Dec. Dig. \S 236(6).]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Assumpsit by George M. Rosengrant against Max Lowy and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The first, second, and third counts sufficiently appear. The fourth count is as follows:

Plaintiff claims of defendants the further sum of \$7,000 for that, on the 30th day of April, 1914, plaintiff and defendants entered into a contract by which the plaintiff undertook to sell and defendants undertook to buy, a large quantity of red oak French claret staves, and a further large quantity of white oak French claret staves, the red oak staves to be delivered within a reasonable time after the execution of the contract, and the white oak staves to be delivered before August 1, 1914, and the plaintiff avers that the said red oak staves were delivered, and that the purchase money agreed to be paid therefor by the defendants exceeded the sum of \$7,000; that said contract contained a further provision that the defendants should retain out of the purchase price for said red oak staves the sum of \$7,000, to be held back by them until the delivery of all of the said 36-inch white oak French claret staves; and the plaintiff avers that thereafter, and before the said 1st day of August, 1914, the defendants declined to receive said white oak staves, and, further, that the plaintiff is ready and willing and has offered to deliver said white oak staves, but the defendants have declined to receive and pay therefor; and the plaintiff further avers that the defendants, nevertheless, refused to pay him said sum of \$7,000 which was due upon the purchase money of the red oak staves delivered by the plaintiff to the defendant under said contract, wherefore the plaintiff sues.

The other facts sufficiently appear.

Webb, McAlpine & Grove, of Mobile, for appellants. Harry T. Smith & Caffey, of Mobile, for appellee.

THOMAS, J. The appellee, George M. Rosengrant, sued appellants, Max Lowy and B. A. Kobler, upon a complaint containing four counts: The first, upon account; second, for money had and received; third, for merchandise, goods and chattels sold; and fourth, in assumpsit.

The first and second grounds of demurrer to the fourth count of the complaint are directed to the failure to allege the quantity of claret staves which the plaintiff undertook to sell and deliver to the defendants; and the third, sixth, and seventh grounds, to the failure of allegation that the plaintiff was ready, able, and willing, or that he offered to deliver the staves within the contract time limit; while the fourth and fifth grounds are that from the allegations of the count the defendants had the right to decline to receive the staves.

The suit was not for a breach of the contract of purchase, but was for the recovery of a balance of the purchase price of the staves delivered by appellee and accepted by appellants as a part performance of the contract. From the purchase price of the staves so delivered and accepted on the contract, appellants had retained the sum of \$7,000 as a guarantee of future deliveries; and appellee's insistence is, that a substantial part of the contract being performed and accepted, a recovery may be had for the balance due him, on the common counts.

The fourth count alleges the making of the contract between plaintiff and defendants, for the delivery of a large quantity of claret staves, the red oak staves to be delivered within a reasonable time after the execution of the contract, and the white oak staves to be delivered before August 1, 1914; that the red oak staves were delivered, and that said contract contained a further provision "that the defendants should retain out of the purchase price for said red oak staves the sum of \$7,000, to be held back by them until the delivery of all of the said 36-inch white oak French claret staves"; and that thereafter, and before the said 1st day of August, 1914, the defendants declined to receive said white oak staves. It alleges, further, "that the plaintiff is ready and willing and has offered to deliver said white oak staves, but the defendants have declined to receive and pay therefor." Said count also avers that the purchase price for the red oak staves so delivered by plaintiff exceeded the sum of \$7,000, and that the defendants refused to pay to plaintiff the sum of \$7,000 which was due him upon the purchase price of the red oak staves so delivered, etc.

[1] The right of a plaintiff to recover on a quantum meruit, for the balance due for the executed part of the contract, is well established. 2 Greenl. Ev. (16th Ed.) § 104; Thomas et al. v. Ellis et al., 4 Ala. 108; Merriweather v. Taylor, 15 Ala. 735; Hawkins v. Gilbert, 19 Ala. 54; Kirkland v. Oates, 25 Ala. 485; Davis v. Badders & Britt, 95 Ala. 348, 10 South. 422; Florence Gas, etc., Co. v. Hanby, Rec'r, 101 Ala. 15, 13 South. 343; Watson v. Kirby & Sons, 112 Ala. 436, 20 South. 624; Martin v. Massie, 127 Ala. 504, 29 South. 31; Aarnes v. Windham, 137 Ala. 513, 34 South. 816; Matthews v. Farrell, 140 Ala. 293, 37 South. 325; Higgins Mfg. Co. v. Pearson, 146 Ala. 528, 40 South. 579; Walstrom v. Oliver-Watts Const. Co., 161 Ala. 608, 50 South. 46; Smith v. Sharpe et al., 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; Dees v. Self Brothers, 165 Ala. 225, 51 South. 735; Montgomery County v. Pruett, 175 Ala. 391, 57 South. 823.

This right, however, is subject to recoupment for the resulting damages to the defendant (Ala. Chem. Co. v. Geiss, 143 Ala. 591, 39 South. 255) that may be "a matter of easy ascertainment," or that can be calculated with "any degree of certainty" and is "susceptible of measurement by a pecuniary standard." Stratton v. Fike, 166 Ala. 203, 209, 51 South. 874; Henderson-Boyd Lumber Co. v. Cook, 149 Ala. 226, 42 South. 338; Keeble v. Keeble, 85 Ala. 552, 5 South. 149; McPherson v. Robertson, 82 Ala. 459, 2 South. 333; Dees v. Self Bros., supra; Walshe Mfg. Co. v. Smith Lumber Co., 178 Ala. 472, 59 South. 455; 2 Page on Contr., § 1175.

There was no error of the court in overruling the demurrers to the fourth count of the complaint that sought recovery for the

balance of the purchase money of the staves delivered by plaintiff and accepted by defendants.

Defendants' amended pleas 2, 3, and 4 met the objections pointed out by the plaintiff's demurrers sustained to pleas 2 and 3 as originally filed. There was no error in the ruling of the court.

The defendants' second and third pleas as amended averred that under the terms of the contract plaintiff bound himself to deliver the staves at Mobile; that it was possible for the delivery to have been made at Mobile by plaintiff before the expiration of the contract time, but that plaintiff neither tendered nor delivered the full amount of the staves contracted for, although defendants were ready, willing, and able to receive and pay for the staves in compliance with the terms of their contract; and that this nondelivery by plaintiff, within the terms of the contract, caused loss to them of a sum in excess of that sued for. And defendants claim recoupment for such damages.

The fourth plea was of like tenor, but alleged, in addition, an extension of the time in the contract for the delivery of a portion of the white oak staves, and "that plaintiff knew at the time of the execution of said contract of April 30, 1914, that said white oak French claret staves were being purchased for the Bordeaux market in France."

The fourth replication filed to pleas 2, 3, and 4 is as follows:

"And for further replication to this plaintiff says that after the said 1st day of August, and on, to wit, the 3d day of August, 1914, the defendant through his agent, notified the plaintiff in writing that he reserved the right to accept further deliveries under said contract after the expiration of the month of August, 1914, and thereby waived the time limit for such deliveries, and thereafter the plaintiff had a reasonable time within which to make deliveries to the defendant, and the defendant at no time since the month of August, 1914, notified the plaintiff that he demanded delivery within any fixed period."

[2] The failure of a seller to deliver on time confers upon the buyer the option to either treat the contract as terminated, or waive the time limit and insist on the delivery, within a reasonable time. After the buyer has waived the time limit and insisted on delivery under the contract, he cannot put the seller in default without first giving notice of his desire to receive the purchased property with the offer of reasonable time for making the delivery after notice. Farmers' C. O. & T. Co. v. Ward & Son, 170 Ala. 491, 54 South. 513; J. M. Ackley & Co. v. Hunter-Benn & Co., 166 Ala. 295, 51 South. 964; Elliott v. Howison, 146 Ala. 568, 40 South. 1018; McFadden & Bro. v. Henderson et al., 128 Ala. 221, 29 South. 640; Stephenson v. Allison et al., 123 Ala. 439, 26 South. 290.

[3-5] When the seller fails to make deliveries, and time is of the essence of the contract, the buyer is under no duty to give notice of his rescission for such nondelivery un-

der the contract. When, however, the buyer undertakes to give notice of his rescission of the contract, for nondelivery, he must rescind the whole contract unequivocally and without reservation. *Elliott v. Howison*, supra; *Stephenson v. Allison* et al., supra; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. Where the party to whom delivery has not been made within the time stipulated does not treat the contract as breached, but evidences to the other party thereto, a purpose to continue it in force, or to reserve to himself the right to insist on its further performance at some future time, he waives the time limit, and for a reasonable time thereafter the respective parties are bound by the terms of the contract. 3 *Elliott on Contr.* § 2026, and authorities there cited.

[6, 7] One cannot claim the benefits of a contract and insist upon its further performance, and at the same time ask its dissolution. When a breach occurs, an election must be made between treating the contract as dissolved in toto, and insisting upon further performance. The choice is made once for all. *Continental Jewelry Co. v. Pugh Bros.*, 168 Ala. 295, 53 South. 324, Ann. Cas. 1912A, 657; *Stephenson v. Allison*, supra; *Knight v. Turner*, 11 Ala. 636; *Dunn v. White & McCurdy*, 1 Ala. 645; *Des Allemands Lbr. Co. v. Morgan City Timber Co.*, 117 La. 1, 41 South. 332. Even where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for performance has passed. 9 Cyc. 608; *Paddock v. Stout*, 121 Ill. 571, 18 N. E. 182; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450; *Brown v. Guarantee Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; *Phillips Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Amoskeag Mfg. Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715; 8 *Rose's Notes U. S. Supreme Court*, p. 746.

In *Thorne v. French*, 4 Misc. Rep. 436, 24 N. Y. S. 694, there was a contract between plaintiff and defendant whereby the plaintiff's opera company was to play in defendant's theater, the engagement to commence September 1st. On that date the company then playing at defendant's house was so successful that it was continued throughout the period that plaintiff's company was to play, and until the day for a third company to begin its engagement. The defendant all the while recognized the contract as being in force, even though the plaintiff had not supplied the band, librettos, etc., by September 1st, as he had contracted to do; and on September 5th defendant wrote plaintiff that he would be glad to see him upon his arrival which would be in ample time for the band parts. The court affirmed the opinion of the learned judge of the equity term, in which

opinion is the following statement of the law of the case:

"Conceding that time was of the essence of the contract, and there was no waiver in respect thereto, the defendant had the right (1) to elect to rescind the contract for failure to deliver the materials on or before September 1, 1891; or (2) to elect to continue the contract in force. The plaintiffs, by their simple failure to deliver the materials, did not put an end to the contract, although their default might have given the right to the defendant to elect to rescind. If he elected to rescind, it was incumbent on him to make his choice promptly. * * * By electing to continue the contract in force, the defendant retained his rights under it until September 1, 1893. He evidently intended to regard the contract as a subsisting obligation, and one that might ultimately prove beneficial to him. A defendant is not bound to take advantage of a delay or forfeiture, and there may be a waiver, if there be conduct indicating an intention to waive a condition as to time, 'although * * * there may be no technical estoppel.' * * * Where time is waived a party is not put in default until he has demanded performance, and thus restored time as an element of the contract. *Lawson v. Hogan*, 93 N. Y. 39; *Wallman v. Society*, 45 N. Y. 485; *Leard v. Smith*, 44 N. Y. 618; *Owen v. Evans* [134 N. Y. 514], 31 N. E. 999; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 176."

In *Hennessy v. Bacon*, 137 U. S. 78, 84, 11 Sup. Ct. 17, 19 (34 L. Ed. 605), Mr. Justice Harlan states the general rule as to rescission upon breach of contract to be:

"If a party means to rescind a contract because of failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties." 1 *Sugden on Vendors*, c. 5, § 5.

In *Dingley et al. v. Oler et al.*, 117 U. S. 490, 501, 6 Sup. Ct. 850, 853 (29 L. Ed. 984), the defendant, an ice dealer, had all of the year 1880 in which to make a shipment to plaintiff. Plaintiff wrote, demanding the shipment early in July of that year, and defendant in reply answered:

"We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point."

The court, holding that such communication did not show a positive intention to abandon the contract so as to constitute an anticipatory breach and allow the plaintiff to sue at once, said:

"Although in this extract they decline to ship the ice that season, it is accompanied with an expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs."

In *Andrews v. Tucker*, 127 Ala. 602, 612, 29 South. 34, 38, the question was as to whether there had been a waiver of the time stipulation in a contract to grade a road-bed. The court said:

"By the law as it has been settled in this state, a written contract which by its terms is

executory as imposing the performance of duties other than the mere obligation of making payment, may, while the contract is executory in respect of any part of such duties, be altered, modified or rescinded with or without a writing and without any other consideration than that of mutual assent. * * * And such change under such circumstances may extend to the waiver of any right either party might have had under the original contract but for the new agreement. * * * A waiver of a right to declare a contract forfeited may even be implied from conduct of the parties which is inconsistent with the intention to claim a forfeiture. Accordingly, the fact that the contract here involved was acted upon and treated by the parties as in force after the time specified therein for completion of the work undertaken by plaintiffs implied an agreement on the defendants' part not to treat the failure of completion within that time as a cause of forfeiture."

In *Brigham v. Carlisle*, 78 Ala. 243, 246 (56 Am. Rep. 28), the plaintiff had a contract with defendant whereby he was to be defendant's travelling salesman on a commission basis, his work to begin October 1st and continue eight months, but he became ill shortly before that time, and so remained until December. Late in December defendant sent him samples and cautioned him against giving credit to certain parties. Plaintiff made his first attempt to go on the road January 1st, but his expense account was turned down and later he was ordered to send back the samples. It was declared that:

"The third charge requested by the defendants based their right to abandon the contract on the naked fact, unexplained, that the plaintiff did not commence the performance of the contract until January 1, 1882. The violation of a contract by one of the parties, or when he is unable to perform the acts or services stipulated, may be sufficient to authorize the other party to abandon it. * * * Its abandonment, in such case, is at the election of the defendants; and they will be held to have waived their right to renounce the contract, when, after the delay has terminated, they regard and treat it as continuing and in force."

In *Stewart v. Cross*, 66 Ala. 22, it was held that when a written contract for the sale of lands reserves to the vendor the right of rescission if payments are not made by a designated date, this right is waived by continuing to receive partial payments on the purchase money. *Acker v. Bender*, 33 Ala. 230; *Davis v. Robert*, 89 Ala. 402, 8 South. 114, 18 Am. St. Rep. 126; *Zirkle et al. v. Ball et al.*, 171 Ala. 568, 54 South. 1000.

It results from what we have said that there was no error in overruling the demurrer to the fourth replication to defendants' plea.

In *Massachusetts Mutual Life Insurance Co. v. Crenshaw*, 70 South. 768, this court said:

"These pleas offered at the last trial, with the possible exception of those of the class last above referred to, though not so denominated, were in substance amendatory statements of the defense upon which the case has been first tried; they were not additional or wholly different pleas within the purport and meaning of the rule laid down in *Jones v. Ritter*, 56 Ala. 270,

and the line of cases cited in *Craig v. Pierson Lumber Co.*, 179 Ala. 535 [60 South. 838]; they fell rather under the remedial influence of the statute of amendments, and defendant should have been allowed to place them upon the file, their legal sufficiency remaining subject to question by demurrer, unless, indeed, it appeared that in other pleas already on file defendant had the full benefit of the defense it was thus attempting to cast into new shapes."

[8] It was thus discretionary with the court to allow these pleas of defendants to be filed when offered. When the trial was entered upon the plaintiff may have been prepared to disprove the fourth plea as to the "Bordeaux market in France," and not, as designated in the fifth and sixth pleas, as to the "European market."

The court committed no error in giving the plaintiff's general affirmative charge. The case is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

BIRMINGHAM WATERWORKS CO. v. HERNANDEZ. (6 Div. 194.)

(Supreme Court of Alabama. Jan. 13, 1916.
Rehearing Denied March 23, 1916.)

1. WATERS AND WATER COURSES ~~§~~194—PUBLIC WATER SUPPLY—CONNECTIONS.

The rule that a water company must extend the same public service to all in like circumstances without discrimination does not make it the duty of water company to make connections for private consumers.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ~~§~~194.]

2. WATERS AND WATER COURSES ~~§~~194—PUBLIC WATER SUPPLY—CONNECTIONS.

The charter of a waterworks company, authorizing it to distribute water and lay pipes for conducting it and to make excavations through streets, alleys, or public grounds, creates no duty on the company to do more than lay its mains, since it could not compel the owner of property to take water, so that the question whether connections for private consumers should be made at the expense of the company or of the consumers is dependent upon the contract between the company and the consumer.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ~~§~~194.]

3. MUNICIPAL CORPORATIONS ~~§~~668—STREETS—REGULATION—PRIVATE USE.

The owner of property abutting upon a city street has the right of access to it for the purpose of excavating and laying connections for water mains and similar purposes, his right being a property right and not illegal as a private use of public property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1444; Dec. Dig. ~~§~~668.]

4. WATERS AND WATER COURSES ~~§~~194—PUBLIC WATER SUPPLY—DUTY TO LAY AND MAINTAIN SERVICE PIPES.

The duty to maintain service pipes for supplying private consumers with water is the same

as that to lay them, and rests upon the same party, whether the company or consumer.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ¶194.]

5. WATERS AND WATER COURSES ¶194—PUBLIC WATER SUPPLY—FRANCHISES—CONDITIONS.

Municipalities in granting franchises for the furnishing of water may require the company, if the statute so authorizes, to connect service pipes with mains as a part of the consideration for the franchise; but, unless the charter or contract so provides, such connections are left to the agreement of the parties.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ¶194.]

6. FRANCHISES ¶2—CONSTRUCTION—AMBIGUOUS PROVISIONS.

Ambiguous provisions in the grant of a public franchise will be construed in favor of the public.

[Ed. Note.—For other cases, see *Franchises*, Cent. Dig. § 2; Dec. Dig. ¶2.]

7. CONTRACTS ¶170(1)—CONSTRUCTION—AMBIGUOUS PROVISIONS.

There being nothing to the contrary in its language, the parties may, by mutual consent, interpret ambiguous provisions in a contract for themselves, in which event the court must enforce the contract according to such interpretation.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. ¶170(1).]

8. WATERS AND WATER COURSES ¶194—PUBLIC WATER SUPPLY—PRIVATE CONSUMERS—CONTRACTS.

In the absence of special contract provision, the court will be slow to hold that a consumer of water has become bound by acquiescence of other consumers, over whom he has no control, in a custom requiring consumers to pay for connections with the water mains.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ¶194.]

9. WATERS AND WATER COURSES ¶200(1) — PUBLIC WATER SUPPLY—FRANCHISES—PRESUMPTIONS.

Where the municipal authorities contracted with a water company for supply, it will be presumed that they acted competently as the agent of all the people of the city and that they knew the state of the matter in which they undertook to act.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 274; Dec. Dig. ¶200(1).]

10. WATERS AND WATER COURSES ¶194 — PUBLIC WATER SUPPLY—CONNECTIONS FOR PRIVATE CONSUMER—WHO LIABLE.

The custom of a water company requiring private consumers to install service pipes for connections with the mains is not unreasonable, in the absence of franchise provisions to the contrary, and the courts will not by mandamus require the company to pay for such installation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ¶194.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Mandamus by Robert M. Hernandez against the Birmingham Waterworks Company to compel it to install a service pipe between its main and the property line of the

relator. From a decree granting the writ, respondent appeals. Reversed and remanded.

The petition alleges that relator is a resident of the city of Birmingham, and is engaged in business under the name of the Hernandez Machinery Company, conducting a machine shop at 311 South Twelfth street in the city of Birmingham, which said premises abuts on a portion of the public streets, in said city of Birmingham; that the respondent is a public service corporation, acting under a charter granted it by the Legislature of Alabama, a copy of which is set out and attached as an exhibit; and that in June, 1888, it entered into a contract with the city of Birmingham to supply the inhabitants thereof with water, and a copy of this contract is set out and made an exhibit; that relator has applied to respondent for a supply of water in his business located as above set out, and has offered, and still offers, to pay respondent the usual water rates, and to comply with all the reasonable rules and regulations, except as to laying or installing of service pipes, from defendant's water mains or pipes in the streets, abutting said property, to the property line of said premises; but that respondent refused, and has refused, to provide said service pipe between said line.

Percy, Benners & Burr, of Birmingham, for appellant. Romaine Boyd and M. M. Ullman, both of Birmingham, for appellee.

SAYRE, J. The question in this case arises out of an application by Hernandez for a writ of mandamus to compel the Birmingham Waterworks Company to lay at its expense a lateral or service pipe line from its main to the premises of the petitioner, who desires to be supplied with water.

Respondent is exercising charter powers under and by virtue of the special act of incorporation approved February 13, 1885 (Acts 1884-85, p. 415 et seq.). This charter authorized respondent "to send and distribute water throughout the said city and places adjacent thereto," and "to lay pipes for conducting its water, and to make excavations through any of the streets, alleys or public grounds of the said city of Birmingham by and with the consent of the corporate authorities of said city." This charter provided that the company should have "the right to make contracts with individuals and corporations for the water to be supplied by it, and to charge for and collect such water rates and compensation therefor as may be contracted to be paid by them." Respondent is also exercising its charter powers in the city of Birmingham under an ordinance-contract with the municipal authorities into which the parties entered on June 2, 1888. This contract provided for certain maximum flat and meter rates at which water was to be furnished by respondents to domestic consum-

ers, and contained the following stipulations, which, it is supposed, must exert some influence in the proper decision of the controversy between the parties to this cause:

"The Birmingham Waterworks Company is authorized to lay down, maintain water mains, pipes, aqueducts and other fixtures to, in and through any of the streets, avenues, alleys and public grounds in said city, for the use of said city and its inhabitants as herein provided."

"The whole of said pipe system shall be such as to cover, supply, and keep supplied all portions of streets of the city which it may be necessary to supply, and be furnished with all the necessary and usual stop gates, special castings, air valves, blow-offs, etc."

"That all hydrants provided for under this contract shall be put in by, and at the expense of said Birmingham Waterworks Company, but shall thereafter become the property of said city, and shall be kept in repair and when worn out shall be replaced with new hydrants by and at the expense of said city."

To these things respondent's answer added averments that since it had been engaged in supplying water to the city of Birmingham, uniformly, both before and after the contract of June 2, 1888, consumers had paid the cost of laying and installing the service pipe lines between their premises and its main; that before said contract it had adopted a rule or regulation to that effect which was proper, reasonable, and such an one as had been generally maintained in cities throughout the United States, both in cases where the water supply was maintained by municipalities and as well where it was privately owned. The answer also set forth ordinances of the city of Birmingham providing that any one may make excavations in the streets for the purpose of laying service pipes on obtaining the city's permit, which is granted on the payment of a fee of one dollar and the giving of security that the street will be relaid in as good condition as it was before excavation.

The question then is, on the facts disclosed by the petition and answer, whether, on relator's application to be supplied with water, it was the duty of the respondent to lay the service pipe connecting its main with relator's premises at its own expense, or whether it might charge the cost of the work to relator.

In *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 South. 23, this court said:

"In this state it is not yet settled, and, however we might be disposed to view it, we do not regard it as a willful and culpable breach of duty by respondent to now decline to furnish such pipes at its own expense; though it is proper to say that the great weight of authority in other states seems to recognize and impose the duty in question."

At this time the question is presented for a definite answer, and we have made such shift as we could to investigate anew the original authorities and the reason of the matter.

It must be now admitted that the weight of authority, if numbers may count for weight, rests with relator's side of the controversy. Some of the cases constituting this weight of authority did not really involve the precise

question here presented, and some of them appear to have been influenced to some extent by general statutory provisions; but it is safe to say that the rule for which relator contends has been substantially adopted as a rule of decision in Arkansas, California, Idaho, New Mexico, Oklahoma, and Washington, as the following cases will show: *Pine Bluff Corporation v. Toney*, 96 Ark. 345, 131 S. W. 680, Ann. Cas. 1912B, 544; *Title Guarantee & Trust Co. v. R. R. Commission*, 168 Cal. 295, 142 Pac. 878; *Hatch v. Consumers Co.*, 17 Idaho, 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263; *State v. Albuquerque Water Supply Co.*, 19 N. M. 36, 140 Pac. 1059, L. R. A. 1915A, 246; *Bartlesville Water Co. v. Bartlesville* (Okla.) 150 Pac. 118; *Cleveland v. Malden Water Co.*, 69 Wash. 541, 125 Pac. 769. In Texas, the Court of Civil Appeals for the Fourth Division holds to the same doctrine.

It is not without profit to note of the foregoing line of cases that it had its origin in some language, used arguendo, in *Pocatello Water Co. v. Standley* (1900) 7 Idaho, 155, 61 Pac. 518, where the question was between the water company and a plumber, not the prospective consumer, and related to the reasonableness of the company's rule by which it reserved the right to make all taps of its mains and pipes. Considering the obligations of a water supply company and construing the statute of that state, the court said:

"Under the said franchise the respondent * * * is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits."

That case was cited to sustain the rule in *Hatch v. Consumers Co.*, supra. This last case (*Hatch Case*) went to the Supreme Court of the United States (224 U. S. 148, 32 Sup. Ct. 465, 56 L. Ed. 703), and the decision of that court is cited in the brief for relator and was cited by the Supreme Court of Oklahoma as sustaining its ruling in *Bartlesville Water Co. v. Bartlesville*, supra. But the only effect of the ruling in the Supreme Court of the United States was that the judgment of the state court requiring the water company to make the service connection at its own expense impaired no constitutional right of the company which had accepted its charter in 1903, in contemplation of the duty of water companies as clearly settled by both the statute law and decisions at that time. To make the matter clear, we quote the language of the court:

"The charter of the company was construed by the court below in connection with the statutes in force at the time of the grant of the franchise in the light of the construction given to those statutes in decisions made prior to such grant. We excerpt in the margin * * * a passage from the opinion in one of those cases (*Pocatello Case*). * * * That the construction thus placed upon the charter by the court below, in the light of the state of law at the time of its adoption, did not amount to an im-

pairment of the obligations of the charter by subsequent legislation, is, we think, too clear for anything but statement."

The idea which seems to underlie all the cases holding with relator, except as they are affected by statute or ordinance, may be fairly stated as follows: Since the franchise to furnish water is affected with a public use, requiring all consumers to be served on equal terms, and since water companies have the right to excavate the streets, while private persons have not, the duty to lay service pipes, which involves excavations, and so the duty to deliver water on the consumer's premises, must devolve upon the water companies.

[1-5] We do not feel that we are constrained to adopt the relator's view of this case by the theory suggested nor by the cases which seem to adopt it as the reasonable foundation of their decisions. *City of Mobile v. Blenville Water Supply Co.*, 130 Ala. 384, 30 South. 445, in common with a multitude of cases, holds that the same public service must be extended to all in like circumstances and without discrimination. We fully recognize the obligation of that rule; but we are unable to see that it sheds any particular light upon the question whether, in the absence of contract or controlling statute or ordinance, the water company owes the consumer the public duty to furnish at its expense connections between its main and his premises. Respondent's charter operated, no doubt, as a general permit to excavate the streets in order to lay its mains and prepare its plant for the discharge of its public duty. But, so far as the laying of pipes and the excavation necessary thereto is concerned, in the beginning of its operations in any street, its whole right and duty was to lay its mains. It could not compel the owner of any abutting property to take water, and, as for anything to be found in respondent's charter and its contract with the city, respondent was left free to contract with consumers, subject, of course, to the general principle that all consumers in like circumstances should be treated alike and reasonably, and subject, also, to the stipulation for maximum rates. Either party may dig trenches for the laying of service pipe, subject always to reasonable municipal regulations. If it be said that to accord such right to the consumer is to permit a private use of the street, still the right to such use is but part and parcel of the right of access which cannot be taken, injured, or destroyed without compensation. To employ substantially the language of Judge Dillon, the abutting owner has a right of passage, and also other rights not shared in by the public at large, special and peculiar to himself, and arising out of the very relation of his lot to the street in front of it. These are rights of property. The private rights of abutters are not limited to the easement of light, air, and access. They are

coextensive with the use to which the street may be by law devoted, and become integral parts of the estate of the abutting owner. In cities and towns the streets are commonly devoted to the conveyance of water, gas, and sewage, and the abutting owner's property is essentially dependent upon the use of the streets for connections with the appropriate means of conveyance. 3 Dillon Mun. Corp. (5th Ed.) §§ 1224-1227. In *McClagherty v. Bluefield Waterworks Co.*, 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. (N. S.) 229, the Supreme Court of West Virginia says:

"The abutting owner has the right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the street to lay his pipe for the conveyance of water a right of access constituting a property right in the street, which he may use and of which he cannot be divested?"

And that court, establishing by its decree the legal obligation of a contract by which the consumer agreed to keep his service pipe in repair, as neither lacking in consideration nor relieving a public service corporation of its duty under the law, and knowing perhaps more of the matter of fact than we do, said, in line with an averment of respondent's answer in this case, that such was the general rule in cities and towns. There can be no distinction in principle between the duty to lay service pipes and the duty to maintain them. In the Hatch Case, *supra*, which, as we have seen, turned upon the construction of a statute, the Supreme Court of Idaho recognizes that the consumer may be required by ordinance to pay the expense of service connections when a statute so authorizes, and cites some cases so holding. And in *State v. Albuquerque Water Supply Co.*, *supra*, the most elaborately argued of the cases upon which relator relies, the question being whether the property owner or the water company must defray the expense of laying the service pipe from the main to the property line, the court said:

"The answer to the question necessarily depends upon the construction to be placed upon the franchise and contract under which the water company operates, for it is clear that the contracting parties might legally stipulate that this burden should be borne by the consumer, or, on the other hand, that the public service corporation should assume it."

The first Missouri case on this question (*Fisher v. St. Joseph Water Co.*, 151 Mo. App. 530, 132 S. W. 288) follows the doctrine of some English cases and *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33. In Wisconsin the question turned upon a statute. The Fisher Case was followed in *Joplin v. Wheeler*, 173 Mo. App. 590, 158 S. W. 924. The reasoning of the court in the Joplin Case is of interest here. In the course of its opinion, the court said:

"The city argues that the franchise of the company is coextensive with the entire street, and the company's obligation is to deliver water

at the property line. It is obvious that the purpose for which the waterworks system is maintained, to wit, the supplying of the inhabitants of the city with water, can be accomplished by either method. Unless we should say that the supply of water to the inhabitants necessarily means delivering it to the consumer at the very place of consumption, a position not taken by any court, and not contended for here, then the question of who should connect the water mains by service pipes with the private property was properly a matter of contract between the city and the water company, and should have been embodied in the franchise-ordinance. That the installation and maintenance of such service pipes to the property line is not one of the necessary incidents and obligations growing out of the right and duties of the water company to supply water to the inhabitants of the city is shown by the fact that this company has for 25 years discharged its duties without so doing."

The discussion need not be further protracted; but we cite some cases looking very persuasively to respondent's view, and quote a clear, and as we think a correct, statement of the law in dispute which is found in the language of Reed, D. J., speaking for the United States Court of Appeals in the case of *City of Wichita v. Wichita Water Co.*, 222 Fed. 789, 138 C. C. A. 337, a very recent case, precisely in point, in which the court evidently had before it the cases cited for relator here. The court said:

"Municipalities, in granting franchises to or making contracts with private persons or corporations to furnish water to the city and its inhabitants, may require the water company, when the statute so authorizes, to connect the service pipes with the water mains as a part of the consideration that shall pay for the privilege of furnishing the water; but, in the absence of a charter or contract that so provides, the matter is left to the agreement of the parties." *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030; *Vinton Water Co. v. Roanoke*, 110 Va. 661, 66 S. E. 835; *Franke v. Paducah Waterworks*, 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265.

[8-10] The rule is well settled that ambiguous provisions in the grant of a public franchise will be construed in favor of the public. In this case we find nothing to the point one way or the other in either the respondent's charter or its contract with the city. On the subject in dispute both those instruments are dumb. Ordinarily, there being nothing to the contrary in the language of a contract, it is competent for the parties by mutual consent to interpret for themselves, in which event it is the duty of the court to enforce the contract according to the interpretation put upon it and practiced by both parties. *Bixby v. Evans*, 174 Ala. 581, 57 South. 39; *City of Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 South. 764. On this point we have stated above the averments of the answer. So far as the alleged practice subsequent to the ordinance-contract of June 2, 1888, is concerned, if that contract had undertaken, though by doubtful expression, to determine the right of consumers in the respect at issue, or if the relator's contention, in the absence of contract, were determinable in his favor on any general principle of

law, we would be slow to hold that he had been bound by the practice of the water company though acquiesced in by individual consumers, for he had no control over nor any responsibility for their actions in the premises. But different considerations may apply to the period, of what length the answer does not say, reaching from the time when respondent began to furnish water to consumers down to the contract of June 2, 1888. In making that contract the municipal authorities acted competently as the agent of all the people of Birmingham, then and thereafter, and it may reasonably be presumed to have known the state of the matter in which it undertook to act. Unfortunately it said nothing to the point in issue. At best, for relator we could only assume that there was a tacit understanding that respondent's previous practice had not been unreasonable nor unlawful, and the effect of this understanding would be strongly reinforced by any such universality of practice as is alleged in respondent's answer. We have stated the reason for our conclusion that the practice heretofore followed is not unreasonable, nor prohibited by any principle of general law or provision of statute or ordinance, and, on that consideration, without reference to the practice alleged, we hold that respondent has the legal right of the case, and hence that the trial court erred in sustaining the demurrer to respondent's answer.

Relator refers to the decision of this court in *City of Montgomery v. McDade*, 180 Ala. 156, 60 South. 797. That case holds nothing to the contrary of what we have here said. It will be seen by reference to *City of Montgomery v. Greene*, 180 Ala. 322, 60 South. 900, on which in the main the decision in the McDade Case was based, that the holding was simply that if the city desired to have the water measured, it should furnish the meter, and that all consumers in the same class must be treated alike by the city in the territory in which its charter allows it to operate. In these cases the matter of laying service pipes was determined by ordinance-contract.

On the authority of the cases cited by relator, *McQuillin* and *Pond*, in their respective works on *Municipal Corporations* and *Public Utilities*, state the weight of authority as it was stated in *State v. Birmingham Waterworks Co.*, *supra*; the latter citing meter cases along with the rest. But Prof. Wyman of Harvard Law School, in his work on *Public Service Corporations*, after referring to the same line of cases, says:

"On the other hand, there is as much authority, if not more, to the effect that the requirement by legislation or even by the regulation of the company that the consumer shall pay for his service pipe is not outrageous, as this installation is peculiarly for his benefit and no part of the general facilities of the system in the use of which all share to some degree." Volume 1, § 824.

It results from what we have said that the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

LITTLEJOHN v. LITTLEJOHN, County Treasurer. (5 Div. 608.)

(Supreme Court of Alabama. Feb. 10, 1916.)

1. COUNTIES \S 151—INDEBTEDNESS—WARRANTS.

The issuance by the authority of the commissioners' courts of interest-bearing warrants on the county treasurer, payable at stated times in the future to pay for public buildings, public roads, and bridges, is not the issuance of bonds within Const. 1901, \S 222, forbidding the issuance of bonds by a county, except after submission of the question to a popular vote, and the commissioners' court is competent to issue such interest-bearing warrants, unless restrained by section 224, limiting county indebtedness.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 166, 218; Dec. Dig. \S 151.]

2. COUNTIES \S 166—INDEBTEDNESS—"COUNTY WARRANT."

A county warrant is the command of one duly authorized officer to another to pay from county funds a specific sum to a designated person whose claim therefor has been allowed by the court of county commissioners.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 259; Dec. Dig. \S 166.

For other definitions, see Words and Phrases, First and Second Series, County Warrant.]

3. COUNTIES \S 167—INDEBTEDNESS—WARRANTS—NATURE OF CONTRACT.

A county warrant has not the attributes of commercial paper and is not assignable, and hence no action can be brought thereon by a transferee.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 249; Dec. Dig. \S 167.]

4. COUNTIES \S 151—INDEBTEDNESS—"BOND."

In Const. 1901, \S 222, forbidding the issuance of bonds by the county except upon submission of question to popular vote, "bond," signifies an obligation in writing to pay a sum of money at a future date and commonly bears no specific designation of the person or entity in whose favor the promise runs.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 166, 218; Dec. Dig. \S 151.

For other definitions, see Words and Phrases, First and Second Series, Bond.]

5. COUNTIES \S 184—INDEBTEDNESS—BONDS—NEGOTIABILITY—COMMERCIAL PAPER.

Bonds authoritatively issued by agencies of the government are commercial paper capable of assignment and transfer, and the succeeding owner may found an action thereon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 282, 285-288; Dec. Dig. \S 184.

For other definitions, see Words and Phrases, First and Second Series, Commercial Paper.]

6. COUNTIES \S 190(2)—INDEBTEDNESS—INTEREST—"DEBT"—"LIABILITY."

Under Const. 1901, \S 215, prohibiting a county from levying a greater rate of taxation than one-half of one per cent., provided that to pay any debt or liability now existing or hereafter incurred for public bridges or roads, an additional levy may be made, the terms "debt" and "liability" comprehend the engagement for

payment of interest, and recognize the power to incur obligation to be discharged in the future. [Ed. Note.—For other cases, see Counties, Cent. Dig. \S 303; Dec. Dig. \S 190(2).

For other definitions, see Words and Phrases, First and Second Series, Debt; Liability.]

7. COUNTIES \S 195—TAXATION—DIVERSION OF PROCEEDS.

Under Const. 1901, \S 215, limiting the rate of taxation, but providing that to pay any debt or liability for necessary public buildings, bridges, or roads an additional levy may be made the application of the proceeds of a special levy to provide means to discharge a debt or liability for the construction of public roads to the payment of installments of interest on such debt or liability, is not a diversion of the proceeds of the special levy.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 307; Dec. Dig. \S 195.]

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

Bill by H. T. Littlejohn, as a taxpayer of Chilton county, against J. Wiley Littlejohn, as Treasurer, to enjoin payments out of the county's money on certain interest-bearing warrants issued by the commissioners' court of the county to J. G. Brown in payment of certain road work construction under contract made with the commissioners' court. From a decree denying relief, respondent appeals. Affirmed.

The road improvement warrants referred to in the opinion read as follows:

"\$500 No. 1.
"Know all men by these presents that the county of Chilton, state of Alabama, for value received, is justly indebted to J. G. Brown, contractor, in the principal sum of five hundred dollars, and the treasurer of said county is hereby authorized, ordered and directed to pay to said J. G. Brown, contractor, or his assigns the said sum of five hundred dollars from the fund hereinafter designated on the 15th day of January, 1914, 1917, 1918, with interest thereon from the date hereof at the rate of 6 per cent. per annum payable annually on the 15th day of January in each year on presentation and surrender of the coupons hereto attached bearing the signature of the judge of probate of said county, as they respectively mature. Both principal and interest of this warrant are payable in lawful money of the United States of America at the office of the treasurer of said county in Clanton, Alabama, from the special fund raised by special tax levied and collected and to be levied and collected upon the taxable property of said county to pay the debt created for constructing and improving the public road running from Clanton to the line of Chilton and Shelby counties, at or near South Calera via Thorsby and Jemison in Chilton county.

"This warrant is one of a series of time warrants of like tenor and effect, excepting as to date and time of payment, authorized by the court of county commissioners of said county to be issued to J. G. Brown for constructing and improving said public road running from Clanton to the line of Chilton and Shelby counties pursuant to contract providing therefor entered into by the court of county commissioners of said county and J. G. Brown on the 26th day of October, 1914.

"It is hereby certified, recited, and declared that the claims of said contractor evidenced by this warrant has been audited and allowed by the court of county commissioners of said county and has been duly registered in a book kept for that purpose; and that the said sum is lawfully due said contractor; that a special tax

upon the taxable property of said county in such amount as may be necessary to pay the debt evidenced by this warrant and the other warrants of said series, with interest thereon at maturity will be levied and collected; that all acts, conditions, and things required to be done precedent to and in the issuance of this warrant have been properly done, have happened and have been performed in regular and due form and time as required by law.

"In testimony whereof, I, E. B. Deason, judge of probate of Chilton county, Alabama, being duly authorized to execute this warrant have hereto subscribed my name officially and affixed my official seal this 4th day of January, 1915."

The interest coupons were in the following form:

"No. 1. \$———. "On January 15, 1916, the treasurer of Chilton county, Alabama, will pay to J. G. Brown, contractor, or his assigns ——— dollars at his office in Clanton, Alabama, from the special fund raised by special tax levied and collected upon the taxable property of said county to pay the debt created for constructing and improving the county road running from Clanton to the line of Chilton and Shelby counties at or near South Calera, via Thorsby and Jemison in said county, being interest then due on road improvement warrant issued to said contractor No. ———. Judge of Probate."

The certificate of registration was as follows:

"I hereby certify that I have registered this claim against the special fund raised by special tax levied and collected and to be levied and collected upon the taxable property of Chilton county, Alabama, to pay the debt created for constructing and improving the public road running from Clanton to the line of Chilton and Shelby counties at or near South Calera via Thorsby and Jemison in said county this ——— day of ———, 191—.

"Registration No. ———. "County Treasurer of Chilton County, Ala."

J. B. Atkinson, of Clanton, for appellant. Curry & Walker and Smith & Gerald, all of Clanton, for appellee. Middleton & Reynolds, of Clanton, specially, for warrant holders.

McCLELLAN, J. [1] It must be regarded as settled that the issuance by the authority of a commissioners' court of interest-bearing warrants on the county treasurer, payable at stated times in the future, to pay for public buildings, public roads and bridges, is not the issuance of bonds by the county within the provisions of section 222 of the Constitution; and that commissioners' courts are competent, unless restrained by the debt limit fixed in section 224 of the Constitution (Hagan v. Com'rs, 160 Ala. 544, 49 South. 417, 37 L. R. A. [N. S.] 1027; Gunter v. Hackworth, 182 Ala. 205, 62 South. 101; O'Rear v. Sartain, 99 South. 554), to issue interest-bearing warrants of the character above described (Talley v. Jackson Co., 175 Ala. 644, 39 South. 167; Matkin v. Marengo County, 137 Ala. 155, 34 South. 171).

[2, 3] A county warrant "is the command of one duly authorized officer to another, whose duty it is to obey, to pay, from county funds, a specified sum to a designated person whose claim therefor has been allowed by the court of county commissioners." Savage

v. Mathews, 98 Ala. 535, 537, 13 South. 323. Such a warrant has not the attributes of commercial paper, and is not assignable, so as to be made the foundation of an action at the suit of a transferee. Savage v. Mathews, supra.

[4, 5] As employed in section 222 of the Constitution, the term "bond" signifies an obligation in writing to pay a sum of money. It imports, necessarily, a promise to pay a certain sum of money at a future date, and commonly bears no specific designation of the person or entity in whose favor its promise runs. Bonds authoritatively issued by agencies of the governments are commercial paper and are capable of assignment and of transfer, and the succeeding owner may of course found an action upon it. Blackman v. Lehman, 63 Ala. 547, 550, 35 Am. Rep. 57. There is, hence, a marked fundamental difference between county warrants and the county bonds to which section 222 of the organic law makes governing reference. The fact that both county warrants and county bonds may be made presentable and payable at a future specified date, and that they bear interest for prescribed periods does not suffice to eliminate the stated characteristic distinctions between them. One, the warrant is an order to pay when in funds; while the other, the bond, is promise to pay.

[6] Section 215 of the Constitution provides:

"No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum: Provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon: Provided further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

It is to be observed that this section contemplates the creation of debts (necessarily within the debt limit fixed by section 224 of the Constitution) by county governing bodies, for the county purposes defined in section 215; to satisfy and discharge which a levy or levies of the special taxes prescribed, not exceeding one-fourth of one per centum, may be made.

The power to incur a debt or liability, for the public purposes named in section 215, is expressly recognized therein; and the authority to levy the special taxes described in that section is conferred to the prescribed and exclusive end of discharging the debt or liability so incurred. The terms "debt" and "liability," as there employed, compre-

hend the engagement for and the payment of interest as an incident to the principal obligation validly assumed by the county in order to provide public buildings, public roads, and bridges. While the section does not establish the existence or antecedent creation of a debt or liability as a condition precedent to the right to levy special taxes to pay for public buildings, public roads, or bridges (*Sou. Ry. Co. v. Cherokee County*, 144 Ala. 580, 42 South. 66), yet it does contemplate the incurring of obligations for those purposes, to be satisfied and discharged in the future, and intends the gathering of the means to that end by and through the imposition of the special taxes described in section 215. Being thus authorized and empowered to provide those public necessities by an assurance of the subsequent payment therefor, it cannot be reasonably doubted that the makers of the Constitution contemplated, and intended, that the means, thus specially afforded, to subsequently discharge the debt or liability could be validly devoted to the payment of interest thereon as a part of the obligation assumed by the county in providing the public necessities described in the section. Such, in effect, was the ruling of this court, more than ten years ago, in *Talley v. Jackson County*, supra, and, in its predecessor, *Matkin v. Marengo County*, supra.

[7] It results, therefore, that the application of the proceeds of a special tax levied under section 215 of the Constitution, to provide means to discharge a debt or liability incurred for the construction or maintenance of public roads, to the payment of installments of interest on such debt or liability is not a diversion of the proceeds of that special levy from the public purpose to which those proceeds must, under that section, be exclusively devoted.

The report of the appeal will contain a copy of the "road improvement warrants," together with a copy of the "interest coupon," and the "certificate of registration," exhibited with the bill. The bill seeks an injunction to restrain the county treasurer from paying warrants numbered from 1 to 24, inclusive, drawn upon that official, to be paid out of the special fund constituted of the proceeds of a special tax levied for the express purpose of constructing and maintaining a certain line of public road in Chilton county. They are warrants, not bonds, and hence are without the provisions of section 222 of the Constitution. Not being bonds, the right to issue them for the purpose stated did not depend upon a favorable election held as provided in section 222 of the Constitution. The commissioners' court of Chilton county possessed and possesses the power and authority to determine what public road or roads should be constructed or maintained in the county; and, likewise, the power and authority to select and to decide, as was done

in this instance, to what public road improvement the proceeds of the special tax should be devoted. The special tax was levied to afford the special fund against which the warrants in question are drawn, and was designed to discharge a "debt or liability" validly incurred for a purpose within the provision of section 215 of the Constitution.

The bill, proceeding as it does on the theory that the warrants are void, and for that reason their payment by the treasurer should be restrained, is not well founded. It is without equity. The decree appealed from so concluded, and was hence well rendered. It is affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

BROTHERS et al. v. RUSSELL & DUKE et al. (7 Div. 767.)

(Supreme Court of Alabama. Feb. 8, 1916.
Rehearing Denied March 30, 1916.)

1. ATTACHMENT — 287 — BOND — SURRENDER — RIGHTS OF SURETY.

A surety on a replevy bond who in due time and according to the terms of the bond delivered the property to the sheriff before forfeiture, notwithstanding any interest in the property which he may have had, was then entitled to assert any claim which he could have asserted before the bond was executed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 999-1017; Dec. Dig. — 287.]

2. CHATTEL MORTGAGES — 294 — PRESERVATION OF PROPERTY — REMEDY AT LAW.

Where complainant attempted to enforce his mortgage lien on cotton by a claim suit under the statute which failed because it was subordinate to a landlord's lien, he might file his bill in the nature of a bill to redeem from the landlord and to foreclose against the tenant as to the excess on bringing into court a sum of money sufficient to satisfy the landlord's lien, since the mistaken claim suit did not prejudice the complainant, as, his lien being subordinate, the lower court was without jurisdiction to give him the relief to which, on the bill in equity, he would be entitled.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 582; Dec. Dig. — 294.]

3. CHATTEL MORTGAGES — 300 — BILLS TO ENFORCE — PARTIES — MORTGAGOR.

On a bill by the mortgagee of cotton to redeem from a prior landlord's lien and to foreclose as to the excess against the tenant, where the tenant's interest had not been determined and it could not be said that he had no interest, subject to the mortgage, the tenant was a necessary party.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 586-590; Dec. Dig. — 300.]

4. JUDGMENT — 707 — SUIT TO ENFORCE LIEN — PARTIES.

The mortgagee of cotton, giving a replevy bond in an attachment suit by the landlord, was not a party to the suit so as to make a judgment there rendered conclusive against his mortgage lien, as, so long as the conditions of the bond were unfulfilled, he could propound

no claim and his ownership as mortgagee could not be disposed of.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ¶707.]

5. JUDGMENT ¶17(11) — SUIT TO ENFORCE LIEN—PARTIES.

In such attachment suit, the judgment against the tenant, if he was brought in by personal service, or appeared, bound him and his interest in the property levied upon, and if he was brought in by levy of the attachment only, the judgment was not strictly and for all purposes in rem, and bound only the tenant's interest in the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 33; Dec. Dig. ¶17(11).]

6. ATTACHMENT ¶287—LANDLORD'S LIEN—ENFORCEMENT—INTERVENTION.

Under Code 1907, §§ 6039-6043, relating to trial of the right of personal property and to interpleader, and to claim by a mortgagee, complainant, the mortgagee of cotton, not claiming primary ownership thereof, could intervene in an attachment suit to enforce a landlord's lien only to assert a lien paramount to the landlord's lien; and could also show that the landlord had no lien.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 999-1017; Dec. Dig. ¶287.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Bill for injunction by Russell & Duke and others against I. S. Brothers and others. Judgment for plaintiffs overruling a demurrer to the bill and a motion to dismiss the injunction, and defendants appeal. Affirmed in part, and reversed and remanded in part.

Culll & Martin, of Gadsden, for appellants. W. J. Boykin, of Gadsden, for appellees.

SAYRE, J. [1] In the attachment suit of Brothers against McCune judgment by default was rendered for plaintiff, and the property levied upon, viz., three bales of cotton, was condemned to be sold for the satisfaction of the judgment. Russell & Duke had become sureties for McCune in a replevy bond, and in due time delivered the property to the sheriff as they were required to do notwithstanding any claim against or interest in the property they may have had. By so delivering the property to the sheriff before forfeiture and according to the terms of their undertaking as sureties on the bond, their own independent rights in or to the property remained unaffected, and they were then entitled to assert any claim to it which they could have asserted before the bond was executed. *Roswald & Stall v. Hobbie & Teague*, 85 Ala. 73, 4 South. 177, 7 Am. St. Rep. 23.

[2] Russell & Duke had a mortgage lien on the property, and this they then tried to enforce by a claim suit under the statute. But their mortgage lien was subordinate to the landlord's lien which Brothers had undertaken to enforce by his attachment, and judgment went against them on the trial of the right of property which followed upon the interposition of their claim. They then

filed this bill alleging that Brothers' judgment against McCune was in excess of his lien upon the property, and that the property was worth more than the lien to which he was justly entitled. They paid the costs of the claim suit and have offered to pay the just amount of any lien Brothers may have had as landlord, bringing into court a sum of money adequate to satisfy that lien as they alleged, and asking the court of equity to ascertain and establish the amounts and priority of the liens claimed by themselves and Brothers, and to preserve the property in the meantime by an injunction against any disposition of it by the sheriff or Brothers. The court issued the injunction, and then overruled a demurrer to the bill and a motion to dissolve the injunction.

[3] The general effect of the argument against the decree below is that complainants had their day in the law court and will not be allowed to review the judgments of that court by an appeal to equity. The bill has equity, and the injunction was not improper, as being the only available means of making effectual any relief that may be decreed to complainants. The interposition of the claim suit should not prejudice complainants in equity for the reason that complainants' lien being subordinate to that of Brothers, for whom the sheriff is acting as agent, the law court was without jurisdiction to give complainants the relief to which, on the averments of the bill, they are in equity entitled. *Stevens v. Hertzler*, 114 Ala. 563, 22 South. 121. Complainants are not estopped by their mistaken claim suit, because they took, and could take, nothing by it, while the only legal detriment Brothers could in any event suffer by that action has been forestalled by complainants' payment of the costs. Complainants are in the position of second lienors, and their bill is at once a bill to redeem from Brothers and to foreclose against McCune. It cannot be safely said that McCune has no interest in the property. Its value has not been determined, and for aught appearing it may be in excess of the total amount of the judgment and costs in the original attachment suit. If so, the overplus will belong to McCune subject to complainant's mortgage, and the existence of the mortgage and the amount of the indebtedness thereby secured cannot be determined in the absence of the alleged mortgagor. McCune was therefore a necessary party to the bill, and the demurrer taking this point should have been sustained.

[4, 5] Complainants were not parties to the attachment proceeding in such sort as to make the judgment there rendered conclusive against their mortgage lien on the property upon which the attachment was levied. *Maas & Block v. Long*, 70 Ala. 243. So long as the conditions of the bond remained unfulfilled they could propound no claim of theirs; but their ownership as mortgagees

could not be disposed of without their presence and an opportunity to be heard on their own account. *Hudson v. Wright*, 164 Ala. 298, 51 South. 389, 137 Am. St. Rep. 55. The judgment against McCune, if he was brought in by personal service, or appeared, bound him and his interest in the property levied upon; if he was brought in by levy of the attachment only, the judgment was not strictly and for all purposes in rem; it bound only McCune's interest in the property. *Kress v. Porter*, 132 Ala. 577, 31 South. 377.

[6] It should be noticed, further, that complainants in this bill, not claiming primary ownership of the property, could under the statute intervene in the attachment suit only for the purpose of asserting a lien paramount to the specific lien claimed by Brothers. Code, §§ 6039-6043. They could have shown that Brothers had no lien. *Samuel Gans Co. v. Tyson*, 170 Ala. 513, 54 South. 237. But if he had a lien for whatever small amount—and the adjudication established the fact that he had a lien in some amount—the judgment denying complainants all relief under their claim suit was the only judgment the law court could render. The record shows that complainants moved the court to declare and enforce their subordinate lien according to equity, but the court properly refused to take cognizance of their claim. The statute makes no provision for any such case, and complainants can have relief in a court of equity only. It may be that the statute might well be amended so as to allow a distribution of the proceeds of property attached among lienholders according to their respective priorities in cases of this sort, as counsel suggests, but the court has no authority to make the amendment. It results from the statute as it is, permitting only paramount lienholders to interpose by claim suit, that substantially the whole controversy between complainants and Brothers, except the lien of the latter under his judgment for costs, remains to be disposed of in the equity court.

The demurrer should have been sustained, as we have said, but the bill containing equity, and its defect being amendable, there was no error in overruling the motion to dissolve the injunction.

Affirmed in part, reversed in part, and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

WHITE v. STATE. (6 Div. 232.)

(Supreme Court of Alabama. Feb. 3, 1916. Rehearing Denied March 30, 1916.)

1. CRIMINAL LAW — 366(1) — EVIDENCE — ADMISSIBILITY — RES GESTÆ.

The statement of deceased at the time of the shooting that "they got [him] from behind

the barrel" is admissible in a prosecution for murder as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 811; Dec. Dig. — 366(1).]

2. WORDS AND PHRASES — "CUT SHELLS."

A "cut shell" is one in which the part containing the shot is nearly severed from the part containing powder, so as to be projected in a unit, inflicting a more dangerous wound than if the shot were scattered.

3. HOMICIDE — 160 — EVIDENCE — ADMISSIBILITY.

The fact that one accused of murder had in his possession cut shells is admissible in connection with evidence of the character of deceased's wound.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 301; Dec. Dig. — 160.]

4. HOMICIDE — 160 — EVIDENCE — ADMISSIBILITY — MOTIVE.

Possession of cut shells and a shotgun by one accused of murder is admissible to evidence intention to predate deceased's store, in doing which he shot deceased when discovered.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 301; Dec. Dig. — 160.]

5. HOMICIDE — 195 — EVIDENCE — ADMISSIBILITY.

Where one accused of murder testified that he was an innocent traveler, passing to his home late at night, and shot deceased in self-defense, evidence that he took a circuitous and unusual and long route home is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 420; Dec. Dig. — 195.]

6. CRIMINAL LAW — 755½ — HOMICIDE — 300(2) — INSTRUCTIONS — SELF-DEFENSE — INVADING PROVINCE OF JURY.

In a prosecution for murder, defended on the ground of self-defense, an instruction that deceased had the right to investigate unusual noises around his store at night, but was not justified in firing on defendant without warning unless he was, or apparently was, committing a felony or was in such an attitude as to lead deceased reasonably to believe that he was about to commit an assault, is correct, and does not invade the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1765; Dec. Dig. — 755½; Homicide, Cent. Dig. § 616; Dec. Dig. — 300(2).]

7. CRIMINAL LAW — 863(2) — INSTRUCTIONS — REQUESTS BY JURY — REASONABLE DOUBT.

Where the jury merely requested further instructions as to justification of deceased in firing on defendant when he discovered him on his premises late at night, it was unnecessary in response thereto to define the doctrine of reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2067; Dec. Dig. — 863(2).]

8. CRIMINAL LAW — 824(12) — INSTRUCTIONS — REASONABLE DOUBT — NECESSITY OF REQUEST.

One accused of murder must request a definition of the doctrine of reasonable doubt in relation to other specific charges; in the absence of such request, failure to instruct thereon being no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2000; Dec. Dig. — 824(12).]

9. CRIMINAL LAW — 755½ — TRIAL — INSTRUCTIONS — INVADING PROVINCE OF JURY.

An instruction invading the province of the jury is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1765; Dec. Dig. — 755½.]

10. CRIMINAL LAW — 809 — TRIAL — MISLEADING INSTRUCTIONS.

A charge that: "A homicide may be voluntary, deliberate, and premeditated, and still not unlawful or wrong in the eyes of the law, and, if the only evidence of malice in this case is the use of a deadly weapon, and there are circumstances in evidence which, if believed, tend to show a justification for the use of a deadly weapon, and the jury believed such evidence, the killing was voluntary, deliberate, and premeditated, and done with a deadly weapon, and used for the purpose of destroying the life of the deceased, would be excused, and a verdict of acquittal should be given"—was properly refused as calculated to confuse and mislead.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. — 809.]

11. HOMICIDE — 300(12) — INSTRUCTIONS — OMISSION OF ESSENTIALS OF DEFENSE.

An instruction that: "If the jury believe from the evidence beyond a reasonable doubt that defendant killed deceased from a present, impending necessity, or from a belief of present, impending necessity, he was not guilty of murder"—was properly refused for predicated acquittal without appropriate reference to his freedom from fault in bringing on the difficulty and inability to retreat as required by law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627, 630; Dec. Dig. — 300(12).]

12. HOMICIDE — 300(12) — INSTRUCTIONS — SELF-DEFENSE.

An instruction that: "Although you may believe beyond a reasonable doubt that defendant committed the crime charged, yet, if you further believe beyond a reasonable doubt that he was compelled to do it by fear of death or great bodily harm from the deceased, and he had no way of escape from doing it, without being in danger of death or great bodily harm, the defendant would not be guilty of murder in any degree"—was properly refused for failing to hypothesize the negative of the possible fact that the defendant was not the aggressor, and was not engaged in an unlawful enterprise before or at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627, 630; Dec. Dig. — 300(12).]

13. CRIMINAL LAW — 761(6) — INSTRUCTIONS — SELF-DEFENSE — ASSUMING FACTS.

An instruction that: "Although you may believe from the evidence that defendant used excessive resistance to the assault by the deceased, yet, if you believe the fatal blow was inflicted in the heat of blood, and with a deadly weapon, and there is no evidence of malice, formed design, or such evidence of deliberation to show that reason held sway, then this is manslaughter, and you cannot find defendant guilty of murder"—was properly refused for assuming that the deceased assaulted accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. — 761(6).]

14. HOMICIDE — 300(13) — INSTRUCTIONS — SELF-DEFENSE.

Such instruction was properly refused for premitting to negative in the hypothesis that defendant was the assailant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. — 300(13).]

15. HOMICIDE — 300(12) — INSTRUCTIONS — SELF-DEFENSE — OTHER DEFENSES.

Such instruction was properly refused as failing to negative the possible fact that accused was unlawfully purposed and engaged just before and at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627, 630; Dec. Dig. — 300(12).]

16. HOMICIDE — 300(5) — INSTRUCTIONS — SELF-DEFENSE — INCLUDED OFFENSES.

Such instruction was properly refused as permitting conviction for manslaughter, where the only defense was a complete justification, so that defendant was either guilty of murder or innocent of any crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 654; Dec. Dig. — 300(5).]

17. CRIMINAL LAW — 807(2) — INSTRUCTIONS — ARGUMENTATIVE CHARGES.

An instruction in a prosecution for murder that: "It is the duty of each and every member of the jury to decide for himself the issues presented, and if, after careful examination and consideration of all the evidence, and the instructions of the court as to the law governing the case, and free consultation with his fellows, there is any juror who has a reasonable doubt of defendant's guilt, it is his duty under his oath to stand by his conviction favorable to finding defendant not guilty"—was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1960; Dec. Dig. — 807(2).]

18. HOMICIDE — 300(13) — INSTRUCTIONS — MISLEADING JURY.

An instruction that: "You cannot find defendant guilty of murder in the first degree if you believe that [deceased] shot at him first, and the defendant was not doing an unlawful act, and defendant could not have retreated without placing himself in more danger"—was properly refused as improperly excluding from consideration unlawful acts of defendant just previous to the shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. — 300(13).]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Jesse White was convicted of murder, and he appeals. Affirmed.

The facts sufficiently appear. After the charge of the court and the retirement of the jury the jury returned and asked the court to give further instructions on a matter of law, and on being brought back into the court the foreman asked the court if Dr. Ferrell would have been justified in shooting at a negro who was found about his commissary premises at a late hour of the night without warning him before he shot, and under what circumstances he would have been justified if he fired at defendant first after finding him intruding on the premises. Thereupon, in the presence of defendant and his counsel and the jury and the officers of the court, the court instructed the jury as follows:

"If Dr. Ferrell heard a knocking or thumping in the direction of his store late at night, he had the right to go down and investigate, and if he went down there from his house for that purpose, and found a man there on his premises near the store, he would not be justified in firing on him without warning, unless the man was at the time Dr. Ferrell fired in the act, or unless he reasonably appeared to be in the act, of committing a forcible felony such as a burglary on the store, or unless, on Dr. Ferrell's approaching him, defendant was in the act of committing some forcible felony upon Dr. Ferrell, as, for instance, assaulting him with intent to murder him, or unless the defendant was in such an attitude at the time as to cause Dr. Ferrell reasonably to believe that the defendant was about then and there to commit such an assault

upon him. A mere trespasser cannot be fired upon without warning, however late at night it may be, or however suspicious the actions of the intruder may be, unless under the circumstances I have stated to you."

The following charges were refused defendant:

(2) A homicide may be voluntary, deliberate, and premeditated, and still not unlawful nor wrong in the eyes of the law, and, if the only evidence of malice in this case is the use of a deadly weapon, and there are circumstances in evidence which, if believed, tend to show a justification for the use of a deadly weapon, and the jury believe such evidence, the killing was voluntary, deliberate, and premeditated, and done with a deadly weapon, and used for the purpose of destroying the life of deceased, would be excused, and a verdict of acquittal should be given. (3) If the jury believe from the evidence beyond a reasonable doubt that defendant killed deceased from a present, impending necessity, or from the belief of a present, impending necessity, then he is not guilty of murder.

(6) Although you may believe beyond a reasonable doubt that defendant committed the crime with which he stands charged, yet, if you further believe beyond a reasonable doubt that he was compelled to do it by the fear of death or great bodily harm from the deceased, and he had no way of escape from doing it, without being in danger of death or great bodily harm, the defendant would not be guilty of murder in any degree.

(7) Although you believe from the evidence that defendant used excessive resistance to the assault by deceased, yet, if you believe the fatal blow was inflicted in the heat of blood, and with a deadly weapon, and there is no evidence of previous malice, formed design, or such evidence of deliberation as to show that reason held sway, then this is manslaughter, and you cannot find defendant guilty of murder.

(8) It is the duty of each and every member of the jury in this case to decide for himself the issues presented, and if, after a careful examination and consideration of all the evidence in this case, and the instructions of the court as to the law governing the case, and free consultation with his fellows, there is any juror who has a reasonable doubt of defendant's guilt, it is his duty under his oath to stand by his conviction favorable to finding defendant not guilty.

(A) You cannot find defendant guilty of murder in the first degree if you believe Dr. Ferrell shot at him first, and the defendant was not doing an unlawful act, and defendant could not have retreated without placing himself in more danger.

Douglas & Ray, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The appellant has been sentenced to death for the murder of Dr. Ferrell. The doctor was the proprietor of a store at Praco, in Jefferson county. His dwelling was across the roadway from the store. Some time after midnight, just previous to the homicide, the doctor and a servant sleeping in his dwelling heard a noise about the store. Both went out on the porch; the doctor having his pistol. It was a clear, moonlight night. The doctor decided to go to the store to investigate the noise, and as he went down the steps of the porch fired the pistol once in the air. The servant testified that he crossed the roadway to the store, and, turning the corner of store building, passed out of her theretofore plain view

of him. The store fronted the road. Its front was near the ground level, but because of the slope of the earth under the building the rear thereof was considerably elevated, thus leaving a view from the porch under the building. The servant testified that almost immediately after the doctor passed out of her sight she heard gunshots, the flashes of which, as she saw them, came from the elevated space beneath the rear of the building. There was a barrel and a metal cask under this part of the building. Immediately following the shots the doctor called to the servant to come to him, that he was shot, but immediately directed her not to come, lest she be shot. There appeared to be tracks of a man or men about the barrel under the store, and what seemed to be a pistol hole in the metal cask. The doctor was mortally wounded, and survived only a short time. Dogs sufficiently shown to be trained to trail human beings (*Hodge's Case*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; *Gallant's Case*, 167 Ala. 60, 52 South. 739), were brought to the scene of the homicide, within a reasonable time, and therefrom took a trail leading to a dwelling in which defendant was found and arrested. Later he admitted having shot Dr. Ferrell, but asserted that his act was in self-defense; that when the doctor turned the corner of the building he immediately saw, and began to shoot at, the defendant, who claimed he was but a traveler through that way, entirely innocent of any unlawful purpose or action.

[1] In addition to testimony reciting the call made by the doctor for his servant immediately after he was shot, the prosecution was allowed to show by the servant that at the same time he said: "They got me from behind the barrel." These expressions of the mortally wounded man were so intimately related in time and occasion to the major fact as to fall within the range of res gestae. *Stevens v. State*, 138 Ala. 71, 35 South. 122.

There was no error in any of the rulings touching the handling and action of the dogs in and about the trailing done by the dogs from the store to the place whereat defendant was arrested. A proper predicate, under the familiar rule, was laid for the admission of the confessions of defendant that he alone shot the doctor.

[2-4] The prosecution was allowed, over defendant's objection, to have a witness qualified by experience to explain a "cut shell," and the difference, in effect, between a cut shell and an uncut shell. Cut shells, along with the defendant's gun, were found at the place of defendant's arrest. A cut shell is the result of nearly severing that part of the shell containing the shot from that containing the powder; and the effect of shooting such a shell is to project the severed part of the shell as a unit, rather than the shot from the shell. The effect of a cut shell on

the object hit therewith is to make a larger hole or wound than is the case where an ordinary shell is discharged, and the shot strikes at a sufficient distance to admit of their separated flight. The use of a cut shell is necessarily more murderous in its effect upon a person hit therewith; and in a case like this the fact that the defendant prepared and had cut shells was a circumstance to go to the jury, in connection with the other evidence, including that descriptive of the wound inflicted on the deceased. Furthermore, the fact that the defendant had equipped himself with this character of munition was likewise a proper matter for the jury's consideration in connection with the jury's right to find from the evidence that the assault upon the deceased was by one who was engaged or about to become engaged in depredating upon the property of the deceased, and this from a place behind a barrel under the store of deceased.

[6] There was no impropriety in the court's allowing testimony tending to show that the defendant had taken a circuitous and unusual route at that time of night from one point in that section to his home; he having testified that he was an innocent traveler toward his dwelling place from another point, from which he could have reached his dwelling place by a more convenient and direct route.

[6-8] There was no error in the instruction the court gave the jury in his supplemental charge. It was a correct statement of the law as we understand it, and in no manner invaded the jury's province to consider the guilt or innocence of the defendant in the light of his theory that he shot the doctor only in self-defense, after the doctor had twice fired at him. It was not necessary, in the connection in which the jury invited further instruction from the court, to define the doctrine of a reasonable doubt. If the defendant desired that the jury be instructed with reference to the doctrine of reasonable doubt in that connection, it was his duty to invoke the court's consideration of that matter in an appropriate way.

[9] Charge C refused to the defendant invaded the province of the jury, since it was entirely possible under the evidence to find the defendant guilty under the indictment, regardless of the purpose, lawful or otherwise, with which the defendant was at or about the store of the deceased. Furthermore, as we understand the defendant's case, he presented the sole theory that the homicide was justified on the ground of self-defense.

[10] Charge 2 requested for the defendant was calculated to confuse and mislead; and was hence properly refused. Gafford's Case, 125 Ala. 1, 10, 28 South. 406, treating charge 1.

[11] Charge 3 requested for the defendant

was correctly refused, for the reason that it predicates an acquittal without appropriate reference to his freedom from fault in bringing on the difficulty and on his inability to observe his duty to retreat as defined in our law.

[12] Charge 6 requested for the defendant was due to be refused upon the ground that it pretermitted to hypothesize the negative of the possible fact that the defendant was not the aggressor, and was not engaged in an unlawful enterprise just before or at the time of the shooting of deceased by him.

[13-16] Charge 7 was properly refused because it assumed that the deceased assaulted the defendant, because it pretermitted to negative in the hypothesis that the defendant was the assailant, and because it omitted to negative the possible fact that the defendant was unlawfully purposed and engaged just before and at the time of the tragedy. Furthermore, the defendant was either justified in taking the deceased's life, on the one hand, or, on the other hand, was guilty of murder.

[17] Charge 8 requested for the defendant was condemned in Fowler's Case, 155 Ala. 21, 45 South. 913 (see charge A).

[18] The refusal of charge A requested for the defendant was justified by its tendency to mislead the jury. Aside from other features of it that may have possessed a tendency to confuse or to mislead, that feature treating of the conduct of the defendant at the time he asserts that Ferrell fired on him was calculated to improperly exclude from consideration the unlawful acts or conduct of the defendant just previous to the shooting.

No error appearing, the judgment is affirmed.

Affirmed. All the Justices concur.

ALABAMA GREAT SOUTHERN R. CO. v. SMITH. (6 Div. 166.)

(Supreme Court of Alabama. Jan. 13, 1916.
Rehearing Denied March 23, 1916.)

1. RAILROADS \S 346(2)—ACCIDENTS AT CROSSING—WANTONNESS—BURDEN OF PROOF.

In an action for a death at a railroad crossing, Code 1907, \S 5476, providing that when a person is killed by a railroad train, the burden of proof is on the railroad company to show it was not negligent, does not apply where the complaint charges wantonness, and the burden in such case is on the plaintiff throughout the trial to sustain the allegation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1118; Dec. Dig. \S 346(2).]

2. RAILROADS \S 333(2)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

In an action for a death at a railroad crossing, where the deceased, on hearing the approach of a train, stopped as if to wait for it to pass, and then, after looking in the direction from which the train was coming, started across the tracks, when it was about 100 feet away, and the danger was imminent, he was guilty of con-

tributory negligence, depriving plaintiff of the right to recover on account of any alleged prior negligence of the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1081; Dec. Dig. ¶ 333(2).]

3. RAILROADS ¶ 320—INJURIES ON TRACKS—RIGHT TO ASSUME THAT PERSON WILL AVOID DANGER.

Where the deceased stopped on approaching a crossing as if to wait for a train to pass, the engineer had a right to assume that the deceased would stay in his place of safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014–1016, 1019; Dec. Dig. ¶ 320.]

4. RAILROADS ¶ 346(1)—ACCIDENTS AT CROSSINGS—EVIDENCE—BURDEN OF PROOF.

In an action for death at a railroad crossing, where the deceased stopped on approaching the crossing as if to wait for a train to pass, the burden of proof is on the plaintiff to show negligence on the part of the engineer after the deceased left his place of safety to go upon the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1117; Dec. Dig. ¶ 346(1).]

5. RAILROADS ¶ 346(2)—ACCIDENTS AT CROSSINGS—EVIDENCE—BURDEN OF PROOF—STATUTE.

Code 1907, § 5476, providing that where a person is killed or injured by a railroad train, the burden of proof is on the railroad company to show that it was not negligent, does not apply where the deceased was guilty of contributory negligence, as he is in the position of a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1118; Dec. Dig. ¶ 346(2).]

6. RAILROADS ¶ 338 — ACCIDENTS AT CROSSINGS—LAST CLEAR CHANCE.

In an action for death at a railroad crossing where the deceased, after stopping to wait for a train to pass, left his place of safety to cross the tracks when the engine was 75 to 100 feet away and the engineer did everything in his power to stop the train, the doctrine of last clear chance had no application, and the plaintiff could not recover for negligence subsequent to the engineer's discovery of the fact that deceased would try to cross in front of the approaching train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096–1099; Dec. Dig. ¶ 338.]

7. RAILROADS ¶ 339(1)—ACCIDENTS AT CROSSINGS—WANTON NEGLIGENCE.

The plaintiff could not recover in such case on the ground of wantonness subsequent to the engineer's discovery of the fact that deceased would try to cross in front of approaching train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1100, 1101; Dec. Dig. ¶ 339(1).]

8. WITNESSES ¶ 311—PARTIES INTERESTED IN THE EVENT.

Although the jury is not to accept the testimony of a biased witness without reserve, the testimony of a witness is not to be rejected capriciously.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1072–1075; Dec. Dig. ¶ 311.]

9. RAILROADS ¶ 348(6)—ACCIDENTS AT CROSSINGS—SUFFICIENCY OF EVIDENCE.

In an action for death at a railroad crossing, where the deceased, after stopping to wait for a train to pass, suddenly left his place of safety to cross in front of the train, evidence held insufficient to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1144, 1149; Dec. Dig. ¶ 348(6).]

10. PLEADING ¶ 53(2) — INCONSISTENT ALLEGATIONS.

In an action for death at a railroad crossing, the complaint, containing two counts, charging, respectively, simple negligence and wantonness, is not demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114–117; Dec. Dig. ¶ 53(2).]

11. RAILROADS ¶ 350(34) — ACCIDENTS AT CROSSINGS—WILLFUL OR WANTON ACTS.

Wantonness does not, as a matter of law, grow out of passing at great speed over a "populous" crossing at grade, but depends upon its reasonableness as measured by conditions to be reasonably anticipated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1192; Dec. Dig. ¶ 350(34).]

12. RAILROADS ¶ 351(23) — ACCIDENTS AT CROSSINGS—TRIAL—INSTRUCTIONS.

In an action for death at a railroad crossing, an instruction that to constitute wantonness, the actual presence of the person injured or killed need not actually be known to those operating the train, although correct in itself, was misleading when coupled with the statement that wantonness consists of passing at great speed over "populous" crossing at grade.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1215; Dec. Dig. ¶ 351(23).]

Appeal from City Court of Birmingham; A. H. Alston, Judge.

Action by Mrs. Mary M. Smith, as administratrix, against the Alabama Great Southern Railroad Company, for damages for the death of her intestate. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The facts sufficiently appear from the opinion. The complaint avers that defendant was operating a line of railroad across and on grade with a public highway in the city of Birmingham, and while plaintiff's intestate was upon said highway at a point near Beverly station in said city, said train ran upon or against him, and so injured him that he died. The first count alleges the negligence as follows:

Defendant negligently conducted itself in that regard, and as a proximate consequence of said negligence, said train ran upon or against plaintiff's intestate, on the occasion aforesaid, and proximately caused his death.

The second complaint alleged the negligence as follows:

Defendant's servant or agent, upon said train, acting within the line and scope of his employment and authority as such servant or agent, wantonly on the occasion aforesaid, by means of said train, caused the death of said intestate.

The following is charge 12 given for plaintiff:

While wantonness grows out of passing at a great rate of speed over a populous public crossing on grade with a railroad, it is not necessary to the completion of such wantonness that the actual presence of the person injured or killed thereby, if one is killed or injured, should have been actually known to those operating the train.

A. G. & E. D. Smith, of Birmingham, for appellant. Harsh, Harsh & Harsh, and Frank W. Smith, all of Birmingham, for appellee.

SAYRE, J. Appellee's decedent was killed by defendant's train about half past 4 on April 21, 1914, at the Beverly crossing. The place in question was in one of the outer districts of the city of Birmingham, where there were only a few buildings scattered around, but it was where Jefferson street, sometimes referred to as the old Tuskaloosa Road, the main thoroughfare between Birmingham and Bessemer, crossed defendant's main line at grade, and the evidence goes to show that it was a crossing much used by persons passing on foot and in vehicles. On the trial of plaintiff's (appellee's) suit, brought under the Homicide Act, there was verdict and judgment for plaintiff, damages being assessed at \$6,500, and from that judgment defendant has appealed, assigning for error, among other things, the action of the court in overruling its motion for a new trial.

All the evidence upon which the jury acted is before us. We have not visited the locus in quo, as did the jury under the court's permission and direction, but a carefully prepared map, drawn to scale and purporting to show street crossings, buildings and street car lines in the immediate vicinity, has been reproduced in the transcript of the bill of exceptions. The accuracy of this map has not been questioned, nor does it disclose any points of difference from the testimony of witnesses many of whom referred to it, thus, and otherwise, locating objects in the neighborhood. There is therefore not the slightest reason for assuming that the jury saw anything which might affect that view of the case which has been forced upon us by what we consider to be quite plain considerations of law and justice.

Weighing the evidence with all proper deference for the jury's finding and for the judgment of the trial judge permitting the verdict to stand, without impeaching the deliberate material testimony of a single witness, drawing only such inferences as a reasoned reflection upon the logic of undisputed facts has rendered necessary, we have learned the relevant material facts involved in the death of plaintiff's decedent as well as any appellate court can ever hope to learn the facts of such a case, and they have produced in our mind a conviction that the verdict was founded upon some erroneous conception in the minds of the jury going to the substantial merits of the cause.

[1] Only three of the witnesses introduced by plaintiff saw the accident. It so chanced that two of them saw deceased only just a moment before he was struck by defendant's engine, the attention of one of them being attracted by some one saying in a stressful voice, "He can't make it," or "He won't make it." Both these witnesses testified that deceased was on the track when they saw him—one of them saying that "he appeared to be in a hurried gait all right, and the train was right at him, only a few

feet from him"; the other, that "when I first saw him he was making his run to get across the track, and when I first saw the train the train was about 30 feet from him." The third of these witnesses, a negro woman, said, "I saw it strike Mr. Smith." She had noticed deceased when he was close to the railroad, but did not undertake to describe his movements upon or immediately before going upon the track. Aside from proving the death of plaintiff's decedent, which was not disputed, the testimony offered by plaintiff appears to have had for its purpose to show that the crossing was in general much used by pedestrians and vehicles, that the train on that occasion was moving with unusual speed, and that no signals of approach were sounded by blowing the whistle or ringing the bell as the statute requires. It may be noted, however, that the weight even of plaintiff's evidence went to show that the whistle was blown sufficiently to put any person near the crossing and in the use of normal faculties on notice that the train was approaching. The only effect, then, to be ascribed to plaintiff's evidence is, that by virtue of the statute it made out a *prima facie* case of simple negligence under the first count of the complaint. As for the second count charging wantonness, the statute in reference to the burden of proof in cases of death or injury at such places gave no help to it, and the burden of proof as to it rested upon plaintiff consistently throughout the trial. *Carlisle v. A. G. S. Ry. Co.*, 166 Ala. 591, 52 South. 341.

We come now to the evidence adduced by defendant. The overwhelming weight of this evidence, considered in connection with that offered by plaintiff, went to prove that the whistle was blown and the bell rung. It tended very strongly also to show that the train moved over the crossing at a rate of speed not in excess of the daily average speed at that point. In other respects it was not in conflict with any part of the testimony offered by plaintiff. But it went further, giving to the case an entirely new aspect, introducing a new element, and involving new issues, as to which defendant's evidence was without conflict and had substantial collateral corroboration in the testimony of the witnesses who testified for plaintiff.

[2] This change in the complexion of the case arose out of the following facts: Plaintiff's decedent approached defendant's track from the north intending to cross over to the south. The point where he intended to cross, and toward which he went, was in the midst of a broad open space affording him ample opportunity for seeing the approaching train while it was yet 800 feet and more, and he more than 100 feet, away from the crossing. The engineer testified that he saw deceased when his engine was 800 feet from the crossing. The track was straight and single for more than that distance, and the

view considerably more expansive than the right of way. Deceased had alighted from a street car at the Beverly station at the same time with a boy about 17 years of age. This street car line at that point came within something like 100 feet of defendant's line and then curved away to Bessemer. The boy was going in the same direction with deceased, and together they came near to defendant's track. They both stopped. The boy heard and saw the train. To indulge the inference that deceased was not aware of its approach would be to disregard the common facts of human experience and the only reasonable inference to be drawn from ample evidence, in addition to that of the boy and the engineer, showing his actions at the time. The engineer testified that plaintiff's decedent stopped 10 or 12 feet from the track, and though there were such small differences as usually earmark the truth of evidence to such a point, the great weight of the testimony of a number of witnesses corroborated the engineer on this point. There was no serious difference about it. Stopping, deceased set a bag or bundle he was carrying on the ground. One of the witnesses said that he set it on the railing of the walk or footbridge over which he had come, the end of which was at hand. This could have meant but one thing to the engineer. After looking in the direction from which the train was coming, deceased picked up his bag or bundle and started hurriedly across the track. Most of the witnesses for defendant who testified to this point say he started to run across. The boy was most emphatic on this point. All of those who saw deceased at the time testified in substance that his manner of crossing was hurried. In this respect defendant's witnesses had substantial corroboration in the testimony of the witnesses for plaintiff to whom we have referred. There can be no sort of doubt about the fact that deceased hurried across the track, nor can anything be clearer than that this was an act of gross negligence on his part, depriving him of every semblance of right to recover on account of any alleged prior negligence on the part of the engineer.

[3] Conceding that there was a modicum of evidence tending to support the theory that the engineer had previously been negligent in running his train at an excessive rate of speed and without due signals of approach, and, in any event, that such facts as were not in dispute had the effect under the statute to put upon the defendant the burden of proving that there was no original negligence on its part, still, in the situation thus in every material particular fully, clearly, and undisputedly developed and established by the evidence for defendant, the engineer's alleged prior negligence became for all the just and proper purposes of the case a negligible quantity. The crossing was not a stopping place for the train; daily it was

operated over that crossing at a speed of 30 to 40 miles an hour; the engineer saw deceased approaching the train, but he saw him stop as if to wait; he thus had a right to assume that deceased would stay in the safe place where he was; and until he started again there was no reason why the engineer should adopt measures to meet so improbable an emergency as was presented when deceased began to hurry into a place of extreme and most obvious danger. *Birmingham Ry. Co. v. Bowers*, 110 Ala. 328, 20 South. 345. In this undeniable posture of the case, it must be treated, so far as the question of simple negligence is concerned, as if it had been originally instituted upon the sole theory and claim that the liability of defendant arose out of actionable negligence on the part of the engineer subsequent to his discovery of the fact that plaintiff's decedent would leave his place of safety to go upon the track. *Helms v. C. of Ga.*, 188 Ala. 393, 66 South. 470.

[4, 5] The only remaining question then, so far as the charge of simple negligence is concerned, is whether the evidence upon the whole afforded any reasonable inference other than that the engineer, after discovering that deceased was, or would put himself, in a position of peril, failed to exert himself promptly and by every means at hand to avert the consequences of the danger into which deceased thus recklessly intruded. On this issue the burden of proof was on the plaintiff. It is of no consequence in this connection whether his decedent may or may not with technical accuracy be referred to as a trespasser; he was guilty of gross negligence; he was clearly in the wrong in going upon the track as he did; he probably became thereby a trespasser, for it was his duty to know, and evidently he did know, before he made the attempt to cross, that the train was approaching in such proximity as to render the undertaking dangerous. *Glass v. M. & C. Ry. Co.*, 94 Ala. 581, 10 South. 215. He was in no better case than a trespasser whose presence and peril have been discovered, and the statute no more applied to him than it does to a trespasser. *L. & N. R. R. Co. v. Jones*, 67 South. 691; *L. & N. R. R. Co. v. Rayburn*, 68 South. 356; *Empire Coal Co. v. Martin*, 190 Ala. 169, 67 South. 435.

[6, 7] The engineer's testimony was that when deceased started upon the track, the engine being then about 75 feet from the crossing, "maybe a little more"—in his testimony at the coroner's inquest he had described the distance as being 100 feet—he "slammed on emergency" and did everything else possible to stop the train; that it was impossible to have stopped the train or slackened its speed more than he did. If this was true, plaintiff could not recover for negligence or wantonness subsequent to the engineer's discovery of the fact that deceased would try to cross in front of the approaching

train. By way of showing some circumstances in contradiction the brief for appellee refers to that part of the testimony of the engineer in which he said that he saw the parties (by which he meant deceased and the boy with him) when he was 800 feet from the crossing, but that he did not put on brakes until he was within 75 feet of them. But this excerpt from the record is wholly misleading, for the record shows the engineer's testimony to be that when he saw deceased and the boy 800 feet away, deceased was not on the track, nor had he and the boy stopped; they were on the walk approaching the track in close proximity to which they afterwards stopped. The boy did not go upon the track. He waited for the train to pass.

Reference is also made to the testimony of Richle, the witness to whom we have heretofore referred as saying that his attention was attracted by hearing some one say in a stressful voice that he (deceased) could not or would not make it. This witness testified, and this part of his testimony the brief quotes, supplying italics:

"The train picked him up on the base beam, I would call it, across the front of the engine where the cowcatcher is fastened in the side, and he fell off as soon as the brake was set up and stopped the force of the engine."

All the evidence tended to show that the body of deceased was carried about 100 feet before it fell off the engine, this distance being easily determined by reference to the spot where it lay immediately after the accident. The testimony quoted last above is supposed to show, that the engineer failed to set the brakes until the train reached the point where the body of deceased fell to the ground. But this testimony at best for appellee shows merely the inference, opinion, or conclusion of the witness, bald and of little or no consequence in the circumstances, to the effect that at the point in question the speed of the train had so far slackened as to relieve the atmospheric pressure created by its motion, which, it may be conjectured, had something to do with keeping the body on the front of the engine.

Appellee also refers to some testimony to the effect that the train moved about a quarter of a mile after passing the crossing; this, we suppose, as tending to prove that no prompt, timely, and efficient effort was made to check the speed of the train. We do not know, and so far as the evidence gave the jury to understand, they did not know, in what distance the train might have been stopped in the conditions prevailing. The fact, if accepted according to appellee's contention, may as well have tended to show the great original speed of the train, and great speed, in view of the uncontradicted evidence as to the actions of deceased and the circumstances in which he went upon the track, could only tend to relieve defendant of the imputation of subsequent negligence

or wrong as necessarily increasing the difficulty of avoiding the then impending disaster, for the momentum of a mass in motion increases in proportion to the acceleration of its velocity.

[8] We have no purpose to encroach upon the absolute right of the jury to decide every fairly debatable question of fact, nor do we intend to lay down any rule that would require the jury in any case to accept without reserve the testimony of any witness who may be biased by thought of the consequences to flow from a situation like that in which the engineer in his case found himself. On the other hand, the testimony of witnesses is not to be rejected capriciously, and here uncontradicted facts conspire most convincingly to demonstrate that when appellee's decedent started to cross the track he was already in all human probability doomed as for anything it was then in the power of the engineer to do. Consulting common experience and observation with a careful regard for the facts of this particular case, we feel entirely safe in saying that, moving hurriedly as deceased did, two or three seconds took him within the fatal sweep of the train, while three or four might possibly have put him across ahead of the engine by the narrowest of margins. The train was moving rapidly, no doubt, but whatever its speed, the outside limit of time in which the engineer had to act was measured by the time required to take deceased across and to a place of safety on the other side. In these crowded moments the engineer had to get a grasp on the new situation thus suddenly thrust upon him, had to execute the orders of his reason by manipulating the appliances of his machine, and these operations had to take effect upon a train that consisted of a locomotive and five or six coaches. It is perfectly clear upon the whole evidence that deceased, being in a place of safety and aware of the train's approach, tested its speed, and took a chance that must have looked desperate to any man in the normal use of his faculties. It cannot be said that another step might not have saved him, but that is a mere speculation, and there is no reason whatever for doubting that the engineer made an effort to afford deceased an opportunity to escape, and a finding that in the exercise of due care according to the circumstances he failed to do something that he could have done, more or better than he did, and that what he might have done would have been effectual to avert the disaster, is not to be justified on grounds of reason or probability, though theoretically the issue may have been one for jury decision in the first place under our theory of jury trials.

[9] Ordinarily just reasons for the verdict of a jury are not hard to find upon the face of the record of the evidence. In this case, if the verdict had been for the defendant,

no one could have doubted that such result was *prima facie* fair and just. But in view of the jury's conclusion to the contrary, it has seemed necessary by a close examination of the record to identify and define those controverted issues of fact upon which a just resolution depended, and then to consider the reasonableness of the result in view of the issues thus identified and defined and the evidence having proper and material bearing upon them. The justification of the result in every case may be thus brought on review to the test of judicial reason, and in this case our judgment is, not only that plaintiff failed to sustain the burden of proof resting upon him in respect of the final and controlling issue in the cause arising out of the charge of subsequent negligence, but that, after according every reasonable presumption in favor of the verdict and judgment below, the preponderance of the evidence against the verdict is so great as to leave no substantial doubt that it was wrong and unjust.

It follows also that, if there was no actionable negligence after the engineer discovered that plaintiff's decedent would go upon the track, then, under the law, there could have been no subsequent act of wanton wrong. *Helms v. Central of Georgia*, *supra*.

[10-12] There was no error in overruling the demurrer to the two counts of the complaint, charging, respectively, simple negligence and wantonness. Nor was there error in the court's rulings on the numerous special instructions requested by the parties, except in one instance. Charge 12, given on plaintiff's request, was, we think, misleading and positively erroneous. This charge was probably accepted by the jury as indicating an assumption on the part of the court that defendant's train passed the crossing at a great, and therefore reprehensible, rate of speed. But whether so or not, speed is a relative term, and whether a given rate, though great in a sense, is evidential of negligence or wantonness, depends upon circumstances and conditions of which the charge takes no account. The charge is far from merely asserting "the legal proposition that there may be wantonness on the part of a person who shows a reckless disregard for human life, even if at the instant he does not know some one is actually present to be injured by his reckless act," which is the effect attributed to it in the brief for appellee. It purports to state the circumstances out of which wantonness arises, and that the statement is inadequate and erroneous seems quite clear. Although the rate of speed was great and maintained over a "populous" public crossing at grade, the question of wantonness depended upon its reasonable-

ness as measured by conditions to be reasonably anticipated at the time and the adequacy of precautions taken against the danger arising out of those conditions, as by sounding signals of approach. Wantonness does not as matter of law grow out of passing at great speed over a "populous" public crossing at grade, and the further assertion of the charge, that to constitute wantonness the actual presence of the person injured or killed need not be actually known to those operating the train, however correct in itself, had the effect of accentuating its error in omitting specific reference to other evidential considerations from which may be inferred wantonness, imputed intention to do wrong, or a universal malice, as it was aptly termed in *Weatherly v. N. C. & St. L. Ry.*, 166 Ala. 575, 51 South. 959. To say simply that a public crossing is "populous" is to inadequately express one of the essential elements of fact about which the law concerns itself in dealing with grade crossing accidents. The fact, without more, that a crossing is within municipal corporate bounds signifies but little. A crossing may be said to be "populous" when it is at customary times used by many people, though at other times or hours it may be deserted. Hence, in defining wantonness at such places, the court has constantly spoken in its decisions of a knowledge of existing circumstances and conditions, or a knowledge that they probably existed at the time, as an element of necessary consideration. No doubt that the considerations to which we have referred were of much importance to defendant in any correct solution of the issue of wantonness or reckless disregard for probable consequences in the manner of approaching the crossing; for unquestionably the weight of the evidence proved signals of approach, and while it showed that the accident occurred in the mid-afternoon of a day in April and at a place described in general terms as a much frequented public crossing, there was in the evidence no intimation of any crowd or confusion of vehicles or pedestrians, nor any that defendant's engineer, who ran the same train over the same crossing at substantially the same rate of speed at the same hour day after day, had any reason to anticipate that any harm would probably result from his operation of the train at the time in question.

For error in giving this charge and in denying the motion for a new trial on the substantial merits of the cause, the judgment must be reversed.

Reversed and remanded.

ANDERSON, C. J., and MCLELLAN and GARDNER, JJ., concur.

MIDDLETON v. ALABAMA POWER CO.
et al. (5 Div. 582.)

(Supreme Court of Alabama. Jan. 20, 1918.
Rehearing Denied March 30, 1918.)

1. FIXTURES \S 35(2)—**HOUSES.**

Where houses are erected upon land of another, prima facie they become part of the realty, excepting where the builder reserves the right of removal.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. \S 73, 74; Dec. Dig. \S 35(2).]

2. FIXTURES \S 35(2)—**TRADE FIXTURES.**

If improvements are what is termed "trade fixtures," they do not become prima facie part of the land on which they stand.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. \S 73, 74; Dec. Dig. \S 35(2).]

3. FIXTURES \S 27(1) — **TRADE FIXTURES — AGREEMENT TO MAKE REALTY.**

Parties may by contract make trade fixtures a part of the land on which they stand.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. \S 5, 22, 25, 44, 45, 54; Dec. Dig. \S 27(1).]

4. FIXTURES \S 27(1) — **RIGHT TO REMOVAL — ORAL AGREEMENT.**

A reservation of a fixture or the right to remove it at the expiration of a lease may be made by oral agreement.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. \S 5, 22, 25, 44, 45, 54; Dec. Dig. \S 27(1).]

5. EVIDENCE \S 441(4) — **ORAL AGREEMENTS — VARYING WRITTEN LEASE.**

A written lease dealing with the subject of fixtures cannot be varied by oral agreement as to fixtures.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1736-1744, 2087; Dec. Dig. \S 441(4).]

6. EVIDENCE \S 155(4) — **ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.**

In a suit for trover for fixtures removed, where a lease did not provide what was to become of houses erected by the lessee, after its termination, and lessee introduced evidence that the houses were trade fixtures, held the lessor could show an agreement that the houses were not removable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 449; Dec. Dig. \S 155(4).]

7. TRESPASS \S 20(2) — **PARTY ENTITLED TO SUE—POSSESSION.**

A lessor not in possession cannot sue in trespass for the wrongful removal of fixtures placed on the premises by a lessee.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 34-37; Dec. Dig. \S 20(2).]

8. TROVER AND CONVERSION \S 16—**POSSESSION BY PLAINTIFF.**

A lessor not in possession may sue in trover for the wrongful removal of fixtures placed on the premises by a lessee.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. \S 119-147; Dec. Dig. \S 16.]

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

Action by J. H. Middleton against the Alabama Power Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

The trespass alleged is the tearing down and removing from a certain five acres of land 12 houses alleged to belong to defendant. The complaint was afterwards amended by adding the count in conversion of certain lumber. It appears that the Alabama Power Company by its contractors had leased its five acres of land from plaintiff for the purpose of quarrying rock for the building of its dams, and had placed thereon 15 or 16 houses for use in its quarrying operations, and when the lease expired, or rather when the quarrying had been finished, all of these houses but 3 were removed, together with the machinery and railroads. The contract provided, in substance, a lease of the five acres described, and the right to take rock and other mineral substances for building purposes in and under said land, and also the right to build and operate one or more railroad tracks over and across the same, and to locate and operate equipment and machinery on said land, and to build structures, houses, and habitations for workmen, all for the quarrying preparation, and transportation of said rock and other material, and the right to use the water of Blue Gut creek. It contained the following provisions also: The rights conveyed by this instrument, and all interest in the said land shall revert to the grantors upon completion of the quarry operations of the said land by said grantee, its successors and assigns, at the expiration of said period of three years. The plaintiff also offered to show by parol testimony that it was agreed between Mr. Middleton and the Alabama Power Company that the houses which they were to build on the land for the purposes of their operation were to be left on the land, and not to be removed from it. The court declined to permit this to be done.

Middleton & Reynolds, of Clanton, and Riddle, Burt & Riddle, of Talladega, for appellant. Rushton, Williams & Crenshaw, of Montgomery, and Smith & Gerald, of Clanton, for appellees.

ANDERSON, C. J. [1-4] The general rule is that, when houses are erected upon the land of another, the prima facie intentment is that they become part of the realty, though this is by no means conclusive, as the intent of the parties usually controls, and the builder may reserve the right to remove same. *Powers v. Harris*, 68 Ala. 409. On the other hand, if the improvements or fixtures are what is termed "trade fixtures," they do not become prima facie a part of the land. *Walker v. Tillis*, 188 Ala. 313, 66 South. 54, L. R. A. 1915A, 654. Though the parties may by contract make them a part of the land just as they may prevent a house or permanent fixture from becoming a part of the freehold (*Powers v. Harris*, supra; *Broadus v. Smith*, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61), it also seems that a reser-

vation of the chattel or a right to remove same at the expiration of the lease may be done by an oral agreement (*Broadbuss Case*, supra; *Harris v. Powers*, 57 Ala. 139; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749).

[5] The lease in question is in writing, and, if it dealt with the question of fixtures, any oral agreement previous to the making of said lease, or contemporaneous therewith, would be merged into the writing, but the lease in question does not deal with this question at all, and does not attempt to fix the nature or character of the structures or improvements to be erected by the defendant.

"The writing is presumed to contain the whole of the contract, and will be protected from any invasion of extrinsic stipulations if upon inspection and study of the writing itself, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagement of the parties, and to define the object and measure the extent of such engagements, and to have been designed by the parties to be the repository and evidence of their final intentions. When the writing does not purport to disclose the complete contract, or if, when read in the light of the attendant facts and circumstances, it is apparent that it does not contain all the stipulations of the parties on the subject, the rule does not apply; for when it thus appears that a part only of a complete oral contract, not within the statute of frauds, has been reduced to writing, parol evidence is always admissible to show what the rest of the agreement was; otherwise the contract could not be brought before the court. The entire contract must be proved. The rule is simply that the entire contract, whether it be all in writing, in one paper or in several papers, or partly in writing and partly by parol, should be proved, and this is not at all inconsistent with the parol evidence rule. Matters in parol must not be inconsistent with matters in writing. But even in that case the parts of the agreement to be proved by parol must not be inconsistent with or repugnant to the intention of the parties as shown by the written instrument; for, where a contract rests partly in parol, that part which is in writing is not to be contradicted." 21 Am. & Eng. Enc. of Law, pp. 1090-1093; *Roquemore v. Vulcan Iron Works*, 151 Ala. 643, 44 South. 557, and cases there cited.

[6] As the contract in question did not attempt to provide what was to become of the houses after the termination of the lease, and as the defendants introduced evidence tending to show that the houses were trade fixtures, the plaintiff should have been permitted to show an agreement with the defendants' agent that the houses were not to be removed, and were not therefore reserved as chattels, and this agreement was in no way inconsistent with or contradictory of the terms of the contract.

[7, 8] The action of the trial court in excluding this evidence cannot be justified upon the theory that the plaintiff could not recover with the evidence in. This was the case as to the trespass counts as the defendants were in possession of the land, but the said possession was no defense to the trover count if the houses belonged to the plaintiff. *Walker v. Tillis*, supra.

The judgment of nonsuit is set aside, the

cause is reinstated, and the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Ex parte FARRELL (8 Div. 885.)

(Supreme Court of Alabama. Feb. 10, 1916.)

DIVORCE \Leftrightarrow 182—EFFECT OF APPEAL.

Although a decree for alimony as an annual allowance is not final in the sense that it cannot be subsequently changed, where there was a final decree determining all the rights of the parties to the divorce including the right to both permanent and temporary alimony, an appeal fully perfected by the execution of a supersedeas bond removed the entire proceeding to the appellate court, with the exception of collateral matters not involved in the appeal, and mandamus will not lie to compel the chancellor to allow temporary alimony pending the appeal.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. \Leftrightarrow 182.]

Original application for mandamus, on the relation of Lucy Farrell, to compel the Chancellor of the Northeastern Chancery Division to annul an order dismissing an application for alimony and suit money pending an appeal. Writ denied.

Betts & Betts, of Huntsville, for appellant. Douglass Taylor and Clarence L. Watts, both of Huntsville, for appellee.

MAYFIELD, J. This is an original application to this court for a writ of mandamus, to be directed to the chancellor of the Northeastern chancery division, directing him to set aside and annul an order heretofore made by him, which order dismissed out of the chancery court petitioner's application for alimony and suit money pending an appeal from the chancery court decree which divorced petitioner from her husband and allowed her both permanent alimony and suit money for prosecuting and defending the divorce proceedings.

It was ruled by this court in the case of *Brady v. Brady*, 144 Ala. 414, 39 South. 237, that an appeal would not lie from an interlocutory order directing the payment of alimony pendente lite, and that mandamus was the proper remedy to vacate such interlocutory order or decree; and the rule has been repeatedly followed by this court in later cases. The petition to the chancellor for alimony pending the appeal, and this application for mandamus, are based on the decisions in the above indicated cases. The rulings in those cases, however, do not control the ruling in the case at hand. There is a final decree in this case, determining all the rights of the parties to the divorce, including the right to both permanent and temporary alimony. This decree will support an ap-

peal; in fact, an appeal had been taken before the application was made to the chancellor. A supersedeas bond had been executed and approved, and the entire proceeding removed from the chancery court to this court. The chancery court and the chancellor had therefore lost all control over the parties and the subject-matter before the application was ever made to the chancellor. Assuredly, this court will not compel the chancellor to do what he has no authority to do. Had he issued the order as prayed, this court would have issued a mandamus prohibition, or other writ, appropriate and necessary to right the wrong. *Ex parte Montgomery*, 114 Ala. 115, 14 South. 365, in which case it was said, with apt reference here:

"There are exceptions to the rule that 'an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal' (*Elliott, App. Proc.* § 541; *Allen v. Allen*, 80 Ala. 154), it is quite true (*Elliott, App. Proc.* § 542), but the present case is not one of them. The lower court, pending an appeal, may proceed in matters which are entirely collateral to that part of the case which is taken up, but it can do nothing in respect of any matter or question which is involved in the appeal, and which may be adjudged by the appellate court. The operation of the mandamus here prayed would be, as we have seen, to compel precisely this to be done by the court below."

Mr. Elliott in his work above cited (section 541) says:

"The overwhelming weight of authority is that an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal. It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. The case must, of invincible necessity, be in the higher court or in the lower court, for it cannot be in both courts. As the authority of the inferior yields to the superior, the case is, for all purposes connected with the consideration and decision of the questions involved in it, completely within the jurisdiction of the appellate tribunal."

The same author (section 543) makes the pointed statement that:

"Where a decree is entered in a suit for divorce, and an appeal is perfected, alimony cannot, as it has been held, be allowed during the pendency of the appeal by the trial court."

To this text is cited *Lewis v. Lewis*, 20 Mo. App. 546; *Cralle v. Cralle*, 81 Va. 773; *Pasour v. Lineberger*, 90 N. C. 159. The first two cases are exactly in point and support the text. In the Virginia case it is said:

"Although, perhaps, an appeal in a chancery cause does not here, any more than in England, stop the proceedings under the decree from which the appeal is taken, yet there can be no manner of doubt but that the effect of an appeal, when fully perfected by the execution of the proper supersedeas bond, is to deprive the subordinate court of all power over the parties and subject-matter of controversy, until the cause is remanded back for its further action; and the only orders, therefore, which that court can rightfully make are such as are needful for the preservation of the res and the rights of the parties pending the appeal. *Slaughter House Cases*, 10 Wall. 273 [19 L. Ed. 915];

Littlejohn v. Ferguson, 18 Grat. [Va.] 53; *Moran v. Johnston*, 28 Grat. [Va.] 108."

The Supreme Court of the United States seems to follow the same rule. In the case of *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025, it is said:

"After the acceptance of the bonds for the appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard v. Ordway*, 101 U. S. 745 [25 L. Ed. 1040], there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In *Draper v. Davis*, 102 U. S. 370 [26 L. Ed. 121], however, it was decided that, after a bond had been accepted by one of the judges in accordance with such an order of allowance, the jurisdiction was transferred from the court below."

We are not unmindful of the rule, that decrees for alimony, as annual allowances, are not final in the sense that they cannot be subsequently changed. Such decrees are usually left open, and subject to be changed, as the circumstances and necessities of the case may require. *Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110.

On appeal, this court can alter or change the result in the lower court, or direct the chancery court to change it, as present or subsequent facts may justify.

Mandamus denied.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

MCKINNON v. CITY OF BIRMINGHAM et al. (6 Div. 221.)

(Supreme Court of Alabama. Feb. 3, 1916.)

Rehearing Denied March 30, 1916.)

1. MUNICIPAL CORPORATIONS \S 812(7) — CLAIMS AGAINST — NOTICE — TIME OF ACCIDENT.

Under Code 1907, § 1275, requiring one having a claim against a city for personal injuries to file a statement, giving substantially the manner in which the injuries were received, the day and time and the place where the accident occurred, when construed to effect its purpose to give the city officers opportunity to investigate the claim, and not to require technical accuracy which might result in the defeat of meritorious claims, a statement, giving the day of the month and year, but not whether in the daytime or the nighttime, is a sufficient statement of the time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1702; Dec. Dig. \S 812(7).]

2. TIME \S 8—"DAY."

As defined by statute and within the meaning of the law, a "day" means 24 hours, the period of time between any midnight and the midnight following.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 10, 33; Dec. Dig. \S 8; *Appeal and Error*, Cent. Dig. § 1914.

For other definitions, see *Words and Phrases*, First and Second Series, Day.]

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.

Action by R. A. McKinnon against the City of Birmingham and others. Judgment for the defendants on demurrer to the complaint, and plaintiff appeals. Reversed and remanded.

F. E. Blackburn, of Birmingham, for appellant. M. M. Uilman and W. A. Jenkins, both of Birmingham, for appellees.

GARDNER, J. Appellant brought suit against appellee for recovery of damages alleged to have been sustained by a fall on the sidewalk of the city of Birmingham, caused by stumbling over a stake across which wire was stretched. The complaint, as last amended, shows that on August 7, 1914, plaintiff made out in writing his claim against the said city for the damages therein set forth, and his claim was duly verified. It was set forth that the injury occurred on May 20, 1914, and the said claim was duly presented and filed with the clerk of said city. The demurrer to the complaint as last amended, which was sustained by the court below, takes the point that the complaint shows the claim filed by the plaintiff did not sufficiently allege the time when said accident occurred, and this is the only question presented for determination on this appeal.

[1] Section 1275 of the Code provides for the filing of claims against a municipality in the following language:

"No recovery shall be had against any city or town on a claim for personal injury received unless a sworn statement be filed with the clerk, by the party injured, or his personal representative in the case of his death, stating substantially the manner in which the injury was received and the day and time, and the place where the accident occurred, and the damages claimed."

Counsel for appellee insist that the claim is insufficient in merely giving the date and the year, without stating whether it was during the day or night that the accident occurred. In *East Tenn., etc., R. R. Co. v. Carlloss*, 77 Ala. 443, this court, in speaking of the statute then in existence, which provided that in a suit against a railroad company for damages to live stock, or cattle of any kind, the complaint must state, among other things, the time when the killing or injury occurred, said:

"The purpose of the requirement is to inform the railroad officials, with reasonable certainty, as to the circumstances attending the alleged injury, so that they may act advisedly in the investigation of the case, either with the view of voluntary adjustment, or of defense at law. The time, we think, should be stated to be a specified day of a given month and year."

It will thus be seen that this court held the view that it was a sufficient designation of the time to give the day of the month and year. In speaking of the statute under consideration in the instant case it was said in *Brannon v. City of Birmingham*, 177 Ala. 419, 59 South. 63:

"Statutes similar to this one have been previously construed by this court, wherein it was held that they were designed for the purpose of giving the city authorities an opportunity to

investigate and adjust claims made against the city, without the expense of litigation, and that a compliance therewith on the part of the plaintiff was a condition precedent to the maintenance of a suit. *Newman v. B'ham*, 109 Ala. 630, 19 South. 902; *Bland v. Mobile*, 142 Ala. 142, 37 South. 843."

And in *Newman v. Mayor and Aldermen of Birmingham*, 109 Ala. 630, 19 South. 902, cited in the *Brannon Case*, this language was used:

"Technical accuracy is not required. It is enough if the board is fairly informed of the nature and amount of the claim, so that it can act intelligently in the investigation and allowance or rejection of the same."

It thus appears that the holding of this court, in construing statutes of this character, to the effect that technical accuracy is not required, but that substantial compliance with the statute is sufficient, is in line with the weight of authority and in conformity with good reason. 5 *McQuillan on Mun. Corp.* 5124, 5125; *Hase v. City of Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Sullivan v. City of Syracuse*, 77 Hun, 440, 29 N. Y. Supp. 105.

We are also in accord with the following statement found quoted in *Hase v. Seattle*, supra, that:

"It was not intended that the terms of the notice should be used as a stumbling-block or pitfall to prevent recovery by meritorious claimants."

[2] As defined by statute and within the meaning of the law a day means 24 hours, the period of time between any midnight and the midnight following. 13 *Cyc.* 262. When the purpose of the statute as above set forth is considered, we are persuaded that a claim, stating a specified day of a given month and year, is a substantial compliance with the statute, and it was not the intention of the lawmakers to require a more specific description, either as to the hour or whether it was night or day.

The trial court was doubtless guided in the conclusion reached by the language used in the opinion in *Brannon v. Birmingham*, supra. The statement in the opinion, to the effect that the claim should state whether the accident occurred during the day or night, if the exact hour is not given, was a mere dictum, as a reading of the opinion readily discloses. The question determinative of that appeal, as shown by the opinion, was that of a material variance between the statement of the claim as to the place of the injury and the proof with respect thereto, and a reference to the brief of counsel for appellee in that cause discloses that to have been the point pressed upon the consideration of the court.

We are of the opinion that the complaint, as last amended, was not subject to the demurrer interposed thereto, and the judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded. All the Justices concur.

BELL et al. v. BELL et al. (6 Div. 121.)
(Supreme Court of Alabama. Feb. 3, 1916. In
Response to Application for Rehear-
ing, March 30, 1916.)

1. MARRIAGE \S 40(11)—PRESUMPTIONS.

Where a woman, who had for more than 25 years lived in marriage relations with one man; undertook to show that her relation, and that of her claimed slave husband, with another, of like duration, were void in view of the slave marriage, the burden of proof to overcome the presumption of validity of the later marriages was heavy upon her.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 68; Dec. Dig. \S 40(11).]

2. MARRIAGE \S 38—LEGALIZING ACTS—EFFECT.

The Constitutional Ordinance of September 29, 1865, legalizing marriages of freed men and women then living together as man and wife, contracted during slavery, did not legalize illicit cohabitation, nor make marriage contracts not intended by the parties.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 110; Dec. Dig. \S 38.]

In Response to Application for Rehearing.

3. APPEAL AND ERROR \S 1099(7)—MATTERS NOT NECESSARY TO DECISION—DICTUM.

Where, on former appeal, the court held that new trial should have been granted on the ground of newly discovered evidence, it was unnecessary to decide the sufficiency of the evidence to support the judge's finding, and an opinion thereon was dictum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4376; Dec. Dig. \S 1099(7).]

4. APPEAL AND ERROR \S 867(1)—SCOPE OF REVIEW—AFFIDAVITS FOR NEW TRIAL.

On appeal from denial of new trial by the probate court, the circuit or Supreme Court can consider affidavits presented to the probate on the motion for new trial only for the purpose of determining whether a new trial should be granted, and not for their evidentiary weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3476, 3482-3485; Dec. Dig. \S 867(1).]

5. APPEAL AND ERROR \S 1012(1)—REVERSAL—WHEN NECESSARY.

When an issue, triable without jury, is so tried on viva voce testimony to the court, the finding will not be reversed unless so manifestly against the evidence that a nisi prius judge would set aside the jury's verdict on the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3900-3902; Dec. Dig. \S 1012(1).]

Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge.

Action by Cornelia Bell and another against Mary Bell and others. Judgment for plaintiffs and defendants appeal. Reversed and remanded, with directions.

Bondurant & Smith, of Birmingham, for appellants. B. F. Ray and David S. Anderson, both of Birmingham, for appellees.

SAYRE, J. This is the second appeal in this case. See Bell v. Bell, 183 Ala. 645, 62 South. 833, where a discussion of the evidence as it then appeared may be found in the dissenting opinion of De Graffenried, J.

[1, 2] There is no reason to doubt that appellee George Bell is the natural son of Jim Bell, deceased, by the other appellee, Cornelia Bell, as now for the purpose of this case she calls herself; nor is there any need to deny that Jim, in a general way, recognized and treated George as his son. But in view of well-known conditions obtaining among negroes in the Southern States before and for some time after the conclusion of the War between the States, these facts can be of little consequence in the settlement of the issue disputed between the parties, viz., whether there was a slave marriage between Jim and Cornelia, recognized by them as an existing status on September 29, 1865. Several children were born to this couple. Of them appellee George was the eldest, and Cornelia at one place in her testimony—though this, it is conceded, is not in accord with the general drift of her deposition—fixes the date of his birth, according to the best of her recollection, at about a year after the marriage she claims to have contracted with Jim and about two years after the soldiers came back from the War. It is not disputed that a marriage between Cornelia Bell and Albert Jackson was solemnized under a license and in due form 25 years before this controversy arose, since which time she has lived with Jackson continuously as his wife, bearing to him six children; that before her marriage to Jackson she had intermarried with Nathan Oliver and had borne to him two—some of the witnesses say four—children; that Jim Bell, the distribution of whose estate is the matter in dispute, and Mary, one of the appellants, were married under a license according to the solemn form of law in 1875, more than 35 years before Jim's death in 1910, during which time they lived together as man and wife, children being born to them; and that during all this long time no question was raised as to the lawfulness of the relations assumed by these parties until the estate of Jim Bell came on for settlement and distribution. It is not necessary to deny that Jim and Cornelia cohabited in slave times in a manner somewhat like man and wife, though even this may appear to be doubtful when the approximate date fixed for the birth of George, and evidence tending to show Cornelia was of loose habits and had children before she settled down between the cold sheets of matrimony, are considered in connection with the common knowledge that sex relations lacked restraint, and births without semblance of wedlock were frequent, among slaves who knew or could do no better and had not learned the practical art of race suicide. But however that may have been, considering the undisputed facts and the consequences to the innocent parties to these formal marriages and their offspring, appellees assumed a very heavy burden of proof when

they undertook to show that the relations in which these parties have lived so long were bigamous by reason of the fact that Jim Bell and Cornelia Jackson had contracted a slave marriage and were living together, recognizing each other as man and wife (*Washington v. Washington*, 69 Ala. 281), on the 29th of September, 1865, the date of the Constitutional Ordinance, which by no means legitimized illicit relations nor imposed upon parties the burdens of contracts they had not intended to assume, but only ratified prior slave marriages between freedmen and freedwomen then living together in mutual recognition of each other as man and wife (*Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Weatherford v. Weatherford*, 20 Ala. 548, 56 Am. Dec. 206).

The evidence contained in the record before us, differing, as we think, in some material respects from that appearing upon the former appeal, has had due consideration by the entire court. Without commenting upon it more circumstantially, our judgment is that the testimony for appellees, not to consider that offered in contradiction by appellants, does not suffice to overcome the strong presumption with which the law surrounds the undisputed formal marriages between these two couples and in virtue of which they have lived together as men and wives so long that the law will exercise extreme caution in disturbing the veil that time has drawn over their ancient relations to found a decree and a new status of social relations and property rights on the frail memory or recently stimulated imagination of ignorant witnesses, who for the lifetime of a generation have never had occasion to give the matter a thought. Upon this conclusion, the decree of the probate court will be reversed, and the case remanded, with direction that a decree be entered distributing the estate of Jim Bell, deceased, among appellants as his surviving widow and child, to the exclusion of appellees.

Reversed and remanded.

All the Justices concur, except GARDNER, J., not sitting.

In Response to Application for Rehearing.

SAYRE, J. Counsel for appellant insist that the holding on this appeal is diametrically opposed to the ruling and opinion of the majority on the former appeal reported in 183 Ala. 645, 62 South. 833.

[3] On the face of the reports of the two appeals this contention would appear to be true; and we therefore deem it proper, if not necessary, to explain the holding in the two cases and the opinion of the majority on the former appeal.

In the first place, what was said in the opinion of the majority as to the sufficiency of the evidence before the probate judge to support his finding was dictum, for the reason that we held that he should have granted a motion for a new trial on the ground

of newly discovered evidence. It was therefore unnecessary to decide as to the correctness of the judgment which we held should have been set aside, and which was set aside, and a new trial ordered. The appeals are materially different; the former appeal to this court was not from the probate court, as was this appeal, but was from the circuit court. We were there reviewing the judgment of the circuit court, and not that of the probate court.

[4] The holding on the first appeal was necessarily a holding to the effect that, if the evidence on another trial should be the same in effect as that indicated by the affidavits for a new trial, the judgment of the probate court should and would be different. Neither the circuit court nor this court could consider the affidavits, except for the purpose of saying whether or not the probate court should have awarded a new trial. These affidavits were not before the probate judge when he rendered his first decree declaring George Bell and Cornelia Jackson the lawful heirs of Jim Bell. The affidavits first appeared in the probate court in support of a motion to set aside the judgment theretofore rendered. For that reason the circuit court could not or should not have considered them except to review the action of the probate court in awarding a new trial.

On this appeal, however, the substance of these affidavits, which are numerous and extensive, was put in evidence before the probate court; and he considered them, or should have considered them, in rendering the decree appealed from. Hence the evidence is materially different, both in kind and in quantity, from that adduced in support of the final decree rendered by the probate court, which this court, on the former appeal, ordered to be set aside, and which was accordingly set aside, and a new trial awarded.

[5] This court still adheres to the correctness and soundness of the rule announced in *Nooe's Case*, 70 Ala. 446, and which was quoted and followed on the former appeal, to the effect that:

"When the law authorizes the disputed question to be tried, and it is tried, by the court without a jury, on testimony given *viva voce* in the presence of the court, * * * the rule is, not to reverse the finding, unless it is so manifestly against the evidence that a judge *at nisi prius* would set aside the verdict of a jury, rendered on the same testimony."

We now recognize and follow that rule, after a careful examination of the evidence as shown by the record on this appeal, which, as we have shown above, is very different from that on the first appeal, except that which appeared only in support of the motion for a new trial, and which we then held was sufficient to entitle these appellees to a new trial. The holdings of the majority, in the two cases, are not therefore inconsistent, though the results are entirely different owing to the fact that the evidence before the

probate court, on the two trials, was materially different. In other words, if the evidence on this appeal were not different from that on the other appeal, we are not prepared to say that the result would be different. It is therefore the difference between the evidence on the two trials which leads the majority to a different result from that attained on the first appeal.

In re MITCHELL. (6 Div. 336.)

(Supreme Court of Alabama. March 27, 1916.)

1. CONTEMPT \Leftrightarrow 9—PUBLICATIONS RELATING TO PENDING PROCEEDINGS.

An attorney, publishing a criticism upon an action of the court in a pending proceeding, renders himself liable to be called upon to answer whether he knew of the pendency of the cause, and whether his attack was made with the intent of intimidating or influencing the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. \Leftrightarrow 9.]

2 ATTORNEY AND CLIENT \Leftrightarrow 32 — PUBLICATION OF CRITICISM OF COURT.

A publication as to a decision of the court as follows: "I accepted the decision in this case, however, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a decision in their favor against a widow residing here"—transcends the bounds of privileged criticism, and is improper attack upon the integrity of the court, and makes out a prima facie case of improper conduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 45; Dec. Dig. \Leftrightarrow 32.]

3. ATTORNEY AND CLIENT \Leftrightarrow 32 — PUBLICATION OF CRITICISM OF COURT.

A publication as to a decision of the court as follows: "It looks like the court was groping around in the dark hunting for some pretext under which the complainant's rights could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her and her family for many years"—transcends the bounds of privileged criticism, and is improper attack upon the integrity of the court, and makes out a prima facie case of improper conduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 45; Dec. Dig. \Leftrightarrow 32.]

4. CONTEMPT \Leftrightarrow 58(4)—PURGING BY WRITTEN DISCLAIMER.

Where respondent in contempt proceedings filed answer disclaiming any intention of influencing or intimidating the court by his publication of criticism of its opinion in a pending cause, and satisfactorily qualifying, explaining, and withdrawing the expressions used in another part of the publication and apologizing for same, he was discharged.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 174, 175; Dec. Dig. \Leftrightarrow 58(4).]

Original proceeding in Supreme Court against James A. Mitchell. Discharged.

Be it ordered by the court that one James A. Mitchell, Esq., of Birmingham, Ala., be and is hereby cited to appear before this court at Montgomery, Ala., on Monday, the

27th day of March, 1916, and then and there show cause why his name should not be purged from the roll of practicing attorneys in this court, and why he should not be adjudged guilty of a contempt of this court (one or both), because of the writing, publishing, or utterance of a certain publication appearing in a weekly newspaper called the Alabama Democrat, published at Montgomery, Ala., on February 10, 1916, in words and figures, as follows, to wit (the substance of which sufficiently appears in the specifications):

Specifications.

Be it ordered by the court that whereas, James A. Mitchell, Esq., a practicing attorney of Birmingham, Ala., and whose name appears upon the roll of attorneys of this court, was on the 21st day of February, 1916, cited to appear on March 27, 1916, and answer said citation, the issuance of same having been induced by a certain publication of February 10th in the Alabama Democrat, and a copy of which was set out in hæc verba as an exhibit:

Now, therefore, in order that the said Mitchell be specifically informed as to the part or parts of said publication that impressed the court as transcending the bounds of privileged criticism and which caused the said citation, the following specifications are made:

[1] First. In criticizing and commenting upon the opinion in the case of *Ex parte Seals Plano & Organ Co.*, 188 Ala. 443, 66 South. 146, you dealt with a cause that was pending in this court for final decision, and you are called upon to answer whether or not you knew of the pendency of said cause, and whether or not your attack upon the first opinion was made with the intent of intimidating or influencing the court upon the final determination of said cause.

[2] Second. In your criticism of and comment upon the opinion of this court in the case of *Manfredo v. Manfredo*, 68 South. 157, appears the following language:

"I accepted the decision in this case, however, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a decision in their favor against a widow residing here."

[3] Third. In the criticism of and comment upon the opinion of this court in the case of *Sulzby v. Palmer*, 70 South. 1, appears the following language:

"It looks like the court was groping around in the dark hunting for some pretext under which the complainant's rights could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her and her family for many years."

The court entertains the opinion that the expressions above set out, not only transcend

the bounds of propriety and privileged criticism, but are an unwarranted attack, direct, or by insinuation and innuendo, upon the motives and integrity of this court, and make out a prima facie case of improper conduct upon the part of a lawyer who holds a license from this court and who is under oath to demean himself with all good fidelity to the court as well as to his client.

The respondent made the following answer:

Now comes James A. Mitchell, and for answer to the writ issued out of this honorable court on the 21st day of February, 1916, commanding him to appear and show cause why his name should not be purged from the roll of practicing attorneys in this court, and why he should not be adjudged guilty of a contempt of this court (one or both), because of the writing, publishing, or utterance of a certain publication which appeared in the Alabama Democrat, a newspaper, on February 10, 1916, and more particularly because of those certain parts of said writing specified in an order of this honorable court, copy of which is this day first received by him, says: That he appreciates full well that this honorable court would not for a moment consider that legitimate criticism uttered by this defendant in the exercise of his right to discuss the official work of officers elected to their duties by popular vote involves contempt of the most lofty positions those officers hold, and that any part or parts of said publication which may have appeared to transcend the bounds of privileged criticism he is glad to have this opportunity to explain or retract.

1. In answer to the first specification contained in the said order, by which this respondent is notified by the court that in criticizing and commenting upon the opinion in the case of *Ex parte Seals Piano & Organ Company* he dealt with a cause pending in this court for final decision, this respondent says that the decision in the case *Ex parte Seals Piano & Organ Company* to which his criticism referred was upon an original application for a writ of mandamus directed to a circuit judge, and was decided by this court in July, 1914; that when he wrote the matter commenting upon the same he did not know that there was any other matter arising out of the same litigation in the court below which was still pending in this court; that he was in no way connected with the cause of action or the litigation, either as party or counsel; and that his criticism and discussion of the decision on the former appeal was in no way intended by him to influence or intimidate the court upon the final determination of the cause.

2. By the second specification in the said order the use by this respondent of the following language in connection with his criticism of the decision of this honorable court in the case of *Manfredo v. Manfredo* is noted as transcending the bounds of privileged criticism: "I accepted the decision in this case, however, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a decision in their favor against a widow residing here."

By way of palliation of this quoted language this respondent begs leave to call to the attention of the court the well-recognized rule of this honorable court, as well as of courts in other jurisdictions, to prefer as far as possible local claimants in the application of local assets where foreign administrations or foreign assignments for the benefit of creditors are involved.

This defendant appreciates, however, that for the court to have applied that rule in reaching the decision in the case in question would have involved a distinct extension of the doctrine, and an extension which the opinion does not reveal the intention of the court to have made. The use by this respondent of the quoted language was therefore highly improper, without indicating at the same time the line of reasoning which would have made his suggestion innocent. This defendant therefore hopes that the court will pardon his use of the language quoted, that it will allow him to qualify it as above indicated, and that it will accept his statement that he meant in no way to reflect upon the motives and sense of justice of the court by the use of the same.

3. By the third specification in the said order the use by this respondent of the following language in connection with his criticism of the decision of this honorable court in the case of *Sulzby v. Palmer* is noted as transcending the bounds of privileged criticism: "It looks like the court was groping around in the dark hunting for some pretext under which the complainant's rights could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her and her family for many years."

While disclaiming any intention to charge this honorable court with improper motives, or with any purpose beyond attempting to support what this respondent believed to be the court's first immature and erroneous conclusion upon the case, he realizes on reading his article after it appeared in print, that the above language went too far, and might be construed to impugn the integrity of the court. He therefore profoundly regrets having used the language noted, prays leave of the court to retract it, and apologizes for having allowed his criticism in the heat of disappointment to contain an expression capable of so misrepresenting both the intent of the writer and the motives of this honorable court.

And this defendant further says that in the writing and publishing of the said article, a copy of which is substantially set out and attached to the said writ, this respondent did not intend any contempt of or towards this honorable court, that the said publication was not made with intent to misrepresent this court, or to bring this court into contempt or ridicule, and that the words used by him in the said publication were not used by him with intention to cast upon this court or any of the members thereof any imputation or charge of corruption or lack of integrity, nor were they used with intent to embarrass or impede the administration of justice.

And now, having fully answered, this respondent prays that said rule be discharged, and that he be dismissed with his costs in this behalf sustained.

Henry Upson Sims and C. C. Nesmith, both of Birmingham, for respondent.

PER CURIAM. [4] Be it ordered by the court that, the said James A. Mitchell, the respondent, having disclaimed any intention of intimidating or influencing this court by the criticism of its opinion in a pending cause, and having satisfactorily qualified, explained, and withdrawn the expressions set out in specifications 2 and 3, and apologized for the use of same, the rule nisi is dissolved, and the respondent is discharged.

LIGHTNER v. STATE. (3 Div. 223.)

(Supreme Court of Alabama. Feb. 3, 1916.
Rehearing Denied March 30, 1916.)

1. CRIMINAL LAW §449(1) — OPINION EVIDENCE — NONEXPERT TESTIMONY — BLOOD STAINS.

A witness need not be an expert on blood to testify that fresh marks and spots on accused's hands and clothing were made by blood stains, since the appearance of fresh blood is within the common knowledge of mankind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034, 1035; Dec. Dig. § 449(1).]

2. CRIMINAL LAW §696(5) — APPEAL — OBJECTION TO EVIDENCE — COMPETENCY OF EXPERT.

Where no objection to the competency of a witness was made before he stated that marks on accused were made by blood, the objection by motion to exclude was too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1640; Dec. Dig. § 696(5).]

3. CRIMINAL LAW §1169(3) — APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.

The admission of evidence was not prejudicial to accused, where the same fact was testified to by numerous other witnesses without objection and admitted by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3139; Dec. Dig. § 1169(3).]

4. HOMICIDE §203(5) — EVIDENCE — DYING DECLARATIONS — FOUNDATION — HOPE FOR RECOVERY.

Where deceased, shortly before his death, stated that he was dying, his request in connection therewith that a doctor be called could indicate only a hope for relief from suffering, not a hope that his life could be saved, and does not render his declaration inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 435; Dec. Dig. § 203(5).]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Lamar Lightner was convicted of murder in the first degree, and he appeals. Affirmed.

Frontis H. Moore and B. Guy Smith, both of Montgomery, for appellant. W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The defendant was convicted of murder in the first degree, and sentenced to death.

The trial judge admitted certain testimony of which appellant complains.

[1] 1. A witness need not be an "expert on blood" in order to testify that fresh marks and spots on the defendant's hands and clothing were made by blood. The appearance of fresh or recently extracted blood is within the common knowledge of mankind, and any intelligent witness is presumptively competent to identify it when he sees it.

[2, 3] However, defendant did not object to the competency of Dr. McGehee for this purpose until after he made the statement, and the objection by motion to exclude came too late. Moreover, numerous other witnesses testified without objection to the presence of blood on defendant's hands and clothing

shortly after the killing, and defendant admitted it himself.

[4] When the dying declaration of deceased was first introduced by the state, no predicate was offered as to his consciousness of and belief in his impending dissolution. But immediately afterwards the witness testified that deceased cried out:

"I am dying! I am dying! My coat is by the fence where I fell. Please get the doctor for me. Lamar Lightner have cut my throat"—and that he died in a short while.

It is contended that deceased's request for a doctor showed that he did not despair of life. We think, however, that this declaration, taken in connection with the plainly desperate character of the wound, and the declarant's almost immediate death thereafter, was sufficient evidence of his belief that he was then dying; and that the declaration properly went to the jury. The accompanying request for a doctor, if it stood alone, would be of equivocal import; for, while it may have been prompted by a lingering hope of life, it may just as well have meant no more than a hope that medical skill might ameliorate his sufferings. But only the latter construction is consistent with his cry, "I am dying." This particular point was so ruled in *Johnson v. State*, 17 Ala. 618, where the declarant asked the physician who was present if he could help her, and he replied that he thought he could; but this did not exclude the declaration. So, also, in *McQueen v. State*, 94 Ala. 50, 10 South. 433, the declaration of deceased that he believed he would not live was not overcome by his contemporaneous request of the witness "to do all you can for me."

We hold that the declaration was prima facie admissible, and that it was properly admitted under the circumstances shown.

As no error appears in the record, the judgment of conviction must stand affirmed.

Affirmed. All the Justices concur.

PHINIZY et al. v. ANNISTON CITY LAND CO. et al. (7 Div. 733.)

(Supreme Court of Alabama. Feb. 10, 1916.
Rehearing Denied March 30, 1916.)

CORPORATIONS §604 — DISSOLUTION — POWER OF COURT OF EQUITY.

While a court of equity may, where it appears beyond question that the continuation of a profitable business cannot be had, decree dissolution of a corporation on petition by a minority of its shareholders, a court of equity has no power, though it appeared that the corporation had lost much money, to decree dissolution where it still had large assets, particularly as in the last year its income exceeded its expenses, notwithstanding it was contended that if dissolution was not decreed the assets would depreciate so that they would be entirely lost.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2388; Dec. Dig. § 604.]

Appeal from Chancery Court, Calhoun County; W. W. Whiteside, Chancellor.

Bill by Mary Lou Phinzy and others against the Anniston City Land Company and others. From decree sustaining demurrers to the bill, complainants appeal. Affirmed.

The two treasurer's reports referred to in the opinion are as follows: Year ending April 30, 1913:

Cash and convertible assets, May 1, 1912	\$ 4,811.53
Anniston Inn rent	22.17
Land rent	1,389.88
House rent	8,323.63
Industrial building rent	999.96
Office building rent	446.75
Interest	3,411.10
Real estate (sales and notes paid) ..	3,480.00
Royalty on sand and stone	10.60
Bonds sold	8,230.32

Total \$31,125.94

Net Disbursements.

Expenses, salaries, advertising	\$ 4,342.28
Insurance	858.38
Taxes	8,607.72
Sidewalks and paving	572.37
Capital stock purchased and canceled ..	13,580.00
Other stocks purchased	1,300.00
Cash and convertible assets, May 1, 1913	1,865.19

Total \$31,125.94

Year ending April 30, 1914:

Net Receipts.

Cash and convertible assets, May 1, 1913	\$ 1,865.19
Anniston Inn rent	49.90
Land rent	2,082.18
House rent	8,798.57
Industrial building rent	950.46
Office building rent	432.96
Interest	3,269.50
Real estate (sales and notes paid) ..	10,619.60
Royalty on sand	5.00
Sold stock Alabama Pipe & Foundry Co.	1,200.00

Total \$29,272.76

Net Disbursements.

Expenses and salaries	\$ 4,166.26
Donation to Lynchburg Foundry Company plant	2,500.00
Chamber of Commerce advertising ..	658.50
Attorney's fee in tax cases	425.00
Court costs in tax cases	184.69
Insurance	1,342.82
Taxes for current year	8,099.24
Taxes for previous year, litigated ..	466.33
Taxes on inn for 1908	510.07
Capital stock retired, 194 shares at \$20	3,880.00
Standard Foundry Company 8% preferred stock	2,500.00
St. Luke Hospital 7% bonds	1,500.00
Permanent building improvement ..	400.00
Distribution No. 3, previously uncalled for	10.00
Cash and convertible assets, May 1, 1914	2,629.85

Total \$29,272.76

Rutherford Lapsley and Willett & Willett, all of Anniston, for appellants. Blackwell, Agee & Bibb, of Anniston, for appellees.

SOMERVILLE, J. The bill of complaint seeks to sequester and distribute the assets of the respondent corporation among its

stockholders by the appointment of a receiver and the sale of the assets, and prays also for a dissolution of the corporation.

Stripped of unessential averments, the bill charges, as a basis for this relief, that since its organization in 1887, with a capital stock of \$3,000,000 and assets valued at \$1,500,000, respondent's assets have been dissipated or consumed by fixed expenses and unwise sales and investments until they are now reduced to a valuation of \$300,000; that the value of its shares of capital stock has been correspondingly depressed; that its fixed or necessary operating expenses each year greatly exceed its income; that it has declared only three dividends in 27 years, aggregating \$75,000, or about 4 per cent. on the outstanding capital stock; that there is no prospect for an enhancement of its property values, or an increase of its earnings, within the next 25 years; that the corpus of its assets is being steadily consumed by taxes, insurance, salaries, and other expenses, and the yearly depreciation of the buildings without proper repair; that it is a question only of time when its assets will be completely exhausted in this way, and completely lost to the corporation and its stockholders; and that, in short, it is a failure, and the further prosecution of its business will end in inevitable ruin.

Our decisions are not entirely harmonious in their statement of the conditions under which courts of equity will exercise the extraordinary jurisdiction here invoked.

In the leading case of Noble v. Gadsden Land Co., 133 Ala. 250, 31 South. 856, 91 Am. St. Rep. 27, it was declared that:

"Where the corporation is a going concern, it is undoubtedly true that a minority stockholder cannot maintain a bill and have it dissolved or to have its assets distributed."

This limitation finds support in the opinion adopted by the court in Sullivan v. Central Land Co., 173 Ala. 426, 429, 55 South. 612. And a corporation is a "going concern" even though its assets are less than its liabilities, "if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so." Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

In Ross v. Am. Banana Co., 150 Ala. 268, 43 South. 817, a right to relief was predicated on the fact that the corporation had "failure of the purposes and objects of its creation."

In Ala. Cent. Ry. Co. v. Stokes, 157 Ala. 202, 47 South. 336, relief was denied for failure to show "that the corporation has suspended business, or is a derelict, or that it is impossible for it to attain the real objects for which it was formed."

In Minona Cement Co. v. Reese, 167 Ala. 485, 52 South. 523, a showing that the corporation was a failure, "and that the business for which it was formed could never be

inaugurated or carried on," was held sufficient.

On the other hand, the test laid down by Mr. Beach, which was merely quoted, arguing, in *Noble v. Gadsden Co.*, supra, and in *Central Land Co. v. Sullivan*, 152 Ala. 360, 44 South. 644, 15 Ann. Cas. 420, seems to have been approved in the later case of *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 South. 522, where relief was granted on that theory. The text referred to is:

"Unless it appears beyond question that the continuation of a profitable business cannot be had, the dissolution of a corporation not yet insolvent will not be decreed upon petition of a minority of its shareholders. If, however, it is clear that the business cannot be profitably continued, the petition of a minority for a dissolution will be granted." Beach on Corp. § 783.

The chief trouble with this test is that its terms require further definition, since even the wisest men may differ as to what is a "profitable" business, and future results that may appear "questionable" to one man may seem "unquestionable" to another.

In his note to *Noble v. Gadsden Land Co.*, 91 Am. St. Rep. 34, Mr. Freeman thus epitomizes the rule as illustrated by the leading cases:

"When the question is one of mere discretion in the management of the business or of doubtful event in the undertaking in which the concern has embarked, a remedy cannot be sought in a court of equity. On the other hand, if it plainly appears that the object for which the company was formed is impossible, it becomes the duty of the company's agents to put an end to its operations and wind up its affairs; and should they, though supported by a majority of the stockholders, pursue operations which *must eventually be ruinous*, or should the enterprise be *abandoned as impossible* of realization, any shareholder would, upon plain equitable principles, be entitled to the assistance of a court of equity, and a decree should be rendered compelling the directors to wind up the company's business and distribute its assets among those entitled to them." (Italics supplied.)

In this connection, however, Mr. Freeman quotes the following statement by an eminent English chancellor:

"A case might occur where the court would be willing to give, under the act, to a minority of shareholders the species of relief that sometimes is given in cases of ordinary partnership where it becomes impossible (I use the word 'impossible' in the strict sense of the term) to carry on the business any longer. It is not necessary now to decide it. * * * But what I am prepared to hold is this: That this court, and the winding-up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation." Per Lord Cairns, in *Re Suburban Hotel Co.*, L. R. 2 Ch. App. Cas. 737.

Notes collecting numerous cases on this subject will be found in 91 Am. St. Rep. 33; 39 L. R. A. (N. S.) 1032; and 15 Ann. Cas. 422.

The doctrine which justifies the drastic intervention of equity courts in corporate affairs in the mode here sought is grounded on the theory that the valuable rights of minor-

ity stockholders can be rescued, along with those of a recalcitrant majority, from a common ruin. It does not contemplate the infliction of any loss or injury upon the majority stockholders in order that the minority may be benefited. To help the one class by hurting the other would be an indefensible wrong.

It needs no argument to show that this power of intervention, however wholesome and necessary its exercise may sometimes be, is extremely dangerous in its tendencies, and should be exercised only in the plainest cases. It is not enough that the past prosecution of the corporate enterprise or business has been a financial failure, nor is it enough that its future prosecution will probably be devoid of profit, however strong the probability may seem. On the contrary, so long as the corporation is a going concern; so long as it possesses the means and ability to pursue one or more of its primary purposes or lines of business; and so long as the conditions exhibited do not demonstrate to a moral certainty that its continuation must by inevitable necessity result in serious loss in the near future, and in complete ruin sooner or later—a court of equity will not and should not deprive the majority stockholders of their right to carry on their business under their chosen management, however speculative and uncertain its prospects may seem to a disapproving and dissident minority.

Those who embark in a corporate enterprise as stockholders do so under an implied agreement that the business shall be controlled and directed by a majority of the stockholders, and that it shall endure for the period fixed by the corporate charter or by general law. The case of *Manufacturers' L. & I. Co. v. Cleary*, 121 Ky. 403, 89 S. W. 248, involved a land company with a history very much like that of the respondent in this case, and in its main features the cases are strongly analogous. The observations of O'Keefe, J., are worthy of repetition:

"While it is true that trading or commercial corporations may be assumed to have been organized solely to make money for their stockholders, it does not follow that the enterprise must be abandoned upon the first disappointment, at the complaint of a single stockholder. The fact that the incorporators had fixed a definite period of existence is an implication that the venture shall be continued that long, unless the corporation be sooner dissolved in the manner allowed by law. All business is not at once successful, or even successful at all. Yet it may be pursued in the hope of success, which is the mainspring of traffic. It would be unwarrantable, as well as intolerable, under a system of free government, that the courts should interfere to put a stop to all business ventures which within reasonable time had not shown evidence of success or which were not, in the court's opinion, being pursued with proper diligence or wisdom. Whether the corporation's purpose be one impossible of execution, so that it may be terminated at the complaint of any stockholder, is not a matter to be determined by the weight of the evidence. It must be a certainty, as things are deemed to be certain in law."

And in conclusion he said:

"Whether the original expectations of the promoters will ever be realized seems to be problematical. Yet it cannot be said with any certainty that they will not be. Just what the future may hold for these properties is that uncertainty which gives value to all things speculated in, in the markets. It would never do, in our opinion, to say that, just because the chance of appellant's realizing its expectations seemed now to be slim, its existence should be prematurely ended and the venture outlawed. No bad faith on the part of the officers or majority stockholders is shown. They are doing with this property, for aught that the record shows, just what many a prudent owner might well do—hold on, without actual evident losses, till a rising market has brought relief from what looked like, at one time, a disastrous investment. The cases and text-books cited by both litigants all really present these ideas in one form or another."

While it is proper enough to observe the past history of the respondent corporation as indicative to some extent of its future tendencies, it must be remembered that our real inquiry is as to the impossibility of its future success, and not the certainty of its past failure.

The business of a land company is obviously different in important particulars from most other commercial enterprises. The primary business of this respondent was and is to buy, hold, improve, lease, and sell real estate. Its other charter powers are subsidiary to and supposedly promotive of its primary business. It has pursued this business uninterruptedly since its creation, and has also bought other corporate stocks as investments, and made donations to encourage industrial development near its properties. It has an active board of directors and an active local manager, and its stockholders hold annual meetings. In short, it is a "going concern," with unincumbered assets worth \$300,000 and with no liabilities other than its capital stock. It was organized in 1887 with a capital stock of \$3,000,000, and assets worth \$1,500,000. It has made at least two disastrous investments,—\$150,000 in a public inn, and \$65,000 in an office building. The inn is now worthless and rents for \$20 or \$30 a year, while the office building rents for about \$450. It has sold off most of its choice and centrally located property, and has bought in numerous parcels of suburban lands, not yet valuable for building lots, and which are not likely to become more valuable for that purpose until the population of Anniston is doubled,—which the pleader estimates as requiring, on the basis of former census reports, a period of about 25 years. The bulk of the proceeds of past sales—about \$500,000—has been consumed in fixed charges and operating expenses; although it appears that within the last 20 years the company has bought in and retired 14,000 shares of capital stock, at a cost ranging between \$150,000 and \$280,000, and has declared and paid three dividends aggregating \$75,000. As an illustration of

the impending immolation of its remaining assets, the bill exhibits the annual reports of the treasurer for the fiscal years ending April 30, 1913 and 1914, from which it deduces the conclusion and makes the charge that the annual deficit—the excess of expenses over revenues—is \$15,000; and hence the final conclusion, upon which alone the equity of the bill must be grounded, that the complete exhaustion of the company's assets and the consequent extinction of stock values, is but a question of time and mathematics.

Judged by the force of its general allegations, many of which are, however, mere conclusions, it may be conceded that the bill makes a case for equitable relief within the rule announced and applied in *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 South. 522. But the bill exhibits facts from which the court must draw its own conclusions. *Ross v. Am. Banana Co.*, 150 Ala. 268, 43 South. 817.

By a reference to the two treasurer's reports above referred to, and which the reporter will set out in his statement, it will appear that the fixed operating charges and expenses for 1912-13—which include chiefly taxes, insurance, advertising, and salaries—amount to \$13,807; and the income receipts, which include rentals, interest, and royalties, amount to \$14,000. The corporate assets sold amounted to \$11,710, and the investments in its own stock (for retirement) and in outside stocks amounted to \$14,830. For the following year, 1913-14, it will appear that the fixed operating expenses, as above, amounted to \$13,607; and the income receipts amount to \$15,587. And the corporate assets sold amounted to \$13,684, while the investments (\$8,280), and the donation to a foundry (\$2,500), amounted to \$10,780; with cash on hand, \$2,629.

The original bill of complaint was filed in the interim between the appearance of these two reports, a comparison of which will refute the allegation of the bill that:

"It is altogether probable that expenses for the current year [then 1913-14], on account of increase in taxes and other expenses, will be larger than for previous years"—expenses actually decreased by \$200.

Such a comparison also discounts the contention, which permeates the bill, that the company's rental income is dwindling from year to year. Rents actually increased by \$1,132.

Just here, another feature of these exhibits is worthy of comment. The bill shows that the total assets of the company do not exceed \$300,000, and yet annual taxes exceed \$8,000. Assuming, as we must, that the aggregate of all tax levies does not exceed 2 per cent. in Calhoun county, and calculating on the statutory basis of 60 per cent. of cash value, lawful taxes cannot exceed \$3,600. It appears therefore that \$4,400 is be-

ing annually lost by misappropriation to inflated assessments. Obviously, then, the fixed and necessary operating expenses, as shown by the last report, must be reduced by \$4,400; and, when this is done, the company will have a net income, above necessary operating expenses, of about \$6,800.

In making these comparisons, and deducing these results, we have, of course, ignored and excluded those expenditures of money which are not reasonably necessary to the operation of the company's business, and which are based on the policy and discretion of its managing officers. If by gross negligence or incompetency they are wasting the funds received by the company, complainants have other and less drastic remedies to which they must resort.

We do not overlook the charge that the buildings on respondent's property have not been kept in reasonable repair, and are constantly deteriorating in value, for which a "fair allowance should not be less than \$10,000 annually." This is not a charge that the buildings are actually reduced in value by \$10,000 each year, nor does the bill show what all the buildings are worth proportionately to the entire property, nor how much of the supposed deterioration is taking place in buildings other than the inn and office building—the complete loss of which particular buildings would clearly be of immense benefit to respondent by the saving of taxes and insurance. But conceding that such a charge might be definitely made, it represents a process of depletion which is too indefinite and too gradual, and whose consequences are too remote, under the conditions shown, to justify the present dismemberment of the corporation by the violent and sacrificial process of judicial sale. It must be noted, also, that the conclusion is refuted by a comparison of the rental returns for the years 1912-13 and 1913-14, for actual results are more persuasive than the wisest prognostications.

So far as the general future of respondent's real property is concerned, we do not think that human wisdom or foresight can affirm with any sort of certainty that it is without such prospects of enhancement as would warrant a further continuation of the life and business of the company—in view of its present condition, and the character of its unincumbered holdings. Its future success or failure is a simple speculation, just as it was 25 years ago, and we cannot justify the substitution of our judgment on that question for the judgment of its directors and majority stockholders, by a judicial affirmance of the impossibility of a comparatively profitable issue of this business—especially if it be conducted with prudence and reasonable economy.

The facts and conditions exhibited by the bill deprive it of its essential equity, and

the decree of the chancery court sustaining the demurrers will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

WATKINS et al. v. CHAPMAN et al.
(1 Div. 832.)

(Supreme Court of Alabama. Jan. 30, 1916.
Rehearing Denied March 30, 1916.)

APPEAL AND ERROR \Leftrightarrow 843(2)—MATTER NOT CALLING FOR DECISION—PROPRIETY OF PART OF DECREE NOT COMPLAINED OF.

Where all parties to a suit to remove the settlement of an estate from the probate to the chancery court, and to have certain deeds by the intestate to two of the respondents annulled on the ground of mental incapacity, etc., were *sui juris* and before the court, and no objection was taken to the part of the decree granting relief under respondents' cross-bill, no error being assigned or insisted upon as to the part of the decree ordering the sale of land for distribution among tenants in common, except that the property should have been decreed to belong to the parties as heirs of the intestate, the court will not determine the propriety of such part of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. \Leftrightarrow 843(2).]

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Bill by Ida P. Watkins and others against R. Z. Chapman and others. From a decree partly for complainants and partly for respondents, the named complainant appeals. Decree affirmed.

Hunter H. McClelland, of Mobile, for appellant. Barnett & Bugg, of Monroeville, for appellees.

MAYFIELD, J. This was a bill filed by appellants against appellees, to remove the settlement of an estate from the probate court to the chancery court, and to have certain deeds by the intestate to two of the respondents annulled on the ground of mental incapacity on the part of the grantor, to have certain moneys and personal property received by these two respondents from the intestate declared advancements rather than gifts, and then to have all the property brought into hotchpot and administered between all the heirs and the distributees of the estate. The two respondents to whom the lands were conveyed and who had received the moneys conveyed answered the bill, and admitted all the facts necessary to remove the proceedings from the probate court to the chancery court; that is, they admitted that complainant Ida P. Watkins, who filed the bill, was an heir of the estate of the intestate, who was the mother of complainants and the three respondents. One of the respondents, R. Z. Chapman, denied all the equity of the bill, while the other two, J. W. and A. L. Chap-

man, denied all the equity of the bill other than that for the removal of the settlement into the chancery court, and alleged that the estate of intestate owned no interest in the lands or in the personal property sought to be brought in and administered, but alleged that as to certain land situated in Jefferson county, and which was conveyed to these two respondents by the intestate mother, the complainant, Ida P. Watkins, and the correspondent R. Z. Chapman, each owned an undivided one-eighth interest, as tenants in common with these two respondents, who each owned an undivided three-eighths interest therein, and sought to have their answer made a cross-bill, and to have the land in Jefferson county sold for distribution among the tenants in common. The court granted the relief prayed as to the removal of the settlement into the chancery court, but denied to the complainant and R. Z. Chapman all relief as to conveyances by the intestate to J. W. and A. L. Chapman, and as to the gifts of personalty being in the nature of advancements, and granted the relief prayed in the cross-bill, and directed that the rents of the lands and the proceeds of certain insurance as to property on the lands in Jefferson county be ascertained, and that the rents and insurance money so ascertained be divided among Ida P. Watkins and R. Z., J. W., and A. L. Chapman in the proportion as their respective interests in the land were ascertained to be; that is, one-eighth each to Ida P. Watkins and R. Z. Chapman, and three-eighths each to J. W. and A. L. Chapman. From this decree Ida P. Watkins appeals, and assigns various errors.

The cause was heard on bill, answers, cross-bill, and proof by all parties; and we are not prepared to say that there is any error shown in the record, of which Ida P. Watkins can complain.

No error is assigned as to the relief granted under the cross-bill, and hence we do not treat or discuss its merits or demerits. We merely suggest that it is difficult to see its connection or relation with the matters contained in the original bill—that is, those pertaining to the settlement of the estate being administered—further than we have shown in this opinion. It is true that the parties, other than the administrator, are the same, and that it relates to the lands sought to be administered, but the relief is granted upon the theory that the lands were not the property of the intestate, and therefore were not in any wise subject to be administered. As the parties are all *sui juris*, and all were before the court, and no objection was taken to this part of the decree, and no error is assigned or insisted upon as to the part of the decree ordering the sale for distribution among tenants in common, other than that the property should have been decreed to belong to the parties as heirs of the intestate, we do not feel that it is proper to attempt

to decide as to the propriety or correctness of this part of the decree.

While the evidence showed that the intestate was very feeble when she executed the conveyances, having had two strokes of paralysis, yet we think that the weight of the evidence falls to show that she was lacking in mental capacity to execute the conveyances in question. We agree with the chancellor that the evidence falls to show the mental incapacity, on the part of the intestate, which would authorize the court to annul those conveyances. We are unable, likewise, to find sufficient evidence in the record to show that moneys received by J. W. and A. L. Chapman from their mother, the intestate, were intended as advancements and not as gifts.

It follows that the decree appealed from must be affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

STATE ex rel. BURR et al., State Railroad Com'rs, v. JACKSONVILLE TERMINAL CO. et al.

(Supreme Court of Florida. March 2, 1916.
On Petition for Rehearing, March 30, 1916.)

(Syllabus by the Court.)

1. MANDAMUS \S 162—PROCEEDINGS—MOTION TO QUASH—ADMISSIONS.

A motion to quash an alternative writ of mandamus, like a demurrer to a declaration, admits as true all such matters of fact as are sufficiently pleaded.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. \S 162.]

2. RAILROADS \S 58—TERMINAL STATION—ORDER OF RAILROAD COMMISSIONERS—CONSTRUCTION.

The description contained in an order of the Railroad Commissioners, of a tract of land upon which a terminal company and certain railroad corporations were required to erect a terminal passenger station, does not show the existence of a public street running through the tract by the use of the following words: Bounded "on the north by a line running parallel with and 200 feet north of the north line of Adams street extended west from Myrtle avenue to the aforesaid west line of the same tract."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. \S 58.]

3. RAILROADS \S 9(1)—REGULATION—RAILROAD COMMISSIONERS—STATUTORY PROVISION.

An order made by the Railroad Commission prior to the act of 1913, chapter 6527, for which no power or authority existed in the Commissioners to make, is not affected by the provisions of such act declaring all presumptions to be in favor of every action of the Commissioners and all doubts as to their jurisdiction and powers to be resolved in their favor,

when the latter act does not confer the power attempted to be exercised either expressly or by implication. In such case no basis exists upon which a doubt as to such power may rest, and the provisions of the act therefore as to the construction of such an order do not apply.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16; Dec. Dig. ¶9(1).]

4. RAILROADS ¶58—TERMINAL STATION—POWER OF RAILROAD COMMISSIONER.

Neither section 2893, General Statutes of Florida 1906, as it existed before the amendment by chapter 6527, Laws of 1913, § 3 (section 2893, Compiled Laws 1914 of Florida), nor the latter act, chapter 6527, confers upon the Railroad Commissioners any valid power to order a local terminal company, engaged in the business of operating a terminal passenger station, to erect a "new, better, and larger" one on a different site for the depot accommodations of all railroads that may enter the city where it is located; nor have the Railroad Commissioners any power whatever under said statutes to order the railroad corporations renting and enjoying the facilities afforded by such terminal station to join with such terminal company in the erection of a new, better, and larger terminal passenger station on a different site.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

5. RAILROADS ¶58—TERMINAL STATIONS—POWER OF RAILROAD COMMISSIONERS.

Subdivisions 5, 7, and 8 of section 3 of chapter 6527, Acts of 1913, amending section 2893 of the General Statutes of Florida 1906 (Comp. Laws 1914, § 2893), prescribe specific and definite regulations applicable to separate and distinct classes of railroad depots and terminal stations, and clearly define the power of the Railroad Commissioners in regard thereto, and neither of said statutes afford any authority whatever for the attempted exercise of the power mentioned in the above headnote.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

6. RAILROADS ¶58—TERMINAL STATION—POWER OF RAILROAD COMMISSIONERS.

The authority delegated by the Legislature to the Railroad Commissioners by section 2893 of the General Statutes of Florida 1906, as amended by chapter 6527, Laws of 1913, § 3 (Comp. Laws 1914, § 2893), to compel two or more railroads entering a city or point to erect, operate, and maintain a joint passenger terminal or union depot for their exclusive use as authorized by subdivision 8 of section 3 of chapter 6527, is different in theory and substance from the asserted power to compel two or more railroads entering the same town or city to erect a terminal passenger station for their use and that of such other carriers as may desire to enter and pay a reasonable compensation for such facilities or the power to compel two or more railroads entering the same town or city to become joint owners of and co-partners with a terminal company in conducting such business and erecting such station.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

7. EMINENT DOMAIN ¶10(1)—TERMINAL COMPANIES—"COMMON CARRIER."

By the provisions of section 2892, General Statutes of Florida 1906, the term "common carrier" is made to include companies operating terminal or union depots, but such section does not change nor in any degree alter the duties and obligations of such a company or corpora-

tion to the public, nor does it confer upon such a company the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35, 37, 39-48; Dec. Dig. ¶10(1).]

For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

On Petition for Rehearing.

8. RAILROADS ¶9(1)—REGULATION—POWERS OF RAILROAD COMMISSIONERS.

As the Railroad Commissioners, who are statutory officers, can have and exercise no "jurisdiction" or "powers" except such as may be lawfully conferred upon them by the statutes of the state, an order made by the Railroad Commissioners cannot "be deemed and held to be within their jurisdiction and their powers," unless there is some basis in a statute for the exercise of the jurisdiction and power involved in making the order.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16; Dec. Dig. ¶9(1).]

9. RAILROADS ¶9(1)—REGULATION—RAILROAD COMMISSIONERS—STATUTORY PROVISION.

The statute provides that "all presumptions shall be in favor of every action of the" Railroad Commissioners, but a presumption in favor of action taken under an asserted delegated statutory power can arise only when some substantial basis of authority for the exercise of the power appears in a statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16; Dec. Dig. ¶9(1).]

10. RAILROADS ¶9(1)—REGULATION—POWERS OF RAILROAD COMMISSIONERS.

Though the statute enacts that "all doubts as to the jurisdiction and powers" of the Railroad Commissioners "shall be resolved in their favor," doubts cannot be resolved in favor of an asserted delegated statutory power when it is clear that there is no enactment that can be a basis for such asserted delegated power.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16; Dec. Dig. ¶9(1).]

11. RAILROADS ¶9(1)—REGULATION—STATUTORY PROVISION.

Where a general statute provides comprehensive regulations of common carriers and in distinct subdivisions enacts separate and specific regulations particularly affecting definite portions of the broad general subject of the statute, each such distinct subdivision of the statute, having had the discriminating attention of the lawmakers, must be regarded as expressing the precise legislative intent as to the nature and extent of the regulations of the particular matter therein treated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16; Dec. Dig. ¶9(1).]

12. RAILROADS ¶58—TERMINAL STATIONS—POWER OF RAILROAD COMMISSIONERS.

Each one of subdivisions 5, 7, and 8 of section 3, chapter 6527, Acts of 1913, amending section 2893 of the General Statutes of 1906 (Comp. Laws 1914, § 2893), provides specific and definite regulations applicable to separate and distinct classes of railroad depots.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

13. RAILROADS ¶58—TERMINAL STATIONS—ORDER OF RAILROAD COMMISSIONERS.

The statutes do not confer upon the Railroad Commissioners any power that may fairly be regarded as authorizing the Commissioners to make an order requiring a local terminal company and the railroad companies that are its patrons jointly to change the location of the terminal company's depot or terminal, and such

order cannot be construed to include a requirement that the railroad companies shall erect a joint terminal or union depot for their joint use, a depot of wholly different class under the statute as to which there has been no hearing or consideration, therefore, the order cannot be enforced as it is framed either in whole or in any part thereof.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

Original application by the State, on the relation of R. Hudson Burr and others, as Railroad Commissioners, for writ of mandamus to the Jacksonville Terminal Company and others. Alternative writ quashed.

D. C. McMullen, of Tallahassee, for relators. W. E. Kay, John E. Hartridge, and John L. Doggett, all of Jacksonville, and W. A. Blount, of Pensacola, Fleming & Fleming, of Jacksonville, J. E. Hall, of Macon, Ga., and John C. Cooper & Son, of Jacksonville, for respondents.

ELLIS, J. An alternative writ of mandamus was issued in this case requiring the respondents to obey certain orders made by the railroad commissioners requiring the construction of a new union depot at the city of Jacksonville.

It appears from the alternative writ that the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Southern Railway Company are Virginia corporations, the Georgia Southern & Florida Railway Company is a Georgia corporation, and the Jacksonville Terminal Company and the Florida East Coast Railway Company are corporations organized under the laws of Florida; that the Jacksonville Terminal Company does business in the city of Jacksonville as "a common carrier and terminal company," and "owns and operates in the city of Jacksonville, Fla., a union passenger depot or terminal station, which is now open to and used by all of the railroad companies aforesaid entering the city of Jacksonville, Fla.," and that its stock is owned by the above-named railroad corporations. That all the railroad corporations named except the Southern Railway Company own and operate lines of railroad lying within the state of Florida and extending into the city of Jacksonville, that the Southern Railway Company transacts business in the state of Florida and enters the city of Jacksonville upon and over the tracks of the Atlantic Coast Line Railroad Company under a "lease or agreement of some character" between the two corporations.

In March, 1913, the Railroad Commissioners issued a notice to the above-named corporations that on April 17, 1913, a meeting would be held in Jacksonville by the Railroad Commissioners "for the purpose of a hearing in the matter of requiring additional and better facilities in and about the said Union Passenger Depot, or a new and larger and better union depot, or better and

larger depot facilities, and in case it should be found necessary to change the location of the said Union Depot, to determine what would be a fit and proper location for a new union depot and to consider and determine any and all other questions which might arise in the premises."

That pursuant to the notice a meeting was held at which the respondents were represented, and at which there also appeared committees representing the city council and various trade organizations. Every one was heard who desired to be heard, the testimony of many witnesses was taken, after which on the 21st day of June, 1913, the Railroad Commissioners made and entered the following order:

"Order No. 400. File No. 3460.

"In the Matter of the Application of the Public Service Committee of the City of Jacksonville for an Order Requiring the Erection of a New Terminal Station in the City of Jacksonville.

"In pursuance of due and lawful notice previously given to the Atlantic Coast Line Railroad Company, the Florida East Coast Railway Company, the Seaboard Air Line Railway, the Georgia Southern & Florida Railway Company, the Southern Railway Company and the Jacksonville Terminal Company, the Railroad Commissioners of the state of Florida met on the 17th day of April, 1913, at 10 o'clock in the morning, at the Board of Trade rooms in the city of Jacksonville to consider a certain resolution of the public service committee of the city of Jacksonville requesting the said Commissioners to visit Jacksonville and hold a meeting for the purpose of investigating the alleged necessity for a new terminal station in the said city and to hear all who might desire to be heard in regard to the same and then and there to determine whether or not they ought to make an order requiring the carriers hereinbefore named to provide additional and better facilities in and about the Union Passenger Depot in the city of Jacksonville or to provide a new and larger and better Union Depot, and at said meeting appeared the following: Mr. John E. Hartridge for the Jacksonville Terminal Company, Mr. Morton Riddle, general superintendent of Atlantic Coast Line Railroad Company, Mr. J. C. Blanton, manager Jacksonville Terminal Company, also the public service committee of the city of Jacksonville, the Jacksonville Real Estate Exchange and the Jacksonville Board of Trade by various representatives, all of whom were fully heard and thereupon the said matter was taken under advisement, leave being granted to the parties in interest to file briefs:

"And now on this day the said matter having been duly considered and the said parties having filed briefs, which have been considered, the said Railroad Commissioners do find that the present Union Passenger Depot in the city of Jacksonville is inadequate to the needs of the city of Jacksonville and insufficient for the proper accommodation of the traveling public, and that a new, better and larger union passenger station ought to be erected in said city.

"And they do further find that the carriers hereinbefore mentioned or one or more of them are the owners of all or the greater part of a certain tract of land situated in the city of Jacksonville, which is bounded as follows:

"On the east by Myrtle avenue, on the west by a line running parallel with Myrtle avenue and eighteen hundred (1,800) feet west thereof; on the south by the north line of Bay street extended west from Myrtle avenue to the afore-

said west line of the said tract and on the north by a line running parallel with and two hundred (200) feet north of the north line of Adams street extended west from Myrtle avenue to the aforesaid west line of the said tract.

"And the Commissioners do further find that the most feasible location for a union passenger depot in the city of Jacksonville is on the tract of land above described, and they do, therefore, order and adjudge that the carriers hereinbefore mentioned shall erect on the said tract of land a union passenger depot so located as to front on Myrtle avenue and be adjacent thereto; said depot to be a double level station building of such capacity and with such conveniences as may hereafter be fixed by the said Commissioners, and to be provided and equipped with such car sheds, tracks, walks and approaches as the said Commissioners may hereafter require.

"And it is further ordered that the said Commissioners shall be in session at their office in the city of Tallahassee on the 15th day of July, 1913, at 10 o'clock in the morning, for the purpose of considering upon what plans the said depot, sheds, and tracks ought to be constructed and what dimensions ought to be required and what conveniences ought to be required and to consider any and all other matters and questions not herein decided which may arise for consideration in the premises; and at such meeting all of the carriers above mentioned and all parties in interest will have an opportunity to be fully heard.

"Witness the hand of the chairman of the said Railroad Commissioners at their office in the city of Tallahassee, this 21st day of June, 1913."

On the 15th day of July, 1913, the Railroad Commissioners held a meeting in Jacksonville pursuant to the terms of Order No. 400 above quoted for the purpose of considering upon what plans the new depot, sheds, and tracks ought to be constructed and what dimensions and conveniences ought to be required. At this meeting the corporations interested moved a postponement of the further consideration of the matter until October 1, 1913, alleging in support of their motion that they had employed competent engineers to prepare ground plans for a station, and plans for the necessary tracks, and they were proceeding in good faith to carry out the said Order No. 400, but that it would be impossible to perfect the plans and submit them before October 1, 1913, whereupon the further consideration of the matter was postponed to that date.

On the 25th day of September, 1913, the Jacksonville Terminal Company requested in writing a further postponement of the hearing to November 15, 1913. This written request of the terminal company set forth that the company recognized "the necessity for larger and better facilities," and that it had employed engineers to submit plans; that the magnitude of the work required a postponement of the matter to October 1st, at which time the company expected to be able to submit the plans, but finds that on account of the engineering difficulties, the large expenditure involved and the great work necessary to be done, the company would not be ready to submit the plans on that date. Afterwards on application of all the parties interested

the matter was again postponed to November 17, 1913.

On the last-named date the Railroad Commissioners held a meeting at Jacksonville at which the above-named corporations appeared by their representatives and submitted "drawings, plans, and blueprints of the said proposed Union Station, and also a yard and track plan indicating a plan of improvement for the existing Union Station." The Jacksonville Terminal Company, at the request of the Railroad Commissioners, filed as information only an amended floor plan of the proposed station. After considering the plans, blueprints, drawings, and all evidence submitted, the Railroad Commissioners on the 15th day of January, 1914, made and entered their "other certain order No. 428," which is as follows:

"Order No. 428. File No. 3480.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Application of the Public Service Committee of the City of Jacksonville for an Order Requiring the Erection of a New Terminal Station in the City of Jacksonville.

"In pursuance of Order No. 405, entered by the Railroad Commissioners of the state of Florida on the 26th day of July, 1913, this matter came on for further consideration on the 1st day of October, 1913, and upon motion of Mr. Morton Riddle, chairman of the board of control of the Jacksonville Terminal Company, and representative of the railroad lines interested, further consideration of the said matter was postponed until the 15th day of November, 1913, and the said matter coming on for further consideration on said 15th day of November, 1913, the further hearing thereof was postponed to the 17th day of November, 1913, at 2 o'clock in the afternoon at the Board of Trade rooms in the city of Jacksonville.

"And on the said 17th day of November, 1913, this matter coming on for further consideration, then and there appeared the following in support of the petition:

"A committee of the city council of the city of Jacksonville, composed of Frank L. Dancy, president, and Messrs. L. G. Hitchcock, S. L. Chapman and John W. Du Bose, composing the public service committee of the city council;

"A committee of the Jacksonville Real Estate Exchange, composed of Arthur T. Williams, chairman, Chas. A. Brown, Jr., and O. H. Hodgson;

"A committee of the Jacksonville Board of Trade, composed of Arthur T. Williams, chairman, J. J. Logan, and George M. Powell;

"William Burbridge, a member of the board of county commissioners of Duval county, and other members of said board;

"Hon. Van C. Swearingen, mayor of the city of Jacksonville, in behalf of the people of Jacksonville;

"Also numerous other citizens; while

"Mr. Morton Riddle, chairman of the board of control of the Jacksonville Terminal Company, appeared as representative of the Jacksonville Terminal Company and of the railroad lines interested in the proposed station, and also Mr. J. C. Blanton, manager of the Jacksonville Terminal Company.

"And there also appeared Hon. A. H. King, in his own behalf, as a citizen of Jacksonville, who advocated the improvement of the existing Union Station.

"And on the said day Mr. Morton Riddle, chairman of the board of control of the Jack-

sonville Terminal Company, submitted drawings, plans and blueprints of the said proposed station, as follows, to wit:

"A floor plan bearing the legend, 'Jacksonville Terminal Company, Floor Plan of Proposed Station, Jacksonville, Florida, November, 1913,'

"A station and yard plan bearing the legend, 'Jacksonville Terminal Company, Office of Chief Engineer, Proposed Station and Yard Improvement, General Lay-out Scheme, B-3, Jacksonville, Florida, Date: September, 1913,'

"And a yard and track plan indicating a plan of improvement for the existing Union Station, bearing the legend, 'Jacksonville Terminal Company, Proposed Station and Yard Improvement, Jacksonville, Florida, November, 1913,'

"And thereupon, the said Railroad Commissioners having heard all who desired to be heard, the said matter was taken under advisement.

"And thereafter, on, to wit, the 15th day of December, 1913, the said Jacksonville Terminal Company, having at the request of the said Railroad Commissioners, filed, as information only, an amended floor plan of the said station, showing an enlargement of the waiting rooms on lines indicated by the said Railroad Commissioners, which amended floor plan bears the legend, 'Jacksonville Terminal Company, Floor Plan of Proposed Station, Jacksonville, Fla., Dec. 15, 1913,' and the said Commissioners having considered all of the said plans, blueprints and drawings, and also the plans, blueprints and drawings filed with the Railroad Commissioners on, to wit, the 17th day of April, 1913, suggesting improvements in the existing Union Station, and having considered all the evidence submitted;

"Now on this day, this matter coming on for further and final consideration, and the said Railroad Commissioners being advised in the premises, do order and adjudge that the Jacksonville Terminal Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, the Florida East Coast Railway Company, the Georgia Southern & Florida Railway Company and the Southern Railway Company, do proceed to erect on the tract of land described in Order No. 400, entered by the said Railroad Commissioners on the 21st day of June, 1913, a union passenger depot so located as to front on Myrtle avenue and be adjacent thereto, and otherwise in accordance with the said Order No. 400. And it is hereby ordered and adjudged that the following requirements shall be fully complied with, to wit:

"The said depot shall be provided and equipped with adequate car sheds, tracks, walks and approaches, and the tracks shall be so arranged that no passenger shall be required to cross any track in approaching or departing from a train;

"The said station building shall contain a waiting room for white passengers with not less than 11,860 square feet of floor space, with a ticket lobby with not less than 4,160 square feet of additional floor space, and a waiting room for colored passengers with not less than 5,624 square feet of floor space.

"There shall also be provided adjacent to each waiting room, but occupying additional floor space, a smoking room for men and a rest room for women, and one toilet for each sex, each toilet to be so arranged that the entrance shall be approached through a smoking room or rest room, the smoking room for white passengers to contain at least 1,120 square feet of floor space, the rest room for white passengers to contain at least 979 square feet of floor space, the men's toilet room for white passengers to contain at least 1,078 square feet of floor space, the women's toilet room for white passengers to contain at least 743 square feet of floor space, the smoking room for colored passengers to contain at least 396 square feet of floor space, the rest room for colored passengers to contain at least 396 square feet of floor space, and each of

the toilets for colored passengers to contain at least 504 square feet of floor space. There shall be provided between the said waiting rooms and the train tracks a concourse to contain at least 19,800 square feet of floor space, with ample entrances from the said concourse to the ticket lobby and each of the waiting rooms, and there shall be provided for the use of passengers passing between the concourse and train tracks at least half as many train gates as there may be tracks.

"And it is further ordered that the floor plan heretofore filed by Mr. Morton Riddle, chairman of the board of control of the Jacksonville Terminal Company, and bearing the legend, 'Jacksonville Terminal Company, Floor Plan of Proposed Station, Jacksonville, Fla., Dec. 15, 1913,' be and the same is hereby approved and accepted as a fit floor plan for the construction of the said depot. And it is further ordered that the yard plan filed with the said Railroad Commissioners on the 17th day of November, 1913, and bearing the legend, 'Jacksonville Terminal Company, Office of Chief Engineer, Proposed Station and Yard Improvement, General Lay-out Scheme, B-3, Jacksonville, Fla., Date September, 1913,' be and the same is hereby approved, accepted and designated as a fit and proper plan for the construction of yards and tracks in connection with the said Union Passenger Depot.

"And it is further ordered that the architect's plans and such other and further plans as may be required in the premises pertaining to the construction of the said Union Station, tracks, yards, etc., as specified in the several orders of the said Commissioners pertaining thereto, shall be submitted for examination and approval to the said Railroad Commissioners on or before the 15th day of May, 1914, and that the work of constructing the said station and the said accessories shall be actually begun on or before the 15th day of July, 1915, and shall be thereafter prosecuted with all reasonable dispatch and that this order shall be fully complied with on or before the 15th day of July, 1915.

"Done and ordered by the Railroad Commissioners of the state of Florida, in session at their office in the city of Tallahassee, the capital, this 15th day of January, A. D. 1914."

Thereafter the corporations filed with the Railroad Commissioners a petition for a "re-hearing and rescission" of Orders Nos. 400 and 428. In acting upon this petition the Railroad Commissioners granted a rehearing to consider "other and different yard plans in order to determine whether a better, more practicable or more economical yard plan could be adopted in connection with the construction of the Union Passenger Station required by said Orders No. 400 and No. 428 and upon the location therein designated, and would thereafter adopt a better and more practicable and more economical plan if such could be found." A meeting was then called for the above purpose to be held at Tallahassee on November 10, 1914. At this meeting the corporations through their representatives were heard, witnesses were examined, and plans submitted, all of which resulted in the following order being made by the Railroad Commissioners and numbered 462:

"Order No. 462. File No. 3460.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Application of the Public Service Committee of the City of Jacksonville for an Order Requiring the Erection of a New Terminal Station in Said City.

"In pursuance of their Order No. 459, made and entered the 9th day of October, 1914, the Railroad Commissioners of the state of Florida, being in session at their office in the city of Tallahassee, on the 10th day of November, 1914, then and there proceeded to the consideration of the matters designated and specified in the said Order No. 459, and then and there appeared the following: W. E. Kay, representing Jacksonville Terminal Company; J. B. Munson, president, Jacksonville Terminal Company; F. P. Fleming, representing Seaboard Air Line Railway; A. V. S. Smith, representing Florida East Coast Railway Company; George M. Powell, chairman board of bond trustees of the city of Jacksonville; F. L. Dancy, representing city council of the city of Jacksonville; R. D. Drysdale, representing the county commissioners of Duval county; W. L. Morse, chief engineer of the Jacksonville Terminal Company; J. B. Willoughby, assistant chief engineer, Atlantic Coast Line Railroad Company; W. D. Faucette, chief engineer Seaboard Air Line Railway; E. Ben Carter, superintendent maintenance of way, Florida East Coast Railway Company, and Frank P. Damon and J. W. Bushnell, engineers of the Railroad Commissioners; but no further or other yard plans were presented by the said Jacksonville Terminal Company, or any other interested carrier.

"And the said hearing having been continued from day to day, was concluded on the 12th day of November, 1914, and thereupon the said Railroad Commissioners took the said matter under advisement.

"And now on this day, the said matter coming on for further consideration, and the said Railroad Commissioners having considered all the evidence and arguments submitted at the hearing, and the plans prepared by their engineers, together with the evidence theretofore submitted, and being fully advised in the premises, do find that their Orders No. 400 and No. 428 ought to be enforced without further modification except as hereinafter set out; but the said Commissioners being of the opinion that a yard plan could be adopted to be used in connection with the Union Passenger Depot described and designated by their Orders No. 400 and No. 428, which would be less expensive than the yard plan heretofore presented by the said carriers, which is described and approved in said Order No. 428, and identified by the legend, 'Jacksonville Terminal Company. Office of Chief Engineer. Proposed Station and Yard Improvement. General Lay-out Scheme. B-3. Jacksonville, Fla. Date: September, 1913,' and that the interested carriers ought to have the option to adopt any better or more practicable or less expensive plan which could be devised to meet the requirements of the said Union Passenger Depot, it is therefore ordered and adjudged that the said Orders No. 400 and No. 428 shall be performed and enforced, except the following portion of the said Order No. 428, which portion is hereby rescinded, to wit, that portion of the said order beginning with the words, 'And it is further ordered that the yard plan filed with the said Railroad Commissioners on the 17th day of November, 1913,' and ending with the words, 'shall be fully complied with on or before the 15th day of July, 1915.'

"And it is further ordered that the yards and tracks necessary to be used in connection with the said Union Passenger Depot shall be constructed, except as otherwise provided herein, in accordance with the requirements of the said Orders No. 400 and No. 428 in such manner as to provide for the convenient and effective use of the said Union Passenger Depot by the traveling public, and to that end the said yards and tracks shall be so arranged and operated as to require all passenger trains when receiving or discharging passengers at said station to stand with rear ends towards the concourse, so that

passengers entraining and detraining will approach and depart by way of the rear ends of such trains, and said Union Passenger Depot shall be so arranged and operated as to provide for the proper and efficient handling of the passenger traffic of the carriers using the said Passenger Depot upon such plans as will harmonize with the use of the floor plan adopted in and by the said Order No. 428 and bearing the legend, 'Jacksonville Terminal Company. Floor Plan of Proposed Station. Jacksonville, Fla., Dec. 15, 1913,' and that in all other respects the said yards and tracks may be constructed upon such plans as the interested carriers shall deem proper and advisable.

"And it is further ordered that the architect's completed building plans, and such other and further plans as may be required in the premises pertaining to the construction of the said Union Depot building, as specified in the said orders of the said Commissioners, shall be submitted to the said Commissioners for examination and approval on or before the 1st day of May, 1915, and thereafter the time for the commencement and completion of the work of constructing the said station will be fixed by the said Commissioners.

"And it is further ordered that in case it should become necessary for the said carriers or either of them, in order to comply with this order and the said Orders No. 400 and No. 428, to acquire a right of way upon any public street or highway, the said carriers may make application to the said Commissioners for relief, and thereupon the said Commissioners will determine to what extent they will make the enforcement of the said orders conditioned upon the granting of such right of way, and that any and all other questions arising in connection with the performance and enforcement of said orders, or concerning the perfection or modification of plans, may be at any time submitted by the interested carriers to the said Commissioners for action on their part.

"Done and ordered by the Railroad Commissioners of the state of Florida, in session at their office in the city of Tallahassee, the capital, this 12th day of December, A. D. 1914."

On May 7, 1915, the Railroad Commissioners gave notice that on the 17th day of May, 1915, they would be in session at Tallahassee, Fla., to consider and determine the date for the commencement and completion of the work of constructing a new terminal station in the city of Jacksonville, and on the last-named date the Railroad Commissioners went into session for that purpose, at which the respondents were represented and gave notice that it was not their intention to comply with the orders theretofore made with respect to the erection of a new terminal station or union depot in the city of Jacksonville. After every one was given an opportunity to be heard who so desired, the Railroad Commissioners took the matter under advisement, and on the 18th day of May, 1915, made the following order, No. 485:

"Order No. 485. File No. 3460.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Application of the Public Service Committee of the City of Jacksonville for an Order Requiring the Erection of a New Terminal Station in the City of Jacksonville.

"In pursuance of Order No. 462 in the above matter, in and by which it was provided, among other things, that 'thereafter the time for the commencement and completion of the work of

constructing the said station will be fixed by the said Commissioners,' the said Commissioners did on the 7th day of May, 1915, issue and serve their notice No. 77, and pursuant to said notice this matter came on for hearing before the Railroad Commissioners of the state of Florida at their office in the city of Tallahassee, on the 17th day of May, 1915, at 3 o'clock in the afternoon, and then and there appeared Jacksonville Terminal Company by W. E. Kay and John E. Hartridge, counsel, J. B. Munson, president, and W. L. Morse, chief engineer; Seaboard Air Line Railway, by F. P. Fleming, division counsel; Atlantic Coast Line Railroad Company by W. E. Kay, assistant general counsel; Southern Railway Company by J. B. Munson, Georgia Southern & Florida Railway Company by J. B. Munson, and George M. Powell, representing the Jacksonville Chamber of Commerce.

"Whereupon Colonel W. E. Kay, on behalf of all of the parties notified of the hearing and present thereat, then and there stated in open session that they had nothing to say as to the time of commencement or completion of said work, as it was not their purpose or intention to comply with the orders heretofore made in this matter with respect to the erection of a new terminal station in the city of Jacksonville, Fla. Thereupon the Railroad Commissioners took the matter under advisement.

"And now on this day, the said matter coming on for further and final consideration, and the Railroad Commissioners being fully advised in the premises,

"It is considered, ordered and adjudged that the work of constructing the said station and accessories, as provided for in former orders in this matter, shall be actually begun on or before the 15th day of November, 1915, and shall be thereafter prosecuted with all reasonable dispatch and that this order and all prior orders made in the premises shall be fully complied with on or before the 15th day of November, 1916.

"Done and ordered by the Railroad Commissioners of the state of Florida in session at their office in the city of Tallahassee, this 18th day of May, A. D. 1915."

It further appears from the alternative writ that all the above-named corporations have disregarded and refused to obey Order No. 462, in that they have not submitted to the Railroad Commissioners for examination and approval the "architect's completed building plans and said other and further plans as may be required in the premises pertaining to the construction of the said Union Depot building as specified in the said several orders," etc. That they have also disregarded and failed to obey Order No. 485. "In that they did not on or before the 15th day of November, 1915, begin the work of constructing the said station and accessories as provided for in former orders in the said matter," etc., and have each and all declared their purpose and intention to disregard and disobey the said Orders No. 400, No. 428, No. 462, and No. 485.

The command of the alternative writ was as follows:

"Now therefore, we, being willing that full and speedy justice be done in the premises, do command you, the Jacksonville Terminal Company, the Atlantic Coast Line Railroad Company, the Florida East Coast Railway Company, the Seaboard Air Line Railway, the Georgia Southern & Florida Railway Company and the Southern Railway Company, and each of you, forthwith

"To submit to the Railroad Commissioners of the state of Florida the architect's completed building plans, and such other and further plans as may be required in the premises pertaining to the construction of the said Union Depot Building as specified in said Orders No. 400, No. 428, No. 462 and No. 485;

"To prosecute to completion with reasonable diligence the work of constructing the said Union Depot, and accessories, as specified and set forth in said orders;

"To provide and equip the said Union Depot with adequate car sheds, tracks, walks and approaches; and so arrange the tracks that no passenger shall be required to cross any track in approaching or departing from a train;

"The Union Depot building shall contain a waiting room for white passengers with not less than 11,860 square feet of floor space with a ticket lobby with not less than 4,160 square feet of additional floor space, and a waiting room for colored passengers with not less than 5,624 square feet of floor space; and also

"To provide adjacent to each waiting room, but occupying additional floor space, a smoking room for men and a rest room for women, and one toilet for each sex, each toilet to be so arranged that the entrance shall be approached through a smoking room or rest room, the smoking room for white passengers to contain at least 1,120 square feet of floor space, the rest room for white passengers to contain at least 979 square feet of floor space, the men's toilet room for white passengers to contain at least 1,078 square feet of floor space, the women's toilet room for white passengers to contain at least 748 square feet of floor space, the smoking room for colored passengers to contain at least 306 square feet of floor space, the rest room for colored passengers to contain at least 396 square feet of floor space, and each of the toilets for colored passengers to contain at least 504 square feet of floor space. There shall be provided between the said waiting rooms and the train tracks a concourse to contain at least 19,800 square feet of floor space, with ample entrances from the said concourse to the ticket lobby and each of the waiting rooms, and there shall be provided for the use of passengers passing between the concourse and the train tracks at least half as many train gates as there may be tracks;

"To construct the yards and tracks necessary to be used in connection with the said Union Passenger Depot in accordance with the requirements of Orders No. 400 and No. 428, as modified by Order No. 462, in such manner as to provide for the convenient and effective use of the said Union Passenger Depot by the traveling public, and so that the said yards and tracks shall require, by their construction, all passenger trains when receiving or discharging passengers at said station to stand with rear ends towards the concourse, so that passengers entraining or detraining will approach and depart by way of the rear ends of such trains;

"To locate the said station upon that certain tract of land situated in the city of Jacksonville, Florida, and bounded as follows: On the east by Myrtle avenue, on the west by a line running parallel with Myrtle avenue and eighteen hundred (1,800) feet west thereof, on the south by the north line of Bay street extended west from Myrtle avenue to the aforesaid west line of the said tract, and on the north by a line running parallel with and two hundred (200) feet north of the north line of Adams street extended west from Myrtle avenue to the aforesaid west line of the said tract; said Union Depot to be so located as to front on Myrtle avenue and be adjacent thereto;

"And in all respects to comply with, observe and obey the said Orders No. 400, No. 428, No. 462 and No. 485, as above set forth.

"Or that you appear before the Justices of this our Supreme Court sitting within and for

the state of Florida, at the courtroom in the city of Tallahassee, on the 23d day of December, 1915, at 10 o'clock in the morning of that day, and show cause why you refuse so to do.

"And have you then and there this writ.

"Witness the honorable R. F. Taylor, Chief Justice of the Supreme Court of the state of Florida, and the seal of the said court, at Tallahassee, the capital, this 23d day of November, 1915.

"[Seal.]

G. T. Whitfield,

"Clerk of the Supreme Court of the
"State of Florida."

To the alternative writ each one of the respondents interposed a motion to quash and set aside the writ.

These motions as argued orally and discussed in the joint brief for the respondents present to this court for its consideration and determination the following questions:

First. A misjoinder of parties respondent. It is contended in behalf of the respondents that both the Southern Railway Company and the Jacksonville Terminal Company have been improperly joined as parties respondent, which if true as to either one the motion to quash should prevail.

Second. The Railroad Commissioners have no power to locate or relocate a union depot. The respondents contending that the statutes of Florida neither expressly nor impliedly confer upon the Railroad Commissioners the power to select sites upon which to erect union depots and require the railroad companies to erect them on the sites selected or after a union depot has been once erected and occupied to abandon the same and construct a new one upon a different site selected by the Railroad Commissioners.

Third. That the power attempted to be exercised by the Railroad Commissioners in making the orders named contravenes the declaration of rights in the state Constitution and the Fourteenth Amendment to the Constitution of the United States. Therefore the statutes under which the power is sought to be exercised should not receive such construction, as would seemingly vest in the Railroad Commissioners such power if any other construction consistent with the state and federal Constitutions is possible. That the power delegated by the Legislature to the Railroad Commissioners to require railroads to establish stations, designate the location and require the erection of passenger depots as the safety, convenience, and comfort of passengers may require, and to require two or more railroads entering the same town, city, or point to erect, operate, and maintain a joint passenger terminal or union depot, may be exercised only in cases where the safety, convenience, and comfort of passengers require or make necessary the exercise of the power. The question being not one of "feasibility," but "public necessity."

Fourth. That Order No. 400 shows upon its face that the findings of fact by the Railroad Commissioners did not authorize the exercise of the power granted by the Legislature because the power was attempted to

be exercised by the Railroad Commissioners upon their finding first, that the present Union Depot was inadequate, and, second, that the new site, or one selected by the Railroad Commissioners, was the more feasible one of the two upon which to erect the new depot. That the language of the order excludes the idea that there was any finding by the Railroad Commissioners that the site of the present Union Depot was an inadequate one upon which to erect a new depot, or that the erection of a new depot upon the designated site was necessary to the safety, convenience, and comfort of the passengers.

Fifth. That the mandatory part of the writ is indefinite and uncertain in that it commands the erection of a building the details of the construction of which are to be left to subsequent action of the relators.

Sixth. That the writ fails to show a clear prima facie case in the relators, and

Seventh. That it requires respondents to appropriate a public street of the city of Jacksonville and attempt to compel the violation of a criminal statute.

[1] Construing the language of the alternative writ according to the rules of construction as applied to other proceedings at law, certain facts may be considered as admitted by all parties. State ex rel. Fowler v. Finley, 30 Fla. 302, 11 South. 500; Scott v. State ex rel. Grothe, 43 Fla. 396, 31 South. 244; State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co., 67 Fla. 441, 63 South. 729; Merchants' Broom Co. v. Butler, 70 Fla. —, 70 South. 383. Four of the railroad corporations named in the writ, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, the Georgia Southern & Florida Railway Company, and the Florida East Coast Railway Company each own and operate and for many years past have owned and operated lines of railroad lying within the state of Florida and extending into the city of Jacksonville; the Southern Railway Company does not own and operate any lines of railroad lying within the state, but it does transact business in Florida and enters the city of Jacksonville upon and over the tracks of the Atlantic Coast Line Railroad Company under a lease or agreement of some character between the two corporations; the Jacksonville Terminal Company is not a railroad corporation, but a corporation which owns and operates in the city of Jacksonville a union passenger depot or terminal station, which is open to and used by the other railroad corporations; that the Railroad Commissioners pursuant to notice held a meeting at Jacksonville and heard all who desired to be heard and took the testimony of witnesses upon the following subjects: First, the matter of requiring additional and better facilities in and about the Union Passenger Depot owned and operated by the Jacksonville Terminal Company; second, whether a new, larger, and

better union depot should be required, or better and larger depot facilities; third, the necessity for changing the location of the Union Depot owned and operated by the Jacksonville Terminal Company, and if such change of location was found to be necessary, what location would be fit and proper for a new union depot; that Order No. 400 contains a recital of the findings by the Railroad Commissioners which are made the basis of their action, and those findings are: First, that the present Union Passenger Depot in the city of Jacksonville is inadequate to the needs of the city of Jacksonville and insufficient for the proper accommodation of the traveling public; second, that a new, better, and larger union passenger station ought to be erected in said city; third, that at least one of the respondents is the owner of a part of the tract of land described in the order; fourth, that the tract of land described is the most feasible location for a union passenger depot in the city of Jacksonville.

[2] We think that the language employed in Order No. 400 to describe the tract of land upon which the new depot was ordered to be built, does not convey the idea insisted upon by counsel for the respondents; that Adams street is an existing public highway or street of the city of Jacksonville actually traversing the tract of land described. The language, "Adams street extended west from Myrtle avenue to the aforesaid west line of the said tract," does not assert or affirm Adams street to be an existing highway or street actually extending across the tract of land, because it is not the function of the past participle to give affirmation or assertion. Webster's Dict. It is true that a participle may denote an attribute as counsel insists, but it is also true that as it partakes of the nature of an adjective it may limit, define, specify, or describe a thing. The word "extended" was used to define or describe Adams street as one terminating at Myrtle avenue, but drawn out to the west line of the tract for purposes of description. "The word 'extended' implies something to be extended." Wisconsin Cent. R. Co. v. Comstock, 71 Wis. 88, 36 N. W. 843. Nor do we think that any map is a necessary part of the description. A surveyor could easily locate the northern line of the tract by projecting the north line of Adams street where it ends at Myrtle avenue, westward 1,800 feet, plus the width of Myrtle avenue. To extend a street means its prolongation in the direction to which it already points, and does not authorize its deflection in order to reach a given point. Mayor and City Council of Monroe v. Police Jury of Ouachita Parish, 47 La. Ann. 1061, 17 South. 498. The land described in Order No. 400 as the site for the new depot is not the same tract as that on which the Union Depot of the Jacksonville Terminal Company now stands.

[3] The question of the power of the Railroad Commissioners under the foregoing facts

to require by valid order the respondents to unite in the acquisition of the described property and erect thereon a new union passenger depot involves: First, the question of power in the Railroad Commissioners to compel a terminal company and one or more railroad corporations to jointly erect and maintain a union passenger depot or terminal station; such a union passenger depot or terminal station as was and now is conducted and operated by the Jacksonville Terminal Company and considered by this court in the case of *State ex rel. Attorney General v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225, and made the special subject of subdivision 7 of section 3 of chapter 6527, Laws of Florida 1913 (Comp. Laws 1914, § 2893), and as distinguished from "depots," which are made the special subject of subdivision 5 of that section or the "Joint Terminal or Union Depots," which are made the subject of subdivision 8 of the same section of the act.

Secondly, there is involved the question of power in the Commissioners to select and designate a site for the location of such a union passenger or terminal station.

The question has never been determined by this court. If the power first above defined does not exist in the Railroad Commissioners it follows that the second does not, and the motions to quash should be granted; but if the power first defined is found to exist in the Commissioners, it does not follow that the second is also vested in them, and if that power should be found not to be possessed by them, the writ must fail.

There should be borne in mind what this court has said anent the powers, authorities, and duties of the Railroad Commissioners in construing the statute whence those powers, authorities, and duties are derived, and in the light of those and other decisions of this court we should determine the questions presented.

This court has said in many cases, that the powers, duties, and authority of the Railroad Commissioners are those and only those that are conferred expressly or impliedly by statute of the state. See *State ex rel. Railroad Com'rs v. Southern Telephone & Const. Co.*, 65 Fla. 270, 61 South. 506; *State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 South. 394; *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 South. 875; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 South. 969, 82 L. R. A. (N. S.) 639. In the latter case it was said:

"The Railroad Commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law or such as is by fair implication and intendment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purpose for which the officers were established;" also "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commissioners the further exercise of the power should be arrested."

The above case was cited and the language quoted in *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 57 Fla. 526, 49 South. 39, in which the court said the "reasonable doubt should be resolved against their exercise of such power."

[4, 5] Those portions of the statute vesting the power in the Railroad Commissioners to compel railroad companies to establish stations, erect depots, and to deal with terminal companies are as follows:

Section 2893 General Statutes of Florida 1906, as amended by chapter 6527, Laws of 1913, section 2893, Compiled Laws of Florida:

"And they shall have power:

"5. To require the establishment of stations, including flag stations, at which trains may be required to stop, and the establishment of landings and wharves at which water carriers may be required to stop; to designate the location and require the erection of such freight and passenger depots, houses, platforms and wharves with all necessary conveniences as the safety, convenience and comfort of passengers and the proper handling, care, protection and prompt delivery and transportation of freight may require; to supervise, regulate and control all stations, depots, platforms, houses and wharves and to require a sufficient force of employees to be maintained therein and thereat to conduct in a proper manner the business of the carriers.

"7. To regulate, supervise and control all passenger, terminal or union depot companies, whether owned or operated by any railroad in connection with its main line or by separate company organized for that purpose and to require the admission into such union depot or terminal by the owner, lessee or operator thereof of any railroad company or companies which may desire to enter such terminal or union depot or which may be required to do so by order of the said commissioners and to compel the person or company operating said depot or terminal to furnish to the railroad entering the same fair and equal participation in all the rights, privileges, connections, interchanges of traffic and other benefits of said depot or terminal and to prescribe and enforce just and reasonable rates for the uses of such terminals or depots and the privileges thereof.

"8. To require two or more of the railroads entering the same town, city or point, to erect, operate and maintain a joint passenger or freight or a joint passenger and freight terminal or union depot and to provide for the interchange of traffic between said railroads."

The three above-quoted subdivisions of the statute deal with three distinct and separate types or classes of passenger depots. Subdivision 5 deals with depots which a single railroad may be required to erect at such stations along its line as may be deemed necessary for the safety, convenience, and comfort of the passengers traveling over such railroad. Such a class of depots this court dealt with in the following cases: *College Arms Hotel Co. v. Atlantic Coast Line R. Co.*, 61 Fla. 550, 54 South. 459; *Louisville & N. R. Co. v. Railroad Com'rs*, 63 Fla. 491, 38 South. 543, 44 L. R. A. (N. S.) 189; *State ex rel. Railroad Com'rs v. Florida East Coast Ry. Co.*, 69 Fla. 165, 67 South. 906.

Subdivision 8 deals with "joint passenger terminal or union depots." A terminal station or union depot which the Railroad Com-

missioners may require two or more railroads entering the same town, city, or point to erect, operate, and maintain jointly for their own exclusive use. Such a depot, however, would in no sense be a "union passenger depot" which any other railroad that might later enter the same city, town, or point could use and occupy under the authority of chapter 4700, Laws of 1899, as amended by chapter 6527, Laws of 1913. The class or type of depots dealt with by this subdivision was considered by this court in the case of *State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co. and Seaboard Air Line Ry. Co.*, 67 Fla. 441, 63 South. 729. In that case the order of the Railroad Commissioners, which was directed to the two railroads entering the "town of Bartow," required them to "erect a joint passenger station" in the said town of Bartow. It would not be contended that any other railroad that might subsequently enter the town of Bartow would have the right of admission into that depot and equal participation in all the rights, privileges, connections, and benefits as the Atlantic Coast Line Railway Company and the Seaboard Air Line Railway Company, simply upon the payment to those two companies of reasonable charges for such use and privileges. The Railroad Commissioners would have no power to require it to be done. They might proceed against the three railroads requiring them to operate and maintain the depot as a joint depot, but in such case the interest or share obtained therein by the new railroad would have to be acquired by purchase or condemnation by eminent domain. The case of *Railroad Commission of Alabama v. Alabama Great Southern R. Co.*, 185 Ala. 354, 64 South. 13, L. R. A. 1915D, 98, cited by counsel for relators was one in which the court had before it an order of the Railroad Commission of Alabama, directed against several railroad corporations and the receiver of one of them directing them to "proceed to the procurement of sufficient grounds within the boundaries above set forth (certain specified territory within the city of Bessemer) and proceed with the construction of an adequate passenger station thereon, to be used jointly by the above set out railroad companies," etc. Here was nothing more than the character of depot contemplated by subdivision 8 and considered by this court in the Bartow Case.

Now subdivision 7 has no reference to a depot or terminal station owned and used by a single railroad company, or jointly by two or more railroad companies for its or their own traffic, but it deals with those passenger terminals or union depots which are owned and operated by a terminal company, or by individuals or by a railroad company in connection with its main line, when such terminal company, individual or railroad company undertakes the public business of furnishing terminal facilities generally to railroad com-

mon carriers. Such a terminal or union passenger depot was considered by this court in the case of *State ex rel. Lamar v. Jacksonville Terminal Company*, 41 Fla. 377, 27 South. 225, in which the court, speaking through Mr. Justice Carter construing that part of section 6 of chapter 4700 which became and now is verbatim subdivision 7 of section 3 of chapter 6527, Laws of 1913, used substantially the above language. In that case the clear distinction was drawn between such a station or depot and those contemplated by subdivisions 5 and 8. The court said:

"We do not mean to say that the Commissioners are given no powers over terminal stations owned and used by a railroad company exclusively for its own traffic, for they have certain powers relating thereto derived from other provisions of the statute, and because such terminals are part and parcel of the main line over which certain powers are given, but as to such terminals the Commissioners have no authority to require the admission of another company and fix the rate of compensation therefor."

[6] Now the orders of the Railroad Commissioners which the alternative writ of mandamus in this case requires the respondents to obey, command the respondents, including the Jacksonville Terminal Company, to erect a union passenger depot. This is to be done and the structure when completed is to be used in place of the "present Union Passenger Depot in the city of Jacksonville" which is owned and operated by the Jacksonville Terminal Company, a separate entity from the railroad corporations named, and which undertook to furnish terminal facilities to and permitted the use of such terminal and its privileges by the railroad common carriers entering the city, and because the present Union Passenger Depot is insufficient for the proper accommodation of the traveling public. So a "new, better, and larger union passenger station" was required to be erected in said city. Not a joint union depot or terminal to be owned, used, and occupied by the railroad corporations named, and none others, in which case the Jacksonville Terminal Company would have been not only an unnecessary, but improper, party, but a passenger terminal or union depot to be owned and operated to furnish terminal facilities not alone to the respondents who are railroad common carriers, but to any other railroad corporations whose line may hereafter enter the city. The railroad corporations named in the orders were required to become partners and joint owners of the terminal or union depot with the Jacksonville Terminal Company. The effect of which would force them into the business of operating a terminal company in connection with their own lines and furnishing terminal facilities to other railroad common carriers that may enter the city and desire terminal facilities at this station. A business which a railroad corporation may enter into in the discretion of its board of directors, but not such a business as it can be

compelled to enter into upon the theory that it is a duty which it owes the public.

It is apparent that Order No. 400, and the subsequent ones mentioned in the writ, can reasonably bear no other construction. The first question considered by the Commissioners was the adequacy and sufficiency of the "present Union Passenger Depot," a depot owned by the Jacksonville Terminal Company and of the character described by subdivision 7 and considered by this court in the case mentioned (*State ex rel. Attorney General v. Jacksonville Terminal Company*). This depot having been found to be inadequate and insufficient, the Jacksonville Terminal Company was ordered to erect a "new, better, and larger" one, and in this enterprise the railroad corporations were required to join and become part owners. That it was to be a "joint terminal or union depot," such as contemplated by subdivision 8, there is nothing in the orders to indicate but the mere joining of the railroad corporations, the significance of which if any was completely destroyed by making the terminal company the owner of the present depot, a party.

[7] We find no authority in the Railroad Commissioners whatsoever to compel a terminal company which is engaged in the business of operating a terminal station which it owns and undertaking to furnish to railroads entering the city or town where the terminal is located, terminal facilities, connections and benefits, to erect a new, better, and larger one. There is authority to compel the railroads entering the city to erect, operate, and maintain a joint passenger terminal or union depot, even though the effect of such order would be to require the railroads using the present terminal depot to withdraw from it. Nor is there any power vested in the Railroad Commissioners to compel two or more railroads entering the town or city to erect a union passenger depot of the character of such depots as is contemplated by subdivision 7, and thus force upon them a business which they are not required by their obligations to the public to enter into; nor is there any power in the Commissioners to compel such railroads to be joint owners with a terminal company in such property and co-partners in such business. A terminal company owning or operating terminals or union depots for the purpose of receiving, delivering, and transferring passenger traffic to and from the place or city in which the terminal or union depot may be situated, etc., is defined by the act as a "common carrier," but that definition does not change nor in any degree alter the duties and obligations of such a corporation to the public, nor does it confer upon such company the power of eminent domain. The delegation of such power must plainly appear. 2 Lewis' Sutherland, Stat. Const. (2d Ed.) § 559; 10 R. C. L. p. 196.

From the views expressed herein it follows that the motions to quash should be grant-

ed. The alternative writ is quashed, and the petition dismissed.

TAYLOR, C. J., and SHACKLEFORD, J., concur.

COCKRELL, J., takes no part.

WHITFIELD, J., absent by reason of illness.

On Petition for Rehearing.

WHITFIELD, J. The relators have filed a petition for a rehearing herein on the following grounds:

"First. Because the decision in this case, in so far as it holds that a doubt as to the exercise of a power by the Railroad Commissioners should be resolved against their exercise of such power, is in conflict with subdivision 13 of section 2893 of the General Statutes of Florida, as amended by act of the Legislature of 1913, which directs that 'all presumptions shall be in favor of every action of the Commissioners, and all doubt as to their jurisdiction and powers shall be resolved in their favor.'

"Second. Because the decision disregards and conflicts with the legislative will in prescribing a rule of construction for the guidance of courts in dealing with the powers of the Railroad Commissioners as set forth in chapter 6527 of the Laws of Florida, Acts of 1913.

"Third. Because the decision admits the power of the Railroad Commissioners 'to compel the railroads entering the city to erect, operate and maintain a joint passenger terminal or union depot,' but denies relief because the Jacksonville Terminal Company is joined in the orders, thereby overlooking or disregarding that part of chapter 6527 of the Laws of Florida which provides that when any part of an order made by the Railroad Commissioners is found invalid 'the court shall proceed to enforce such portion thereof as may be valid.'"

A discussion of the statutory provisions referred to in the petition for rehearing was not necessary to a determination of the questions presented on the motions to quash the alternative writ. The quotation in the main opinion taken from previous opinions of this court relative to doubts as to the existence of power in the Railroad Commissioners merely indicated the rule in force and unaffected by statute when the first order herein, No. 400, was made June 21, 1913, the quoted statute having under section 18, article 3, of the Constitution taken effect in August, 1913, 60 days from the final adjournment of the session of the Legislature at which it was enacted.

Subdivision 13 of section 3, chapter 6527, Acts of 1913, amending section 2893, General Statutes of 1906, provides that:

"Every rule, regulation, schedule or order heretofore or hereafter made by the Commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just and such as ought to have been made in the premises and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumptions shall be in favor of every action of the Commissioners and all doubts as to their ju-

risdiction and powers shall be resolved in their favor, it being intended that the laws relative to the Railroad Commissioners shall be deemed remedial laws to be construed liberally to further the legislative intent to regulate and control public carriers in the public interest. If in any proceeding to enforce any rule, regulation, schedule or order any part thereof shall be found invalid, the court shall proceed to enforce such portion thereof as may be valid if the same can be done." Section 2893, Compiled Laws of 1914.

[8] As the Railroad Commissioners, who are statutory officers, can have and exercise no "jurisdiction" or "powers" except such as may be lawfully conferred upon them by the statutes of the state, an order made by the Railroad Commissioners cannot "be deemed and held to be within their jurisdiction and their powers," unless there is some basis in the statute for the exercise of the jurisdiction and power involved in making the order. The statutory provisions which it is claimed give to the Commissioners authority for making an order, may be regarded as being in law a part of the order; and if the statute does not in reality confer the authority asserted by the order, the absence of authority and the consequent invalidity of the order in effect "plainly appears on the face" of the order within the meaning of the quoted statutory provision.

[9, 10] A presumption in favor of action taken under an asserted delegated statutory power can arise only when some substantial basis of authority for the exercise of the power appears in a statute. Doubts cannot be resolved in favor of a delegated statutory power when there is no enactment that can be a basis for such asserted delegated power.

If there is no statutory provision that may by its terms or by any fair intendment be regarded as affording a basis for the authority asserted by the Railroad Commissioners in making the order here sought to be enforced, the above-quoted provisions of the statute as to the existence of jurisdiction and powers and as to indulging presumptions and resolving doubts in favor of action taken by the Railroad Commissioners can have no application in this case; and the effect of the statute in other cases that may arise cannot properly be anticipated here.

[11, 12] The statute relied on by the relators as conferring the powers here controverted is chapter 6527, Acts of 1913, amending section 2893 and other sections of the General Statutes of 1906. This is a general statute providing comprehensive regulations of common carriers; and in distinct subdivisions enacts separate and specific regulations particularly affecting definite portions of the broad general subject of the statute. Each such distinct subdivision of the statute having had the discriminating attention of the lawmakers, must be regarded as expressing the precise legislative intent as to the particular matter therein treated. Otherwise the manifest purpose to make separate

specific regulations of particular matters contained in the general subject would, in a measure at least, be frustrated. In amending section 2893, General Statutes, by section 3, chapter 6527, the regulations were separated into distinct subdivisions consecutively numbered each relating to a definite portion of the general subject of the statute, thus showing a purpose to deal separately with several classes of depots, as elucidated in the main opinion, viz., stations and depots on lines of railroad, union depots or terminals and joint terminals or union depots, and to express in each subdivision the ultimate legislative intent as to the regulation of the matter covered by such subdivision. Subdivisions 5 and 8 of section 3, chapter 6527, Acts of 1913, provide regulations that are appropriate only to railroads being operated from point to point and to stations and depots on the lines of such railroads. Subdivision 7 in specific terms provides regulations that are appropriate only to terminal or union depot companies or other companies operating local terminal or union depots, for the accommodation of railroads entering such local point.

Subdivision 5 of section 3, chapter 6527, confers upon the Railroad Commissioners power "to require the *establishment of stations*, including flag stations, at which trains may be required to stop, * * * to *designate the location* and require the *erection* of such passenger *depots* * * * as the safety, convenience and comfort of passengers * * * may require; to supervise, regulate and control all *stations, depots*, etc., and to require a sufficient force of employes to be maintained therein." This subdivision clearly relates to *stations* and *depots* upon lines of railroads; and the authority therein given to *designate the location* and to require the *erection of depots*, and to supervise, regulate, and control all *stations, depots*, etc., is obviously given to supplement and make effective the power to require the *establishment of stations* upon lines of railroads. Such provisions have and manifestly were intended to have no relation whatever to passenger terminal or union depots operated at one local point by a terminal company for the use of railroad companies, its patrons. If this were not the legislative intent, the enactment of subdivision 7 would have been unnecessary. Subdivision 5 affords no basis of authority for the order made in this case.

Regulations of union depots or terminals are specifically prescribed in subdivision 7, showing a legislative intent to make separate and specific and particularly appropriate regulations as to union depots and terminals; and these particular provisions must be regarded as expressing the precise and definite legislative intent as to the nature and extent of the regulations designed for such union depots or terminals. These provisions extend only to the regulation, su-

pervision, and control, and to the admission of railroad companies and their rights in the use of union depots or terminals.

Subdivision 8 relates specifically and only to such joint terminal or union depots that two or more railroads entering the same town, city, or point may be required to erect, operate, and maintain, and to provide "for the interchange of traffic between said railroads." Subdivisions 7 and 8 plainly do not give or purport to give to the Railroad Commissioners any semblance of authority to require a terminal company, or two or more railroad companies jointly or conjointly with a terminal company, to change the location of a union depot or terminal that is owned and operated only at a local terminal point by the terminal company for the use of railroad companies, its patrons. No other statute is referred to as conferring the power to make the order involved here.

As there is no basis of authority in the statutes for the order sought to be enforced, such order cannot lawfully "be deemed and held to be within their jurisdiction and their powers," and there is nothing from which a presumption in favor of the order may arise; and as nothing in the nature of the power asserted by the order has been conferred, there is no basis for a doubt to be resolved in favor of such a power. There being no statute giving in plain or in ambiguous or uncertain terms the power to make the order here sought to be enforced, there is nothing in this case upon which the above-quoted provision of the statute as to presumptions and doubts in favor of authority to make the order may operate.

[13] The purpose of the order is to require the respondents, a terminal company and several railroad companies, conjointly to establish a passenger terminal station and to erect thereon a union passenger depot at a point wholly apart and some distance from the one now owned and operated solely as a local union depot or terminal by the terminal company alone, for the convenience of the railroad companies, its patrons. The hearings, proceedings, and orders herein by the Railroad Commissioners do not contemplate, cover, or include the erection of a joint terminal or union depot by the respondent railroad companies under subdivision 8 of section 3 of the statute.

As the Railroad Commissioners have been given no power to require a local terminal company to change the location of its depot or terminal, or power to require the railroad companies that by agreement use the facilities of the terminal company, either jointly or conjointly with the terminal company, to change the location of the terminal company's union depot or terminal, and as no part of the order can be construed to require only the respondent railroad companies to erect a joint terminal or union depot for themselves, the entire order and every part thereof is invalid, and the court

cannot lawfully enforce any part of it; therefore the provision of the statute as to the enforcement of such portions of orders "as may be valid if the same can be done" has no application in this case.

Rehearing denied.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

COCKRELL, J., takes no part.

(139 La.)

No. 20385.

HENRY ROSE MERCANTILE & MFG. CO.,
Limited, v. SMITH.

(Supreme Court of Louisiana. March 6, 1916.
On the Merits, April 3, 1916. Rehearing
Denied April 24, 1916.)

(Syllabus by the Court.)

On Motion to Dismiss.

1. APPEAL AND ERROR \S 781(7) — ACQUIESCENCE—JUDGMENT—DISMISSAL OF APPEAL.

Where a lessee brings suit to annul a lease, upon the ground that, by reason of a partial destruction by fire, the leased building has been rendered unfit for his use, but admits liability for the rent due at the date of the fire and for a proportionate rent for his continued occupancy of the uninjured part of the building for some months thereafter, and the lessor, after judgment in the district court, annulling the lease, and his appeal therefrom, brings suit and recovers judgment for the rent admitted to be due, and the lessee, having abandoned the premises, secures other tenants therefor, there is no such acquiescence in the judgment appealed from as would authorize the dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3122; Dec. Dig. \S 781(7).]

2. APPEAL AND ERROR \S 781(7) — DAMAGES \S 62(4)—ABANDONMENT BY TENANT—DUTY TO MINIMIZE LOSS.

The obligation to pay the rent sued for by the lessor, having been admitted by the lessee, was never an issue in this suit, and was not passed on in the judgment appealed from. The lessee having abandoned the premises, and having thrown them upon the hands of the lessor, it was the duty of the lessor to minimize the prospective loss by finding tenants, if he could, and he did not, by so doing, acquiesce in the judgment annulling the lease, from which he continues to prosecute his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3122; Dec. Dig. \S 781(7); Damages, Cent. Dig. \S 128-131; Dec. Dig. \S 62(4).]

On the Merits.

(Additional Syllabus by Editorial Staff.)

3. LANDLORD AND TENANT \S 101—REVOCA-TION OF LEASE — PARTIAL DESTRUCTION OF PREMISES.

Under Civ. Code, art. 2697, providing that if the thing leased is destroyed in part, the lessee may demand either a diminution of the price or a revocation of the lease, the lessee has an absolute right to revoke the lease, where, in consequence of a fire, the premises have ceased to be fit for the use for which they were leased, and the work of restoration amounts to reconstruction and not to mere repairs, regardless of whether the lessee welcomes the opportunity to revoke and though he consults his convenience

as to the time of vacating; prompt notice of revocation having been given.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 314, 315; Dec. Dig. \S 101.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the Henry Rose Mercantile & Manufacturing Company, Limited, against Milton F. Smith. From judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal. Motion denied, and judgment affirmed.

Blanchard & Smith, of Shreveport, for appellant. Herndon & Herndon, of Shreveport, for appellee.

Statement of the Case.

MONROE, C. J. Plaintiff leased from defendant a certain building in Shreveport, for a term of 3 years, beginning December 1, 1912, and ending November 30, 1915, at \$175 per month for the 12 months ending November 30, 1913, \$190 per month for the 12 months ending November 30, 1914, and \$200 per month for the 12 months ending November 30, 1915, payable at the end of each month. On May 23, 1913, the building was partially destroyed by fire, and, on May 30th following, plaintiff instituted this suit, alleging that, by reason of said partial destruction and the dangerous condition in which the building was left, it was no longer fit to be occupied for the purposes for which it had been leased, and praying that the lease be annulled. After filing an exception of no cause of action, defendant answered, to the effect that the building in question was remodeled especially for plaintiff, and divided into two compartments, separated from each other by brick walls and fire-proof doors, in order that a fire in one compartment might not interrupt the business conducted in the other, that the fire in question destroyed the rear compartment, which measured 70 by 50 feet, was occupied as a candy factory, and was separated in the manner stated from the front compartment, measuring 70 by 100 feet, in which plaintiff conducted a wholesale and retail produce business, to which the candy factory was merely an accessory, and which was left uninjured; that plaintiff had occupied the premises for a number of years; that the fire complained of is the third which has destroyed the candy factory; and that plaintiff has, on each occasion, continued its business in the front compartment until the rear compartment could be rebuilt, the rent having been reduced accordingly. Defendant, therefore, and for other reasons which he sets forth, denies that the building has been rendered unfit for plaintiff's occupancy, alleges that plaintiff is estopped so to assert, and that its doing so is a mere excuse to terminate the lease, that he is willing, and makes tender, to rebuild the compartment used for

the candy factory as it was before, and that plaintiff can continue its business in the front compartment, as it has heretofore done and is now doing, and pay a proportionate rent until the rebuilding is completed. Wherefore, reserving his right to sue for the rent due up to the date of the fire and for that subsequently due for the front compartment, defendant prays that plaintiff's demand be rejected. There were then some amendments to the pleadings, after which the case was tried, and judgment was rendered in favor of the plaintiff, annulling the lease, as from the date of the fire (May 23, 1913), and from that judgment defendant appealed.

Plaintiff now moves to dismiss the appeal, on the grounds: That defendant has acquiesced in the judgment appealed from, in this, to wit: That, at date of the fire, plaintiff owed rent, at \$175 per month, for 23 days, after which it occupied the front compartment of the building to July 1, 1913, and owed proportionate rent therefor. That, in March, 1914, defendant brought suit 18052 for the rent, at \$175 per month, due to May 23, 1913, and for two-thirds of that amount, per month, from May 23, to July 1, 1913, claiming that only one-third of the building had been destroyed, and hence that he was entitled to recover for the occupancy of the front compartment on that basis; that a tender was made of the rent claimed to May 23d, and "a pro rata of the rent to July 1st, as claimed," which tender was accepted, and the suit thereafter prosecuted for certain damages to the building and improvements; that the plea of tender of the rent was sustained, and judgment was rendered also for a portion of the balance of the claim—wherefore, the mover, alleges:

"The defendant and appellant in this suit, having brought suit for the amount of rent due for the building up to July 1, 1913, the day the building was surrendered, he, therefore, acquiesced in the judgment. Besides, that portion of the building not destroyed has been renovated and fixed up and immediately rented out by the defendant herein to various parties who now occupy the building. * * * We, therefore, move the court to dismiss the appeal for the reason that the judgment, in so far as the rent of the building is concerned, has been acquiesced in by receiving the rent tendered and bringing suit and limiting his right to recover up to July 1, 1913, and taking charge of it and renting the building to other parties."

Opinion.

[1, 2] Plaintiff's obligation to pay rent at \$175 per month, up to May 23, 1913, and a proportionate rent from that date to July 1, 1913, for its occupancy of the unburned part of the building, is admitted, and hence is not in dispute in this case. Defendant's suit for, and acceptance of, that rent is therefore not an acquiescence in the judgment herein rendered, which does not concern that rent, but relates to plaintiff's obligation, under the lease here attacked, with respect to the period from July 1, 1913, to November 30, 1915. As to defendant's

taking charge of the premises and leasing to other parties, as the premises were left on his hands, it was his duty to minimize the prospective loss for the benefit of whom it may concern.

The motion to dismiss is therefore overruled.

On the Merits.

PROVOSTY, J. [3] In January, 1913, the defendant renewed for 3 years the plaintiff's lease. Whether on the same terms, the record does not show. It was of a three story brick building fronting 70 feet upon the street and extending 150 to a back alley and divided into a front and a back part by a fire wall situated 100 feet from the front. This front part was used by defendant for carrying on a wholesale fruit and produce business, with a cold-storage compartment; the back part for a candy factory and bottling works, and for the machinery for the cold-storage plant, the candy factory, the bottling works, and the electrical lighting of the building.

On May 23, 1913, this back part was destroyed by fire; with all contents.

On May 26, 3 days after the fire, the city fire marshal notified defendant by letter "that the fire wall is in an unsafe condition and should be torn down at once," and on the same day the defendant took this letter to Mr. Rose, the president of the plaintiff company, for him to read, and added, according to Mr. Rose, and also according to Mr. Petzer, the vice president of the plaintiff company, who was present on the occasion, that he did so in order that the plaintiff might be advised that the responsibility for any injuries that might result from this dangerous condition would lie with the plaintiff company. The defendant states that he merely warned the plaintiff not to "load anything against the wall."

On the next day, the 27th, the plaintiff company notified the defendant that the building "being no longer suitable for the purposes for which it was leased," the lease was at an end.

On the 28th of June the plaintiff began vacating, and ended on July 1, 1913, and then at once brought this suit for a revocation of the lease.

Civ. Code, art. 2697, provides that if the thing leased is—

"destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease."

Defendant contends that this article is not to be read as written; that is to say, that it does not give to the lessee the unqualified right to demand a revocation of the lease if the thing leased is destroyed in part, but that it has been interpreted as meaning that the lessee has this right only if the thing leased ceases to be fit for the purposes for which it was leased, and that the further interpretation has been adopted that a thing does not cease to be fit for the purposes for

which it was leased if, having been partially destroyed by fire, its former condition may be restored without serious inconvenience to the lessee.

And defendant further contends that by continuing to occupy the premises for a time after the fire, and not vacating at once, the plaintiff must be held to have exercised the option to demand only a diminution of the rent, or, at any rate, to have forfeited the right to demand a revocation of the lease.

In *Dussnau v. Generis*, 6 La. Ann. 279, where the sidewalk and part of the backyard of the leased premises, in the rear part of the city of New Orleans, were temporarily covered with water from a crevasse that had occurred a few miles above the city, the court refused to revoke the lease, saying:

"There is no express provision in our legislation for a case of this kind;" but "their general spirit and intentment" of our Code on the subject of letting and hiring, "leads to the conclusion that the lawgiver did not contemplate the dissolution of leases, except in extreme cases, but rather an equitable indemnity to the tenant for a temporary inconvenience sustained unexpectedly and without the fault of the lessor."

In *Denman v. Lopez*, 12 La. Ann. 823, the lessee sought to revoke the lease because of the dangerous condition of a wall, and the court found that the wall was not in a dangerous condition. The court, however, said that:

"The provisions of our laws on letting and hiring do not favor the abrogation of leases, when the loss or inconvenience is not caused by the fault of the lessor, but specifies indemnity as the proper remedy except in extreme cases"

—and added that this was the doctrine of *Dussnau v. Generis*, 6 La. Ann. 279.

In *Foucher v. Chopplin*, 17 La. Ann. 321, the leased premises consisted of a plantation and brickyard, and the military forces took possession of—

"the vacant or pasture grounds in the rear of the portion occupied by the buildings, brickyard, and garden." The effect of this was to "hinder defendant in the use of a private railroad, used for transporting bricks from the brickyard back to the New Orleans & Carrollton Railroad."

The defendant continued to occupy the leased premises, and, so far as appears, without complaint, during the entire time for which rent was being claimed. The court held he was not entitled to a revocation of the lease, but only to a proportional diminution of rent.

In *Penn. v. Kearny*, 21 La. Ann. 23, the leased premises consisting of several lots with buildings, a shed on one of the lots was destroyed by fire, and the defendant notified the plaintiff that as to this lot he desired to revoke the lease. He did not demand the revocation of the lease as an entirety, but, on the contrary, continued in possession of the other lots and buildings to the end of the lease. The court held that, having "continued in possession of the principal portion of the object of lease," he was entitled to nothing more than a proportional reduction of rent.

In *Murrell v. Jackson & Manson*, 33 La. Ann. 1341, the injury to the leased building called only for the reinforcing of one of the walls, and the lessor was willing to have this work done. Under these circumstances, the court found that the lessee was not entitled to revoke the lease, especially in view of the fact that the injury to the wall had resulted from the improper overloading of it by the lessee.

In *Railroad Co. v. Darms*, 39 La. Ann. 766, 2 South. 230, the plaintiff enjoined the defendant from establishing a barroom on premises not leased for that purpose. The case bears no analogy to the one at bar.

In *Meyer v. Henderson*, 49 La. Ann. 1547, 16 South. 729, the court refused to revoke the lease, for the reason that the lessee had, after the fire, subleased the premises in their damaged condition to another, and thereby exercised the option to continue the lease. The observations of the court, *arguendo*, were not made the basis of the decision, and, besides when taken as a whole, are against the contention of defendant in the case at bar that the lessee may not revoke the lease even though the partial destruction has rendered the thing unfit for the uses for which it was leased.

In the case of *Vincent v. Frelich*, 50 La. Ann. 378, 23 South. 373, 69 Am. St. Rep. 436, the leased premises consisted of two buildings connected by arches in the brick partition wall, and one of the buildings had its roof, upper floors, stairway, and water-closets destroyed by fire. The case turned upon whether the work of restoration would consist of repair or reconstruction, and, if the former, whether the inconvenience to the lessee would be so serious as to justify the revocation of the lease. The court concluded that the work would amount to mere repair, and that the inconvenience to the lessee would not be serious.

In *Reynolds v. Egan*, 123 La. 314, 48 South. 940, the lessee had continued in possession to the end of the term of the lease.

The learned counsel for defendant cite also *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776. But this case is the main authority relied upon by plaintiff. In it the Supreme Court of the United States enters upon a most interesting comparison between the common and the civil law on the subject of the revocation of leases for causes arising without fault on the part of the lessor subsequently to the contract going into effect, and reviews elaborately the civil law on that point. It calls attention to the fact that the framers of the Louisiana Code in transplanting article 1722 of the Code Napoleon into the Louisiana Code, as article 2697 of the latter Code, left out the qualifying words "according to circumstances;" so that instead of reading, as does article 1722 of the Code Napoleon, that the lessee may claim a diminution of rent or a revocation

of the lease, according to the circumstances of the case, article 2697 confers this right upon him without qualification.

The omission of this qualifying clause can hardly have been accidental. Nor are we much impressed by the suggestion of our learned predecessors in the case of *Meyer v. Henderson*, 49 La. Ann. 1547, 16 South. 729, *supra*, that its absence may be considered as supplied by article 2699. The latter article would seem to provide for a different contingency. Be that, however, as it may, we are clear that the defendant in the present case can derive comfort from the cases which we have thus reviewed neither as precedents in their facts, nor because of any dicta there to be found. For if it were conceded that only in an extreme case can the lessee revoke the lease for partial destruction of the thing leased, the present case would have to be regarded as being of that character, since the partial destruction here is about as extensive as a destruction could well be without ceasing to be merely "partial," within the legal meaning of that word.

The only difference between the French law and ours on this point, if any, is the one already noticed, namely, that by article 1722 of the Code Napoleon the right of the lessee to revoke the lease in case of partial destruction of the thing leased is qualified, whereas under our article 2697 it would appear to be unqualified, so that our law would appear to be more liberal to the lessee than the French law. Now, according to the prevailing opinion in France, the lessor may put an end to the lease if the injury to the thing leased be so great as to necessitate reconstruction as contradistinguished from mere repairs. See authorities cited by the Chief Justice at page 235 of 109 La., 33 South. 207, in the opinion in the case of *Jackson v. Doll*. In the present case, therefore, in France the lessor could, at this option, put an end to the lease, and the same right would be accorded, evidently, to the lessee, since he could hardly be held to a lease by which the lessor was no longer bound. We mention this French interpretation merely by way of argument, and not by way of adopting it, as the point has not heretofore been considered by this court and need not be considered now.

The learned counsel for defendant suggest that the real motive of plaintiff company in seeking this revocation is the desire to move to a more eligible location which it has found near the railroad; and, in proof of this, the learned counsel say that on two previous occasions when fires occurred in this same candy factory causing more or less damage, the plaintiff suffered the inconvenience without murmur, although it was during the busy season; whereas the present fire occurred in the dull season, at

a time when the plaintiff might, without serious detriment to its business, have abided the delays of reconstruction.

This argument is without force. If the premises have ceased to be fit for the use for which they were leased, and the work of restoration amounts to reconstruction and not to mere repairs, the lessee is entitled to revoke the lease; and it can make no difference that the event which justifies the revocation has come very opportunely and is very welcome.

And, the plaintiff company having promptly notified defendant of its having revoked the lease, we do not think that its having consulted its convenience to some extent in vacating, and delayed a few days or weeks longer than was absolutely necessary for doing so, has changed the legal situation. The continued occupation was by mere sufferance.

Judgment affirmed.

(139 La.)

No. 20439.

DARBY v. NEW ORLEANS, T. & M. R. CO.
(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

RAILROADS \Leftrightarrow 303(1)—DAMAGES TO TRAVELERS—DEFECTIVE CROSSING APPROACHES.

Under section 691 of the Revised Statutes of 1870, as amended by Act No. 157 of 1910, railroads are charged with the duty of constructing and maintaining their crossings (including approaches) over public roads, so as not to hinder, impede, or obstruct the safe and convenient use of the highways, and are responsible in damages to travelers injured by reason of the bad condition of such approaches, resulting from want of proper repairs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. \Leftrightarrow 303(1).]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Frank C. Darby against the New Orleans, Texas & Mexico Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Dufour & Dufour, of New Orleans, and Frank E. Powell, of De Ridder, for appellant. Couvillon & Edwards, of Ville Platte, for appellee.

LAND, J. Plaintiff sued for \$35,000 damages for personal injuries sustained by reason of the overturning of his surrey at a crossing of defendant's track over a public road about a mile from the town of De Quincy in the parish of Calcasieu. In the construction of this crossing, the defendant made an excavation about 5 feet in depth across the public road and graded down the sides of the cut so as not to hinder or impede public travel on the highway. The approaches to the crossing were not kept in repair, but

seem to have been left to the erosive action of the elements. The accident complained of happened on the southern approach on June 14, 1913, at which date, according to the overwhelming weight of the evidence, said approach was in a dangerous condition for vehicular travel, save with extreme caution. The water had washed the ditches into gullies, which had narrowed the approach in some places to 6 or 8 feet, and, about half way down the incline, there were one or more washes about 6 inches deep in the roadway.

The defendant in its answer specially denied that under the law it is made the duty of railroads crossing public roads to build, construct, and maintain in good, perfect, and safe condition approaches of public roads crossing its tracks.

As to this defense the judge below says in his written opinion:

"Section 691 of the Revised Statutes, which makes it the duty of railroads in crossing highways to so construct their works as not to hinder, impede, or obstruct their safe and convenient use, imposes a continuing obligation. The duty is not forever discharged by so constructing their works in the first instance, but they must so maintain them."

Counsel for defendant, in their brief, with commendable frankness, admit the correctness of the foregoing proposition, supported, as they say, by the weight of authority in other states of the Union, citing 33 Cyc. 273.

On the first trial of the case the evidence tended to prove that the plaintiff and his nephew on June 14, 1913, were traveling in an open-top surrey, pulled by one horse; that about dark they reached the southern approach to the crossing, and proceeded cautiously to descend the incline, the horse walking slowly in the middle of the road; that the horse when about 12 or 15 feet from the track stumbled and fell, and as soon as it regained its footing plunged 4 or 5 feet to the left, striking the end of the bridge or apron, and finally turned the surrey over on the edge of the railroad embankment; that plaintiff was violently thrown to the ground, landing on the small of his back, and received such a shock as to render him unconscious; and that his nephew jumped from the vehicle, and received a blow on his head which rendered him unconscious for a few minutes. In the language of the judge, the nephew "found the surrey turned over on the track, and the horse, which had broken out of harness, standing facing the surrey."

The judge, after commenting on the evidence, said:

"It does not clearly appear what caused the horse to stumble in the first instance. However there was a depression about 12 or 15 feet from the track, which was about 6 inches deep, and which went partially or wholly across the approach. This depression had been there for some time, and the edges were worn down by passing vehicles, so as to give it, as I understand, something of a concave form. Assuming that this was the cause of the horse stumbling the court, after carefully considering the point, is of the opinion that such defects in a dirt

road are common, and do not constitute actionable negligence, and that, therefore, plaintiff cannot recover. 20 L. R. A. (N. S.) 618, G, notes."

The court rendered judgment in favor of the defendant, which, however, was set aside on plaintiff's motion for a new trial.

On the second trial, additional evidence was introduced, and for reasons assigned in a well-considered opinion, judgment was rendered in favor of the plaintiff, in the sum of \$8,000, with interest and costs.

Defendant has appealed, and plaintiff has answered praying for an increase of the award to \$15,000.

The first judgment was rendered on the ground that the depression or wash across the approach was not an actionable defect. On the second trial, the judge, in his written reasons for judgment, came to the conclusion that he had erred in not also considering the gullies, which had narrowed the roadway to such an extent as to make the passage of vehicles unsafe, and smaller ruts which made the roadway rough.

On the evidence, which we have read and considered, we concur in the findings of the judge below, that the approach was in a dangerous and unsafe condition, and that the defects in the roadway were the primary and efficient cause of the accident. A witness for the defendant, who had frequently driven his wagon up and down the approach in question, testified that the most dangerous part of the road was about half way down, where there were "some washouts across the road." The plaintiff and his nephew testified that the horse stumbled and fell at or near this point, and the violence of the fall suggests that the animal stepped or stumbled into some hole or depression in the narrow roadway. All the witnesses concur that the roadway in question was in a very bad condition.

It was the statutory duty of the defendant company to construct and maintain its crossing so as not to hinder, impede, or obstruct the safe and convenient use of the highway. R. S. 691; Act No. 157 of 1910. It follows that the defendant was negligent in not performing its statutory duty, and consequently is responsible to plaintiff in damages.

As to the question of damages, we see no good reason for increasing or decreasing the amount of the award. The plaintiff's injury consisted of a bruise over the lower part of the spine, and a sprain on each side of the iliosacrum joint. The immediate effect of the injury was to render the plaintiff incapable of sitting up or standing on his feet. Plaintiff was on crutches when this case was tried; and the doctors seem to have been of opinion that plaintiff would never be able to perform hard manual labor, but in the course of three or four years might be able to ride around and attend to his business of trading in horses and cattle, out of which, plaintiff

testified, he had been making annual profits of about \$3,000 per annum. Considering the large element of loss of business capacity, even for three or four years, we cannot say that the award is excessive.

Judgment affirmed.

(139 La.)

No. 21588.

Succession of HAWKINS.

(Supreme Court of Louisiana. March 6, 1916.

On Application for Rehearing, April 24, 1916.)

(Syllabus by the Court.)

1. ADOPTION \S 21 — RIGHTS OF ADOPTED CHILD—INHERITANCE—"FORCED HEIR."

In the absence of other forced heirs, an adopted child becomes a forced heir, entitled to the legitime of one-third of the estate of the foster parent.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 35, 36, 38-40; Dec. Dig. \S 21.

For other definitions, see Words and Phrases, First and Second Series, Forced Heir.]

2. GIFTS \S 41—GIFTS INTER VIVOS—RIGHT TO REVOKE—WILLS.

As a donation inter vivos is irrevocable, the donor's request, in his last will and testament, that the donee divide with other legatees the property previously donated to her, is only a precatory suggestion having no legal force or effect.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. \S 20; Dec. Dig. \S 41.]

3. JUDGMENT \S 649—EX PARTE JUDGMENT—RES JUDICATA—GUARDIAN AND WARD.

An ex parte judgment, obtained by a tutor for the benefit of his own children and against the interest of another of his minor wards, probating a will, approving the account of the tutor as testamentary executor, or sending the minor children into possession of the estate, has not the force of res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1161; Dec. Dig. \S 649.]

4. EXECUTORS AND ADMINISTRATORS \S 93(1) — GUARDIAN AND WARD \S 62 — MANAGEMENT OF MERCANTILE BUSINESS—DUTY TO ACCOUNT.

A testamentary executor or tutor has no right to carry on indefinitely a mercantile business for the account of his minor ward. Where the tutor conducts a mercantile business with the stock of merchandise inherited by his ward, he must account for the value of the goods or merchandise belonging to the minor, with legal interest from the date on which he took possession of it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 407, 408; Dec. Dig. \S 93(1); Guardian and Ward, Cent. Dig. \S 288-293; Dec. Dig. \S 62.]

5. GUARDIAN AND WARD \S 62—TUTORSHIP—USE OF WARD'S PROPERTY — LIABILITY OF GUARDIAN.

A tutor who has carried on a commercial business in a building belonging to his minor ward must pay his ward rent for the premises when it is adjudged that the business was carried on for the tutor's personal account.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 288-293; Dec. Dig. \S 62.]

6. EXECUTORS AND ADMINISTRATORS \S 511(3) — GUARDIAN AND WARD \S 162—TUTORSHIP—FINAL ACCOUNT—COSTS.

The costs of court incurred in obtaining a final account from a testamentary executor and

tutor must be borne by him personally when due to his illegal method of administration and his unwillingness to render an account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 2260-2264; Dec. Dig. \S 511(3); Guardian and Ward, Cent. Dig. \S 538, 539; Dec. Dig. \S 162.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

In the matter of the Succession of John Armand Hawkins. Rules by Istella Flannery Hawkins, wife of Merlin J. Bellau, against Charles Hawkins, testamentary executor, testamentary tutor, and natural tutor. From the judgment, Charles Hawkins and others appeal. Modified, affirmed, and rehearing denied.

James B. Rosser, Jr., of New Orleans, for appellant Charles Hawkins. E. Howard McCaleb, of New Orleans, for appellants Lotta Hawkins Ramsey and Lillian Hawkins. Titche & Rogers, of New Orleans, for appellee Istella Flannery Hawkins Bellau.

O'NIELL, J. On the 20th of May, 1905, John Armand Hawkins adopted as his child an orphan girl named Imella Stella Flannery, then 9 years of age. Having no children, he gave her the right to bear his name and to become the sole heir to his estate. On the same day he made an authentic act of donation to her of a house and two lots on Cleveland avenue, in New Orleans.

Mr. Hawkins made his last will and testament on the 2d of May, 1910, and died on the 5th of that month, leaving no other forced heir than this adopted daughter, whom he called, in the will, Istella Flannery Hawkins. He bequeathed to her and to the four children of his nephew, Charles Hawkins, namely, Lotta, Lillian, Charles, Jr., and Milton Hawkins, share and share alike, the property in which he had conducted a curio store on Royal street, in New Orleans, and the contents of the store, expressing the wish that the legatees sell out the contents of the store at their leisure. He also expressed the wish that Istella Flannery Hawkins would divide with the above-named four children of his nephew, so as to make them all owners in common of the Cleveland avenue property, which he had previously donated to his adopted daughter and which he wished to be known as the homestead and to be the residence of his five legatees. He expressed the wish that the real estate on Royal street, as well as that on Cleveland avenue, be held by his five legatees at least 20 years. He appointed his nephew, Charles Hawkins, executor of his will, with full seisin of the estate and expressly exempted him from furnishing a bond. The testator also appointed his nephew, Charles Hawkins, testamentary tutor of Istella Flannery Hawkins. The testator concluded by bequeathing all of his property to the above-named four children of

his nephew and to Istella Flannery Hawkins, making them his five universal legatees.

The testament was admitted to probate on the petition of the testator's nephew, Charles Hawkins, who was confirmed and qualified as testamentary executor on the 10th of May, 1910. The inventory of the estate was as follows, viz.:

Contents of store on Royal street..	\$18,599.06
Contents of residence on Cleveland avenue	451.05
Cash in bank.....	2,956.83
Promissory note.....	89.00
Cleveland avenue property.....	4,000.00
Store property on Royal street.....	40,000.00
Total	\$66,095.94

On the 1st of June, 1910, before having qualified as tutor, Charles Hawkins filed an account as testamentary executor, debiting himself with the value of the estate appearing on the inventory, \$66,095.94, and crediting himself with the following items, viz.:

Funeral charges (itemized).....	\$ 616.10
Expense of last illness (itemized)....	110.00
Law charges (itemized).....	7,659.29
Inheritance tax.....	152.29
G. A. Howerton, check and protest fee	302.50
Ordinary debts (itemized).....	113.73

Total liabilities..... \$8,953.91

There appears to be an error of 49 cents in the addition of the liabilities; the sum of which is put down on the account as \$8,953.42, leaving the net value of the estate \$57,142.52, instead of \$57,142.03.

Notice of the filing of the executor's account was published in the English language on the 1st, 5th, and 10th of June, 1910, and in French on the 2d, 6th, and 11th of that month; and, on the testimony of the executor only, stating generally that the items appearing on the account were correct, a judgment was rendered in the district court on the 14th of June, 1910, approving the account and ordering that a distribution be made accordingly.

On the 16th of June, 1910, Charles Hawkins petitioned the court to have an inventory and appraisal made of the property belonging to the minor child, Istella Flannery Hawkins, in order that he might qualify and be confirmed as her tutor. In making this inventory, the interest of Istella Flannery Hawkins was put down as one-fifth of each item of property appearing on the original inventory and was appraised at exactly one-fifth of the value at which each item was originally appraised.

On the petition of Charles Hawkins, as testamentary tutor of Istella Flannery Hawkins and as natural tutor of his own four children (their mother being alive), an ex parte judgment was rendered on the 30th of June, 1910, ordering the five minor children sent into possession of the estate of John Armand Hawkins, and especially of the real estate on Royal street and Cleveland avenue, as the universal legatees and as owners in the proportion of one-fifth to each.

It will be observed that the debts of the

succession, consisting principally of law charges, amounted to \$8,953.91, and that there was only \$2,956.83 cash on hand. To pay the balance of \$5,997.08, the tutor mortgaged the Royal street property, with the permission and approval of the district court, and borrowed \$6,000 on the 5th of July, 1910, on a note bearing interest at 6 per cent.

Instead of selling out the stock of merchandise in the Royal street store, the tutor continued the business, conducting it in the name of "Estate of John Armand Hawkins," and replenishing the stock as it was sold in the ordinary course of business. He was not discharged from the trust of testamentary executor, and did not render an account as tutor of the minor, Istella Flannery Hawkins.

When she was more than 20 years of age, that is, on the 19th of March, 1914, Istella Flannery Hawkins married Merlin J. Bellau. And, a month later, she obtained an order from the district court commanding Charles Hawkins to file an account of his administration and gestion as testamentary executor, or show cause why he should not render the account. Charles Hawkins appeared in his capacity of testamentary tutor and urged, as an exception to the authority or capacity of his ward to demand an accounting from him, that she had married without his consent, during her minority. He also appeared individually and pleaded as an exception that the account rendered on the 1st of June, 1910, was a final account of his administration as executor, and that the judgment approving it, dated the 14th of June, 1910, was binding upon his ward. He again appeared individually and pleaded that the succession of John Armand Hawkins was closed by the judgment rendered on the 23d of June, 1910, sending Istella Flannery Hawkins and the four children of Charles Hawkins into possession of the estate as universal legatees and owners in the proportion of one-fifth to each of them, and that that judgment, as well as the judgment probating the will, was conclusive and binding upon his ward. The district judge overruled the foregoing pleas or exceptions, and peremptorily ordered Charles Hawkins to file an account as testamentary executor; in response to which order he filed a copy of the account which he had rendered on the 1st of June, 1910, showing only the assets and liabilities of the succession on that date. He was then ordered to show cause why he should not be held in contempt for evading the order of the court to render a detailed account of his administration and gestion; in response to which he filed an account of his administration as testamentary tutor from the date of the death of John Armand Hawkins to the date of the marriage of Istella Flannery Hawkins; that is, to the 19th of March, 1914.

Mrs. Istella Hawkins Bellau filed oppositions to the accounts rendered by the exe-

cutor and tutor, contesting each and every item charged to her. Thereafter she filed a petition, praying for citation upon Charles Hawkins, individually, and as executor and as tutor of his minor children, Charles Hawkins, Jr., and Milton Hawkins, who were yet minors, and upon Lillian Hawkins, who had come to the age of majority, and upon Lotta Hawkins Ramsey, who had married L. H. Ramsey, and upon the husband to appear and authorize her. The prayer of the petition was that all of the movable property of the succession be judicially sequestered; that the petitioner be recognized as the only forced heir of John Armand Hawkins, and, as such, entitled to one-third of his estate as her legitimate; that the judgments probating the will, approving the executor's original account and recognizing each legatee to be the owner of one-fifth of the estate, be decreed null and of no effect; that she (Mrs. Bellau) be recognized as, and decreed to be, the sole owner of the Cleveland avenue property, by virtue of the donation made to her by John Armand Hawkins during his lifetime; that the mortgage of \$6,000 on the Royal street property be decreed null and of no effect; and that she (Mrs. Bellau) recover from Charles Hawkins, individually, and as testamentary executor and testamentary tutor, \$3,000 as the value of a house which, she alleged, Charles Hawkins had caused to be demolished and removed from the Cleveland avenue property, and recover rent for the Royal street store at the rate of \$300 a month. The petition was put at issue by answers and by a plea of *res judicata*, based upon the judgments, probating the will, approving the original account of the executor and sending the legatees into possession of the estate. The property of the succession was not judicially sequestered. On the issue tendered by the foregoing pleadings, the case was taken up for trial; and the district judge found the accounts so complicated, and the vouchers and data so meager, that he appointed an expert accountant to audit the books and accounts of the testamentary executor and tutor, and to report to the court. On the auditor's report and the evidence adduced, judgment was rendered in favor of Mrs. Bellau and against her tutor for \$1,881.89, with interest at 5 per cent. per annum from the date of the judgment. The judgment recognized Mrs. Bellau to be the sole owner of the Cleveland avenue property and of one-third interest in the Royal street property, free from any debt or incumbrance. All other demands and oppositions of Mrs. Bellau were rejected and dismissed. The fee of the expert accountant was fixed at \$500, which, with all other costs, Charles Hawkins was condemned to pay. Charles Hawkins, as testamentary executor, as testamentary tutor, and as natural tutor of his two minor children, appealed from the judgment. Mrs. Lotta Hawkins Ramsey and Miss Lillian Hawkins also appealed. Mrs. Bellau

has filed an answer to the appeal of her tutor, praying that the judgment be amended in these respects, viz.: That the amount which he was condemned to pay to her be increased to \$12,780.52; that she be allowed interest on the value of her property from the date her tutor took possession of it; and that she be allowed her share of the rental value of the Royal street property during the time it was occupied by the tutor as a store. She complains that the judgment is founded upon the theory that the tutor had a right to carry on the mercantile business for the account of his wards, whereas he should have been condemned to account for the full value of the property he received as tutor. She also complains that all items charged on the tutor's account against her that were not proven should have been disallowed, and that the testamentary executor should not have been allowed a commission as such, because he did not obtain a discharge, and should not be allowed a commission, as tutor, because he did not faithfully administer the affairs of his ward.

Opinion.

[1] As John Armand Hawkins had no forced heirs, his act of adoption of the present appellee conferred upon her all of the rights of a legitimate child. R. C. C. 214; *Vidal v. Commagere*, 13 La. Ann. 516. As such, she became a forced heir to the extent of one-third of his estate. R. C. C. 1493. Hence the testator could not and did not legally dispose of more than two-thirds of his estate to the children of his nephew, Charles Hawkins, to the prejudice of the testator's adopted child and forced heir. *Succession of Hosser*, 37 La. Ann. 839; *Succession of Vollmer*, 40 La. Ann. 593, 4 South. 254; *Succession of Teller*, 49 La. Ann. 282, 21 South. 265.

[2] As the donation made by John Armand Hawkins of his Cleveland avenue property to his adopted daughter was irrevocable (R. C. C. 1468), his request in his will that she divide or share that property with the other legatees was only a precatory suggestion of no legal force or effect.

[3] From the foregoing observations, the testamentary executor, Charles Hawkins, knew, or must be held to have known, that the Cleveland avenue property belonged to Istella Flannery Hawkins, and that she inherited also an undivided third interest in all of the property of the succession of John Armand Hawkins. Notwithstanding his knowledge of the facts controlling the title of all of this property, the testamentary executor caused the Cleveland avenue property to be put upon the inventory of the estate of John Armand Hawkins, and now seeks to hold his ward bound by the *ex parte* judgment, rendered when she was a minor and was not represented by a tutor, approving his account on which appeared the Cleveland avenue property as a part of the estate of John Armand Hawkins. He invokes also

the judgment probating the will, as *res judicata* and as preventing his ward from demanding that the bequest to the other legatees be reduced to the disposable portion. And he invokes, in support of his plea of *res judicata*, the *ex parte* judgment which he procured in the interest of his own children and against the interest of his other ward, decreeing the interest of the latter child to be only one-fifth and the interest of his own children to be four-fifths of the Cleveland avenue property, which belonged entirely to Istella Flannery Hawkins, and of the remaining property, in which she owned one-third interest. There is no merit whatever in the appellant's plea of *res judicata*. See *Succession of Wiemann*, 106 La. 387, 30 South. 893, and *Miguez v. Delcambre*, 109 La. 1090, 34 South. 99. In the case of *McNeely, Tutrix, v. McNeely, Executor*, 50 La. Ann. 837, 24 South. 338, it was held that a person having knowledge of the existence of a child born in wedlock, though born after a separation of the parents from bed and board, must be held to have knowledge of the rights of the child.

The accounts rendered by the testamentary executor and tutor in this case were made out on his theory that his ward, Istella Flannery Hawkins, was compelled to share her Cleveland avenue property equally with the four children of her testamentary tutor, and that she was not a forced heir, or had lost her rights as a forced heir, to the estate of John Armand Hawkins. In this respect, the testamentary executor and tutor, perhaps, observed the wishes of John Armand Hawkins, as expressed in his last will and testament. These expressions, however, were not binding upon the forced heir; hence she has the right to repudiate her tutor's observance of them.

[4, 5] The accounts of the testamentary executor and tutor were also kept and finally rendered on the erroneous idea that the tutor had a right to continue the mercantile business with the property of his ward and for her account. The carrying on of the business indefinitely by replenishing the stock of merchandise was not justified under a reasonable construction of the clause in the testament, "they are to sell out at their leisure" the contents of the store on Royal street. The continuance of the business indefinitely by a tutor for the account of his minor ward is an illegal method of administration. In *Succession of Wiemann*, 112 La. 293, 36 South. 354, where an administrator, with the consent of all of the heirs, continued to carry on the commercial business of which the decedent had been the proprietor, it was held, as to a minor heir, that the administrator was only entitled to receive credit on his account for such expenditures as should have been made if he had settled the succession according to law.

The tutor's account discloses that his gross sales of merchandise, from the 6th of May,

1910, to the end of March, 1914, amounted to \$41,175.29, and that the expense of carrying on the business during that period including the invoices for merchandise purchased in replenishing the stock, amounted to \$44,261.70, showing a net loss of \$3,086.41 in the business, assuming that the tutor has not increased the stock of merchandise at the expense of his wards. As the tutor did not furnish an inventory of the stock of merchandise on hand at the time he rendered his account, there is no means of determining whether it is worth more or less than the value of the merchandise of which he took possession in May, 1910. And, from the fact that he had sold, in the regular course of business, during the first 3 years and 11 months, $2\frac{1}{4}$ times as much stock as he had received in value from the succession of John Armand Hawkins, it may be assumed that there is now very little, if any, of the original stock of merchandise on hand. An inventory made on the 1st of October, 1914, showed the value of the stock on hand at that time to be only \$12,721.12; that is about two-thirds of the value of the old stock left by the decedent.

The showing of an apparent loss in the business is due to certain errors in the tutor's method of accounting, as is explained in the report of the auditor. There are several instances in which duplicate charges were made, the three largest of which amounted to \$13,500. The errors found by the auditor in the tutor's account show that the business made a profit exceeding \$7,000 during the first four years, although the auditor explained that it was impossible to obtain an accurate statement of the business from the vouchers and data furnished.

The judgment appealed from is apparently based upon the theory that Mrs. Bellau is entitled to one-third of the net profits of the business conducted by her tutor during her minority. Our conclusion is that she is entitled to an accounting for her third interest in all of the movable property of the succession of which her tutor took possession; and we shall recast the account accordingly.

The tutor is not entitled to credit on his final account for the debts shown on his original account as executor, amounting to \$8,953.91, because they were offset with the cash in bank, \$2,950.83, and the proceeds of the loan of \$6,000, for which the minors' property remains mortgaged. It also appears that the promissory note of \$89 appearing on the original inventory was not collectible; hence this item need not be considered. The other movable property on the original inventory was appraised at \$19,050.11; for one-third of which, that is, \$6,350.04, the tutor must account to Mrs. Bellau.

The account shows a list of expenditures made for the minor, Istella Flannery Hawkins, amounting to \$5,605.98, to which must be added \$15.73, being the difference between one-third and one-fifth of certain court costs

and two law fees, amounting to \$118. And from the total sum, \$5,621.71, must be deducted the following items, viz.:

One-fifth of mortgage note and interest	\$1,458.00
Amount reserved for court costs	100.00
10 per cent. commission on gross sales	823.50
Proceeds of sale of material from Cleveland avenue property	120.00
	<hr/> \$2,501.50

Deducting the net amount of expenditures, \$3,120.21, from the \$6,350.04 to be accounted for, leaves \$3,229.83 to the credit of Mrs. Bellau. She is also entitled to interest at 5 per cent. per annum on \$6,199.68, the value of her third of the stock of merchandise appropriated by her tutor to the business conducted by him, from the 6th of May, 1910; and she is entitled to one-third of the rental value of the Royal street store from that date. *McNeely v. McNeely*, 50 La. Ann. 824, 24 South. 338. The evidence shows that \$200 or \$225 per month would be a reasonable charge for the rent of this building; and we have concluded to allow one-third of the smaller amount, that is, \$66.66% per month.

There is no evidence to support the contention that the building demolished and removed from the Cleveland avenue property was worth more than the proceeds of the sale of the material, for which we have given Mrs. Bellau credit.

The tutor is entitled to credit for one-third of the interest paid by him on the mortgage note of \$6,000 at 6 per cent. per annum from the 5th of July, 1910. He is also entitled to reimbursement from Mrs. Bellau for one-third of the taxes paid by him on the real estate on Royal street and for all of the taxes paid by him on the Cleveland avenue property. But, as it is not possible for us to separate the amount of taxes paid on the real estate from the amount paid on the stock of merchandise, we can do no more than reserve the tutor's right to recover the amount of taxes paid by him on the real estate belonging to Mrs. Bellau.

[6] As the costs incurred in these proceedings are due to the illegal method of administration and the unwillingness of the tutor to render an account to his ward, he should pay the costs.

For the reasons assigned, it is ordered that the judgment appealed from be amended by increasing the amount which Charles Hawkins is condemned to pay to Mrs. Istella Hawkins Bellau to \$3,329.83; by requiring her to pay \$2,000 of the debt secured by mortgage on her third interest in the Royal street property; by condemning Charles Hawkins to pay to Mrs. Bellau interest at 5 per cent. per annum on \$6,199.68 from the 6th of May, 1910, until this judgment is paid, and rent at the rate of \$66.66% for her third interest in the Royal street property from the 6th of May, 1910, and as long as he occupies the premises; by allowing him cred-

it for the interest paid by him at 6 per cent. per annum on \$2,000 from the 5th of July, 1910; and by reserving whatever right of action he has for reimbursement for taxes paid by him on the real estate belonging to his ward. As thus amended, the judgment appealed from is affirmed at the cost of Charles Hawkins.

On Applications for Rehearing.

PER CURIAM. The amount which the tutor was condemned to pay Mrs. Bellau is \$3,229.83, as shown in the above opinion. The figures \$3,329.83 in the decree contain a clerical error, which is now corrected so as to read \$3,229.83.

The decree in this case is also corrected so as to allow Mrs. Bellau legal interest on \$3,229.83 from the 6th of May, 1910, until paid, and average interest, that is, one-half of the legal interest, on \$2,969.85 from the 6th of May, 1910, to the 19th of March, 1914.

Mrs. Bellau has no further claim on the stock of merchandise received by her tutor. The applications for rehearing are denied.

(139 La.)

No. 21901.

STATE ex rel. LABBE et al. v. MILLSAPS,
Secretary of State.

In re STATE ex rel. PROGRESSIVE PARTY
OF STATE OF LOUISIANA et al.

(Supreme Court of Louisiana. April 8, 1910.)

(Syllabus by the Court.)

1. ELECTIONS — 154(1) — NOMINATIONS — CONTEST BOARD — CONCLUSIVENESS OF DECISIONS.

In the terms of section 55 of Act No. 152 of 1898, as amended by Act No. 132 of 1900, the decision of a majority of the members of the contest board in a contest of the right of a candidate to the nomination of a political party is final and not subject to review by the courts.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. — 154(1).]

2. ELECTIONS — 153 — NOMINATIONS — CONTEST BOARD — JURISDICTION.

The contest board created by section 55 of Act No. 152 of 1898 has exclusive jurisdiction to consider and decide a contest filed by any person having an interest in contesting the nomination of a candidate for a political office, and is not limited to contests filed by candidates claiming the nomination by the same political party for the same office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 135; Dec. Dig. — 153.]

3. ELECTIONS — 151 — NOMINATIONS — CONTESTS — "PARTY."

In the requirement in section 55 of Act No. 152 of 1898, that the person contesting the regularity of a certificate of nomination shall notify the party or parties affected thereby, the term "party" does not mean the political party of the contestee. It means the individual or party whose right to the nomination is contested.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 133; Dec. Dig. — 151.]

For other definitions, see Words and Phrases, First and Second Series, Party.]

Application by the State, on the relation of D. C. Labbe and others, for writ of mandamus to W. F. Millsaps, Secretary of State, with application also by the State, on the relation of the Progressive Party of the State of Louisiana, for writ of mandamus. Writ denied, and application dismissed.

L. H. Burns, H. S. Suthon, and Esmond Phelps, all of New Orleans, for relators. H. F. Brunot, of Baton Rouge, pro se.

O'NIELL, J. The relators presented to the judge of the district court of the parish of East Baton Rouge a petition for a writ of mandamus directed to the secretary of state, commanding him to place upon the official ballot to be voted in the parish of St. Martin on the 18th of April, 1916, the names of the relators as candidates for the following offices, nominees of the Progressive party, respectively, viz.: For sheriff, D. C. Labbe, for coroner, Dr. Clarence W. Boring, and for assessor, Onezime Calais, Jr. They alleged that the relator, the Progressive Party of the State of Louisiana, appearing through its state central committee and the secretary of said committee, was a body politic, organized and existing under and by virtue of the statutes of this state, being a political party with a franchise and the right to nominate its candidates and to have their names printed on the official ballot under its party emblem; that it had nominated a candidate for Governor and another for Lieutenant Governor, and local candidates in several parishes and senatorial and representative districts, and had an interest in furthering the candidacy of all of its nominees; and that its right to nominate candidates and to have their names printed on the official ballot was founded upon the statutes of this state and had always been conceded since it had polled the proportion of votes required to make it a political party. They alleged that they, the candidates for the aforesaid offices in the parish of St. Martin, had been regularly nominated at a convention composed of delegates regularly elected from among the members of the Progressive party, to be voted for at the general election to be held on the 18th of April, 1916; that their nominations were certified to by the chairman and secretary of the nominating convention, and that the certificates of nomination in proper form were transmitted to the secretary of state within the time and in the manner prescribed by law; that each of said candidates was the only nominee of the Progressive party for each office, respectively, and that, therefore, it was the ministerial duty of the secretary of state to place the names of the said candidates on the official ballot, but that the secretary of state refused to place the names of said candidates on the official ballot, basing his refusal on a ruling of the contest board organized under authority of section 55 of Act No. 152 of 1898, and stating that

the contest board had met and considered a protest against the candidacy or nomination of the relators, and had sustained a protest and ordered him, the secretary of state, not to place the names of the relators on the official ballot as the candidates or nominees of the Progressive party, and that its ruling was final and binding on him, the secretary of state. They alleged that the protests considered and sustained by the board of contest were made and filed only by the Democratic candidates for the aforesaid offices, respectively; that no opposition or contest was made by the Democratic party, nor by any contestant claiming a right to the nomination of the Progressive party; and that, therefore, no contest had been made before the board of contest as contemplated by law. They alleged that the contest board had no jurisdiction to decide or consider the contest or complaint made by the Democratic nominees, but had arbitrarily assumed the right to destroy the franchise of the Progressive party and, in effect, to name the officials of the parish of St. Martin for the next four years; that the exercise of that power was arbitrary, oppressive, ultra vires, null, and void, and was in violation of the provisions of the law governing the secretary of state, and that that official had no right to act upon the ruling of the board of contest. They averred that the right of the Progressive party to nominate candidates and to have their names placed on the official ballot was granted and guaranteed by Act No. 48 of 1914, amending the election law (Act No. 152 of 1898); that it was never the intent or purpose of the statute creating the board of contest to give that board authority to deny the right of a political party to make nominations as such; and that, if that ever was the intent of the general election law, it was repealed and superseded by Act No. 48 of 1914. The relators averred finally that, if the board of contest had jurisdiction in the premises, it was not exercised in a lawful manner, because there was no notice served upon the Progressive party, or upon its chairman or secretary, of any protest or contest of the right of the party to nominate candidates for office in the parish of St. Martin.

The judge of the district court refused to issue an alternative writ of mandamus and declined to exercise jurisdiction in the case, on the ground that the contest was within the jurisdiction of the board of contest exclusively, and that the ruling of the board was final and not subject to review by the courts. Thereupon the relators made application to this court for a writ of mandamus to compel the judge of the district court of the parish of East Baton Rouge to exercise jurisdiction and issue the mandamus to the secretary of state. In their petition to this court, they make the same allegations that were made in the petition filed in the district court.

In answer to the rule to show cause why the relief prayed for by the relators should not be granted, the district judge admits all of the allegations of fact contained in their petition, but denies the legal conclusions drawn therefrom by the relators. He alleges that, in refusing to issue the writ of mandamus, he accepted as true the relators' allegation that the board of contest had met and considered and sustained a contest of the nomination of the relators and had ordered the secretary of state not to place their names on the official ballot. The respondent judge avers that he assumed that the board of contest had considered and acted upon the question of regularity or irregularity of the certificates of nomination and had sustained the contest on legal grounds; that he considered that the acts complained of were those of the board of contest and not of the secretary of state; that he (the district judge) had no jurisdiction or authority to compel the secretary of state to do what the board of contest had forbidden; and that he had no jurisdiction or authority to control the board in the exercise of the discretion which the law had vested in the members of the board exclusively.

The pleadings do not inform us of the cause or ground of the contest before the contest board; nor was the district judge, nor are we, called upon to review the ruling of the board.

[1] The relators' counsel admit in their brief filed in this court that, if the board of contest had jurisdiction to consider and decide the protest or contest of their right to the nomination in question, the decision of the board was final and the district court had no jurisdiction in the premises. They contend, however, that the statute defining the jurisdiction of the board of contest limits it to cases where there are a greater number of claimants of the nomination of the same party for the same office than there are officers to be elected.

[2] It is true that section 56 of Act No. 152 of 1898, as amended by Act No. 132 of 1900, declaring that it shall be the duty of the contest board to determine which candidate, if any, is entitled to a party nomination, expressly mentions only contests in which a greater number of candidates claims the nomination of the same party than there are officers to be elected. But this section of the law expressly declares that the contest board shall have authority to determine not only which candidate, but whether any candidate, is entitled to the nomination. The statute, therefore, plainly contemplates that the right of any and all candidates claiming the nomination of the same party for the same office may be contested, and that the board shall have jurisdiction to determine whether any of the candidates is entitled to the nomination; from which it follows that the regularity of a certificate of nomination may be contested by any per-

son having an interest in the contest, though not claiming the nomination from the same party.

Section 55 of the statute, as amended, declares that certificates of nomination that appear to be in conformity with the provisions of the act shall be deemed to be regular unless an objection to their regularity is made in writing within 72 hours after the last day allowed by law for filing the certificates of nomination, and that objections arising in relation thereto shall be considered by the contest board, composed of the secretary of state, the auditor, the treasurer, and two electors to be appointed by the Governor within 24 hours after the last day and hour allowed for the filing of objections; and it provides that the decision of a majority of the members of the board shall be final. This section of the law, creating the contest board and giving it exclusive and final jurisdiction to consider and decide contests arising in relation to the regularity of certificates of nomination, does not, expressly nor by implication, limit its jurisdiction to contests filed by candidates of the same party for the same office; and we have no authority to legislate on this subject.

In the case of *State ex rel. Burke et al. v. Foster, Judge, et al.*, 111 La. 939, 36 South. 32, it was said:

"The decision of disputes as to party nominations rests with the party whose nomination is claimed, in the absence of statutory regulations to the contrary. The jurisdiction of courts, in such matters, is purely statutory. Act No. 152, p. 266, of 1898, confers no jurisdiction whatever on the courts, but creates a board of contest, whose decision is made final on all questions within its cognizance."

In the case of *State ex rel. Tebault v. John T. Michel, Secretary of State*, 122 La. 188, 47 South. 460, the regularity of the nomination of a candidate for mayor of the city of New Orleans by nomination papers of the Independent Democratic League was contested by James C. Henriques as citizen, elector, Democrat, and chairman of the Democratic executive committee. The board of contest considered and sustained the contest, although it was not made by a candidate claiming the nomination of the same party for the same office. The secretary of state, therefore, refused to place the name of the candidate of the Independent Democratic League on the official ballot; and, in the suit to compel him to place the name of the candidate on the official ballot, it was held that he could not be compelled by mandamus to do that which the law did not authorize him to do. One of the complaints before this court was that:

"The objector was without interest or capacity to make the objections upon which the alleged or supposed contest was based."

To which this court replied:

"The right to make the objections is not confined to any particular individual or class."

The relators' contention that sections 55 and 56 of Act 152 of 1898 were amended by

Act No. 48 of 1914, so as to deprive the contest board of its jurisdiction of a contest filed by another person than a candidate for the nomination of the same party for the same office, or to vest in the courts jurisdiction to reverse the rulings of the contest board in such cases, is not well founded. The Act of 1914 did not change the law in that respect. It amended only sections 49 and 64 of Act No. 152 of 1898. Section 49 relates only to nominations by convention, and makes no reference whatever to contests or to the contest board. It originally provided that nominations might be made by a convention of delegates representing a political party that had polled 20 per cent. of the entire vote cast in the last general election preceding the holding of such convention. It was amended by Act No. 132 of 1900 so as to reduce the requirement to the polling of 10 per cent. of the entire vote cast at the last state election preceding the holding of the convention; and it was further amended by Act No. 48 of 1914 so as to provide that a political party might nominate candidates by convention if it had polled at least 10 per cent. of the entire vote cast at the last preceding state election or United States presidential election. Section 64 of Act No. 152 of 1898, as amended by the Acts of 1900 and 1914, relates to the same subject. It limits the number of qualified voters of the electoral district or division necessary to constitute a caucus or to make a nomination or choose delegates to a nominating convention. Hence the law vesting exclusive jurisdiction in the contest board to determine the regularity of certificates of nomination has not been altered or amended since the decisions were rendered by this court in the cases cited above.

[3] The complaint that no notice of the contest was served upon the Progressive Party or upon the chairman or secretary of the state central committee of that party is without merit. The statute (section 55 of Act No. 152 of 1898, as amended by Act No. 132 of 1900) only requires that the objector to the regularity of a certificate of nomination shall notify the party or parties affected thereby, and shall certify under oath to the secretary of state in what manner he has notified such party. We interpret this to mean that the objector or contestor shall notify the candidate whose certificate of nomination is contested. If the Legislature had intended to require notice of a contest to be given to the chairman or secretary of the State Central Committee of the political party whose candidate's nomination is contested, the requirement would have been expressed in plain terms. The term "party or parties affected thereby" does not mean political party or parties in the sense in which the relators interpret it.

The complaint or argument that this interpretation of the law allows the contest

board to perpetuate the dominant party in power and, in some instances, to control the elections, is an objection to the system of party nominations, to be addressed to the Legislature, not the courts.

Our conclusion is that the district judge was without jurisdiction to compel the secretary of state to place the names of the relators upon the official ballot, and that the refusal to issue the alternative writ of mandamus was in accordance with the law.

For the reasons assigned, the relief prayed for is denied, and the relators' application is dismissed.

(139 La.)

No. 21900.

STATE ex rel. ELFER et al. v. MILLSAPS,
Secretary of State.

In re STATE ex rel. PROGRESSIVE PARTY
OF STATE OF LOUISIANA et al.

(Supreme Court of Louisiana. April 8, 1916.)

Application by the State, on the relation of Charles Elfer and others, for writ of mandamus to W. F. Millsaps, Secretary of State, with application also by the State, on the relation of the Progressive Party of the State of Louisiana for writ of mandamus. Writs denied, and applications dismissed.

L. H. Burns, H. S. Suthon, and Esmond Phelps, all of New Orleans, for relators. H. F. Brunot, of Baton Rouge, pro se.

O'NIELL, J. The pleadings and issues presented in this case are the same as in the case of State ex rel. D. C. Labbe et al. v. W. F. Millsaps, Secretary of State, No. 21901, 71 South. 496, decided this day, except that the relators in this case are not the same individuals. They are Charles Elfer, candidate for sheriff, and Ortman W. Crawford, candidate for representative, of the parish of St. Charles.

For the reasons assigned in the case of State ex rel. D. C. Labbe et al. v. W. F. Millsaps, Secretary of State, In re State ex rel. Progressive Party of the State of Louisiana et al., 71 South. 496, applying for a writ of mandamus, it is ordered that the relief prayed for in this case be denied, and that the relators' application be dismissed.

(139 La.)

No. 20696.

WALKER et ux. v. RODRIGUEZ et al.
(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

1. STREET RAILROADS ⚡98(8) — PERSONS CROSSING TRACKS—DUTY TO LOOK AND LISTEN.

Street cars in the city of New Orleans have the right of way; and it is the duty of others in crossing car tracks to look and listen for the approach of cars.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 208; Dec. Dig. ⚡98(8).]

2. MUNICIPAL CORPORATIONS ⚡705(1)—STREETS—PERSONAL INJURIES—AUTOMOBILE ACCIDENT.

Persons running automobiles through the streets of a city should have them under control, particularly at street railroad crossings, and avoid colliding with street cars, and to stop, and not to swerve from their courses onto places where they have no right to be. And

if they inflict injuries upon persons who are not shown to have contributed to the accident, they will be held responsible in damages for injuries thus inflicted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705(1).]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Joseph A. Walker and wife, for the use of their minor child, Ida Walker, against Rene Rodriguez and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

James Legendre, of New Orleans, for appellants. P. L. Fourchy, of New Orleans, for appellees.

SOMMERVILLE, J. Plaintiffs are colored persons, the parents of Ida Walker, a girl 17 years of age, who, with a companion, was walking in Canal street, January 5, 1913, about 8 o'clock in the evening, when she and her companion were knocked down by an automobile, being driven by one of the defendants, Rene Rodriguez. Her right foot was crushed beneath one of the wheels of the machine. The navicular bone and the necks of the second, third, and fourth metatarsal bone were fractured. And plaintiffs have asked for judgment in damages in the sum of \$8,050.

The defendants, Rene and Albert Rodriguez, excepted on several grounds, which exceptions were properly overruled. And, as they have not been urged in oral or printed argument in this court, they will be considered to have been abandoned.

The defendants answered, denying the allegations contained in plaintiffs' petition, and averred that if an accident happened to plaintiffs' daughter, at the time and in the manner set forth in the petition, it was unavoidable; and, if not unavoidable, then it was the result of contributory negligence by her.

There was judgment in favor of defendants, and plaintiffs have appealed.

The testimony on behalf of plaintiffs shows that their daughter, with a companion, was crossing the neutral ground in South Rampart street, at the intersection of Canal street, when plaintiffs' daughter, who will hereafter be called the plaintiff, observed a lake end car, coming down Rampart street, and she said to her companion: "Hurry! Let us get out of the way of the car." And he said, "All right." They stepped from the neutral ground onto the roadway in South Rampart street, going in the direction of the sidewalk on the east, or river, side of that street. They, plaintiff and her companion, did not see or hear the automobile coming behind them, and going in the direction of the river; and they had no reason to expect that an automobile going in that direction would have left the roadway in Canal street, and have crossed the neutral ground

in South Rampart street, and run onto the roadway in South Rampart street, where they were walking. Defendants have failed to prove any contributory negligence on the part of plaintiff.

The defendants, and their witnesses, claim that they were in Canal street, on the roadway, when they observed a lake end train moving on the neutral ground of Canal street as it was turning into South Rampart street, and that they veered from their course to avoid a collision with the train; and they argue that the accident to plaintiff was unavoidable.

[1] It was clearly the duty of defendants to have seen the lake end train, and to have had their machine under such control as to have stopped it in time to have avoided a collision therewith. They knew, or they should have known, that the lake train would turn from the neutral ground in Canal street into South Rampart street; and they should not have run in front of the moving train. One of the witnesses for the defendants testified: "The West End car stopped in the curve." If that was true, it was shown that the West End train was not going at a very rapid rate of speed, and that it stopped in time for the defendants to have followed their course, and not to have swerved from it. If they had done so, the accident would not have happened.

Besides, the train had the right of way, and it was the duty of the defendants to have guided and controlled their car, and to have yielded this right of way, without running over the neutral ground, and injuring plaintiff in so doing.

[2] Defendants deny that the automobile struck the plaintiff, and they argue that it may have struck her companion, who was thrown to one side, and, in falling, he struck the plaintiff, and that she received her injuries in that way. But the preponderance of evidence shows that the automobile struck the plaintiff and knocked her down; and, even if this were not so, and she was struck by her companion, who, in turn, had been thrown to the ground by the machine of defendants, they, the defendants, would still be liable. The evidence also is that one of the wheels of the heavy automobile passed over the right foot of plaintiff, and that, while it may not be permanently injured, she has suffered much from the accident, and she is likely to limp the balance of her life. Before the accident she was earning \$18 a month, and, because of her incapacity she is earning but \$10 per month now.

Defendant Rene Rodriguez, who was driving the machine, looked too late to see the oncoming West End train to have averted an accident; and to have looked too late was not to have looked at all. *Shields v. Fairchild*, 130 La. 648, 58 South. 497; *Boylan v. New Orleans Ry. & Light Co.*, 139 La. —, 71 South. 360. It was gross fault on his part

not to have looked and listened for the steam train at the crossing. His neglect to do so was inexcusable. C. C. 3556, No. 13.

The damages will be fixed at \$2,000.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as Rene Rodriguez is concerned, and that there now be judgment in favor of plaintiffs, and against defendant Rene Rodriguez in the sum of \$2,000, with interest from date of judgment, and for costs. In other respects, the judgment is affirmed.

(139 La.)

No. 20717.

GUERARD v. HOWARD et al.

(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

BROKERS \S 49(1) — RIGHT TO COMMISSION—
PERFORMANCE OF CONTRACT.

A real estate broker, who has neither sold nor found a purchaser for the property of his principal, is not entitled to commissions for his services.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 70; Dec. Dig. \S 49(1).]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by R. G. Guerard against A. P. Howard and others. From a judgment for defendants, plaintiff appeals. Affirmed.

D. B. H. Chaffe, of New Orleans, A. D. Preston, of Beckley, W. Va., and R. Emmet White, of New Orleans (W. L. Hughes, of New Orleans, of counsel), for appellant. Gustave Lemle, of New Orleans, for appellee.

LAND, J. The case of plaintiff, as alleged in his petition, is as follows:

On or about October 16, 1912, the defendants employed plaintiff as a real estate agent to find a purchaser for their residence property, situated in the square bounded by St. Charles, Carondelet, Poydras, and Lafayette streets, and agreed at that time to pay plaintiff for his services $2\frac{1}{2}$ per cent. upon the selling price of the property.

On October 22, 1912, plaintiff offered said property for sale to the Boston Club for \$225,000, and on October 24, 1912, as authorized by the defendant Alvin P. Howard, re-offered the same property to said club for \$220,000.

Plaintiff continued to negotiate for the sale of said property until December 7, 1912, on which day an agreement of purchase and sale of said property was signed and executed between the defendants and the said Boston Club, whereby the defendants agreed to sell, and the Boston Club to buy, the said property, known as the Howard residence.

Said agreement of purchase and sale was

made subject to terms, conditions, and stipulations, agreeable to defendants; and on or before February 28, 1913, all the conditions upon which said agreement depended had happened and had been fully complied with.

Notwithstanding the completed agreement of sale, enforceable in the courts, defendants have taken no action to carry said agreement into effect, and do not intend to enforce said contract, and have refused to pay plaintiff for his services as real estate agent a commission of $2\frac{1}{2}$ per cent. on \$200,000, offered by the Boston Club and accepted by the defendants in the agreement of December 7, 1912.

Wherefore the plaintiff on April 7, 1913, instituted the present suit to recover of the defendants the sum of \$5,000, with legal interest thereon from judicial demand, and costs.

The agreement of December 7, 1913, referred to in the petition, was made subject to several conditions, one of which was that "the purchaser shall be able to sell its present club site on Canal street on or before February 28, 1913, for not less than three hundred and twenty-five thousand dollars," upon such terms as it might deem best. It was agreed and understood that in the event of the nonfulfillment of the conditions or any of them within 90 days thereafter, the agreement should at once become void and of no effect.

The defendant denied the alleged agreement to pay plaintiff commissions for the sale of their residence, but averred that the agreement as to commissions was predicated on their purchase of the Boston Club property for \$325,000, and that the purchase was predicated on their ability to resell the property for \$310,000. Defendants averred that the Boston Club advertised and offered its property for sale on February 26, 1913, at public auction, but received no bid for the same; and on the same day defendant Alvin P. Howard received from J. Weis & Co. a proposition to purchase the club property for \$310,000, which was made known to the plaintiff, who advised that said defendant make a proposition to purchase the said property for \$325,000, on the terms and conditions stated in the advertisement for sale at public auction, plaintiff to be paid a commission of $2\frac{1}{2}$ per cent., and the property, when purchased, to be at once transferred to third persons for \$310,000, "thus making the defendants acquire for their property \$185,000."

Defendants further averred that Alvin P. Howard made a proposition to the Boston Club to purchase the property for \$325,000 on the terms as advertised, except that a commission was to be paid to the plaintiff; that said proposition was declined, and on February 27, 1913, the said Howard made another proposition to the Boston Club to

purchase the property for \$325,000 on the terms and conditions set forth in the agreement of December 7, 1912.

Defendants averred that the proposition was taken under advisement by the Boston Club, and matters remained in this position until March 1, 1913, when defendants were informed by the parties represented by J. Weis & Co. that unless their offer to purchase was definitely accepted by 6 p. m. of Tuesday, March 4, 1913, it was withdrawn; that defendant Alvin P. Howard thereupon notified the Boston Club that unless his offer to purchase was accepted by 5 p. m. of March 4, 1913, it was withdrawn.

Defendants further averred that the board of directors of the Boston Club met on the same day, but made no definite acceptance of said proposition; that the parties represented by J. Weis & Co. insisted on a definite answer being given to them by 6 p. m. of March 4, 1913, and as the said Howard was unwilling to purchase the Boston Club property unless there was a certainty of an immediate resale to the parties represented by J. Weis & Co., he withdrew his offer, and the Boston Club did not sell its property to any one.

Defendants further averred that the Boston Club, having failed to sell its property, made no purchase of defendant's property, and defendants, not having been able to sell their property to any one, plaintiff, therefore, is not entitled to any commission, even if there was any agreement to pay him any commission on what defendants' property would sell for, which is denied, and that the said offer by Alvin P. Howard to purchase the Boston Club property and the conditions under which it was made were well known by the plaintiff, who was a party to the entire proceedings, to be part of a fixed plan by which said Howard was to acquire the property for \$325,000, and sell it to Mente and Benjamin (represented by J. Weis & Co.) for \$310,000, so that defendants could sell their property to the Boston Club for \$200,000. Defendants further averred that if the deal had been consummated they would have received only \$185,000 for the property.

There was judgment in favor of the defendants, and the plaintiff has appealed.

Defendants' cause of action, as set forth in his petition, is based on the agreement of December 12, 1912, coupled with allegations—

"that on or before February 28, 1913, all the conditions upon which the agreement of sale between defendants and the Boston Club depended had happened and had been fully complied with, which was within the time and terms stipulated and set forth in the contract of purchase and sale hereto annexed."

That agreement was conditional on the ability of the Boston Club to sell its site in Canal street on or before February 28, 1913, for not less than \$325,000.

The said site was advertised for sale at

public auction on February 26, 1913, and was on that day offered for sale, but there was no bidder.

On the day of sale, J. Weis & Co., in behalf of their clients, wrote to Alvin P. Howard, offering to pay him \$310,000 for the Boston Club property, on the terms and conditions under which the property was offered for sale at public auction; Howard to pay J. Weis & Co. a commission of \$2,500 if the transaction was consummated. On February 27, 1913, E. W. Mente and E. V. Benjamin, the clients of J. Weis & Co., wrote to the plaintiff, making a more detailed offer to purchase the same property, for the same price, and for the same commission.

Alvin P. Howard authorized the acceptance of this proposition, subject to the Boston Club accepting his offer of the same date.

On the same day Alvin P. Howard made a proposition in a letter to the Boston Club to purchase its site property for \$325,000 upon such terms as to cash and credit portions as the club might fix. The proposition was conditioned on the club's simultaneous purchase of the Howard property as per agreement of December 7, 1912. The letter concluded as follows:

"I will be much obliged if you will at once draft an agreement inserting such terms and conditions as to cash and credit portions of the selling price as you may deem advisable, and I will at once accept the same."

According to the plaintiff's testimony the Boston Club had a meeting on March 28, 1913, to consider Howard's proposition, and after asking for further time, which Mr. Howard refused to give, the meeting adjourned without action, on the day on which the contract expired.

On March 4, 1913, the board of government of the Boston Club met and adopted the following resolution:

"Resolved: That it is the sense of the board that it should accept Mr. Howard's proposition of February 27, 1913, if within the club's obligation under its contract with the Howards of December 7, 1912, and to that end, that the opinion of a disinterested attorney be procured within 48 hours as to the club's obligation in the premises."

According to plaintiff's testimony, the above resolution was read to Mr. Howard, and the attorney for the club said to him, "You will have to give us more time," and Howard replied that the time limit for acceptance had expired, and his offer was off, and "the matter absolutely died right there." As a matter of fact, both the time limit fixed by Howard, and the time limit fixed by Mente and Benjamin had expired. The time limit fixed by the contract of December 7, 1913, had expired four days previously. The final result was that no sale of the property of the Boston Club, or of the Howards was ever made.

Plaintiff's theory is that he is entitled to commissions, because all the conditions of the agreement of December 7, 1912, have happened, and the Boston Club is therefore

bound to pay the defendants \$200,000 for their property. The essential condition of the sale of the Boston Club's site for \$325,000 never happened.

As already stated, after the failure of the auction sale of February 26, 1913, Howard made an earnest effort to purchase the Boston Club property. He was assisted in this deal by the plaintiff from the beginning to the end, and the latter was present when Mr. Howard withdrew his offer of February 27, 1913, to the Boston Club, and made no objection to the withdrawal. Mente and Benjamin were insisting upon the acceptance or withdrawal of the offer, and their time limit had expired. The plaintiff admits in his testimony that Mr. Howard did not want to buy the Boston Club property, and that his offer to purchase was predicated on the agreement with Mente and Benjamin, which in turn was predicated on his purchase of the Boston Club property.

The transaction between Mr. Howard and the Boston Club amounted merely to an offer to purchase on his part, which was never accepted, and was formally withdrawn, without objection from any quarter.

As the plaintiff never sold or found a purchaser for defendants' residence, he cannot be entitled to the commissions sued for.

Judgment affirmed.

(139 La.)

No. 20675.

FRANCINGUES v. DUPIERRIS.

(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied April 24, 1916.)

(*Syllabus by Editorial Staff.*)

JUDGMENT \Leftrightarrow 248—SUPPORT BY PLEADINGS—ADEQUACY.

A judgment not responsive to the pleadings and not covering the case will be set aside on appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. \Leftrightarrow 248.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by Bertrand C. Fracingues against Isabelle Dupieris. From a judgment for defendant, plaintiff appeals. Judgment set aside, and case remanded.

Felix J. Puig and Emile Pomes, both of New Orleans, for appellant. A. J. Rossi, of New Orleans, for appellee.

PROVOSTY, J. This is a suit for a partition of the property depending upon the community of acquets and gains at one time existing between the parties.

The judgment decrees the wife to be owner of a certain described lot, and also of a note, which note, by the way, was one executed by herself. It is not responsive to the pleadings, and does not cover the case.

The judgment appealed from is set aside, and the case is remanded to be proceeded with according to law; the costs of this appeal to await the final disposition of the case.

(139 La.)

No. 20716.

LADNER v. NEW ORLEANS TERMINAL CO.

(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(*Syllabus by the Court.*)

RAILROADS \Leftrightarrow 327(1) — OPERATION — ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

It is the duty of one crossing over railroad tracks in a city to look and to listen so as to avoid accidents; and, if he fails to look and listen, and to see and hear danger signals, he is negligent, and he cannot recover damages for injuries suffered by him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043, 1045; Dec. Dig. \Leftrightarrow 327(1).]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Homogene Ladner against the New Orleans Terminal Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss suit.

Hall, Monroe & Lemann, Dufour & Dufour, and R. Bland Logan, all of New Orleans (George Janvier, of New Orleans, of counsel), for appellant. George J. Untereiner, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff asks for judgment in the sum of \$10,000 against defendant for damages suffered by him through the alleged fault and neglect of the latter.

Plaintiff alleges that on December 6, 1911, at 5:45 o'clock in the afternoon, while on his way home from work, and while crossing the intersection of Toulouse street and Claiborne avenue, in the city of New Orleans, leading to a bridge over the Carondelet Canal at that place, he was run into and knocked down by a freight car of the defendant company, which was being operated over the tracks in Toulouse street, and which was being driven backwards by a steam locomotive; that his skull was fractured; that his jaw and six ribs on the left side of his body were also fractured; that he was wounded about the neck, face, and shoulders, and was severely shocked; further, that the injuries to him were without fault on his part, and that they were due solely to the fault and negligence of the defendant, its agents and employes, and that that negligence consisted in failing to have a flagman in the tower of defendant at the intersection aforesaid; that the gates erected at said intersection for the protection of pedestrians, under the terms of a municipal ordinance, were raised, thereby announcing to petitioner and others crossing over the said intersection that it was safe to pass over; that the defendant company had

parked its cars near the intersection so as to screen and hide any locomotive or cars from his view that might be running on the track at the time of the accident; that defendant drove its car through the streets of the city backwards, with no one on the front end thereof to warn pedestrians of its approach, and without sounding its bells to warn persons crossing at the intersection.

Defendant answered, denying all liability, and that, if any injury was suffered by plaintiff, it was caused solely and entirely by gross carelessness on his part, and that plaintiff contributed to the accident by his negligence.

There was judgment in favor of plaintiff in the sum of \$800, and defendant has appealed. Plaintiff has answered the appeal, and has asked for an increase in the amount of the judgment.

The evidence shows that the plaintiff was very seriously injured; but it does not show that he suffered a fracture of the skull. The evidence further shows that plaintiff was not knocked down by a freight car, but by a switch engine; that there was a flagman in the tower at the intersection named, who lowered the gates on the signal given from the approaching engine. The engine was being driven backwards, but the evidence shows that it was well lighted in the front and in the rear, and the bell was being constantly sounded.

There were four persons in the party with plaintiff, laughing and talking, as they walked home from their daily employment in a factory a short distance from the scene of the accident. Plaintiff was the only one of the four who was injured. His three companions appeared as witnesses for him, and they severally testified as to the ringing of the bell on the locomotive, that it was not coming too fast, and that the light on it was seen by them. One of them testified that he warned plaintiff, saying, "You can't make it," but that the plaintiff "stooped down, and that is the time he must have got hit by the train." He further testifies that plaintiff stooped for the purpose of getting under the gates, which were descending at that time.

Plaintiff testifies that it was dark, and that the rain was falling on the afternoon of the accident, and that he did not see the approaching engine, or the lights thereon, or hear the ringing of the bell. He further testified that the gates at the end of the Claiborne bridge over the Carondelet Canal were raised. In this he is contradicted by the watchman in the tower, in the employ of the defendant company, who testified that he had received a warning from the approaching engine, and that the gates were lowered in response thereto, while the engine was about two squares distant. In this the witness is corroborated by the motor-neer of a street car who was detained on the bridge by the closed gates. The preponder-

ance of the evidence shows that the gates were closed at the time of the passing of the locomotive and of the injury to plaintiff; and it would appear that plaintiff was running in a stooping position to get under the lowered gates, and away from the approaching engine.

Plaintiff appeared to think that because of the failure of the defendant company to lower the gates, and he testified that it failed to lower them in this instance, he was relieved of all responsibility to look and listen while crossing the tracks of the defendant company. In this he was mistaken. He should have looked and listened while crossing a street in which cars are being operated in a city.

He testified to the arrangement of the tracks in the locality mentioned. They were divided into two groups. Five were in the first group near St. Louis street, and six were in the second group, at Toulouse street, near the Carondelet Canal, with a space intervening of 132 feet between the two groups. The engine which injured plaintiff was on the outbound main track, which was closest to Toulouse street, and within about 7 feet of the gates, which were intended to warn pedestrians and others of approaching engines. Plaintiff had passed over the first group of tracks, nearest St. Louis street, and had crossed all of the second group with the exception of the last track. He says that he was laughing and talking with his companions, and that there were box cars on some of the side tracks to his right which obscured from his view the oncoming engine.

In answer to questions on cross-examination he answered:

"After you got past these box cars on the tracks did you look to the right to see if there was anything coming along? A. No, sir; I didn't have to look to the right, because the signal was up. Q. So you just walked right straight across without looking; is that it? A. Yes, sir; because when you come to the bridge, of course, you naturally look for the signals, and, if they are down, then you know that there is danger, but, when they are not down, you just go right on and you don't have to watch out. Q. When you come there and see that the gates are up, you just walk right across, do you? A. Yes, sir; of course. Q. And you don't look to the right or left to see if there is anything coming along the track? A. I don't have to do it. Q. You don't have to stop and listen to see if anything is coming along? A. No, sir; of course, you don't, because after you get the signal to come across you are just going across. Q. After you do what? A. I say, when you get a signal to go across, of course, naturally you go right across. Q. Well, did you get a signal to come across that track? A. Yes, sir; surely I did; the signal was up. Q. You mean the gates were up; nobody waived to you to come across the track, did they? A. No, sir; but I was going home. Q. And the gates were up when you got down there? A. Yes, sir. Q. And you went right on across without looking or listening or anything of that kind? A. Yes, sir; because that was my business; I didn't have to look to see if anything was coming, any train or anything like that. * * * Q. Now, Mr. Ladner, if you had stopped, or if you had

looked when you passed that car, to the right, you could have seen that engine coming, couldn't you? A. I might have seen it coming if I had looked; yes, sir. Q. You could have seen it if you had looked? A. Yes, sir; but it wasn't my business to look, because the bridge was clear, and that is why I went across. Q. So you didn't look at all, but just kept right on, because, as you say, the way was clear or appeared to be clear? A. Yes, sir; of course, when the bars are down at night, there is a red light on it to show people, and I wouldn't have crossed. Q. But, not seeing it down, you just kept right across, without looking or listening or anything like that? A. Yes, sir."

Plaintiff saw that he was crossing railroad tracks; he was in the habit of going and coming over them every day; he knew there was danger from passing locomotives; and he must have received some warning of the approaching engine, for he assumed a stooping position to get under the gates.

It was the duty of the defendant company to lower the gates at the intersection at the end of the bridge over the canal, and this duty was performed by the defendant, although plaintiff testifies that he failed to see the signal, which was a burning lantern hung at one end of the gates.

Plaintiff failed to use that diligence which a reasonably prudent person should use, and which his three companions did use, in crossing the tracks, and avoid the locomotive which injured him, and he was negligent in failing to do so. This negligence was the cause of the accident to him; while the caution used by his companions prevented the same accident happening to them. No fault or negligence has been proved on the part of the defendant company or its agents or employés. It (the engine) was being driven with care and caution. Plaintiff contributed to the accident which befell him.

Only questions of fact are presented in this case, and it is usual for the court to affirm the verdict of the jury, and the judgment of the trial court, in such cases; but, when plaintiff testifies to his own fault and neglect, and that fault and neglect is shown clearly to be the cause of the injuries complained of by him, and no fault is shown on the part of defendant, he cannot recover damages.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered that plaintiff's suit be dismissed at his cost.

(139 La.)

No. 20979.

BALLARD v. THOMPSON.

(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM §41 — COMPENSATION AND RECONVENTION — SUBJECT-MATTER—MUTUALITY OF CLAIMS.

A defendant, sued for a debt due by him, cannot plead, in compensation thereof, a debt

alleged to be due by the suing creditor to a corporation of which he (defendant) is a stockholder, since compensation takes place only "when it happens that both plaintiff and defendant are indebted to each other."

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 76-79, 81; Dec. Dig. §41.]

2. CORPORATIONS §399(4) — OFFICERS—AUTHORITY.

Where the board of directors of a business corporation elects a president and authorizes him "to appoint any and all managers, clerks, and other employés deemed necessary by him for the work of the corporation, and to fix salaries and compensation of all parties so employed," the president has the power, under the authority so conferred, to fix the compensation of any officer, within such reasonable limit as his judgment may suggest, and, unless the circumstances be unusual, if he and one other person own all the stock of the corporation, such other person would have no reason to complain, since the compensation so fixed would be paid from a fund that would otherwise inure to the president and him, share and share alike.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1588; Dec. Dig. §399(4).]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Marshall Ballard against Frederick I. Thompson. From a judgment for plaintiff, defendant appeals. Affirmed.

Parkerson & Parkerson, of New Orleans, and Wm. B. Inge, of Mobile, Ala., for appellant. Robert H. Marr, of New Orleans, for appellee.

MONROE, C. J. Defendant prosecutes this appeal from a judgment condemning him to pay plaintiff \$4,192.50, with interest, and sustaining a writ of attachment which plaintiff had caused to be issued.

The cause of action set forth by plaintiff is as follows: That in 1906, defendant, being then about to acquire a certain interest in a newspaper called the Daily Item, entered into a contract whereby he agreed, in consideration of plaintiff assuming the duties of managing editor of said paper, to pay him 6½ per cent. of the stock which defendant then held and should thereafter acquire in the Item Company, it being understood, however, that for defendant's convenience the stock should be carried in his name; that plaintiff accordingly entered at once upon the discharge of the duties of managing editor, and has continued to discharge them up to the present time; that on May 21, 1910, defendant sold his entire interest in said paper to James M. Thompson for \$76,500, and that plaintiff is now entitled to 6½ per cent. of that amount, or \$4,192.50, with interest from judicial demand. Further alleging that defendant is a nonresident, plaintiff caused a writ of attachment to issue, and defendant obtained the release of the seizure made thereunder by furnishing bond as provided in such cases.

On an exception of vagueness, plaintiff

amended his original petition by alleging that the contract sued on was verbal.

Defendant at first filed a general denial, and then an amended answer, alleging as follows (quoting in part):

"He admits that plaintiff was to receive 10 per cent. of 65 per cent. of the capital stock of the Item Company, held by said Frederick I. Thompson and James M. Thompson; half from defendant and half from James M. Thompson."

Further answering, he alleges:

"That on the balance sheet of the said Item Company from January 1, 1909, to December 31, 1909, * * * plaintiff drew from the said company five per cent. of the profits, and the item appears on said balance sheet in the language following, to wit:

"Marshall Ballard, bonus account, to Jan. 1, 1910.....\$3,349.40"

"That the said amount was illegally withdrawn; that half of it was the property of defendant, and the withdrawal was protested against by said defendant at the time. Defendant specially pleads, as compensation or set-off to whatever amount may be found [due] by defendant to plaintiff, for [the] half of said sum, or \$1,674.70."

On the trial of the case, defendant gave the following, with other, testimony concerning the foregoing admissions:

"Q. You have made, in your answer, an admission that he was to have 10 per cent. of 65 per cent. of the stock? A. He was to have a percentage of stock. * * *

"Mr. Marr (counsel for plaintiff): Of course, it is no use to go back into this, Mr. Thompson. You have admitted it in your answer, what the contract between you and Mr. Ballard was; so it is no use to go beyond that. We consider that absolutely settled.

"Mr. Parkerson (counsel for defendant): We stand on that.

"Mr. Marr: You stand on that; I stand on it."

Then, after some further testimony, we find this apparently superfluous admission:

"It is admitted that the answer filed by Mr. Frederick I. Thompson admits that the plaintiff was to receive 10 per cent. of 65 per cent. of the capital stock of the Item Company, held by said Frederick I. Thompson and James M. Thompson, half from Frederick I. Thompson and half from James M. Thompson."

Defendant, somewhat later, was asked how it happened that he made the foregoing admission in his answer, when he had taken a different position in the correspondence between him and plaintiff which preceded the bringing of the suit, and he testified as follows:

"I think that is very easily answered; because I have neglected to give to Mr. Parkerson, prior to the filing of his brief, the full information in my possession, already gone into. Q. You mean to say that the answer was filed by you under a misapprehension of facts? A. Yes, sir.

"Mr. Parkerson: Q. But you stand on your answer? A. Yes, sir.

"Mr. Marr: Q. Now, under date of February 5, 1910 [about nine months before the institution of this suit] you appear to have written to Mr. Ballard as follows: 'I have no desire to be precipitated into litigation, as any litigation involving the affairs of the Item Company would be far-reaching. I deny, without equivocation, any promise on my part to give any stock in the Item Company, or authorizing any one to make such a promise for me,' etc. A. That is true. Q. How does it come about

that this statement was made to Mr. Ballard on the 5th of February, 1910, when he was trying to get a settlement? A. Because I had never promised to give Mr. Ballard any stock in the Item Company."

[1] There is no attempt to explain defendant's admission, that plaintiff "was to receive" the stock, by saying that they meant that he was to receive it from some one else than defendant, and we hold the admission to be conclusive that he was to receive it from defendant, by virtue of a contract between them to that effect. It will be noted that 10 per cent. of 65 per cent. is equal to 6½ per cent. of the whole. It is abundantly shown, and admitted, that according to the contract in question, as originally entered into, plaintiff was to receive a fixed salary of \$50 per week, in addition to the stock, and he and James M. Thompson testify that under a subsequent contract he was further to receive 5 per cent. of the net profits of the business; but defendant denies, in his pleadings and his testimony, that he was a party to any such contract, or knew anything about it, until some time in October, 1909, when he was informed by plaintiff that the item "\$3,349.40," appearing on the balance sheet, represented money which had been credited to him on account of profits, and part of which he had drawn, whereupon defendant protested, and advised plaintiff that he was not entitled to such credit, and should return the money so drawn to the company. Whilst, however, the agreement as to the stock and as to the salary of \$50 was entered into between plaintiff, on the one side, and the Messrs. Thompson, as the prospective purchasers of stock in a corporation, on the other side, the agreement as to the 5 per cent. of the profit, was a matter between the plaintiff and the corporation, and in order to entitle defendant, as a stockholder in the corporation, to recover money which he alleges has been illegally paid out by it, to the prejudice of his possible dividends, it would be necessary that the affairs of the corporation should be liquidated, and the responsibility for such illegal payment, if illegal it was, fixed upon him by whom it was authorized, and the money brought into the treasury of the corporation. It is quite clear that defendant cannot plead, in compensation of a debt due by him, a debt due by his creditor to a corporation of which he is a stockholder, since compensation takes place only "when it happens that both plaintiff and defendant are indebted to each other." C. P. 366; Hen. Dig. vol. 1, p. 257, III.

[2] Beyond that, defendant testifies that he would not have invested in the stock of the Item Company if it had not been that James M. Thompson had agreed to take charge of the active management of the business, and it appears that, he and James M. Thompson having purchased a majority of the stock, and a new board of directors having been elected, and having elected James M. Thompson president of the company, it

(the board) proceeded on January 7, 1907, to adopt a resolution authorizing and empowering him "to appoint any and all managers, clerks, and other employes deemed necessary by him for the work of the corporation, and to fix salaries and compensation of all parties so employed," and that, acting under the authority so conferred, he fixed the compensation of plaintiff at \$50 per week, as had been previously agreed on, and added thereto 5 per cent. of the prospective profits. The capital stock of the company, of the par value of \$50,000, was at that time held by James M. Thompson (\$17,500), defendant (\$15,000), and by a minority stockholder (\$17,500). Thereafter the Thompsons bought the minority of the stock, and divided the entire capital equally between them, and in April, 1910, defendant sold his half interest to James M. Thompson for the net amount of \$64,500, upon which occasion he might, perhaps, have brought about some settlement of the claim, here set up, that James M. Thompson has allowed plaintiff the 5 per cent. of the profits without authority. As the matter stands, we are unable to discover in what respect the authority was lacking, nor does it occur to us that defendant has any reason to complain of the manner of its exercise, since James M. Thompson dealt with defendant's interest as with his own, the 5 per cent. credited and paid to plaintiff, having been deducted from profits that would otherwise have inured to him and defendant, share and share alike, and he has conveyed to plaintiff his proportion of the stock, the value of the remaining proportion of which plaintiff is now seeking to recover from defendant.

The judgment appealed from is therefore affirmed.

(139 La.)

No. 20497.

STATE ex rel. HENRY v. LYONS et al.
(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

DIVORCE \Leftrightarrow 298(3)—CUSTODY OF CHILDREN—EVIDENCE.

Several years after having obtained a divorce on the ground of adultery, in a suit by the husband for possession of the child, the evidence taken in the divorce suit is not enough to prove that the mother is yet unworthy of or unfit for the companionship and care of her minor child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 783; Dec. Dig. \Leftrightarrow 298(3).]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by the State, on the relation of Charles L. Henry, against Mrs. Chattie Lyons and another. From a judgment for defendants, relator appeals. Affirmed.

Ker & Fellu, of New Orleans, for appellant. Paul L. Fourchy, of New Orleans, for appellees.

O'NIELL, J. The relator obtained a divorce from the defendant, Chattie Lyons, on statutory grounds, in May, 1911. In his petition for divorce he demanded also the custody of their boy, then less than four years of age. The judgment of divorce, rendered by default, did not mention the custody or care of the child, who was left with the defendant.

In January, 1914, the relator instituted this suit to recover possession of his child from the mother and maternal grandmother. The case was submitted on the record in the divorce suit, and the testimony of the relator's mother, who testified that she was able and willing to take care of the child, and on the testimony of a neighbor who said that, as far as he knew, the relator's habits were good. Without hearing any evidence on behalf of the defendants, the district court rendered a judgment of nonsuit, from which the relator has appealed.

The child was between seven and eight years of age when this suit was tried. There is no proof that the mother is not deserving of the custody of her child, except the evidence taken on confirmation of the judgment of divorce, nearly three years before the trial of the present suit. From the fact that no evidence was offered on the trial of this case to prove that the conduct of the child's mother is not good, we assume that she has reformed since she was sued for a divorce, and that she is now as worthy of the custody and companionship of her child as is the relator. The child is yet at an age when he needs the care of a good mother. The evidence shows that the relator was prosecuted in the criminal court for nonsupport of the child, pleaded guilty and was condemned to pay alimony. We find no error in the judgment appealed from. It is therefore affirmed.

(139 La.)

No. 20467.

LEVY v. LEVY.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

EVIDENCE \Leftrightarrow 445(6) — PAROL EVIDENCE — AGENCY—SUBSEQUENT AGREEMENT.

In a suit for an accounting by a principal against his agent, in which is combined other demands, it is competent for defendant to prove by oral evidence instructions subsequent in date to that of the written power of attorney, given by the principal to the agent, referring to expenses of the principal which were paid by the agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2061; Dec. Dig. \Leftrightarrow 445(6).]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Alfred M. Barbe, Judge.

Action by Armand Levy against Samuel Levy. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

McCoy & Moss, of Lake Charles, for appellant. Pujo & Williamson, of Lake Charles, for appellee.

SOMMERVILLE, J. Plaintiff, the principal, sues defendant, his agent, for an accounting under a very full power of attorney, which contains, among many others, the power "to settle accounts," "to draw checks against all money on deposit in the Calcasieu National Bank and the State National Bank of Lake Charles," etc. He alleges that the defendant drew upon petitioner's bank accounts for things other than for the necessities and requirements of petitioner, and that he drew funds for his own personal use, approximating more than \$1,600, and that of the money so drawn from the banks he recalls to have been used for himself and the members of his family the sum of \$495. In addition to the suit for an accounting, plaintiff alleges that the defendant removed from a lot formerly belonging to petitioner a house belonging to him to a lot belonging to the agent which was worth between \$1,800 and \$2,000. He prays for judgment for such sum as may be found to be due under the account, and for \$1,800, the value of the house referred to.

Defendant answered that the items complained of in the account were for expenses incurred for and on behalf of plaintiff, and for his interest, and he tendered the house back which had been taken from the lot of plaintiff.

There was judgment in favor of plaintiff and against defendant in the sum of \$1,525; which included the value of the house claimed in the petition. Defendant has appealed.

The evidence discloses that plaintiff was engaged in business at the time of the execution of the power of attorney, and that he fell ill. He was compelled to leave his home for a different climate, and he gave to the defendant, his brother, the full power of attorney above referred to.

While plaintiff was absent from his home, defendant deemed it his duty to go and see his brother, and he made three trips for that purpose, for which he charged on the account. In this case, where the principal and agent were brothers, and the visits by the defendant to the plaintiff were voluntarily made, without any request by plaintiff, and were such as were prompted by good feeling on the part of the former to the latter, the charges were properly disallowed.

"Where services are rendered for each other by near relatives or others constituting members of the same family, the law presumes that they are inspired by motives of affection, gratitude, or other considerations than those of a pecuniary nature; and in order to rebut this presumption there must be clear and unequivocal evidence of a promise or agreement to pay for the services rendered." *Mechem on Agents*, § 599.

While on these visits to his principal defendant, on the request of plaintiff, it is stated, sued out several writs of habeas corpus to have plaintiff released from the sanitariums in which he was confined at different times. Plaintiff objected to parol evidence going to show that he had authorized defendant to sue out such writs, on the ground that this is a suit for an accounting, and that evidence of other transactions not connected primarily with or growing out of the discharge of the duties undertaken and imposed by the power of attorney was incompetent; and the objection was sustained.

This is more than a suit for an accounting; it is a suit for a money judgment for money said to have been misappropriated, and for the value of a certain house which was alleged to have been taken by defendant from plaintiff's property. The evidence shows that the checks had been drawn by defendant; and it was competent for the defendant to show that the money had been expended for the benefit of the plaintiff. The drawing and spending of this money grew out of the discharge of the duties undertaken and imposed by the power of attorney. The suing out of writs of habeas corpus may not have been mentioned in the power of attorney, but defendant was authorized to settle all accounts of plaintiff, and the settlement of the expenses for such writs was a settlement of plaintiff's accounts. As the instructions of plaintiff to defendant to sue out such writs was subsequent in date to the power of attorney, it was competent for defendant to show by parol that such instructions were given, if given. Such evidence would not vary or alter the written power of attorney. The ruling of the court rejecting such evidence was erroneous; and the case will have to be remanded for the purpose of permitting defendant to introduce the evidence tendered.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded to be proceeded with in accordance with law and the views expressed in this opinion; costs of appeal to be paid by plaintiff.

(139 La.)

No. 21877.

STATE v. DORR.

(Supreme Court of Louisiana. April 3, 1916.)

*(Syllabus by the Court.)***1. CRIMINAL LAW §1144(2)—GRAND JURY—ORGANIZATION—PRESUMPTION.**

The presumption is that the grand jury was duly organized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2745, 2901, 3017; Dec. Dig. §1144(2).]

2. INTOXICATING LIQUORS §150—OFFENSES—PLACE OF SALE.

In a prosecution for unlawfully retailing intoxicating liquors without a license, the question whether the sale was made in a "wet" or "dry" district is immaterial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 164, 165; Dec. Dig. §150.]

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

M. P. Dorr was convicted of violating the liquor law, and appeals. Affirmed.

Thomas & Cagle, of Coushatta, for appellant. R. G. Pleasant, Atty. Gen., and J. F. Stephens, Dist. Atty., of Coushatta (G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. The defendant was indicted for keeping a grog and tippling shop and for retailing spirituous liquors without previously obtaining a license from any town or city authorities or from the police jury of the parish of Red River, which required a license therefor.

The defendant waived arraignment, and pleaded not guilty, and filed motions for bills of particulars. The accused was tried and found guilty as charged. Motions for new trial and in arrest of judgment were filed and overruled. Defendant was sentenced to pay a fine of \$500 and to serve six months in the parish jail. Defendant has appealed.

Defendant's first motion called upon the district attorney to state whether he relied on or intended to introduce the evidence of "spotters," and, if so, to furnish their names and address. The defendant's second motion called upon the district attorney to state whether the alleged sale was made by the defendant in person or by another as agent or clerk.

The district attorney answered that the sale was made by the defendant in person, and was not made to a "spotter."

The first bill of exception was to the refusal of the court to rule out the testimony of one Sam Fletcher, a witness tendered by the state, and objected to by the defendant on the following grounds:

"That he filed a motion asking whether evidence relied upon by the state would be furnished by spotters, and the state answered that

it would not, but that defendant is informed and verily believes that this witness was acting in the capacity of a spotter at the time of the alleged crime."

The extracts following, taken from the testimony of one Mr. Carter, are annexed to the bill:

"Q. Do you know whether or not Mr. Sam Fletcher was acting as a 'spotter' when he went to Lonsburg?

"A. I would think so.

"Q. What do you base that on?

"A. From the way he testified before the grand jury."

The objection of defendant was overruled by the judge for the following reasons:

"The court knows of no law that the names of the witnesses are to be given, and, even if the law provided that the spotter's name should be given, it would be for the reason that the defendant have the time to investigate the standing he had in the community in which he lived, and, as this witness lived in Red River parish all of his life, that would not hold, and the defendant made no attempt to prove the witness Sam Fletcher unworthy of belief."

It is to be noted that the answer of Mr. Carter, *supra*, is merely his opinion, and proves nothing.

In the case of *State v. Mines*, 137 La. 489, 68 South. 837, the state witnesses were strangers in the community, detectives by occupation, and working for a contingent fee of \$50 for every conviction secured by their testimony.

We think that the objection of the defendant was properly overruled.

The next bill of exception was taken to the overruling of defendant's motion for a new trial for the following reasons:

"The evidence showed beyond doubt that the defendant was guilty, and the defendant had been tried legally and with fairness."

[2] Bill of exception No. 1 was the only one taken during the trial of the case. But in the motion for a new trial the defendant made the point that the court erred in convicting the defendant in the absence of evidence showing that Red River parish was a prohibition parish, or that the police jury required a license for the sale of spirituous liquors. This contention is without merit, as the question whether the parish was "dry" or "wet" was immaterial. *State v. Hollingsworth*, 137 La. 478, 68 South. 834.

The motion for a new trial was properly overruled. The motion in arrest is a duplication of objections raised in the motion for a new trial.

[1] Defendant in his brief in this court makes the objection that the transcript does not show that a grand jury was ever impaneled or that a foreman was appointed.

The presumption is that the grand jury was duly organized. Objection to the organization of the grand jury comes too late after plea and trial. *State v. Harp*, 133 La. 1007, 63 South. 500.

Judgment affirmed.

(139 La.)

No. 21881.

STATE v. MURRAY

(Supreme Court of Louisiana. April 3, 1916.
On Application for Rehearing,
April 24, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 892—TRIAL—VERDICT—CONFLICT IN RECORD.

Where there is a variance in the verdict indorsed on an indictment and signed by the foreman of the jury, and the verdict as recorded by the clerk, the former will be accepted as showing the intention of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2114; Dec. Dig. \S 892.]

2. CRIMINAL LAW \S 379—EVIDENCE—CHARACTER OF ACCUSED.

"Accordingly, it is generally agreed that a reputation at any time after a charge published, or other controversy begun, is not admissible."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 843, 844; Dec. Dig. \S 379.]

3. CRIMINAL LAW \S 1171(1) — TRIAL — REMARKS OF COUNSEL.

It is not every idle or irrelevant remark by a district attorney during the course of a trial which will cause the case to be remanded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3127; Dec. Dig. \S 1171(1).]

4. HOMICIDE \S 191 — PROSECUTION — EVIDENCE.

Testimony of oppressive or harsh acts on the part of the prosecuting witness towards the accused, at times other than at the time of the commission of the crime charged, is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 414; Dec. Dig. \S 191.]

5. CRIMINAL LAW \S 683(1) — RECEPTION OF EVIDENCE—REBUTTAL EVIDENCE.

Testimony by defendant of a specific overt act on the part of the prosecuting witness may be rebutted, when not testified to by the latter when he was examined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1615, 1617; Dec. Dig. \S 683(1).]

Appeal from Second Judicial District Court, Parish of Bossier; John N. Sandlin, Judge.

Ben Murray was convicted of shooting with intent to kill, and appeals. Affirmed.

Foster, Looney & Wilkinson, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Thomas W. Robertson, Dist. Atty., of Minden (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. [1] Defendant assigns, as error, patent on the face of the record, that the transcript shows:

"After due deliberation the jury returned into open court, and in the presence of the accused, with the following verdict:

"We, the jury, find the defendant guilty with shooting to kill.

"Defendant shows that the above verdict of the jury convicts him of no crime known to the laws of Louisiana, and he asks for a new trial."

The transcript also shows that the verdict of the jury as rendered indorsed on the indictment is:

"We, the jury, find the defendant guilty with shooting with intent to kill.

"[Signed] E. R. Hardcastle, Foreman."

The above verdict of the jury convicts defendant of a crime denounced by the laws of the state.

There was apparent error by a careless clerk in recording the verdict of the jury in the case, but such error cannot have effect where the verdict of the jury is in the record, and speaks for itself, as to the intention and finding of the jury.

In the case of *State v. Reonnals*, 14 La. Ann. 278, where the foreman signed an irresponsible verdict, and the clerk recorded one which was responsive, it was said of the verdict signed by the foreman:

"This shows what was the intention of the jury, and the verdict ought not, under such circumstances, to be sustained."

And it was set aside, although the recorded verdict would have been valid.

[2] Bill of exception 1. This bill is taken to the exclusion of the testimony of a witness as to the character of the defendant for peace and quiet after the commission of the crime.

If the question had referred to declarations or acts of parties after the commencement of the suit the testimony would have been inadmissible, as the presumption would be that they had been made with reference to the suit.

The same presumption would apply to the reputation of parties to a suit. This hearsay testimony as to character might well be made with reference to the suit; and the state or defendant might cause the reputation of the accused to be discussed, to the disadvantage or to the advantage of the accused. A false reputation might thus be created. The objection to the testimony was properly sustained.

Mr. Wigmore in his second volume, \S 1618, p. 1966, lays down the rule:

"Accordingly, it is generally agreed that a reputation at any time after a charge published, or other controversy begun, is not admissible."

And, in *State v. Johnson*, 60 N. O. 151, it is said:

"Upon principle, it ought to be confined to the time when the charge was first made. A different rule will expose the defendant to the great danger of having his character ruined or badly damaged, by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay, and the general rule in relation to that kind of testimony is, that it shall not be received if the hearsay be post litem motam."

[3] Bill 2. This bill is taken to a remark by the district attorney in the course of his argument. As the argument of the district attorney is not given, or even that portion in which the objectionable remark was made, it is impossible to pass upon its possible effect upon the jury. We fail to see the rel-

evancy of the remark, and cannot conceive how it could have affected the jury prejudicially to the accused. The court, in a per curiam, says that "the district attorney was answering argument of counsel for defendant," and that "the verdict of the jury shows, to my mind, that the argument was not prejudiced, as they only found the accused guilty of shooting to kill."

It is not every idle or irrelevant remark made by a district attorney which will cause a case to be remanded. Where such remarks are clearly offensive or prejudicial to the accused they may be cause for remanding the case.

[4] Bill 3. The court refused to permit a witness to testify whether or not the prosecuting witness, a stepbrother of defendant, was oppressive and harsh in his treatment of his younger brother, the defendant. It is argued that the testimony might have thrown light upon who the aggressor in the case was.

Testimony of oppressive or harsh acts on the part of the prosecuting witness towards defendant, at times other than at the time of the shooting, would have opened the door to irrelevant testimony which could have served no useful purpose. It was properly rejected. The matter to be proved was who the aggressor was at the time of the shooting, and this is shown by the verdict of the jury.

[5] Bill 4. After the state had closed its case, and defendant had testified that when he shot the prosecuting witness that the latter had his hand in his pocket and made a motion as if to draw a weapon, the prosecuting witness was recalled by the state and asked where his hands were at the time defendant shot him.

This was clearly rebuttal evidence. According to the statement of the judge the prosecuting witness had not testified directly on the point. He could not have been expected to have so testified. It was not until defendant had testified to the specific act of aggression on the part of the prosecuting witness that the latter could be called to deny that particular act.

Judgment affirmed.

On Application for Rehearing.

PER CURIAM. In his application for a rehearing, defendant states that the court overruled a former opinion of the court, without making reference to it in the decision. An examination of the decision in *State v. Anderson*, 135 La. 326, 65 South. 478, shows that the evidence of reputation in that case had reference to the reputation of the accused prior to his indictment, although discussed after that time. Whereas, in the present case, the reputation of defendant for peace and quiet was that after his imprisonment, which the witness had heard discussed. He testified that he did not know the reputa-

tion of the accused prior to the time of his incarceration. The trial judge says with much force:

"The evidence was excluded for the reason that it would be an easy matter to manufacture character, either good or bad, after it was sure that such evidence would be necessary or could be used in a trial; hence the discussion of character, at a time not suspicious, would be the proper ones on which to form an opinion as to character."

Rehearing refused.

(139 La.)

No. 20504.

MILLS v. ST. TAMMANY & NEW ORLEANS RY. & FERRY CO.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

CARRIERS \S 314(5) — CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—PLEADING.

In an action for damages for personal injuries alleged to have been caused by an unexpected movement of a passenger car while the plaintiff was alighting from it, the petition must contain an allegation to the effect that it was the duty of the employes of the railroad company to look out for the safety of the plaintiff as a passenger or an employe, or it will not disclose a cause of action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 1273, 1275½; Dec. Dig. \S 314(5).]

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; J. B. Lancaster, Judge.

Actions by Mrs. Aurora Reisland Mills against the St. Tammany & New Orleans Railway & Ferry Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. Robert Rivarde, of Hahnville, for appellant. Harvey E. Ellis, of Covington, for appellee.

O'NIELL, J. The plaintiff appeals from a judgment dismissing her suit on an exception of no cause of action. Her demand is for damages for personal injuries alleged to have been sustained while stepping from a passenger car. She alleged, in her petition, that, in company with a number of friends and acquaintances, she boarded one of the passenger cars operated and controlled by the defendant company between Covington and Mandeville; that, when she arrived at her destination in Mandeville, the car, in charge of the employes of the defendant company, stopped to permit the plaintiff and her friends to alight; that several persons got off ahead of her, and, when she attempted to step from the car to the ground, the car started suddenly and without warning, throwing her down and spraining her ankle. She alleged that, if the car had been in charge of competent and skillful employes, and if they had been attentive to their duties, the accident would not have occurred.

The district judge held that the allegations of the petition were deficient because the plaintiff failed to allege that she was a passenger or an employé, or was invited to ride on the car, or that she had a right to be there, or was not a trespasser on the defendant's property, or any other fact that would make it the duty of the employés of the defendant company to look out for her safety. The ruling is in accord with the decisions of this court in *Lynch v. American Brewing Co.*, 127 La. 850, 54 South. 123, and in *Morris v. Great Southern Lumber Co.*, 132 La. 306, 61 South. 383, and no good reason is suggested why it should be reversed.

The judgment appealed from is affirmed.

(139 La.)

No. 21643.

MANDEVILLE ICE & LIGHT CO. v. TOWN OF MANDEVILLE et al.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by Editorial Staff.)

MUNICIPAL CORPORATIONS ¶680, 681(5) —
USE OF STREET—INJUNCTION—STATUTES.

Act No. 76 of 1914, authorizing towns to grant to corporations the right to use and occupy the streets and to obstruct them with buildings necessary to such corporations, provided the consent of the taxpayers is obtained, containing no repealing clause, did not repeal section 1, par. 7, of Act No. 111 of 1912, authorizing towns to grant the use of their streets for the erection of electric light poles, etc., as the later act was intended to enlarge and not to restrict the powers of towns, and referred to unusual and serious obstructions, such as buildings, and not to the customary obstruction of electric light poles, so that a company, proceeding to erect such poles under the authority of an ordinance of a town, will not be enjoined.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1463; Dec. Dig. ¶680, 681(5).]

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; J. B. Lancaster, Judge.

Suit for an injunction by the Mandeville Ice & Light Company against the Town of Mandeville and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry L. Garland, of Opelousas (Wm. V. Seeber, of New Orleans, of counsel), for appellant. M. R. Neuhauser, of New Orleans, for appellee Town of Mandeville. Harvey E. Ellis, of Covington, for appellee St. Tammany & N. O. Ry. & Ferry Co.

PROVOSTY, J. The St. Tammany & New Orleans Railway & Ferry Company was proceeding to erect electric light poles in the streets of the defendant town, under an ordinance authorizing it to do so, when the present suit was brought, enjoining the further prosecution of the work.

The sole ground of injunction alleged in the petition is that, as an effect of Act 76, p. 194, of 1914, towns can grant such a use of the streets only with the consent of the taxpayers of the town, obtained at an election held for that purpose.

Authority to grant such use of streets is conferred upon towns by paragraph 7 of Act 111, p. 128, of 1912, without anything being said about consent of taxpayers. But this restriction upon the authority of the town is imposed, says counsel, by the said act of 1914. The act reads:

"Towns * * * shall have authority to grant to railroads and other corporations the right to use and occupy the streets and alleys therein and to obstruct same, or part thereof, with buildings necessary to and used by said corporations," provided the consent of the taxpayers is obtained.

The act contains no repealing clause. Evidently its object was to enlarge, not to restrict, the powers of towns. Evidently, also, it has reference to unusual and serious obstructions, such as buildings, and not to the customary ones of poles for stringing wires, pipes for conducting gas and water, and rails for operating cars. The idea that a town should have to consult the taxpayers by means of an expensive election preliminarily to allowing electric light poles, or gas or water pipes, or railway tracks to be laid in a street, were it even for one single block, is evidently foreign entirely to the purpose and intentment of this act.

Judgment affirmed.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(139 La.)

No. 20329.

STATE v. UNDERWOOD.

(Supreme Court of Louisiana. Oct. 18, 1915.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

1. LICENSES \S 15(7)—OCCUPATIONS—"TRADING STAMPS."

A person who is engaged in distributing gratuitously to all comers, and in bartering with all comers, the coupons of the Hamilton Corporation of New York is engaged in issuing trading stamps, within the meaning of Act No. 47 of 1904 (amending and re-enacting section 15 of Act No. 171 of 1898), and is liable for the license tax thereby imposed.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. \S 15(7).]

2. CONSTITUTIONAL LAW \S 230(3) — COMMERCE \S 64—LICENSES \S 7(1, 2, 4)—DEALING IN TRADING STAMPS—EQUAL PROTECTION OF LAWS.

Act No. 47 of 1904 (amending and re-enacting section 15 of Act 171 of 1898) is not in contravention of article 225 or article 229 of the State Constitution, or article 1, \S 8, of the Constitution of the United States, or of the Fourteenth Amendment to that Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 837; Dec. Dig. \S 230(3); Commerce, Cent. Dig. \S 104-106; Dec. Dig. \S 64; Licenses, Cent. Dig. \S 7, 8, 10, 19; Dec. Dig. \S 7(1, 2, 4).]

3. PUBLIC POLICY OF STATE SUSTAINED.

In the District of Columbia, where the paramount laws of the land are made and authoritatively construed, there is now, and for more than 40 years has been, in force an act of Congress making it a penal offense to engage in any gift enterprise in that District, which act has been, and is now, applied to the trading stamp business, notwithstanding that, as thus applied, it has been, time and again, attacked, as in contravention of the Constitution of the United States, and notwithstanding that the Supreme Court of the United States has been, time and again, applied to for the review and reversal of the rulings of the District of Columbia Court of Appeals, repelling such attacks. In view of those facts, there can be no reason, arising under the Constitution of the United States, why, until the Supreme Court of the United States shall have decided to the contrary, this court, yielding its own convictions, should hold that the state of Louisiana is not at liberty to adhere to, and enforce, its public policy as to the grave question concerning the rights of the individual, considered with reference to the rights of the community, which is here put at issue.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by the State against Charles A. Underwood, or Southern Merchandise Exchange. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

A. W. Cooper and Wm. W. Westerfield, both of New Orleans, for appellant. Denegre, Leovy & Chaffe, of New Orleans, for the State.

Statement of the Case.

MONROE, C. J. Plaintiff ruled "Charles A. Underwood, doing business under the name of Southern Merchandise Exchange; Charles

A. Underwood, Proprietor," into court, alleging that he is, and has been since June 1, 1913, "engaged in the business of a dealer in trading stamps, in the city of New Orleans, issuing trading stamps to merchants or dealers, without having paid * * * a license tax," and praying that he be required to show cause why judgment should not be rendered against him in the sum of \$5,000, as the license tax for the year 1913, with interest, etc., and why he should not be enjoined from conducting his business until the tax shall have been paid.

The proceeding is founded upon so much of Act 47 of 1904, amending and re-enacting section 15 of Act 171 of 1898 (the state license law), as reads:

"For every trading stamp company, and all other dealers of every kind whatsoever, issuing stamps to merchants or dealers, where the gross annual receipts are more than \$200,000, the license shall be \$10,000; where the said gross annual receipts are \$150,000 or more, and less than \$200,000, the license shall be \$7,500; where the gross annual receipts are \$100,000 and less the license shall be \$5,000."

Defendant denies that he is engaged in the business described in the statute, and alleges that his business consists of the sale or barter of various articles of merchandise which are sold to the public, generally, for cash, or exchanged for coupons or premium tokens, or the like, having a money value; such coupons or tokens, issued by any reliable concern, being so received in exchange for merchandise, and the value thereof being afterwards collected from the original issuers. He sets up the further defense, in the alternative, that as applied to his business the statute relied on contravenes the state and federal Constitutions, for certain reasons, which he specifies.

On the trial of the rule, there were but two witnesses examined, the defendant and another called on his behalf. The testimony of the other witness is wholly unimportant; that of defendant is disingenuous. We gather from it the impression that, although he may be, or may think he is, in a position to swear that he is not the agent of "The Hamilton Corporation" (a New York trading stamp company), and that he has no other connection with that company than as a receiver, purchaser, or collector, barterer, and vendor of its stamps (or "coupons," as he prefers to call them), and although his primary object in establishing himself in New Orleans is, no doubt, to make money for himself, he nevertheless came here in April, 1913, under an agreement with the Hamilton Corporation, and some time in June opened a store at No. 608 Canal Street, in the name of the Southern Merchandise Exchange; Charles A. Underwood, Proprietor; and, as it appears to us, the principal basis and means through which he expects to succeed in the business that he is there conducting is the promotion and development of the busi-

ness of the Hamilton Corporation. He admits that that corporation is his surety for the rent of his store, under a lease for three years at \$300 a month, though he testifies that he does not know the name of either its president, secretary, or treasurer. There was exhibited to him a full-page advertisement, in a New Orleans daily newspaper of June 29, 1913, containing illustrations of furniture, musical instruments, toilet articles, etc.; also what purports to be a reproduction of a "Hamilton Coupon," and reading, in part, as follows:

"Here's the Magic Money That Buys These Valuable Premiums.

"Hamilton Coupons.

"They are Packed with Popular Goods. You Buy Every Day. You can Exchange Them for Valuable Premiums Right Here in New Orleans.

"You are invited (Buy the Goods Listed Below.) coupons free. You expect these pre- (.....) are invited to miums. You can (.....) visit the Ex- then appreciate (.....) change at 608 Ca- the wide variety (.....) nal St., and you of high-grade (.....) will be presented merchandise you (.....) with twenty-five can obtain by (.....) (25) complimen- saving your (.....) tary coupons, Hamilton cou- (.....) with which to pons, which (.....) start your collec- come packed with (.....) tion, a complete goods you use (.....) list of goods with daily. (.....) which Hamilton (.....) coupons are (.....) packed, and a (.....) beautiful illus- (.....) trated catalogue (.....) showing the pre- (.....) miums you can (.....) obtain in ex- (.....) change for your (.....) Hamilton cou- (.....) pons.

"The Southern Merchandise Exchange, 608 Canal Street,

"Charles A. Underwood, Proprietor.

"The Store That's Different."

And he gave the following testimony concerning it, to wit:

"Q. I show you a page advertisement, dated Sunday morning June 29, 1913, * * * and ask you to look at this line and state whether or not this was put in there by you? A. No, sir. Q. You had nothing to do with it? A. No, sir; I had nothing to do with it. Q. Can you account for its appearance? A. I presume the Hamilton Corporation of New York did it. Q. I notice the words at the bottom of the advertisement, in large type, 'The Southern Merchandise Exchange, 608 Canal Street, Charles A. Underwood, Proprietor. The Store That's Different.' Does that refer to your store? A. Yes, it must. Q. What is your connection with the Hamilton Corporation of New York? A. None whatever, except that I buy goods from them, the same as other merchants. Q. Simply the relation of buyer and seller? A. Yes, sir. Q. You are not an agent of the Hamilton Corporation? A. No, sir. Q. You do not handle their coupons? A. Yes, sir; I buy them of them. Q. What do you do with them when you buy them? A. Exchange them for hundreds of other kinds of coupons. Q. You are in the coupon business? A. Yes, sir. Q. You buy and sell these coupons? A. I sell all kinds of coupons, including the Hamilton, not to people, but to manufacturers. Q. If any one comes into your store and asks for twenty-five free

coupons, do you inquire whether or not he is a merchant? A. No, sir. Q. Are you willing to swear that none of the coupons are issued to merchants? A. No, I cannot do that. * * * Q. You say this advertisement appeared in the paper without your knowledge or consent? A. Yes, sir. * * * Q. Read that advertisement and see whether that states fairly the character of business that you are doing? A. I can hardly tell. * * * Q. For instance, this advertisement reads: 'You are invited to visit the Exchange at 608 Canal street, and you will be presented with twenty-five (25) complimentary coupons with which to start your collection, a complete list of goods with which Hamilton coupons are packed and a beautifully illustrated catalogue showing the premiums you can obtain for your Hamilton coupons.' That is a fact, is it not? A. What is a fact? Q. You mean to pretend to do what this advertisement claims you do? A. We give them a catalogue, which is furnished by the Hamilton Corporation, and a coupon. * * * Q. Do you carry the stock of articles that are mentioned in that illustrated catalogue? A. Some of them and some that are not illustrated there; I am (not) confined to that catalogue entirely."

The witness is then further cross-examined in regard to certain advertising "dodgers," and concerning one of them testifies as follows:

"Q. I call attention to the wording of the advertisement. After requesting that everybody collect 'your coupons,' they have this little paragraph, headed 'Trading Stamp Collectors may exchange their Hamilton coupons on an equal basis for trading stamps at the premium parlors of many responsible stamp collectors.' Do you stand back of that advertisement? A. Can I explain? Q. Yes; but answer 'Yes' or 'No' first. Do you vouch for that statement in that advertisement? A. No, sir; I do not vouch for it. Q. You do not know that it is there? A. I presume I read it. Now, this is printed and published by the Hudson Condensed Milk Company. It is a fact that Hamilton coupons are exchangeable in every state in the Union, except Florida and Louisiana, for different kinds of trading stamps, and these are nationally distributed; they might go to California or Maine, and some of them come down here; and you will see that it is on almost all circulars where they say something about trading stamps; but, so far as I am concerned, these are furnished to me by the manufacturers and the words on there are up to them."

The witness was asked whether his business in this city was not the soliciting of merchants with a view of inducing them to place Hamilton coupons in the goods sold by them, and whether he was not conducting an exchange where Hamilton coupons can be bartered for the articles mentioned in the Hamilton Catalogue. To the first question he answered, "No," but, on further cross-examination, he said that he had talked to grocers about Hamilton coupons but had not solicited them. He was then unable to remember what he had said in his conversations, but, finally, recalled that he had solicited the grocers to sell goods in which Hamilton coupons are packed, his object being to have more Hamilton coupons come back to his store.

"These coupons," he states, "are taken in exchange for merchandise, money, or coupons, anything that you will bring, in my store." Q. You will swap anything in your store for these Hamilton coupons? A. Yes; for anything else that

has value. * * * Q. So the purpose of your store is to redeem the Hamilton coupons? A. No, sir; we redeem them and other coupons."

The witness then refers to a pamphlet containing a list of "other coupons" in which he deals, and further testifies:

"Q. Now, I call your attention to the fact that this pamphlet * * * declares that these coupons are exchangeable for Hamilton coupons? A. We make that Hamilton coupon as a unit. Q. The Hamilton coupon is a unit in your business? A. Yes, sir. Q. That is a standard of value for all coupons? A. Yes, sir. * * * Q. On page 3 of this catalogue, under the heading, 'Where to Exchange your Hamilton Coupons for Premiums,' I find the following: 'For the convenience of collectors, we have established more than 500 local premium stations where they may take their coupons and exchange them for premiums.' Are you running one of these article premium stations referred to here? A. Not in that sense at all. * * * Q. Nevertheless, you give out this catalogue? A. Yes, sir. Q. Do you not tell them to redeem them at your place? A. I tell them that they can be redeemed there. Q. What is the difference, Mr. Underwood? A. Well, because they redeem them in almost every city in the United States. Q. What is the difference between your establishment and one of these 500 local premiums stations, referred to in this catalogue? A. Those referred to in this book are owned by the Hamilton Corporation, and this one is owned by me. * * * Q. Now, then, you say that you buy these coupons, Mr. Underwood, is that a fact? A. Not for cash. Q. What do you give for them? A. Merchandise. Q. That is, to the collector? A. Yes, sir. Q. Then what do you do with the coupons that you get from the collector? A. They are sent to New York. Q. To whom, in New York? A. To the Hamilton Corporation. Q. All of them? A. Yes; with the exception of the 'Item's,' and one local concern. Q. What does the Hamilton Corporation give you for the Hamilton coupons? A. Two dollars a thousand. Q. In cash? A. No, not in cash; but they are credited against my account; I buy goods from them. Q. What do you do with the other coupons which are referred to in this list of 250 coupons? A. They are sold to the Hamilton Corporation in payment of goods I buy from them."

The witness testifies that he does a cash business at his store, amounting, in gross receipts, to about \$5 a day, and he is then further examined:

"Q. Where do you get the cash from, other than the \$5 a day; where does your cash come in from? In other words, how do you make any money out of that store? A. It takes time to work up a business like this; you can't expect to make money right off the reel. Q. You must touch money at some time? A. I have some money of my own. Q. When will it come back? A. In time; my coupons exceed the merchandise bought. Q. When does that happen? A. Any time I make a settlement. Q. How often do you make these settlements? A. I haven't made any yet. Q. Have you any stated time to make a settlement? A. No, sir. * * * Q. You say you have an arrangement for a settlement with them (the Hamilton Company)? A. Not at present, because I have been too busy; not on coupons. Q. Have you any other arrangement with them? A. No. * * * Q. You have made no arrangement for a settlement? A. No; I haven't asked for one. Q. And there is no stated time, either monthly, annually, or semiannually, for a settlement? A. No, there has been no settlement made, but there has been an exchange of statements. Q. But there is no stated time at which settlements are made between you and the Hamilton Corporation? A. No, sir."

The witness appears to contradict himself on several important points and to be rather unintelligible on others, as for instance:

On the direct examination: "Q. Are you engaged in selling coupons? A. No, sir."

On cross-examination: "Q. You buy and sell these coupons? A. I sell all kinds of coupons, including the Hamilton, not to people, but to manufacturers."

On re-direct examination: "Q. Do you sell any Hamilton coupons at all? A. No, sir; I do not. * * * Q. Do you sell any Hamilton coupons to manufacturers? A. No, sir."

On cross-examination: "Q. If any one comes into your store and asks for twenty-five free coupons, do you inquire whether or not he is a merchant? A. No, sir. Q. Are you willing to swear that none of these coupons are issued to merchants? A. No, sir; I cannot do that."

On redirect examination: "Q. Have you ever delivered Hamilton coupons to merchants or dealers in this city? A. No, never."

On direct examination: "Q. Have you ever issued any coupons to any persons with the promise, express or implied, that you would redeem these coupons? A. No, sir."

On cross-examination: "Q. Nevertheless, you give out this catalogue? A. Yes, sir. Q. You give it to collectors of Hamilton coupons? A. Yes, sir. Q. Do you tell them to redeem them at your place? A. I tell them that they can be redeemed there."

At another time, in his redirect examination, he testifies as follows:

"Q. Then you are not engaged in the business of redeeming Hamilton coupons? A. No, sir. Q. You are engaged in the brokerage of Hamilton coupons? A. Yes, sir. Q. And also all other kinds of premium coupons in this city? A. Yes, sir. Q. There are 250 different kinds? A. Yes, 250 to 500 different kinds. Q. Which you give merchants in exchange for all different kinds? A. Yes, sir. Q. And you sell these different kinds at a price that is agreeable to you? A. Yes, sir."

Opinion.

[1] The statute imposes the license tax, not only upon "every trading stamp company, issuing stamps to merchants and dealers," but also upon "all other dealers, of every kind whatsoever," who may be engaged in the business so described. It is not necessary, therefore, in order to become liable for the tax, that one should be the originator and ultimate obligor of the stamps issued by him; it is sufficient that he be engaged in the issuing of the stamps, "to merchants or dealers," whether the stamps be originated, and are ultimately to be redeemed by him, or by some other person or trading stamp company.

The evidence in this case leaves no doubt that "Hamilton coupons" are "trading stamps," within the meaning of the statute; and it leaves no doubt that defendant is engaged in selling, bartering and giving away those coupons; nor can we doubt that, in one or more of those methods, he is engaged in issuing them to "merchants or dealers," as to other members of the community, since he testifies (and they are among the few points upon which he does not contradict himself) that he distributes "complimentary" Hamilton coupons to all comers, and, as we understand him, barter the regular Hamilton coupons, with all comers, for coupons is-

sued by other concerns; his interest in that business being that the Hamilton corporation allows \$3.50 a thousand (in trade) for such "other" coupons, whereas it allows but \$2 a thousand for its own. The issuance of the "complimentary" Hamilton coupons is an important feature of the business. It is the first step which counts. It introduces the business for which the license tax is required; and we have no more reason or authority for holding that the lawmaker did not intend that it should be counted as an issuance of coupons or stamps than for so holding with regard to the bartering or selling such coupons. As to the selling of the Hamilton coupons, defendant's statement, on cross-examination, is, "I sell all kinds of coupons, including Hamilton, not to people, but to manufacturers." It is true that, in answering "No" to the questions propounded to him by his counsel, before and after his cross-examination, he denies selling Hamilton coupons at all, and denies selling them to manufacturers. But why did he make the specific, and, as to those matters, uncalled-for, statement, "I sell all kinds of coupons, including Hamilton, not to people, but to manufacturers"? The questions propounded did not require him either to include Hamilton coupons among those which he sells, or to exclude manufacturers from the "people" to whom he does not sell. Are we, then, to presume that he went out of his way to say the thing that is not against his interest; and, if so, why should we accept his denial of that which he says when the denial appears to subserve his interest? The answer is that the testimony of a litigant, as well as his pleading, is construed against him, upon the theory that he will make the one as well as the other as strong in his own favor as he can.

We conclude, therefore, that defendant's statement that he sells Hamilton coupons, and sells them to manufacturers, should be accepted as true; and, considering the statute here in question, with reference to the purpose for which it was enacted, we are inclined to the opinion that the "merchants or dealers" therein referred to may be included among the "manufacturers" to whom defendant sells the coupons, since manufacturers must buy their raw material and sell their product, and in so doing they become merchants and dealers as well as manufacturers, and compete with each other and with other merchants and dealers who buy and sell similar articles. It is, however, sufficient for the purposes of this case that defendant is engaged in issuing Hamilton coupons, by giving them away and bartering them; and as he insists upon it that he is doing so upon his own account, and not as the agent of the Hamilton corporation, and the evidence to the contrary is only inferential, we take him at his word, and hold that, unless his attack upon the constitutionality of the statute imposing the tax be well founded, he is liable for the tax.

The grounds relied on, as supporting that attack, are:

(1) That the statute "constitutes unfairly discriminatory, unequal, and uniform taxation," in violation of articles 225 and 229 of the state Constitution."

(2) That the necessary effect of the tax will be to prohibit and destroy the business upon which it is imposed, and that defendant is thereby denied the equal protection of the law, and is deprived of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) That the statute operates as an interference with the power of Congress to regulate interstate commerce, in violation of the provision of article 1, § 8, of the Constitution of the United States.

[2] The first and third grounds, as thus stated, are without merit. Article 225 of the Constitution, requiring equal and uniform taxation, refers, in terms, to taxation on property, and has no application to the taxation of occupations. Article 229, requiring license taxes to be graded, has been complied with in Act 47 of 1904. *State v. Merchants' Trading Co., Ltd.*, 114 La. 529, 38 South. 443. Defendant is engaged in issuing coupons (which we hold to be trading stamps within the meaning of the law) in the city of New Orleans; and we find nothing in the taxing of that business, as he conducts it, which operates an interference with the power of Congress to regulate interstate commerce.

The remaining question is, in what way does a statute of this state, enacted by the General Assembly in 1904, imposing a particular license upon all persons engaging in a particular business, deny the equal protection of the law to, and deprive of his property without due process of law, within the meaning of the Fourteenth Amendment, a person who came into the state, for the first time, on April 12, 1913? The answer which the learned counsel for defendant make is that, by the imposition of a prohibitive tax upon the business of issuing trading stamps, defendant has been deprived of that freedom of contract and right of choice, in the matter of a lawful occupation, to which, as a citizen of the United States, he is entitled. But the learned counsel do not deny that the state has the power to tax the occupation in which defendant is engaged, and the Supreme Court of the United States, speaking through Judge Marshall, long since enunciated the doctrine that:

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state or corporation may prescribe." *Weston et al. v. The City Council of Charleston*, 2 Pet. 466, 7 L. Ed. 487.

And it has been held by this court, in a suit against a trading stamp company for a license tax, arising under Act 47 of 1904, that the question of the amount of such tax to be

imposed upon a particular occupation is for the Legislature, and not the courts, to determine. *State v. Mercantile Trading Co.*, 114 La. 529, 38 South. 443.

Conceding, however, that "a person living under our Constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit" (*People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465), it must be admitted that a rather delicate situation is brought about when a difference of opinion arises between the community (speaking through its representatives in the Legislature) and the courts as to whether a particular pursuit is injurious and unlawful, or innocuous and lawful; and the situation becomes even more difficult when the courts themselves disagree with respect to the character of the same pursuit and the constitutionality of statutes taxing, regulating, or prohibiting it.

From a lately issued volume of a publication of the highest merit, we make the following excerpt in regard to the pursuit under consideration, to wit:

"The courts in the several jurisdictions differ in their attitude towards the validity of laws restricting the issuance of trading stamps. Such laws, forbidding any person to sell, give away, or distribute any stamp, coupon, or other device which will enable a purchaser to demand or receive from another person any article of merchandise other than that actually sold to such purchaser, have been held to be in violation of the Fourteenth Amendment to the Constitution of the United States. In other jurisdictions, such statutes are upheld as valid. It has been held that the business of a trading stamp company is not a process of advertising the merchant with whom contracts are made which will take it out of the operation of the police power, and that the freedom of contract is not unconstitutionally interfered with by the prohibition of the use of trading stamps." 6 R. C. L. 211.

The cases cited as supporting the proposition last above stated are: *In re Gregory*, 219 U. S. 210, 31 S. Ct. 143, 55 L. Ed. 184; *District of Columbia v. Kraft*, 35 App. D. C. 253, 30 L. R. A. (N. S.) 957, and note.

In the case of *District of Columbia v. Kraft*, *supra*, Chief Justice Shepard delivered a most able and exhaustive opinion, in which the whole jurisprudence upon the subject of the trading stamp business is reviewed, reaching the conclusion as stated in the last paragraph of the foregoing excerpt. In the course of the opinion he quotes, with approval, as follows from a previous opinion handed down by the same court in the case of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, to wit:

"They" (the trading stamp concerns) "are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is * * * nothing more or less than a cunning device. With no stock in trade, but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia, between seller and buyer, not for the advantage of either, but to prey upon both.

They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant. * * * The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of others, and partly through fear of losing his own if he declines."

In his review of the different cases which are sometimes cited as supporting the contention that the trading stamp business is a legitimate business, and does not fall within the grasp of the police power, the learned Chief Justice finds that there are but few of them which touch the point here presented.

From a note appended to the case it appears that the similar case of *Columbia v. Gregory*, 35 App. D. C. 271, was heard at the same time, and decided in the same way; that application was made to the Supreme Court of the United States for the review of the *Kraft* Case by certiorari, but that the writ was denied; and that subsequently *Gregory* applied for relief by habeas corpus, which writ was denied. The note also refers to a Canadian case (*Wilder v. Montreal, Rap. Jud. Quebec*, 26 C. S. 504), in which, the provincial Legislature having passed an act authorizing municipalities to prohibit the use of trading stamps, and the act having been upheld, the judgment sustaining it was reversed by the King's Bench on the ground that the act was ultra vires, as impinging on the power of Parliament; whereupon the Canadian Parliament passed an act amending the criminal law and declaring the trading stamp business illegal.

Recurring to the case under consideration, defendant's position is that he is prevented by the state of Louisiana from following within her territory (quoting, from the brief of his counsel, the language of the New York Court of Appeals in *People v. Gillson*) "such lawful industrial pursuits, not injurious to the community, as he may see fit," in that he is prevented from issuing trading stamps; and he appeals to the Constitution of the United States, not, be it observed, on the ground that the state of Louisiana is using its taxing power in a case in which, if the prevention can be applied at all, it should use its police power, but on the ground that the state is using its taxing power to stifle a pursuit that is not subject to the police power; a legitimate pursuit; a lawful, industrial, pursuit, not injurious to the community; a pursuit which the Fourteenth Amendment guarantees that every citizen of the United States may follow, as of right, in every state in the Union, the people, Constitution, statutes, and public policy of such state notwithstanding to the contrary. If, then, the pursuit selected by defendant be not shown to be a lawful industrial pursuit, innocuous to the community, or, broadly speaking, if it be not shown that his pursuit is beyond the reach of the police power of the state, he can take nothing by his plea, since his appeal to the Fourteenth Amendment is

based upon the alleged legitimacy and innocuousness of his pursuit; and if he has failed to establish what he has alleged, and it appears that his pursuit is within the police power of the state to regulate or prohibit, the question whether the state has exercised that power in accordance with its own laws is one of which the Fourteenth Amendment will not take cognizance, provided that which has been done might legally have been done in the exercise of that power.

Well, the state of Louisiana takes issue with the defendant on the question stated. Fifteen years ago it enacted a statute entitled "An act making it a misdemeanor to issue trading stamps or other devices," which imposed penalties of fine and imprisonment upon any one who should engage in issuing trading stamps or who should deal with such person. It is true that this court decided that the act was unconstitutional, because the title was inadequate and misleading—the context going beyond the title, and it being found impossible to separate that which was, from that which was not, included. But it served, nevertheless, as a declaration of the views of the people of the state, speaking through their lawmakers, and of the public policy of the state, concerning the trading stamp business. And the Act of 1900, No. 35 (thus referred to), was followed, in 1904, by the act now under consideration, which was sustained by this court, against an attack similar to that which defendant now makes, in the case of *State v. Merchants' Trading Co. Ltd.* (hereinbefore cited), and which, according to defendant's allegations, imposes a prohibitive tax on the business in question. Whatever others may think, therefore, it is fairly evident that the people of Louisiana have been, for 15 years, of the opinion that the trading stamp business is not an industrial pursuit, working no harm to the community, but is a mere parasite, seeking to fatten upon such pursuits, and that they have endeavored to make it unlawful, and are now endeavoring to so tax it as, at least, to discourage its development. Who, then, if the case be doubtful, should be the better able to determine whether the business is harmless or pernicious—the members of the Legislature, upon whom that obligation is imposed, and who are fresh from the mass of the people, with whom the business of the defendant is transacted, or the judges of the courts, whose connections with the current affairs of life are more remote? The courts have, no doubt, a duty to perform in the protection of the rights of the individual citizen; but they have also a duty to perform in the protection of the rights of the mass of the citizens. The rule by which they should be

governed has therefore been deduced by the highest authority, from all the cases, as follows:

"But in all the cases there is the constant admonition, both in their rules and examples, that when a statute is assailed as offending against the highest guarantees of the Constitution it must clearly do so to justify the courts in declaring it invalid." *Eubank v. Richmond*, 226 U. S. 143, 33 Sup. Ct. 77, 57 L. Ed. 158, 42 L. R. A. (N. S.) 1126, Ann. Cas. 1914B, 194.

Bearing in mind the admonitions thus referred to, we are of opinion that the statute here attacked offends no guarantee invoked by defendant of either the Constitution of the United States or of this state.

[3] In the District of Columbia, where the paramount laws of the land are made and authoritatively construed, there has been in force, since February 17, 1873 (17 Stat. at L. 464, c. 148), a period exceeding 40 years, and is now in force, an act of Congress making it a penal offense to engage in any gift enterprise in that District, which act has been, and is now, applied to the trading stamp business, notwithstanding that it has been, time and again, attacked upon the grounds here relied on by defendant, and notwithstanding that the Supreme Court of the United States has been, time and again, applied to for the reviewal and reversal of the rulings of the District of Columbia Court of Appeals, repelling such attacks; and, in view of those facts, we are further of opinion that, until the Supreme Court of the United States shall have decided to the contrary, there can be no sufficient reason, arising under the Constitution of the United States, why this court, yielding its own convictions, should hold that the state of Louisiana may not adhere to and enforce its public policy with regard to the grave question of the rights of the individual, considered with reference to the rights of the community, which is here put at issue.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and avoided, and that there now be judgment in favor of the state of Louisiana and against the defendant, Charles A. Underwood, in the sum of \$5,000, with 2 per cent. per month interest thereon from June 10, 1913, until paid, 10 per cent. as attorney's fees, upon the aggregate of said principal and interest, and recognition of a first lien and privilege for the whole upon all the property of the defendant, movable and immovable. It is further decreed that defendant be enjoined from the further conduct of the business in which he is engaged at 608 Canal Street, New Orleans, until the amount awarded by this judgment shall have been paid.

(139 La.)

No. 21852.

BRANA v. BRANA.

In re BRANA.

(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by Editorial Staff.)

1. INFANTS — 18 — MINORS — NEGLECTED CHILD—JURISDICTION OF JUVENILE COURT.

Under the law giving the juvenile court jurisdiction over neglected children, prescribing the conditions which must exist in order that a child should be considered to be a neglected child, no children are neglected or delinquent, for the purposes of its jurisdiction, save those who fall within the classification established by the law.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. —18.]

2. JUDGMENT — 27 — VALIDITY — JURISDICTION.

The judgment of any tribunal in a matter of which it has no jurisdiction is a mere nullity, and may be treated as such whenever and wherever it is sought to be made a ground of action or defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 38; Dec. Dig. —27.]

3. JUDGMENT — 474—JURISDICTIONAL FACT—CONCLUSIVENESS.

The decision of the juvenile court, vested with jurisdiction to determine when a child answers the description of a neglected child given by the Constitution is not to be challenged except in a direct action brought for that purpose, or in some appellate tribunal; and hence is not subject to inquiry in the civil district court, but must there be assumed to be well founded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 909; Dec. Dig. —474.]

4. INFANTS — 18 — MINORS — NEGLECTED CHILD—JURISDICTIONAL FACT.

Under the law vesting the juvenile court with jurisdiction to determine when a child answers the description given of a neglected child by the Constitution, the fact of the condition of the child is not strictly jurisdictional, but is only quasi jurisdictional.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. —18.]

5. INFANTS — 18—MINORS—JUVENILE COURT—NEGLECTED CHILDREN—JURISDICTION.

The jurisdiction of the juvenile court as to the custody of neglected children is quasi criminal, operating as between the state and the parents or as between the child and the state, and if the civil district court, having civil jurisdiction of a suit for separation from bed and board, had awarded the child to the mother, there was nothing to prevent the juvenile court from finding that the child was neglected and from taking it away from the parent who was neglecting it, or from both parents, as in that matter its jurisdiction was not concurrent with the civil district court.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. —18.]

O'Niell, J., dissenting.

Suit in separation from bed and board by Jules L. Brana against Maria A. Brana, his wife, brought in the civil district court, and proceeding by the wife in the juvenile court against her husband to compel provision for the support of a minor child, with order of

the juvenile court, placing the child in charge of its mother, and from an order of the district court, revoking its order giving the custody to the mother, and giving the custody to the father, the wife applies for writs of certiorari and prohibition. Writ of prohibition to issue.

Loys Charbonnet and Jas. J. McLoughlin, both of New Orleans, for relator. A. D. Henriques, Asst. Dist. Atty., Fred D. King, and Paul L. Fourchy, all of New Orleans, for respondent.

PROVOSTY, J. On September 14, 1915, Mrs. Brana charged her husband before the juvenile court with having failed to provide for the support of their nine months old child; and the court made an order that he pay her \$3 weekly for that purpose.

On the same day, the husband brought suit in separation from bed and board in the civil district court, and the suit was assigned to the division of the respondent judge.

Two days thereafter, on the 16th, the probation officer of the juvenile court made an affidavit before that court, charging that the husband had taken the child from the custody of the mother; that the child was sick; that the mother had made every effort in vain to see the child in order that she might attend to its wants; and that the child was a neglected child; and the said court made an order "temporarily placing the child in charge of her mother until further orders of this court."

Whether this was done after, or without, having granted the father a hearing does not appear.

On the next day, the 17th, the husband took a rule in the respondent judge's court, as an incident in the separation from bed and board suit, on his wife to show cause why the custody of the child should not be given to him, for the reason that the mother was an unfit person.

On the day fixed for the return of this rule, September 21, 1915, the parties were heard, and the court made an order, giving the custody to the mother, but requiring her to furnish bond in the sum of \$300 conditioned for the production of the child in court whenever so ordered.

On February 15, 1916, the husband took another rule on his wife in the respondent judge's court to show cause why the order of September 21st, giving her the custody of the child, should not be set aside and the custody taken away from her and given to him. He assigned as reasons that the wife had not given bond, as required, and had—"moved from her former residence without permission of the court, under the advice and instigation of certain intermeddlers, so as to make it as inconvenient as possible for mover to call for and ask for the child, at the same time isolating said child from all family surroundings"; and because "said defendant works out at the Victoria Hotel daily from 7 a. m. to 2

p. m. and from 5 p. m. to 8 p. m., and during all of that time abandons this child to the care and mercy of strangers, and thus deprives said child of both maternal and paternal love and affection."

In her return to this rule, the wife alleged that her change of residence had been by authority of both the juvenile court and the court of the respondent judge; that her custody of the child was by virtue of a judgment of the juvenile court of date September 27, 1915; and that, the two courts having concurrent jurisdiction, and the juvenile court having been first seized of the child, the respondent judge was without authority to proceed further in the matter.

After hearing, the respondent judge held that it was his court that had been first seized of the child by virtue of his order of September 21, 1915, and that, moreover, the juvenile court had no jurisdiction at all over the child, since it was not a neglected child, it was under the care of the husband's mother, a woman of means, "in the house in which it was born, where it was raised up to the age of 15 months, and had every comfort a child of that age could have"; that the case was simply one where two parents were contending for the custody of a child to whom they were attached, and of whom they would be sure to take good care. And he revoked the order by which he had given the custody to the mother, and gave the custody to the father.

Thereupon the wife applied to this court for the writs of certiorari and prohibition to review this action of the respondent judge.

In his return the respondent judge justifies his action on the grounds hereinabove stated, and adds that, on the trial before him:

"It was shown that Mr. Brana, when he married and until his wife abandoned him, lived with his mother, Widow Charles Brana, a lady of means, who was devotedly attached to said minor child, has always cared and provided, not only for said child, but also for the father and mother, the child being raised on the bottle."

[1] The juvenile court is asserting jurisdiction of said child on the score of its being a neglected child, and not on any other ground. The law which confers jurisdiction upon said court over neglected children prescribes the conditions which must exist in order that a child should be considered to be a neglected child. It provides:

"The term 'neglected child' shall mean any child, seventeen years of age and under, found destitute or dependent on the public for support or without proper guardianship, or whose home, by reason of the neglect, cruelty or depravity, or indigence, of its parents, guardians or other persons, is an unfit place for such child, or having a single surviving parent undergoing punishment for crime, or found wandering about the streets, at night, without being on any lawful business."

In the case of *State v. Rose*, 125 La. 1080, 52 South. 165, this court held that the juvenile court had no jurisdiction of a child simply because it was made to perform on the stage, and said:

"No children are neglected or delinquent, for the purposes of its jurisdiction, save those who fall within the classification established by the law which confers the jurisdiction."

In *State v. McCloskey*, 136 La. 739, 67 South. 813, this court said that the meaning of the term "neglected child," had been "expressly, carefully, and explicitly defined by the" law conferring jurisdiction upon the juvenile court.

It is plain, therefore, that, upon the assumption of the facts of the case being as stated by the respondent judge, the juvenile court was utterly without jurisdiction in the matter, and its interference was simply that of an intermeddler.

[2, 3] The judgment of any tribunal in a matter of which it has no jurisdiction is a mere nullity, and may be treated as such whenever and wherever it is sought to be made a ground of action or defense. But it is equally true that the decision of any tribunal, upon a question of fact of which it has jurisdiction, is conclusive; that is to say, is not to be challenged on the score of its incorrectness, except in a direct action brought for that purpose, or by recourse to some tribunal having power of revision over it. These propositions are axiomatic. The juvenile court is vested with jurisdiction to determine when a child answers the description given of a neglected child by the Constitution; and hence its decision upon that point is not subject to inquiry in the court of the respondent judge, but has to be there assumed to be well founded. For the purpose of the present discussion, therefore, the said child has to be assumed to be a neglected child.

[4] The learned respondent judge concluded that because the fact of this child being a neglected child, is jurisdictional, and because he, himself, found upon the evidence that this fact did not exist, therefore the juvenile court had no jurisdiction, and its judgment, or order, was a pure nullity. This view would be correct if this fact of the condition of the child were a fact strictly jurisdictional, but such is not the case; it is only quasi jurisdictional. For a very clear exposition of the distinction between matters strictly jurisdictional and matters quasi jurisdictional only, see *Noble v. Union River Logging Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.

[5] Equally untenable is the other ground of the decision of the learned respondent judge—that his court was first seized of the child. In the first place, the order made by the juvenile court, on September 16th, placing the child in the custody of the mother, preceded by five days that made by the respondent judge on September 21st, placing the child in the custody of the mother. In the second place, the question cannot be made to depend upon precedence. The two courts have not concurrent jurisdiction. This has already been pointed out in the

case of *State v. McCloskey*, 136 La. 739, 67 South. 813. The one jurisdiction is civil; it acts as between the parents. The other is quasi criminal; it acts as between the state and the parents, or as between the state and the child. After the respondent judge's court has awarded the child to the one parent, as being the one most worthy, or least unworthy, of the charge, there is nothing to prevent the juvenile court from finding that the child is being neglected, and therefore should be taken away from both parents, or from the parent who is neglecting it. And such a course would in no wise interfere with the jurisdiction of the court having civil jurisdiction as between the two parents. In such a case, the action of the juvenile court would be based strictly on the ground of the child being neglected, and not, like that of the respondent judge, upon an issue between the two parents.

This is the legal, or theoretical, aspect of the matter. We readily perceive that in practice the situation may develop differently. That in a case such as the respondent says in his return this one is, where the child is not a neglected child, there would be a conflict between the two courts. But the law would not be to blame; but the juvenile court would be at fault in having found that a child was neglected when in fact it was not.

In this case this court cannot review the facts on this point, no more than it could in the *McCloskey* Case, *supra*; the facts not having been brought in such form as would allow of its being done.

Therefore let the writ of prohibition issue herein as prayed.

O'NIELL, J., dissents.

(139 La.)

No. 20424.

BRISTO v. CHRISTINE OIL & GAS CO.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \Leftrightarrow 30 — VENDOR AND PURCHASER \Leftrightarrow 18(1) — REQUISITES OF LEASE—DEFINITENESS.

A lease or an option for an indefinite term is a nudum pactum.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 86, 87; *Dec. Dig.* \Leftrightarrow 30; *Vendor and Purchaser*, Cent. Dig. § 23; *Dec. Dig.* \Leftrightarrow 18(1).]

2. MINES AND MINERALS \Leftrightarrow 66 — MINING LEASES—CONSIDERATION.

A stipulation in a mineral lease that the lessee or grantee shall have the right, without any obligation, to prevent a forfeiture of the contract and hold the grantor's land under a perpetual lease or option by paying a stipulated rental annually, is a nudum pactum.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 185, 186; *Dec. Dig.* \Leftrightarrow 66.]

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Bettie Bristo against the Christine Oil & Gas Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellant. Elan & Lee, of Mansfield, and J. S. Wheless, of Beaumont, Tex., for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a sale of the minerals on or in the plaintiff's land and a lease of the land for mining purposes.

The principal features of the contract are these: For and in consideration of the price and sum of \$1 paid in cash by the grantee, the plaintiff granted, bargained, sold, and conveyed unto the grantee, and his heirs and assigns, all of the oil, gas, coal, and other minerals in and under the lands described in the contract, together with the right of ingress and egress at all times for drilling and mining purposes. The grantor was to receive a royalty of one-eighth of whatever oil might be produced, and 4 cents for every ton of coal and a stipulated royalty for each gas well. The grantee reserved the right to remove at any time all machinery, fixtures, and improvements that he might place upon the leased premises. It was stipulated that, in the event the drilling of a well should not be commenced within a year from the date of the contract and prosecuted with due diligence, the grant was to become null and void, provided that the grantee might prevent the forfeiture from year to year by paying to the grantor the sum of 10 cents per acre annually until a well was commenced or until shipments from the mines had begun, which payments might be made at the People's Bank in Mansfield, La. It was stipulated that the completion of a well should operate a full liquidation of all rents, and that, in the event of the discovery of oil or other mineral, the contract should remain in force 25 years from the date of such discovery, and as long thereafter as the minerals could be produced in paying quantities. The grant was declared to be not a mere franchise, but a conveyance of the land for the purposes mentioned in the contract; and it was also recited in the deed that the rights conferred and obligations imposed upon the parties thereto, respectively, should descend to their heirs, administrators, and assigns.

The contract was signed on the 25th of January, 1911. Nothing whatever was done by the grantee or his assigns in pursuance of the grant, except that on the 24th of April, 1913, the defendant, transferee of the contract, deposited to the credit of the plaintiff in the People's Bank of Mansfield, La., \$16,

there being 180 acres of land described in the contract. The plaintiff refused to receive the deposit, and 4 months later filed this action of nullity.

The suit was founded principally upon these complaints: (1) That the cash price, \$1, paid as a consideration for the pretended sale, was out of proportion to the value of the grant, and that therefore, under the provisions of the Civil Code, the act could not be considered a sale; (2) that the 10 cents an acre stipulated as the consideration to be paid annually for a renewal from year to year, or to prevent a forfeiture, was also entirely out of proportion to the value of the pretended lease; (3) that the agreement contained and depended upon potestative conditions, and not mutual obligations; (4) that the pretended lease was without a fixed or definite term; and (5) that, if the contract was ever valid, it was violated and breached by the defendant's failure to drill a well or do anything in pursuance of the agreement.

The answer of the defendant is that the annual rental of 10 cents an acre was adequate consideration for the lease, and that it was only after the defendant had expended a large sum of money in the development of the adjacent territory that the plaintiff deemed it advantageous to herself to seek to put an end to her contract.

There is no dispute as to the important facts of this case. The plaintiff's land was of so little value at the time she signed the contract in question that 10 cents per acre might have been regarded as a fair annual rental. It was the discovery of gas and oil in the vicinity of the plaintiff's land in April or May, 1913, that gave value to the lease in contest.

Opinion.

[1, 2] Article 2464 of the Civil Code provides that the price of a sale must not be out of proportion with the value of the thing sold, and as an illustration declares that a pretended sale of a plantation for \$1 should be considered, not a sale, but a donation disguised. It is not necessary, however, to determine whether that article of the Code is applicable to the present case. It may be assumed that the grantee could have acquired a mineral lease for 25 years by drilling a well on the plaintiff's land within the year stipulated in the contract. It is not disputed that the grantee's rights, if he had any, under the contract, were forfeited by his failure to commence drilling a well on the plaintiff's land within the year, unless it be held that the defendant could prevent the forfeiture and keep the option in force indefinitely by paying the stipulated annual rental of 10 cents an acre. Hence the only question presented for decision is whether the stipulation that the grantee might prevent a

forfeiture and continue the lease or option from year to year by paying an annual rental of 10 cents an acre was or is enforceable. Our opinion is that that stipulation in the contract is null for want of a fixed or definite term. Whether it be regarded as a lease or an option, it would be an anomalous contract without a definite term or limitation. To recognize that the defendant has the right, without any obligation, to hold the plaintiff's land under a perpetual lease or option, would take the property out of commerce, and would be violative of the doctrine of ownership, defined in the second title of the second book of the Civil Code.

In the case of *Saunders v. Busch-Everett Co.*, 71 South. 153, not yet officially reported, where we held that the stipulation allowing the grantee to keep the option in force by paying an annual rental of 15 cents an acre was valid, the right was limited to 5 years. The opinion contains an analysis of our jurisprudence on mineral leases, distinguishing the contract then under consideration from the *nudum pactum* found in other cases, and particularly in *Murray v. Barnhart*, 117 La. 1025, 42 South. 489.

We rest our decision in this case, not upon the potestative condition on which the contract was made, but upon the proposition that a contract purporting to give a perpetual option to hold land under a mineral lease is null.

The judgment appealed from is affirmed.

(139 La.)

No. 20428.

CALHOUN v. CHRISTINE OIL & GAS CO.
(Supreme Court of Louisiana. April 3, 1916.)

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Milo Calhoun against the Christine Oil & Gas Company. From judgment for plaintiff, defendant appeals. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellant. Elam & Lee, of Mansfield, and J. S. Wheelless, of Beaumont, Tex., for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease similar to the contract declared null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. For the reasons assigned in that case, the judgment appealed from is affirmed.

(139 La.)

No. 20425.

NORRIS v. SNYDER & McCORMICK.
(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

ESTOPPEL §92(2)—ANNULMENT OF INVALID OPTION—ACCEPTANCE OF CONSIDERATION.

The grantor's acceptance of the consideration paid by the grantee for keeping an indefinite and therefore invalid option in force, during the time it was considered in force by both par-

ties, does not prevent the grantor's demanding that it be decreed null thereafter.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 261; Dec. Dig. ¶92(2).]

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Thomas F. Norris against Snyder & McCormick. From judgment for plaintiff, defendants appeal. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellants. Pegues & Burgess, of Mansfield, for appellee.

O'NIELL, J. The defendants have appealed from a judgment annulling a contract purporting to be a mineral lease, similar to the contract decreed null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. In the present case it appears that the plaintiff accepted and drew out the money deposited by the defendants with a view of preventing the forfeiture of the lease. The deposit was not made, however, until nearly a year after the option was forfeited by the defendants' failure to drill a well within the year after the signing of the contract. The suit was filed four months after the grantee made the deposit. The amount of the deposit was slightly in excess of a year's rent. But it does not appear that the rent was paid to a date beyond the time this suit was filed. The grantor's acceptance of the consideration for the time that the option was regarded by him and the grantee as being in force did not prevent his demanding that the contract be decreed null thereafter. In all other respects the facts of this case are the same as in the case of *Bettie Bristo v. Christine Oil & Gas Co.* For the reasons this day handed down in that case, the judgment appealed from herein is affirmed.

(139 La.)

No. 20426.

DUNHAM v. McCORMICK.

(Supreme Court of Louisiana. April 3, 1916.)

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Kimball Dunham against W. B. McCormick. From a judgment for plaintiff, defendant appeals. Affirmed.

Hampden Story, of Shreveport, and Liverman & Pollock, of Mansfield, for appellant. Elam & Lee, of Mansfield, and J. S. Wheless, of Beaumont, Tex., for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease similar to the contract declared null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. For the reasons assigned in that case, the judgment appealed from is affirmed.

(139 La.)

No. 20429.

NERVIS v. McCORMICK.

(Supreme Court of Louisiana. April 3, 1916.)

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Pat Nervis against W. B. McCormick. From a judgment for plaintiff, defendant appeals. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellant. Elam & Lee, of Mansfield, and J. S. Wheless, of Beaumont, Tex., for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease, similar to the contract declared null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. For the reasons assigned in that case, the judgment appealed from is affirmed.

(139 La.)

No. 20430.

PARROTT v. McCORMICK.

(Supreme Court of Louisiana. April 3, 1916.)

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Andrew Parrott against W. B. McCormick. From a judgment for plaintiff, defendant appeals. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellant. Lee, Hardin & Atkinson, of Leesville, for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease, similar to the contract declared null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. For the reasons assigned in that case, the judgment appealed from is affirmed.

(139 La.)

No. 20431.

WILLIAMS v. McCORMICK.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

ESTOPPEL ¶92(2)—ACCEPTANCE OF BENEFITS—RESCISSION OF CONTRACT—RIGHTS OF PARTIES.

The grantor's acceptance of the consideration paid by the grantee for keeping an indefinite, and therefore invalid, option in force, during the time both parties considered it in force, does not prevent the grantor's demanding that it be decreed null thereafter.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 261; Dec. Dig. ¶92(2).]

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by C. O. Williams against W. B. McCormick. From a judgment for plaintiff, defendant appeals. Affirmed.

Hampden Story, of Shreveport, and Liverman & Pollock, of Mansfield, for appellant. Parsons & Craig, of Mansfield, for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease, similar to the

contract decreed null in the case of *Bettle Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. In the present case it appears that the plaintiff accepted and drew out the money which the defendant had deposited in bank with a view of preventing the forfeiture of the lease. The deposit was not made, however, until more than a year after the option was forfeited by the defendant's failure to drill a well within the year after the signing of the contract. The suit was filed four months after the grantee made the deposit. The amount of the deposit was for only one year's rent; hence nothing was paid in advance. The grantor's acceptance of the consideration for the time that the option was regarded by him and the grantee as being in force did not prevent his demanding that the contract be decreed null thereafter. In all other respects the facts of this case are the same as in the case of *Bettle Bristo v. Christine Oil & Gas Co.* For the reasons this day handed down in that case, the judgment appealed from herein is affirmed.

(189 La.)

No. 20432.

PARROTT v. KIRSCHLER.

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

ESTOPPEL ¶92(2)—ANNULMENT OF INVALID OPTION—ACCEPTANCE OF CONSIDERATION.

The grantor's acceptance of the consideration paid by the grantee for keeping an indefinite, and therefore invalid option in force, during the time both parties considered it in force, does not prevent the grantor's demanding that it be decreed null thereafter.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 261; Dec. Dig. ¶92(2).]

Appeal from Twelfth Judicial District Court, Parish of De Soto; James G. Palmer, Judge.

Action by Andrew Parrott against Charles F. Kirschler. From judgment for plaintiff, defendant appeals. Affirmed.

Liverman & Pollock, of Mansfield, and Hampden Story, of Shreveport, for appellant. Lee, Hardin & Atkinson, of Leesville, for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease, similar to the contract decreed null in the case of *Bettle Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided to-day. In the present case it appears that the plaintiff accepted and drew out the money deposited by the defendant with a view of preventing the forfeiture of the lease. The record does not show when the deposit was made. It was apparently some time in 1913. The contract was signed on the 27th of January, 1911. The suit was filed in June, 1913. The amount of

the deposit was for only three months' rent. The grantor's acceptance of the consideration for a part of the time that the option was regarded by him and the grantee as being in force did not prevent his demanding that the contract be decreed null thereafter. In all other respects the facts of this case are the same as in the case of *Bettle Bristo v. Christine Oil & Gas Co.* For the reasons this day handed down in that case, the judgment appealed from herein is affirmed.

(189 La.)

No. 20440.

JUNG & SONS CO. v. TROSCLAIR (LE BOURGEOIS & BUSH, Interveners).

(Supreme Court of Louisiana. April 3, 1916.)

(Syllabus by the Court.)

COURTS ¶224(3)—JURISDICTION—JUDGMENT ON INCIDENTAL DEMAND.

"In all cases where there is an appeal from a judgment rendered on a reconventional, or other incidental, demand, the appeal shall lie to the court having jurisdiction of the main demand."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 614; Dec. Dig. ¶224(3).]

Appeal from Twentieth Judicial District Court, Parish of Lafourche; W. P. Martin, Judge.

Action by Jung & Sons against L. A. Trosclair, and Le Bourgeois & Bush, third opponents and interveners. From judgment for plaintiffs, interveners and third opponents appealed to the Court of Appeal, which transfers the case to the Supreme Court. Ordered that case be transferred to Court of Appeal.

Alexis Brian and Foster, Milling, Saal & Milling, all of New Orleans, for appellants. Caillouet, Caillouet & Howell, of Thibodaux, for appellees.

SOMMERVILLE, J. This case has been transferred by the Court of Appeal, First Circuit of Louisiana, to this court with the accompanying statement:

"Plaintiffs, alleging themselves to be creditors of L. A. Trosclair in the sum of \$378.04 for coal furnished to the defendant for the purpose of making, saving, and manufacturing into sugar and molasses his crop of sugar cane grown by him on his Laurel Grove plantation, in the parish of Lafourche, and alleging the lien and privilege granted by law in their favor as furnishers of supplies, prayed for a writ of sequestration under which the sheriff seized and sequestered two tanks of third sugars containing about 60,000 gallons, valued at \$2,400.

"Le Bourgeois & Bush, a commercial firm, then appeared in this suit by intervention and third opposition. They allege that defendant is indebted to them in various sums aggregating over \$100,000, secured by lien and privilege and by pledge and pawn on the crops made by said defendant on his Laurel Grove plantation, that their said privileges are higher in rank than that purported to be held by plaintiffs on the said crops, and especially on the third sugars herein seized and sequestered by the plaintiffs, and that they are entitled to be paid by preference

and priority over plaintiffs. They further allege that the property under seizure is of a value not more than \$7,000, and they finally pray that the sheriff be ordered to restore possession of said sugar and molasses to them as pledgees thereof and recognizing them, interveners and third opponents, as the first privilege creditors of said defendant, L. A. Trosclair, all at the cost of said plaintiffs.

"Trosclair, defendant, made no appearance, and judgment by default was confirmed against him, and after due trial, the district court further rendered judgment in favor of plaintiff, rejecting and dismissing the demand of the interveners and third opponents, and from this judgment the said interveners and third opponents appealed to this court.

"It appears from the foregoing statement of the pleadings and facts of this case that the whole controversy pending between the parties is a contest as to which primes the other on property admittedly worth between \$2,400 and \$7,000. The amount in controversy is then clearly above the jurisdiction of this court. *Denegre v. Tebault*, 130 La. 283, 57 South. 929; *Bacas v. Adler*, 112 La. 806, 36 South. 739.

"We therefore feel compelled to decline jurisdiction of this appeal *ex proprio motu*, reserving, however, to the appellants the rights granted them by Act No. 19 of 1912.

"For these reasons, it is therefore adjudged and decreed that, in pursuance of the provisions of Act No. 19 of the General Assembly of the state of 1912, this case be transferred to the honorable Supreme Court of this state; interveners and appellants to pay costs of this court."

The court has failed to consider article 95 of the Constitution, as amended by the joint resolution of the General Assembly, known as Act No. 137 of 1904, p. 307, which is as follows:

"In all cases where there is an appeal from a judgment rendered on a reconventional, or other incidental, demand, the appeal shall be to the court having jurisdiction of the main demand."

The main demand in this case is for \$378.04, and the appeal from the judgment in the case on that demand, and other incidental demands, in the case was to the Court of Appeal.

The intervention and third opposition of *Le Bourgeois & Bush* was an incidental demand in the case, and the appeal in such case lies "to the court having jurisdiction of the main demand."

The decision of this court in *Bacas v. Adler*, 112 La. 806, 36 South. 739, and referred to by the Court of Appeal, was rendered prior to the amendment of article 95 of the Constitution, and can therefore have no application.

The other case, *Denegre v. Tebault*, 130 La. 283, 57 South. 929, involved the right of a state tax collector to a writ of certiorari from this court, where he was not a party to the suit originally, and where he had filed a rule, under the law, in the proceeding claiming taxes out of the proceeds of the sale of certain property. There was judgment partly in his favor, and he applied to this court for a writ of certiorari to review the judgment of the trial court. The writ was denied on the ground that the Court of Appeal had jurisdiction of the case. Neither

the original plaintiff nor defendant was before this court. The contest was between the tax collector and the civil sheriff. No reference was made to article 95 of the Constitution, as amended. The court stated:

"The question to be decided is whether the amount of the taxes is due on \$12,500, or on \$1,292.90."

And the court ruled:

"The parties are left to their remedy before the tribunal having appellate jurisdiction."

The ruling is not authority in this case.

This court is without appellate jurisdiction in this case.

It is therefore ordered, under section 1 of Act No. 19 of 1912, p. 26, that this case be transferred to the Court of Appeal, First Circuit of Louisiana, to be there proceeded with as if it had never been transferred to the Supreme Court.

(139 La.)

No. 21663.

SIMS, Examiner of State Banks, v. ATHENS BANK.

(Supreme Court of Louisiana, March 20, 1916.
On Application for Rehearing,
April 24, 1916.)

(Syllabus by the Court.)

BANKS AND BANKING §109(3)—FUNCTIONS AND DEALINGS—REPRESENTATION BY OFFICER—PLEDGE.

A pledge of the assets of a bank by the cashier without authority of a resolution of the board of directors, being in violation of a prohibitory law, is invalid. The pledge, under such circumstances, may be recognized as an ordinary creditor for the amount received by the bank, but the illegal contract of pledge cannot be enforced to the prejudice of other creditors of the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 260; Dec. Dig. § 109(3).]

Monroe, C. J., and Land, J., dissenting.

Appeal from Third Judicial District Court, Parish of Claiborne; William C. Barnette, Judge.

Action by R. N. Sims, Examiner of State Banks, against the Athens Bank. The American National Bank proceeded by rule to be recognized as pledgee of certain collateral securities. From a judgment for the plaintiff in rule, the Examiner of State Banks appeals. Judgment annulled and set aside, and decree entered.

Richardson & Richardson, of Homer, for appellant. Stubbs & Theus, of Monroe, and McClendon & McClendon, of Homer, for appellee.

O'NIELL, J. The American National Bank, being a creditor of the Athens Bank, in liquidation, proceeded by rule against the examiner of state banks, and against the special agent and liquidator of the Athens Bank, to be recognized as the pledgee of certain

promissory notes and cotton warehouse receipts. These collaterals had been given in pledge by the cashier of the Athens Bank to the American National Bank to secure certain loans exceeding \$15,000, represented by four promissory notes bearing the signature of the Athens Bank, by its cashier, payable to the American National Bank.

In answer to the rule, the bank examiner and liquidator averred that they were in error in having listed the notes and cotton warehouse receipts held by the American National Bank as pledged to that bank. They averred that the list of these securities had been given to them by the representative of the American National Bank, whose statement, that the notes and cotton warehouse receipts had been lawfully pledged to the national bank, the defendants accepted as true, but that, on examination of the minute book of the proceedings had by the directors of the Athens Bank, it developed that no authority had been given to any one to pledge or hypothecate the notes and cotton warehouse receipts in question. The defendants, therefore, prayed that the plaintiff in rule be ordered to deliver the collateral securities in question to the liquidators, to be disposed of and the proceeds distributed in due course of liquidation of the bank's affairs.

The plaintiff in rule filed a plea of estoppel, alleging that the Athens Bank had borrowed and received, through its cashier, the money, to secure the repayment whereof the notes and cotton warehouse receipts were delivered in pledge by the cashier with the knowledge and approval of the directors of the Athens Bank; that it had been the custom for the cashier of the Athens Bank to borrow money for and in the name of the bank, and to secure the payment of such loans by pledging the available assets of the bank, all with the knowledge and consent of the directors of the bank. The plaintiff, therefore, pleaded that the Athens Bank, its liquidator and the state bank examiner, were estopped from contesting the rights of the American National Bank as pledgee of these notes and cotton warehouse receipts.

The record contains an admission by counsel for the plaintiff in rule that there was no resolution of the board of directors of the Athens Bank to authorize its cashier to borrow the money loaned by the American National Bank or to pledge or hypothecate the securities held by the national bank. It is admitted that the Athens Bank, through its cashier, borrowed and received the amounts or proceeds of the four notes held by the American National Bank, bearing the signature of the Athens Bank, by its cashier; that the cashier had, on several occasions, borrowed money from the American National Bank for and in the name of the Athens Bank, on notes similar to those now held by the plaintiff in rule, and had secured the loans by pledging the available securities of

the Athens Bank. It is also admitted that the notes held as collateral security were received in pledge by the American National Bank from the cashier of the Athens Bank before maturity, and that some of them are renewals of the notes originally pledged.

The district court gave judgment in favor of the plaintiff in rule, making the rule absolute, recognizing the plaintiff's right of pledge, and ordering the proceeds of the pledged notes and cotton warehouse receipts paid to the American National Bank, as pledgee, and in preference to other creditors of the Athens Bank. The state bank examiner prosecutes this appeal.

Opinion.

The borrowing of the money for the Athens Bank, and the pledging of its securities to the American National Bank, by the cashier, without a resolution of the board of directors of the Athens Bank, violated a prohibitory law. Section 4 of Act No. 193 of 1910 provides:

"That no officer of any state banking association, savings bank or trust company, shall have the right to borrow money and pledge or hypothecate any of its assets except in pursuance of a resolution of the board of directors duly entered upon its minute books."

The district court held that the Athens Bank should not be allowed to repudiate the contract of loan and pledge and retain the money received in the unauthorized transaction. Therefore, in effect, the plea of estoppel was maintained, merely because the court was unable to restore the condition existing in each bank at the time their respective officers entered into the unauthorized contract of loan. This reason for maintaining the plea must suggest itself in every case where the corporation has received the benefit of the unauthorized transaction of its officers. These considerations of equity, therefore, cannot, in this case more than in any other, prevent the application of the law that whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed. R. C. C. 12.

The district judge cites the case of *Blanc v. Germania National Bank*, 114 La. 742, 38 South, 537, and the case of *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, in support of his ruling that the liquidators of the Athens Bank cannot repudiate the cashier's unauthorized contract of pledge, without returning the money, for the payment whereof the bank's notes and warehouse receipts were pledged. If the cases cited maintained that doctrine, they would hold that a contract of pledge, made by an unauthorized officer of a bank or other corporation, must be enforced, any law to the contrary notwithstanding.

In the first of the cases cited, this court held that a corporation, having received the consideration for its promissory note signed only by its secretary, could not defeat a suit

on the note, with the defense that the charter of the corporation prescribed that such instruments should be signed by the president and the secretary. And it was held that the obligation to return or repay the money was sufficient to support the pledge of certain warehouse receipts. The difference between that case and the one before us, however, is that, in the case cited, the contract did not conform to the requirements of the charter of the corporation, whereas, in the present case, the unauthorized contract of pledge contravenes a prohibitory law. In the case cited, the only attack upon the validity of the pledge was that there was no debt to support it. In the case before us, the contention is that the contract of pledge violates a prohibitory law and is null, even though the debt exists.

In the second case cited, *Aldrich v. Chemical National Bank*, the Supreme Court of the United States held that the Chemical National Bank was entitled to receive a distributive dividend as a creditor of the Fidelity National Bank, in liquidation, notwithstanding the officer of the Fidelity National Bank who negotiated the loan from the Chemical National Bank was not authorized to make it. The obligation, however, arose, not from the contract of loan, but merely from the fact that the one bank had received money from the other, for which it had given no valid consideration, and which it was obliged to return.

On the principle of the case last cited, the American National Bank is a creditor of the Athens Bank for the money received by the latter from the former institution in pursuance of the unauthorized transaction between their respective officers. The plaintiff in rule, therefore, is entitled to share in the distribution of the assets or proceeds of the sale of the assets of the Athens Bank, in liquidation, as an ordinary creditor. But the contract of pledge, made in contravention of a prohibitory law, cannot be enforced to the prejudice of other creditors of the Athens Bank in liquidation.

The judgment appealed from is annulled and set aside, and it is now ordered and decreed that the American National Bank deliver to the examiner of state banks and the special agent and liquidator of the Athens Bank the assets belonging to said Athens Bank, given in pledge by its unauthorized cashier. The costs hereof are to be paid by the liquidators.

LAND, J., dissents.

On Application for Rehearing.

MONROE, C. J. My reconsideration of this case has led me to the conclusion that neither the law upon which the opinion of the court is predicated nor the jurisprudence of either this state or the country at large sustain the

proposition that, where, as in this case, one corporation has advanced money to another, which has received and used it, under a contract that was unauthorized and void, quoad the receiving corporation, and where, as in this case, the first corporation is recognized as a creditor of the second for the money so advanced and received, the first corporation be compelled to surrender the collateral by which the advance was secured whilst the second is allowed to retain the money advanced.

I, therefore, dissent from the present ruling of the court, refusing the rehearing.

LAND, J., concurs.

(139 La.)

No. 20521.

DIXON v. VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR — 1003 — NEGLIGENCE — 134(1) — RAILROADS — 348(1, 6) — ACCIDENTS AT CROSSINGS — EVIDENCE — REVIEW.

A verdict and judgment manifestly against the weight of the evidence will be set aside and reversed. A plaintiff suing to recover damages for personal injuries must prove the alleged negligence of the defendant by a preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. 1003; Negligence, Cent. Dig. § 267; Dec. Dig. 134(1); Railroads, Cent. Dig. §§ 1138, 1140, 1141, 1144, 1149; Dec. Dig. 348(1, 6).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Miss Bertha Dixon against the Vicksburg, Shreveport & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and suit dismissed.

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Andrew D. Keeney and Edward Barnett, both of Shreveport, for appellee.

LAND, J. Plaintiff sued the defendant for \$20,000 damages for injuries alleged to have been sustained in the city of Shreveport on October 23, 1912, by reason of a collision between an automobile for hire in which the plaintiff was riding as a passenger and a train of the defendant at a point on Louisiana street where the tracks of the defendant cross said street.

The petition alleges negligence in the defendant, in that there was no switchman or flagman on the ground at the crossing; no one to give warning; nor was any bell ringing or whistle blowing; nor was any one on the front end of the backing train as a lookout; nor was the train being run at the low rate of speed required; nor did the train

stop as required before crossing the street; nor was there any light on the front end of the train.

The petition charges that the train did not stop before making the crossing, and was running in excess of six miles an hour, in violation of the ordinances of the city of Shreveport.

The petition alleges that the plaintiff suffered injuries which shortened her right leg more than an inch, and that "her ribs on the left are severely injured and permanently," and that since the collision she has greatly suffered from insomnia, etc.

In a supplemental petition it is alleged that:

"The direct and immediate cause of the said injuries was the fact that the switchman or brakeman, who saw the approaching automobile, did not hold the train at the crossing, and the passage of the train over the crossing was due to the negligence of the said switchman, who was also and further negligent in that he did not take any steps in time to save the approaching automobile."

This petition was disallowed as inconsistent with the allegations of the original petition.

The answer of the defendant may be epitomized as a general and special denial of each and every negligent act or omission charged in the petition, with a special averment that the accident was caused solely by the gross carelessness of the occupants of the automobile, including the plaintiff, coupled with an alternative plea of contributory negligence on the part of the plaintiff and the other occupants of the car.

The first trial of the case before a jury resulted in a mistrial. The second trial resulted in a verdict in favor of the plaintiff for \$4,500. From a judgment pursuant to the verdict, the defendant has appealed.

The occupants of the car at the time of the accident were Miss Bertha Dixon, her sister, Lula, Homer Ferguson, and John Dillman. The hour of the accident was 2:10 o'clock in the morning. Ferguson was driving the car. Miss Lula Dixon was seated on the back seat with Dillman. The curtains were closed. Ferguson had been driving the car about 20 minutes. He took the place of Dillman, who had started driving about 11 p. m. of the previous day. We excerpt the foregoing facts from Dillman's testimony: The same witness further stated that the car, which was new, belonged to Monsour & Sons, from whom Ferguson had rented it for three hours commencing about 11:30 p. m. The next 3 hours were spent in driving about the city and the adjoining country.

Dillman said he did not see the defendant's train until the automobile was about 20 feet from the crossing; that, looking between two houses, he saw the train backing in; that as soon as the train appeared Ferguson turned to the left, and attempted to cross ahead of it; that the car was under

full power, but was only going about 4 miles an hour, and could have been stopped within 10 or 15 feet; by his actions, Ferguson seems to have attempted to stop the car; the witness did not see any flagman or signal; the trainmen made no effort to prevent the collision, that he could see, until they were under the car.

Miss Lula Dixon testified that she did not see the train at all, could not see ahead of the automobile, because the curtains were down, and she was not noticing, and the first time she knew of the threatened collision was when it knocked her senseless.

The plaintiff testified that as the car approached the crossing the first thing she saw was "that the train came out on the track" about 4 or 5 feet from them; she saw no flagman, or lantern, or warning; "when she saw the train, she said, 'O, my God, Homer! look at that!'" and at that he threw the car to the left;" the next thing she knew the car struck them, and he was too close to the train to turn around. On cross-examination the plaintiff said she supposed she saw the train before Ferguson did; that she first saw the back end of the coach, 4 or 5 feet away, she supposes; that the fender of the automobile was over the first track, and the train was on the second track.

Defendants' evidence was, in substance, as follows: Roche, foreman of the night switch engine, testified that he and his crew were switching a short passenger train from the coachhouse; that the coach was in front, and the engine, head-on, was pushing it, and drawing the rest of the cars; that the train moving from west to east was stopped about 6 feet from the sidewalk in Louisiana street; that the flagman got off and proceeded to the street car line in the middle of Louisiana street, and gave the signal to come ahead; that the street was clear, and as the train moved ahead, and just as it crossed over the sidewalk, Roche noticed the automobile, about halfway of the block, coming down on the right-hand or western side of the street; that the flagman was standing in the middle of the street, and gave the automobile the stop signal, and "hollered, 'Look out;'" that the automobile swerved to the left, and the flagman had to jump back to keep it from hitting him, and as he did so he cried out to Atkins (switchman) to "hold them," and gave him the emergency signal, which he in turn gave the engineer, who "threw the air into the emergency and reversed the engine," and at that time the automobile and the coach came together, about 3 feet from the east curb of the street.

Mr. Roche further testified that the bell of the locomotive was ringing as it approached, and passed over the crossing, which was well lighted by two big arc lights which were burning on the occasion in question. The same witness stated several times that the automobile turned at the left, and then went

straight ahead in order to cross the track ahead of the coach.

J. A. Gaffney, switchman, testified that the train stopped just west of the pavement of Louisiana street in order to flag the crossing; that he went out and flagged the crossing, and found the street clear; that he passed the signal "come ahead" to Atkins, who in turn passed it to the engineer; that the train was crossing the street when he first saw the automobile about half a block away; that he did not realize that the automobile was not going to stop until it was right on them; that he flagged the motor car down and "hollered, 'Look out,'" but no attention was paid to the warning, and then he "hollered to Atkins to hold them" (meaning the train). This witness also testified that the bell on the engine was ringing.

J. T. Atkins, switchman, also testified that the train stopped when it got to Louisiana street; that Gaffney got off and flagged the crossing, and then gave the come ahead signal to the witness, who passed it on to the engineer; that the witness was there for that purpose; that just before the collision Gaffney flagged the engineer down, the engineer applied the brakes, and the train struck the automobile on the street car line and pushed it just beyond the sidewalk.

Mat Pryer, fireman, in his testimony corroborated the testimony of the other defense witness as to the stop of the train at Louisiana street, to the flagging, signals, etc. This witness was on the left side of the locomotive, and had a clear view of the automobile as it neared the train. This witness stated that just as the train started off after the stop he for the first time saw the automobile. It was making a circle to go ahead of the coach, the end of which was about middle way of the street. The witness further stated that Gaffney gave the signal on witness' side, and flagged the train down, and that the witness "hollered" to the engineer to stop; that the latter put on the brakes and reversed the engine, which pushed the automobile about 15 feet.

R. C. McCoy, engineer, corroborates the testimony of the other witnesses as to matters within his own observation, such as the stop, signals, etc., and stated that when he received the signal to go ahead he released the air, and let the car and engine go on at a speed of 3 or 3½ miles an hour; that when the train about reached the street car track he received the "distress stop signal," threw the air into the emergency, and reversed the engine, which was all he could do, and stopped the train within 22 feet, which was as soon as possible.

A juror, from his questions to the engineer, seemed to think that, if a locomotive can be stopped on a turntable within 6 inches or a foot, it can be stopped in a like distance when operating on the tracks, and that the engineer on the occasion in question should have put

on steam instead of permitting his engine to roll down grade.

Mr. Hearne, the superintendent of the defendant company, testified that at 8 a. m. of the day of the accident he saw the tracks of the automobile going down on the right side of Louisiana street, and then crossing diagonally over the tracks to the left side of the street.

Plaintiff offered no evidence to rebut the testimony of the trainmen as to their actions in the premises. Plaintiff's counsel seem to argue this case on the hypothesis that all the trainmen who testified for the defense are unworthy of credit, and that the testimony of the plaintiff and of Dillman is sufficient to prove the negligence of the defendant. We cannot concur in this view of the evidence. In our opinion, the testimony of the trainmen shows conclusively that they performed their full duty in the premises, and the testimony of plaintiff shows that she and Ferguson were guilty of gross negligence in driving upon the railroad tracks without stopping, or even looking or listening. Dillman was on the back seat of the closed car talking with plaintiff's sister, who saw nothing, and his vision to the front was obstructed by the bodies of the plaintiff and Ferguson, who also saw nothing, until they were within a few feet of the moving coach. Dillman said that even he, on the back seat of the car, with his limited field of vision, saw the train when the car was some 20 feet from the railroad track. If he saw, the plaintiff and Ferguson, seated in front, could have seen if they had looked.

Plaintiff, having failed to prove negligence in the defendant, must go out of court.

It is unnecessary for this court to consider this case from the point of view of negligence in plaintiff as a passenger. But we may state that it has been held by respectable authorities that a passenger riding with the driver, and having an equal opportunity to exercise his faculties, and failing to do so, cannot recover damages from a railroad company. Thompson on Negligence, vol. 1, §§ 499, 503; Berry on Law of Automobiles, p. 176.

It is therefore ordered that the verdict and judgment below be set aside and reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

(139 La.)

No. 21842.

STATE ex rel. JOHN T. MOORE PLANTING CO., Limited, v. HOWELL, Judge, et al.

(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 154(4)—RIGHT OF REVIEW.

"The party against whom judgment has been rendered cannot appeal: (1) If such judg-

ment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily. * * * Code Prac. art. 567. And, a fortiori, a party in whose favor a judgment has been rendered, in strict accordance with his own prayer, cannot appeal, since a prayer that a judgment be rendered is something more than even a confession or an acquiescence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 966-968; Dec. Dig. § 154(4).]

2. DISMISSAL AND NONSUIT §19(2)—VOLUNTARY NONSUIT—RIGHT OF PLAINTIFF.

A plaintiff, against whom the defendant in the cause has asserted a demand in reconvention, may discontinue or abandon his own demand, but he cannot thereby put the defendant out of court, or in any manner prejudice his rights, or alter his position for the worse, with respect to his demand in reconvention. In other words, a plaintiff in his character as defendant, quoad a reconventional demand, acquires no greater rights, or other means of defense or of complicating or protracting the pending litigation, by discontinuing his demand, and going out of court, than he possesses while remaining in court. In fact, for all the purposes of such demand, he remains in court, and all that he can, at best, accomplish by discontinuing, is, in some cases (though not where his demand and the reconventional demand involve the same title, or issue) to postpone the adjudication upon his own demand, with the possible right to renew it at some other time.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 34, 35; Dec. Dig. § 19(2).]

3. APPEAL AND ERROR §16—DISMISSAL AND NONSUIT §19(2) — RIGHT TO DISMISS — RIGHT OF REVIEW—SEPARATE PORTION OF JUDGMENT.

Where a plaintiff brings suit asserting title and attacking the title held by another, and claiming damages as resulting from the alleged illegal possession and administration of the property, and defendant reconvenes, asserting the validity of the title held by him and praying that it be sustained, but, in the alternative, praying that, should the title be decreed to be in plaintiff, the mortgage under which it was supposed to have been devested be revived and enforced, and the property again sold to pay the mortgage debt, plaintiff has no power to withdraw the issues thus presented, or either of them, by discontinuing his own demand; nor can he acquire any right, or impose any disadvantage on the defendant (as plaintiff in reconvention), by such discontinuance, that he would not have possessed or could not have imposed without it. Hence, where, in such case, judgment is rendered decreeing the nullity of the title set up by defendant and that the title in dispute is vested in plaintiff, but also decreeing the revival of the mortgage, in the attempted enforcement of which the title set up by defendant was acquired, and directing that the property be again sold in satisfaction of the mortgage debt, plaintiff has no right to a separate appeal from that part of the judgment rendered in accordance with the prayer of his petition, which decrees him to be the owner of the property, and has no right to suspend the execution of that, or any, part of the judgment thus obtained by plaintiff in reconvention, on a bond for costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 59, 60; Dec. Dig. § 16; Dismissal and Nonsuit, Cent. Dig. §§ 34, 35; Dec. Dig. § 19(2).]

Application by the State, on the relation of the John T. Moore Planting Company, Limited, for writ of mandamus to W. E.

Howell, Judge, and others. Peremptory writ granted as to part of relief prayed for.

Beattie & Beattie and Charlton R. Beattie, all of Thibodeaux, for relator. Dufour & Dufour, of New Orleans, and R. B. Butler, of Houma, for respondents.

Statement of the Case.

MONROE, C. J. In July, 1914, relator brought suit against J. B. Levert Company, Limited, in liquidation, setting up title to a certain plantation lying in the parishes of Terrebonne and Lafourche, alleging that defendant had caused it to be seized and sold under executory process, and bid in for its account; that the sale was illegal for a variety of reasons; that it (plaintiff) had been damaged thereby, and by defendant's subsequent illegal possession and administration of the property; and praying for judgment decreeing the nullity of the sale, decreeing petitioner to be the owner of the plantation, and placed in possession thereof and of certain movable property, of which defendant was alleged to have taken possession, condemning defendant to pay various amounts in compensation of the damages alleged to have been sustained; and praying that its rights be reserved with respect to other such claims and to rents and revenues.

Defendant, by way of answer, asserted the validity of the sale, denied the allegations of injury to plaintiff, and prayed to be dismissed with costs; and, by supplemental answer, reasserted the validity of its title.

"However," the supplemental answer proceeds, "respondent avers that, if it should be held that, by reason of the alleged irregularity and informality set out in plaintiff's petition, the sale of the mortgaged premises * * * was and is null and void, and if said sale be set aside, then, and in that event only, the mortgage held by J. B. Levert Company, Limited (now in liquidation), and in execution of which executory process issued and said sale was made, * * * should be revived and reinstated and recognized to be in full force and effect. And, now, therefore, assuming the character of plaintiff in reconvention, and without, in any manner, admitting plaintiff's demands, but, on the contrary, insisting on respondent's rights and its title to and ownership of said real estate, * * * and solely in the alternative, and in the event the court should annul and avoid the said sale, this respondent says that its mortgage rights should be held to have revived and should be reinstated and recognized, and that respondent should be particularly recognized as the holder and owner of the following described notes, all made and subscribed by John T. Moore Planting Company, Limited, to wit:"

And then follows a description of notes aggregating a very large amount, bearing interest from various dates, and alleged to be secured by mortgage and privilege on the property in question, which is also described. The prayer of the answer and demand in reconvention reads:

"That plaintiff's petition be dismissed, at its cost, and that respondent's title to, and ownership of, the hereinabove described properties may be recognized and confirmed, and that, in

the event that plaintiff should recover judgment against respondent, annulling the sale of said properties, and decreeing plaintiff to be the owner, * * * then respondent prays that its reconventional demand may be sustained and that it be recognized as a creditor of, and have judgment against, the John T. Moore Planting Company, Limited, in the full sum of (1) \$100,122.07, and interest" (on different amounts from different dates) "with recognition of respondent's mortgage to secure said aggregate amount * * * (2) \$6,661.86" (amount expended for taxes), "with recognition of respondent's lien for said taxes. * * * And * * * plaintiff in reconvention further, and likewise in the alternative, prays that its mortgage, liens, and privileges * * * be recognized, and that said above-described property may be sold and respondent be paid, by preference and priority, out of said proceeds of sale, the amounts hereinabove claimed, with interest and attorney's fees," etc.

It appears that the case thus put at issue was set down for trial on January 3, 1916, without notice to plaintiff and without allowing the legal delay, and that it was heard and taken under advisement, but that plaintiff, through its attorneys, thereafter moved that it be reopened and set for trial on January 27th, which motion was granted; that, upon the calling of the case, upon that day, neither plaintiff nor its attorneys appeared, and it was again heard and taken under advisement; that on February 10th, while it was still under advisement, plaintiff's attorneys filed a written motion reading as follows:

"And now into this honorable court, by their undersigned attorneys, come the John T. Moore Planting Company, Limited, plaintiffs herein, and move to discontinue, at their costs, the demands made by them in this suit, against the defendants, the J. B. Levert Company, Limited, and the liquidators thereof, without prejudice to the right of the said company and the said liquidators to continue to prosecute, in this suit, any and all rights or claims they may legally have in reconvention, under and by virtue of their pleadings, legally filed herein."

It also appears that, on the same day (February 10th), the judge a quo declined to allow the motion so filed, and rendered judgment in the case to the following effect, to wit:

In favor of plaintiff, "annulling, canceling, and setting aside, because of irregularity in the advertisement," the sale of the plantation, and "recognizing the John T. Moore Planting Company, Limited, as owner" thereof.

Dismissing "as of nonsuit" plaintiff's claims for damages, as set forth in certain enumerated articles of its petition, as, also, its claim for the value of certain fuel oil.

Decreeing that, "in all other respects, plaintiff's suit be * * * dismissed and rejected," but especially reserving "its right to sue for such damages as it may have suffered by reason of the illegal detention of its property by plaintiff in reconvention."

Decreeing that defendant, plaintiff in reconvention, recover from said planting company \$100,122.07, with interest, and other amounts, with recognition of the mortgage and privileges asserted by it; that the mort-

gaged property be sold and said amounts be paid, by preference, from the proceeds; and that the rights of plaintiff in reconvention with respect to expenses and disbursements made by it on account of said property, and its claim for taxes for 1914 and 1915, be reserved. Thereafter, on February 17th, plaintiff filed a motion alleging that it was aggrieved by the order overruling its motion to discontinue and by the judgment which followed that order, and that it desired—

"to take an appeal, suspensive and devolutive, or either, from said order and from that portion of said judgment which reads as follows: It is therefore ordered * * * that there be judgment in favor of plaintiffs, John T. Moore Planting Company, Limited, and against the defendants, J. B. Levert Company, Limited (in liquidation), and * * * liquidators, annulling, * * * because of irregularity in the advertisement, that certain sale" (describing the sale of the plantation) "and recognizing the said John T. Moore Planting Company, Limited, as owner of said properties."

And, upon the motion so filed, the court made the following order:

"A bond to operate as a suspensive appeal bond must be for the amount fixed by law, to wit, one-half over and above the amount of the judgment against plaintiff on the demand in the reconvention, returnable to the Supreme Court April 10, 1916. * * * Let a devolutive appeal be granted on plaintiff's furnishing bond for \$100, conditioned according to law."

Notice was given of the intention to apply to this court for relief, and counsel filed the application now under consideration, in which, after setting forth the facts, they pray that the judge a quo be restrained from further proceeding, or allowing defendant to proceed, in the case—

"and especially from executing the judgment illegally rendered as aforesaid, and that, after due hearing, * * * said writs" (of certiorari, mandamus and prohibition) "be made peremptory and the said district judge and the court over which he presides be ordered and directed: First, to allow and grant to plaintiff a suspensive appeal, as prayed for, * * * upon their furnishing bond sufficient to pay all costs, to wit, \$100; and, second, in the alternative, should this court deny the order as above prayed for, then that said district judge, and said court, be ordered and directed to allow and grant said written motion to discontinue, and be prohibited from further proceeding in said case inconsistently with said motion to discontinue, and from permitting defendants to proceed in said case or under said illegal judgment in any way inconsistent with said motion and order of discontinuance. * * *"

Opinion.

[1] With its demand for the annulling of the title under which defendant held the plantation in question, and for the recognition of the title set up by it, plaintiff (relator herein) joined the several claims for damages said to have been sustained by reason of the alleged illegal sale and defendant's alleged illegal possession and administration, thereunder; from which it follows that the claims for damages must find, for their underlying basis, a judgment decreeing the nullity of the sale, and that, if the attack upon

the sale is abandoned, those claims fall, as the superstructure falls with the foundations. But:

"The party against whom judgment has been rendered cannot appeal: (1) If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily. * * * " C. P. art. 567.

And, a fortiori, a party in whose favor a judgment has been rendered, in strict accordance with his own prayer, cannot appeal, since a prayer that a judgment be rendered is something more than even a confession or an acquiescence and operates, if that be possible, as a more complete estoppel to deny the correctness of the judgment so obtained than does a confession, to deny the correctness of the judgment confessed, or an acquiescence, to deny the correctness of the judgment acquiesced in. If, then, we pretermitt the question presented by the ruling of the court on the motion to discontinue, plaintiff was not entitled to the appeal as prayed for.

Proceeding to consider the bearing upon the matter of that motion, and, in connection therewith, of the fact that there was a reconventional demand in the case, we find as follows:

[2] It has been settled from an early period in our jurisprudence that a plaintiff against whom a demand in reconvention has been asserted cannot discontinue, to the prejudice of such demand. In *Lanusse's Syndic v. Pimplenella*, 4 Mart. (N. S.) 442, Porter, J., as the organ of the court, said:

"Whether the plaintiff can discontinue his action, and by this means put both himself and the defendant out of court, will depend, in some measure, on ascertaining in what light he is to be received in relation to the demand in reconvention; whether he be not, quoad this demand, really a defendant, for, if he is, it would seem to follow, as a consequence, that he cannot exercise a right which is given to those who are asking judgment against others, and who are therefore at liberty to enforce their claims in the manner and at the time which their interests may dictate. He stands, on the contrary, according to the hypothesis just put, in a situation where every imaginable reason is opposed to the exercise of such a privilege. There would be few judgments, we imagine, rendered in this country, or any other, if the party against whom condemnation was prayed, and against whom it was about to be pronounced, could arrest the sentence, by the expression of a wish that it should be postponed to another time, or by decreeing that the suit against him should be discontinued.

"Now, with the exception that the defendant who sets up the plea of reconvention is not the party with whom the cause originates, it is not seen by us, in relation to such claim, in what other light he can be viewed than as plaintiff. In all these things, which essentially distinguish the one from the other, he certainly is; his demand is not merely that the plaintiff shall not have judgment, but that he shall be obliged to render to the defendant something which is withheld from him. On the judgment which might be rendered on this demand the same consequences would follow as if the suit had been commenced by original petition instead of one in reconvention. * * *

"It follows, then, that every consideration which prohibits the defendant from withdrawing from a cause applies with equal force against

allowing the plaintiff to discontinue the demand presented against him. * * *

In *Adams v. Lewis*, 7 Mart. (N. S.) 405, we find the following:

"Next, it was said there was a plea of reconvention, and that the plaintiff could not dismiss. He certainly cannot, *but he may well determine not to prosecute his claim in that suit, though he cannot, by a mere abandonment on his part, defeat any legal rights the defendant may have acquired, under the demand in reconvention, to have judgment against him.*" (Italics by the court.)

In *McDonough v. Copeland*, 9 La. 310, Martin, J., said:

"It is true, as a general principle, that the plaintiff may discontinue his suit on payment of costs. But this principle cannot be extended to cases in which the parties are alternately plaintiffs and defendants, as in a *concurso*, and, in a case of reconvention. Neither party is there at liberty to dismiss, or discontinue a suit or action which is not exclusively his own, with a view to avert judgment in a case in which his opponent has a right to obtain it."

In *Coxe v. Downs*, 9 Rob. 135, it appears that plaintiff had been allowed to dismiss his claim, and the court, noting that circumstance, said:

"But the defendant should not thereby be put out of court, as to his demand for a rescission of the sale and a return of the money paid. * * * It therefore results that, although Coxe is out of court, as to his demand on the notes, the defendant is not obliged to follow him, and may prosecute his demands, leaving his adversary to seek his remedy wherever he can find a legal tribunal."

In *Barrow v. Robichaux*, 15 La. Ann. 70, it was held (quoting from the syllabus):

"When the defendant in a suit sets up a reconventional demand, the plaintiff is not permitted to discontinue his suit when defendant opposes it; and, if the plaintiff has discontinued the suit, without opposition on the part of defendant, the latter has the right to prosecute against him his claim in reconvention, notwithstanding the discontinuance."

And so, in *Davis v. Young*, 35 La. Ann. 740, which was a petitory action wherein defendant set up title in reconvention, it appears that, after the evidence had been received and the argument for the defense had begun, plaintiff asked to take a nonsuit, to which defendant objected and demanded a final judgment. The trial court overruled the objection and granted the nonsuit, reserving to defendant her rights on her reconventional demand (but to be elsewhere asserted). *Bermudez, C. J.*, in disposing of the case, on appeal, said:

"The plaintiff here had a clear right to discontinue before judgment. A motion to that end the court would have been bound to grant, unless thereby some acquired right of the defendant would be impaired. There exists no essential difference between a discontinuance and a voluntary nonsuit. * * * The withdrawal of a suit by the plaintiff, in any form, cannot destroy or affect the right of the defendant to a judgment on her reconventional demand which she had asked, but which was not rendered." (Citing authorities.) "It is therefore settled that a plaintiff in reconvention has the right to oppose a discontinuance or voluntary nonsuit which would tend to produce such effect. * * * Although the withdrawal of the case is allowed, the reconventional demand re-

mains in court, and the plaintiff therein can prosecute the same, notwithstanding the withdrawal; otherwise the withdrawal of the suit would certainly affect vested rights of the plaintiff in reconviction, for he would then be driven either to a continuance of the case or to institute another proceeding, and he might thus lose rights and advantages already acquired. The defendant, as plaintiff in reconviction, is entitled to have the case remanded."

And the case was, accordingly, remanded, with instructions to the trial court "to replace it in the condition in which it stood when the motion for nonsuit was made and granted, and with directions to proceed with the trial of the same on the reconventional demands."

In *Thompson v. McCausland*, 136 La. 775, 67 South. 826, the court cited C. P. 491; *Coxe v. Downs*, supra; *Smalley v. Lawrence*, 9 Rob. 213; *Donnell v. Parrott*, 10 La. Ann. 704; *Davis v. Young*, supra; and *State ex rel. Administrator v. Judge*, 48 La. Ann. 455, 19 South. 256—to the effect that "plaintiff may discontinue his suit, at any time before judgment," but that he cannot, by so doing, put the defendant "out of court with respect to his demand in reconviction." Applying the doctrine thus stated to the facts of the instant case, the defendant herein having met plaintiff's attack upon the title held by it by a demand, in reconviction, that the title be decreed valid, or, in the alternative, that the mortgage, under which the title had been acquired, be held to be revived and the property ordered to be again sold in satisfaction of the debt, it follows that plaintiff was powerless to interfere, by discontinuing its demands, with the prosecution of the demands thus set up by defendant, or to alter, for the worse, in any respect defendant's position with regard thereto; and it further follows that, as the issue of title vel non had been presented, and defendant (as plaintiff in reconviction) had prayed judgment thereon, plaintiff was powerless to withdraw that issue, and that it was not only competent for the court, but was its imperative duty, to decide it, with or without the plaintiff, and, having decided it as it did, to proceed to consider and decide the alternative demand set up by defendant. Defendant appears to be more heavily interested in the question of the validity of the title than plaintiff, and had the right, of which plaintiff had no power to deprive it, to have that question determined in the suit then before the court, and, the court having decided that the title set up by defendant was invalid and that plaintiff was the owner of the property, defendant had the further right, of which plaintiff had no power to deprive it, to insist upon the judgment, prayed for in the alternative, which was rendered by the court.

[3] Plaintiff may be entitled to appeal from that judgment, as a whole, but, as it is a moneyed judgment for more than \$100,000, recognizes the mortgage and privileges asserted by defendant, and orders the mortgaged property to be sold in satisfaction of the same, it cannot be suspended by an appeal from only the part which deals with the title of the property, or upon a bond for costs.

Nor, yet, is plaintiff entitled to a separate appeal from the part of the judgment thus referred to, on the theory that, having moved to discontinue, it could no longer be regarded as praying for such judgment, and hence is not estopped to question its correctness. Its rights, in that respect, so far as defendant is concerned, were fixed when the demand in reconviction was filed. It could not, then, have so shifted its position as to have been enabled to attack, when rendered, the judgment which, contradictorily with defendant, it prayed the court to render, and it could have acquired no such right to the prejudice of defendant, by its discontinuance, if allowed, for the discontinuance could have been allowed only on condition that it did not prejudice the rights of the plaintiff in reconviction, and it would not have been permitted to produce that effect. In other words, a plaintiff, in his character as defendant, quoad a reconventional demand, acquires no greater rights, or other means of defense or of complicating or protracting the pending litigation, by discontinuing his demand and going out of court, than he possesses while remaining in court. In fact for all the purposes of such demand, he remains in court, and all that he can, at best, accomplish by discontinuing, is, in some cases (although not where his demand and the demand in reconviction involve the same title or issue), to postpone the adjudication upon his own demand, with the possible right to renew it at some other time.

The usual order to show cause has not been issued in this case, but, the trial judge and the counsel for the defendant having been notified of plaintiff's intention to make this application, they (defendant's counsel) have filed their briefs, to which counsel for plaintiff have replied, and we are of opinion that no good purpose will be subserved by further delay.

It is therefore ordered that the alternative writ of mandamus herein issued be now made peremptory, to the extent that the respondent judge be directed to allow the discontinuance as moved for by plaintiff (relator herein). It is further ordered that, in all other respects, relator's application be denied and this proceeding dismissed.

(139 La.)

No. 21809.

WAGNON v. SCHICK.

In re SCHICK.

(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied April 24, 1916.)*(Syllabus by the Court.)*

1. VENDOR AND PURCHASER — 98, 116—RESCISSION OF CONTRACT—RIGHTS OF PARTIES.

"If the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise: to wit, he who has given the earnest by forfeiting it, and he who has received it by returning the double." Civ. Code, art. 2463.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163-165, 205-208; Dec. Dig. 98, 116.]

2. PAYMENT — 82(1) — RECOVERY — NATURAL OBLIGATION.

"No suit will lie to recover what has been paid or given in compliance with a natural obligation." Civ. Code, art. 1759.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254, 258, 259, 261, 265; Dec. Dig. 82(1).]

3. VENDOR AND PURCHASER — 334(1)—REMEDIES OF PURCHASER—RECOVERY OF EARNEST MONEY—"NATURAL OBLIGATION."

The payment of earnest money by a wife out of her separate funds, without the authorization of her husband, is the discharge of a natural obligation, and no right of action is given the wife or husband to recover the same.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959, 962, 964; Dec. Dig. 334(1).]

For other definitions, see Words and Phrases, First and Second Series, Natural Obligation.]

Certiorari to Court of Appeal, Parish of Orleans.

Action by Mrs. Ruth Wagnon against Louis Schick. Application by defendant for certiorari or writ of review. Judgment affirmed in part, and reversed and rendered in part.

Martin H. Manion and Meyer S. Dreifus, both of New Orleans, for plaintiff. George B. Smart, of New Orleans, for defendant.

SOMMERVILLE, J. Plaintiff, on her brief, states the case as follows:

"The facts in the case are that on October 11, 1913, the plaintiff and appellee paid to the defendant the sum of \$260 to bind the intending purchase on the part of plaintiff of a piece or portion of ground, in the city of New Orleans, * * * which property was to be purchased for the sum of \$2,625; \$2,000 of which was to be paid in cash, and the balance in five years, with six per cent. interest.

"Petitioner desired to recede from said agreement, and instituted the present action to have the said deposit returned to her, and to have the agreement entered into October 11, 1913, annulled and canceled.

"The ground set up by your petitioner is that she is a married woman, not judicially separated from her husband; and that the earnest money deposited by her was her separate and paraphernal money, under her separate administration and control and separately acquired; and, being a married woman, what had been paid by her on account of a null contract could be recovered."

In her petition plaintiff states that, "though not judicially separated from her husband," she "has not seen or heard from him in more than five years;" and that the agreement to purchase the property above referred to was in writing, signed and executed by her and defendant; and the payment and receipt of the earnest money was acknowledged in said written document.

There was judgment in favor of petitioner, which was affirmed by the Court of Appeal for the parish of Orleans, and defendant has asked that the matter be reviewed.

The Code provides, in article 122:

"The wife, even when she is separate in estate from her husband, cannot alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing."

And, if a wife enters into a contract forbidden by article 122, proceedings to annul such act, for want of authority by the husband, may be instituted by the husband or wife, or by their heirs. Article 134, C. C.

As plaintiff was not authorized by her husband to enter into the contract referred to, she had the right to institute this proceeding to have it annulled; and the judgments annulling the contract to buy the real property are correct.

But plaintiff has also sued for the recovery of the earnest money which she paid to bind the contract of sale.

The incapacity of the wife to enter into a contract without the authorization of her husband, or of the judge, does not render the contract an absolute nullity. The incapacity may be removed, and unauthorized contracts may be made valid by the authorization of the husband, or, in cases provided by law, by that of the judge. And such contracts, like the acts of minors, may be made valid after the marriage is dissolved, either by express or implied ratification. Civil Code, art. 1786.

They are relatively null; and suit may be instituted to annul such acts by the husband, or the wife, or by their heirs. But a different proposition is presented when the wife attempts to collect money which she has paid under a contract, where she was not authorized by her husband to make such payment.

A contrary doctrine appears to have been announced in the case of Dranguet v. Prudhomme, 3 La. 74. The case is there stated to be:

"That the said Celeste Dranguet was never legally authorized or empowered by her said husband, Benjamin Dranguet, or by any competent authority, to contract for the purchase of said land, or to affect in any manner her dotal property."

The court say:

"The question already alluded to, which the case presents, grows out of the pleadings. The plaintiff insists that she is not required to prove (that) she was not authorized. That the proposition is a negative one, which throws the burden of proof on the defendant."

The defendant presented the opposite view; and that was the only question in the case which was argued and discussed. In the course of the opinion it is stated: "The law, it is admitted, prohibits the wife from contracting, unless authorized by her husband or by the judge; and, if she does contract without their permission or approbation, she has the right to have the contract set aside;" and the court did not consider the question as to whether the wife or husband had the right to recover that portion of the purchase price which she had already paid. The judgment was in her favor, annulling the contract according to the recited agreement; and there was further judgment for the money which she had paid on the contract price.

[1] The Civil Code provides, in article 2463:

"If the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise, to wit: he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."

Mrs. Wagon paid \$260 earnest money to bind the sale under consideration, and she had the right to recede from the promise to buy; but the earnest which was given by her was forfeited under the law when she so acted.

[2, 3] The law is that the paying of earnest money to bind a sale is a natural obligation; and, while a natural obligation may not be enforced by suit, the voluntary payment thereof will not give rise to a cause of action. C. C. art. 1759, says: "No suit will lie to recover what has been paid, or given in compliance with a natural obligation." And the contracts of married women, made without the authorization of their husbands, are said to be natural obligations, under article 17 of the Code of Practice, which is as follows:

"Natural obligations give no right of action, but what has been paid pursuant to those obligations is not subject to repetition.

"Those are natural obligations for which the law gives no right of action; they arise on contracts entered into by persons who, though possessed of sound discretion and judgment enabling them to make contracts, are nevertheless disqualified by law from contracting, as are the contracts of married women made without the authorization of their husbands."

There is no allegation that the plaintiff was not possessed of sound discretion and judgment, sufficient to enable her to make contracts with reference to her paraphernal funds; and the contract she entered into was not therefore absolutely null and void; it was not like a contract entered into by a minor or other person who is presumed not to have sound discretion and judgment, and whose contracts cannot be enforced, unless ratified after the disability has been removed. She was disqualified from making the contract, but having made it there arose a natural obligation to pay the purchase

price; and the payment by her of earnest money to bind the sale was the discharge of a natural obligation, and she has no right of action for its recovery.

The money paid by plaintiff in this case was her separate property, and she sues for it as such. Article 2334 of the Civil Code, as amended by Act No. 170, 1912, p. 310, in part, provides as follows:

"The earnings of the wife when living apart from her husband, although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses, and the property purchased with all funds thus derived are her separate property."

Community funds are not involved in this case. Plaintiff is suing for the recovery of money paid by her, when her husband had been absent for more than five years, and from whom she had not heard during that time.

In the case of *Bowers v. Hale*, 14 La. Ann. 421, where the plaintiff, Mrs. Bowers, sued to recover certain money which she had paid, on the ground that the notes represented, in part, portions of money for house rent due by her husband, who was then in insolvent circumstances, the court say:

"We will consider the case as if the plaintiff had demanded a restitution of the money paid, as well as the cancellation of her unpaid notes. And we think that both demands should be rejected upon the matters pleaded in the answer, which, being established by the proof and admissions, show, first, a natural obligation on the part of plaintiff which is a valid consideration for the payment, and bars the demand in repetition; and, secondly, a legal obligation, under article 2409 of the Civil Code, for the rent of the premises occupied by plaintiff and her family in the years 1855 and 1856. The plaintiff's obligation to pay the rent of 1856 is indeed not disputed; but that for the previous year's rent is equally clear."

The case involved the payment of rent, where, because of the insolvency of the husband, and his failure to pay rent for a portion of the previous year, the house was leased by the wife, who was separate in property, for the subsequent year; and the court held that she was equally obligated with her husband to contribute, in proportion to her funds, to the household expenses and to those of the education of their children. The unpaid portion of the rent for the previous year, due by the husband, and embraced within the notes for the current year, had all been paid, with the exception of \$50; and the court held that that amount of money, due by the husband and paid by the wife, could not be recovered in a suit by the wife. She was relieved from paying the balance of \$50.

Again, in the case of *Grant v. Maier*, 32 La. Ann. 51, where a married woman pleaded prescription to a note signed by her while she was a widow, and upon which she paid interest, without the consent or authorization of her second husband, the court held such payment interrupted prescription; and judg-

ment was rendered against her for the amount of the notes signed by her.

When Mrs. Wagnon paid the \$260 as earnest money on a written promise to buy real estate, without the authorization of her husband, she discharged a natural obligation, and she will not be allowed to recover what has been paid thereunder.

It is therefore ordered, adjudged, and decreed that the judgments of the Court of Appeal and of the district court be affirmed in so far as they set aside the contract to buy, entered into between plaintiff and defendant on October 11, 1913; and that they be set aside in so far as there was judgment in favor of plaintiff and against defendant for the return of the earnest money paid by plaintiff to defendant. It is further ordered, adjudged, and decreed that there now be judgment in favor of defendant and against plaintiff, dismissing plaintiff's demand for \$260; and as thus amended the judgments are affirmed.

(139 La.)

No. 20007.

GILMORE v. FROST-JOHNSON LUMBER CO.

(Supreme Court of Louisiana. March 6, 1916.
Rehearing Denied April 3, 1916.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION §14—PRESCRIPTION—PHYSICAL POSSESSION—NECESSITY.

Civil possession, evidenced only by signs indicating an intention to possess, cannot be a basis for the prescription of ten years unless it commenced with physical possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.]

2. TAXATION §805(4)—TAX TITLE—ADVERSE POSSESSION—RECORDING OF TAX DEED.

The prescription of three years, under article 233 of the Constitution of 1893, does not commence until the tax deed is recorded in the official or authorized conveyance register of the parish in which the property conveyed is situated, whether the tax sale was made before or after the adoption of the Constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1596; Dec. Dig. § 805(4).]

3. TAXATION §689(2)—SALE OF FORFEITED PROPERTY—SETTING ASIDE OF TAX SALE—LIMITATIONS—"SALE FOR TAXES."

A sale made by the state pursuant to the provisions of Act No. 80 of 1888, of property that had been forfeited or sold to the state for delinquent taxes, is not a "sale of property for taxes," within the meaning of article 233 of the Constitution, providing that no sale of property for taxes shall be set aside, except for certain causes, unless the proceeding to annul it is instituted within three years from the date of recordation of the tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1381; Dec. Dig. § 689(2).]

4. TAXATION §805(2)—TAX SALE—ACTION TO NULLIFY—PRESCRIPTIVE TITLE.

The prescription of three years, under section 5 of Act No. 105 of 1874, like the prescription of five years provided in article 3543, Civ. Code, cannot defeat an action of nullity founded upon a radical defect in a tax sale, such as that

the property was sold under an assessment made in the name of one who did not own it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1594; Dec. Dig. § 805(2).]

5. ADVERSE POSSESSION §14—PRESCRIPTION—TAX TITLE—PLEA OF PRESCRIPTION—ACTUAL POSSESSION.

The holder of a tax title must have had actual possession of the property to maintain a plea of prescription of three years, under section 5 of Act No. 105 of 1874.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; Robert S. Ellis, Judge.

Action by William V. Gilmore against the Frost-Johnson Lumber Company. From judgment for plaintiff, defendant appeals. Affirmed.

R., C. & S. Reid, of Amite, for appellant. J. C. & Thomas Gilmore, of New Orleans, and Edward N. Pugh, of Donaldsonville, for appellee.

O'NIELL, J. The defendant has appealed from a judgment annulling the appellant's tax title for 326.66 acres of timber land, described as the east half of section 13, township 7 south, range 5 east, and condemning the defendant to pay \$40 damages for timber taken from the land.

The plaintiff claims title by mesne conveyances from James E. Zunts, who acquired title from the state under a patent dated the 5th of August, 1857. The defendant claims title through mesne conveyances from Robert A. Corbin, who purchased from the state at a public sale made by the sheriff and ex officio tax collector of Livingston parish, under the provisions of the Act No. 80 of 1888, on the 20th of July, 1889. The land had been adjudicated to the state on the 30th of April, 1884, for the unpaid taxes of 1883, assessed in the name of "Stone & Co.," under the provisions of the Act No. 96 of 1882. At that time the deed from James E. Zunts to the plaintiff's author in title, Judson & Co., was recorded in the conveyance records of Tangipahoa parish, but not in Livingston parish, where the land was situated. There is no evidence that "Stone & Co." ever owned or claimed the land in contest. There is an admission in the record that the courthouse was destroyed by fire on the 14th of October, 1875; but no testimonial proof or secondary evidence whatever was offered regarding "Stone & Co."

The tax deed from "Stone & Co." to the state was never recorded in the conveyance records of the parish of Livingston, but a copy was contained in a book labeled "F. W. Miscar, Sheriff and Tax Collector, Parish of Livingston, State of Louisiana." This book is described by a witness who testified that he was a deputy clerk and recorder in 1905 and 1906, and that he considered the book a part of the conveyance records of the of-

rice, as made up of the printed forms of the tax sales "for the year 1885, bound and then filled out by the clerk." It was admitted, however, by the parties to this suit, during the trial, that the conveyance records of the parish of Livingston are marked "Conveyance Records" and have indices, and that "Conveyance Book No. 4" was the current conveyance record of that parish during the period embraced in the book marked "F. W. Miscar, Sheriff," etc.

No one has ever resided upon or actually occupied the land in dispute; in fact, there are no buildings on it. When the plaintiff purchased it, in July, 1890, he went upon the land and left in charge of it a man who resided half a mile away, and who thereafter went over the land at such times as he deemed necessary to prevent trespassing upon it. The defendant purchased all of section 13, in township 7 south, range 5 east, on the 1st of August, 1907, and had it surveyed and the boundary lines blazed in September, 1908. The trees were marked with three hacks on the side opposite section 13 and with the peculiar brand of the defendant company on the side facing the section marked. The brand had been recorded in the parish of Livingston and in two adjoining parishes, and had been published 90 days in the official journal of each parish. The defendant then also put upon eight or nine boundary trees tin signboards, 12 by 18 inches in size, bearing the warning: "No trespassing on the lands of Frost-Johnson Lumber Company." The man having charge of all the timber lands of the defendant company testified that he rode over the land in contest to prevent trespassing upon it at least 12 times—perhaps 24 times—during the 5 years after the defendant had bought it. The plaintiff's agent notified him promptly when the defendant had the land surveyed, but no actual interference was made by or on behalf of the plaintiff. Certain stave-makers began work on the land, under a contract with the defendant company, in January, 1911, and finished while this suit was pending. The suit was filed and service of the petition was accepted and citation waived on the 8th of March, 1908.

The land in contest was assessed to "Stone & Co.," and to no one else, on the assessment rolls of 1880, 1881, 1882, 1883, and 1884. On the roll of 1885 it appears in the list headed "Lands Adjudicated to the State for the Year 1883." It does not appear at all on the assessment roll of 1886; and on the rolls of 1887, 1888, and 1889 it was assessed only to Wm. V. Gilmore, under the heading "Supplemental Roll for Back Years." This is explained by the fact that the plaintiff paid the taxes for 1887, 1888, 1889, and 1890 on the 6th of October, 1890, after he had bought the property. The land was also assessed to R. A. Corbin on the original roll of 1889, and he paid the taxes of that year. Thereafter

it was assessed every year in the name of W. V. Gilmore, and also in the name of R. A. Corbin (or one of his transferees), and the taxes were paid each year under both assessments.

Counsel for the defendant contends that the defendant has had physical possession of the land in contest continuously since September, 1908, and that, although the plaintiff alleged in his petition that he was in possession of the land and demanded damages for the alleged trespass and slander of title in this action of nullity of the defendant's tax title, he was not in possession, and therefore must be regarded as the plaintiff in a petitory action. It cannot affect the decision of this case to assume that the defendant took physical possession of the land in contest in September, 1908, and was in actual possession therefore more than one year, but less than three years, before the acceptance of service of the petition in this suit.

The defendant relies upon the following pleas of prescription, filed in this court, viz.:

(1) The prescription of ten years, under article 3478 of the Civil Code; (2) the prescription of three years, under article 233 of the Constitution, against the plaintiff's attack upon the sale made by the sheriff and ex officio tax collector of Livingston parish to Robert A. Corbin, dated the 20th of July, 1889; (3) the prescription of three years and of five years, under section 5 of Act No. 105 of 1874, as a bar to the action to invalidate the adjudication to the state, dated the 30th of April, 1884, and the action to invalidate the sale made by the state to Robert A. Corbin on the 20th of July, 1889; and (4) the prescription of five years, under article 3543 of the Civil Code, as a bar to the action to annul either the auction sale in the name of Stone & Co. to the state, dated the 30th of April, 1884, or the auction sale by the state to Robert A. Corbin, dated the 20th of July, 1889.

Opinion.

[1] The plea of prescription of ten years, under R. C. C. art. 3478, cannot prevail, because there is no evidence that the defendant or any of its authors in title had physical or actual possession of the property ten years before the institution of this suit; in fact, the defendant does not claim that there was any actual possession of the land before September, 1908. Article 3487, R. C. C., provides that civil possession will suffice to complete a possession already begun, provided it has been preceded by corporeal possession. In *Millaudon v. Gallagher*, 104 La. 716, 29 South. 307, and again in *George et al. v. Cole et al.*, 109 La. 834, 33 South. 784, in both of which cases the prescription of ten years was invoked in defense of a tax title, this court quoted from the decision in *Chamberlain et al. v. Abadie et al.*, 48 La. Ann. 587, 19 South. 574, that:

The prescription of ten years, under R. C. C. arts. 3478 and 3479, "must be supported by corporeal possession in the beginning, after which, if it has not been interrupted, it may be preserved by external and public signs announcing the possessor's intention to preserve the possession of the thing, as the keeping up of roads and levees, the paying of taxes, and other similar acts."

Hence civil possession, evidenced by mere signs indicating an intention to possess, is not a basis for the prescription of ten years unless it began with actual physical possession.

[2, 3] The defendant invokes the prescription of three years, under article 233 of the Constitution, only in defense of the attack upon the sale made by the tax collector to Robert A. Corbin on the 20th of July, 1889. The plea is not invoked in defense of the attack upon the tax sale made in the name of Stone & Co. to the state on the 30th of April, 1884. That sale could not be the basis of the prescription of three years, under article 233 of the Constitution of 1898, because the tax deed was not recorded in the authorized or official conveyance book. The article of the Constitution provided that the three years should commence from the adoption of the Constitution as to tax sales that had already been made, and from the date of the recordation of the tax sales to be made thereafter. The object in providing that the prescription should run from the adoption of the Constitution, instead of from the date of registry, as to tax sales that were made before the adoption of the Constitution, was to avoid giving the law a retroactive effect. The provision that the prescription should run from the date of registry of tax deeds made after the adoption of the Constitution, instead of from the date of the execution or signing of the deeds, shows plainly that it was not intended that the prescription should apply to an unrecorded tax sale, whether made before or after the adoption of the Constitution. Therefore the only question presented for decision with regard to this plea of prescription is whether it applies to a sale made by the state pursuant to the provisions of the Act No. 80 of 1888.

The tax deed in the name of Stone & Co. purports to convey to the state only "the right, title, interest, and claim which the said Stone & Co. on the 21st of April [1884], or at any time since, had in or to the said property or any part thereof." As Stone & Co. had no title whatever to the property, it follows that the state acquired nothing, without the aid of the prescription or statute of repose provided in article 233 of the Constitution.

Several like statutes were enacted before the adoption of the Act No. 80 of 1888, all providing for the sale by the state of property that had been forfeited or adjudicated to the state for unpaid taxes; e. g., Act No. 107 of 1880, Act No. 98 of 1882, and Act No. 82 of 1884. It has been held consistently

that a sale made by the state under the provisions of any of these statutes is not a "tax sale," or "sale of property for taxes," within the meaning of article 210 of the Constitution of 1879, which, except for the prescription of three years, corresponds with article 233 of the Constitutions of 1898 and 1913.

In the case of *Gatlin v. Hutchinson*, 36 La. Ann. 350, where the plaintiff had purchased from the state, under the provisions of Act No. 107 of 1880, Chief Justice Bermudez for the court said:

"The title on which plaintiff relies is not one to property purchased at a sale of it for taxes due by it, but is a title derived directly from the state, by ordinary contract, such as is daily entered into in conventional sales."

The decision quoted above was cited with approval in *Wilbert v. Michel*, 42 La. Ann. 856, 8 South. 607, with reference to the statute now under consideration (Act No. 80 of 1888); and the court added that the validity of a title acquired from the state under the provisions of that statute depended entirely upon the validity of the forfeiture or adjudication to the state.

Referring to article 210 of the Constitution of 1879, in *Breaux v. Negrotto*, 43 La. Ann. 433, 9 South. 502, where the defendant relied upon a deed from the state under the provisions of Act No. 80 of 1888, it was said:

"This article refers to sales of property for taxes, and can have no application to the property which the state sells and to which she has title, whether acquired at tax sale or otherwise. But, if the state acquired no title to plaintiff's property because of radical defects in the tax proceeding, she would convey no title to the defendant under the sale made in pursuance of Act No. 80 of 1888. *Guidry v. Broussard*, 32 La. Ann. 926; *Gibson v. Hitchcock*, 37 La. Ann. 209; *Baton Rouge Oil Works v. Dundas*, 34 La. Ann. 255; *Denegre v. Gerac*, 35 La. Ann. 952; *Gatlin v. Hutchinson*, 36 La. Ann. 350; *Garig v. Bush & Levett*, 35 La. Ann. 1109."

If a sale made by the state under the provisions of Act No. 80 of 1888 was not a "sale of property for taxes," within the meaning of article 210 of the Constitution of 1879, it is not a "sale of property for taxes" within the meaning of precisely the same language in article 233 of the Constitutions of 1898 and 1913, which provide that:

"No sale of property for taxes shall be set aside for any cause, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted within * * * three years from the date of recordation of the tax deed," etc.

The doctrine announced in *Breaux v. Negrotto* was quoted and affirmed in *Sims v. Walshe*, 49 La. Ann. 792, 21 South. 861, and in *Kohlman v. Glaudi*, 52 La. Ann. 708, 27 South. 116, and no suggestion has been made that it is not applicable to the present case or should be overruled. Our conclusion therefore is that the prescription of three years provided in article 233 of the Constitution of 1898 and 1913 has no application to

the sale made by the state pursuant to the provisions of Act No. 80 of 1888.

[4, 5] Referring to the defendant's plea of "prescription of three years and five years provided by section 5 of Act 105 of 1874," we observe that the section referred to merely provides that:

"Any action to invalidate the titles to any property purchased at tax sale under or by virtue of any law of this state, shall be prescribed by a lapse of three years from the date of such sale."

The statute makes no provision for prescription of five years. The prescription of three years, under that act, cannot prevail in this case, for two reasons: First, because it does not bar an action of nullity founded upon a radical defect, such as a sale in the name of one who was not the owner of the property; and, second, because the holder of the tax title must have had actual possession for three years to maintain that plea of prescription.

The prescription of five years, in the terms of article 3543, R. C. C., applies only to "informalities connected with or growing out of any public sale." In support of the proposition that a tax sale of property under an assessment in the name of one who was not the owner contains a radical defect that is not cured by the prescription of three years, under Act No. 105 of 1874, nor by the prescription of five years, under R. C. C. art. 3543, we refer to the decision in *Lague v. Boagni*, 32 La. Ann. 912, cited with approval in *Hickman v. Dawson*, 33 La. Ann. 442; *Roberts v. Zansler*, 34 La. Ann. 209; *Davenport v. Knox*, 34 La. Ann. 409; *Wederstrandt v. Freyham*, 34 La. Ann. 707; *Hickman v. Dawson*, 35 La. Ann. 1087; *Barrow v. Wilson*, 39 La. Ann. 409, 2 South. 809; *Robinson v. Williams*, 45 La. Ann. 492, 12 South. 499; *Cane v. Herndon*, 107 La. 599, 32 South. 33; *Terry v. Heisen*, 115 La. 1075, 40 South. 461. See, also, *Kohlman v. Gaudi*, 52 La. Ann. 700, 27 South. 116, and *Millaudon v. Gallagher*, 104 La. 716, 29 South. 307, where it was said:

"The prescription of three years set up by the defendant under the act of 1874 does not cure such radical defects in title as are here involved. *Parish of Concordia v. Bertron*, 46 La. Ann. 358, 15 South. 60; *Johnson v. Martinez*, 48 La. Ann. 52, 18 South. 909; *Marmion's Heirs v. McPeak*, 51 La. Ann. 1631, 26 South. 376; *Kohlman v. Gaudi*, 52 La. Ann. 700, 27 South. 116. Still less does the prescription of five years, which by the terms of the law (Rev. Civ. Code, art. 3543) applies only to informalities."

See, also, *George et al. v. Cole et al.*, 109 La. 834, 33 South. 784.

In support of the proposition that the holder of a tax title must have actual possession to maintain the plea of prescription of three years, under section 5 of Act No. 105 of 1874, we refer to the decision in *Breaux v. Negrotto*, 43 La. Ann. 426, 9 South. 502, cited with approval in *McWilliams v. Michel*, 43 La. Ann. 989, 10 South. 11; *Robinson v. Williams*, 45 La. Ann. 492, 12 South. 499; *Michel v. Stream*, 48 La. Ann. 347, 19 South.

215; *Russell v. Lang*, 50 La. Ann. 38, 23 South. 113; *Hansen v. Mauberret*, 52 La. Ann. 1568, 28 South. 167; *Boyle v. West*, 107 La. 354, 31 South. 794; *Scott v. Parry*, 108 La. 13, 32 South. 188; *In re Seim*, 111 La. 560, 35 South. 744; *Boagni v. Pacific Imp. Co.*, 111 La. 1069, 36 South. 129.

Our conclusion is that none of the defendant's pleas of prescription can prevail in this case.

The judgment allowing the plaintiff \$40 damages for the timber taken by the defendant is correct, in view of the testimony of the defendant's agent that 2,000 staves were made from the plaintiff's timber, and were worth 2 cents each.

The judgment appealed from is affirmed at the cost of the appellant.

WESTBROOK v. STATE. (No. 18653.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Amite County; R. E. Jackson, Judge.

Henry Allen Westbrook was convicted of murder and sentence of death pronounced against him, and he appeals. Affirmed, and execution set for June 9th.

J. T. Lowrey, of Gloster, for appellant. Lamar F. Easterling, Asst. Atty. Gen., for appellee.

PER CURIAM. Affirmed; execution set for June 9th.

POSTAL TELEGRAPH CABLE CO. v. BALKAN & BERNSTEIN.

(No. 17937.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Laflore County; F. E. Everett, Judge.

Action between the Postal Telegraph Cable Company and Balkan & Bernstein. From the judgment, the Cable Company appeals. Affirmed.

Campbell & Cashin, of Greenville, for appellant. Kimbrough & Kimbrough, of Greenwood, for appellees.

PER CURIAM. Affirmed.

BENEDICT WARREN HARDWARE CO. v. SANDERSON et al. (No. 17834.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Action between the Benedict Warren Hardware Company and W. A. Sanderson and others. From the judgment, the Hardware Company appeals. Affirmed.

Huddleston & Austin, of Philadelphia, for appellant. G. E. Wilson, of Philadelphia, for appellees.

PER CURIAM. Affirmed.

JOHNSON v. STATE. (No. 18877.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

H. B. Johnson was convicted of manslaughter, and appeals. Affirmed.

Leftwich & Tubb, of Aberdeen, and T. O. Kimbrough, of West Point, for appellant. Lamar F. Easterling, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

COLLINS v. JANDON et al. (No. 17789.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, Monroe County; T. L. Lamb, Chancellor.

Action between W. E. Collins and J. O. Jandon and another. From the judgment, W. E. Collins appeals. Affirmed.

W. H. Clifton, of Aberdeen, for appellant. Paine & Paine, of Aberdeen, for appellees.

PER CURIAM. Affirmed.

GRAY v. MOBILE & O. R. CO. (No. 17777.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

Action between C. W. Gray and the Mobile & Ohio Railroad Company. From the judgment, Gray appeals. Affirmed.

Paine & Paine, of Aberdeen, for appellant. J. M. Boone, of Corinth, and D. W. Houston, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

MEYER BROS. v. LITCHFIELD.

(No. 17708.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between Meyer Bros. and M. O. Litchfield. From the judgment, Meyer Bros. appeal. Affirmed.

F. V. Brahan, of Meridian, for appellants. J. W. McCall, of Meridian, for appellee.

PER CURIAM. Affirmed.

SMYTHE v. STATE. (No. 18863.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

O. G. Smythe was convicted of manslaughter, and appeals. Affirmed.

Cochran & McCants, of Meridian, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

HERBERT v. YAZOO & M. V. R. CO.

(No. 17798.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Warren County; T. G. Birchett, Judge.

Action between Morgan Herbert and the

Yazoo & Mississippi Valley Railroad Company. From the judgment, Herbert appeals. Affirmed.

Hudson & McKay, of Vicksburg, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. BRIDGER.

(No. 17913.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action between the Illinois Central Railroad Company and J. E. Bridger. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. L. F. Rainwater, of Sardis, for appellee.

PER CURIAM. Affirmed.

BRAZELL v. BRAZELL. (No. 17775.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, Panola County; D. M. Kimbrough, Chancellor.

Action between Clifton Brazell and Daisy Brazell. From the judgment, Clifton Brazell appeals. Affirmed.

L. B. Lamb, of Batesville, for appellant. Pearson & Carothers, of Batesville, for appellee.

PER CURIAM. Affirmed.

McALLUM et al. v. STANDARD DRUG CO.

(No. 17749.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between E. F. and C. T. McAllum and the Standard Drug Company. From the judgment, the McAllums appeal. Affirmed.

Cochran & McCants, of Meridian, for appellants. McBeath & Miller, of Meridian, for appellee.

PER CURIAM. Affirmed.

HAILE v. MASON HOTEL & INVESTMENT CO.**MASON HOTEL & INVESTMENT CO. v. HAILE.**

(Supreme Court of Florida. April 6, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 369—**PROCEEDINGS TO TRANSFER CAUSE—PAYMENT OF COSTS—WAIVER.**The provision of the statute that "no writ of error shall be granted to the original plaintiff in any suit unless said plaintiff shall first pay all costs which may have accrued in and about the said suit up to the time when said writ of error shall be prayed" (Gen. St. 1906, \S 1698), is for the benefit of the defendant in the trial court, and it may be waived.[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1998; Dec. Dig. \S 369; Reference, Cent. Dig. \S 218.]

2. DISMISSAL AND NONSUIT ¶7(3)—VOLUNTARY NONSUIT—TIME FOR TAKING.

Taking a nonsuit immediately after a motion for a directed verdict for the defendant is granted may be regarded as a compliance with the statute, requiring the nonsuit to be taken "before the jury retire from the box."

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 17; Dec. Dig. ¶7(3).]

3. NEW TRIAL ¶6—TRIAL ¶171—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

The considerations and legal principles that guide the judicial discretion in directing a verdict and in granting a new trial on the evidence are not the same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. ¶6; Trial, Cent. Dig. § 396; Dec. Dig. ¶171.]

4. TRIAL ¶171—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

In directing a verdict, the court is governed practically by the same rules that are applicable in demurrers to evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 396; Dec. Dig. ¶171.]

5. TRIAL ¶178—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

A party, in moving for a directed verdict, admits, not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. ¶178.]

6. TRIAL ¶142—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

Where on the evidence adduced there is room for a difference of opinion between reasonable men as to the existence of facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. ¶142.]

7. TRIAL ¶171—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

The duty devolving upon the court in reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 396; Dec. Dig. ¶171.]

8. INNKEEPERS ¶10—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY.

Where the evidence tends to show that the plaintiff, who was injured by falling into an open elevator shaft in a hotel, was not a mere licensee, and the tendency of the evidence is to show actionable negligence on the part of the defendant hotel company, a verdict for the defendant should not be directed.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14-16; Dec. Dig. ¶10.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action by George R. Haile against the Mason Hotel & Investment Company. Judgment for defendant. Plaintiff brings error, and defendant brings cross-error. Reversed, and new trial granted.

A. H. King and Roswell King, both of Jacksonville, for plaintiff in error. Marks, Marks & Holt, of Jacksonville, for defendant in error.

WHITFIELD, J. George R. Haile brought an action against the hotel company, in which the declaration alleges, in effect: That the defendant company was the owner and proprietor of a certain hotel called Mason Hotel, in the city of Jacksonville, Fla., that plaintiff at about 11:30 a. m. went to the said Mason Hotel on business with its manager, when he was then and there directed and conducted to the office of the said manager by a clerk and another employé of the defendant. That after concluding his business with the said manager, plaintiff proceeded to leave said office and hotel by a passageway or hallway then and there provided for said purpose. That while he was passing, or attempting to pass, from the said office of the said manager to the lobby of said hotel, as he was directed, authorized, and invited to do, plaintiff fell into an open elevator shaft in said hall or passageway which was and had been left open, unguarded, unlighted, unprotected, by and through the negligence and carelessness of the defendant. That defendant was guilty of negligence and carelessness in the premises, in this, to wit: That it failed to keep said hallway or passageway sufficiently or properly lighted for the protection of plaintiff and others similarly situated in the premises. That by reason of said carelessness and negligence of the defendant the plaintiff fell into the elevator shaft, as aforesaid, and was injured, etc., wherefore plaintiff claims specified damages.

Issue was joined on a plea of not guilty and several special pleas. At the trial after the evidence for the plaintiff had been introduced, the defendant moved for an instructed verdict, the grounds being:

"First. The evidence adduced is insufficient to entitle the jury to lawfully find for the plaintiff.

"Second. It appears from the undisputed testimony that the defendant violated no duty owed to the plaintiff.

"Third. It affirmatively appears that plaintiff was a mere licensee upon the property of the defendant at the time and place when and where he was injured.

"Fourth. It affirmatively appears that plaintiff was a mere licensee upon defendant's premises because he went there of his own volition and for his own business ends, and without invitation from this defendant, and consequently has no right to complain of the condition of said premises.

"Fifth. Because it does not appear that the alleged clerk and other employé who directed plaintiff to that portion of the hotel where he was injured, if such direction was given, had any authority (actual or apparent) to give the same for and on behalf of this defendant, and, further, because even if such direction was given by parties authorized to bind this defendant, same merely amounted to a permission or license to go upon the premises, and not to an invitation.

"Sixth. Because it affirmatively appears that the plaintiff suffered the alleged injuries by reason of his own negligence, and not otherwise. "Seventh. Because the testimony proves defendant's pleas without contradiction."

The motion was granted. The plaintiff excepted to the ruling and moved for a nonsuit, with bill of exceptions, which was granted, the defendant excepting thereto. Thereupon the court rendered a judgment "that a judgment of nonsuit be entered against the plaintiff, George R. Halle, and that defendant, Mason Hotel & Investment Company, a corporation, go hence without day and recover" its costs, and the plaintiff took writ of error. The defendant also took a writ of error to the judgment granting a nonsuit to the plaintiff.

[1] After the cause was submitted on briefs upon the merits, the defendant below moved to dismiss the plaintiff's writ of error on the ground that the costs below had not been paid as required by the statute.

"Writs of error * * * shall issue on demand as matter of right. * * * But no writ of error shall be granted to the original plaintiff in any suit unless said plaintiff shall first pay all costs which may have occurred in and about the said suit up to the time when said writ of error shall be prayed." Gen. Stats. 1906, § 1698.

The latter provision is for the benefit of the defendant in the trial court, and it may be waived. In this case it was stated at the bar that the costs assessed when the writ of error was issued were paid. Subsequently other costs due in the cause were taxed. The defendant, having submitted the cause before making the motion to dismiss, has waived his right by not acting promptly. He had notice of the issuance of the writ of error by its record under the statute. The motion to dismiss is denied.

As the plaintiff had a right by bill of exceptions and writ of error to a final judgment for the defendant duly taken, to a review of the order directing a verdict for the defendant, the taking of a nonsuit with bill of exceptions under the statute was unnecessary.

[2] Taking a nonsuit immediately after a motion for a directed verdict for the defendant is granted may be regarded as a compliance with the statute, requiring the nonsuit to be taken "before the jury retire from the bar."

Section 1496 of the General Statutes of 1906 as amended by section 1, c. 6220, Acts of 1911, is as follows:

"Upon the trial of all cases at law in the several courts of this state, the judge presiding on such trial shall charge the jury only upon the law of the case; that is upon some point or points of law arising in the trial of said cause. If, however, after all the evidence shall have been submitted on behalf of the plaintiff in any civil case, it be apparent to the judge of the circuit court, county court or court of record that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff, the judge may then direct the jury to find a verdict for the defendant; and if, after all the evidence of all the parties shall have been

submitted, it be apparent to the judge of the circuit court or county court or court of record that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party." Section 1496, Compiled Laws 1914.

The amendment to the statute above quoted provides that:

"After all the evidence shall have been submitted on behalf of the plaintiff in any civil case, if it be apparent to the judge * * * that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff, the judge may then direct the jury to find a verdict for the defendant."

[3] The considerations and legal principles that guide the judicial discretion in directing a verdict and in granting a new trial on the evidence are not the same.

[4] In directing a verdict, the court is governed practically by the same rules that are applicable in demurrers to evidence.

[5] A party, in moving for a directed verdict, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.

[6] Where on the evidence adduced there is room for a difference of opinion between reasonable men as to the existence of facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge.

[7] The duty devolving upon the court in reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised. *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435.

[8] The plaintiff testified:

That on the day he was injured he went to the Mason Hotel between 11 and 12 o'clock, to see Mr. Mason, the manager of the hotel; that he went to the office in the lobby of the hotel and asked to see Mr. Mason; that he asked one of the clerks at the counter if he could see Mr. Mason. "He told me that Mr. Mason was in his private office. I asked where was his private office. He says, 'It's back behind yonder.' I says, 'I have never been back in there before, and I don't know where the office is.' I says, 'Will you please show me where it is?' At that time he called one of the bell boys and says, 'Show Mr. Halle Mr. Mason's office,' which the bell boy did. I recognized him as one of the bell boys in the hotel. There was half a dozen of them waiting round there for service. The clerk called him just the same as if he had called a bell boy to show me to a room upstairs. The bell boy led the way and opened the door to the passageway that leads back behind there, and through a little room, and says, 'That is Mr. Mason's office right there,' and I opened the door and saw Mr. Mason sitting there and I went in and sat down and had a little talk with him. I was not with him over 8 or 10 minutes. The first conversation I had with him was just a short conversation on the line of business with the new hotel. * * *

"When I finished my conversation with Mr. Mason I got up and bid him good-by. He stood up and shook hands with me, opened the door, and as I walked out, he closed the door, the door to his private office. If I remember right, he had some kind of lights in his office. I don't know what they were, but it was light enough to do work in there. You could see to do work. I don't know whether they had a skylight over it, or not. That was my first trip back there. When I passed out of his office, Mr. Mason was standing up right by his desk, just inside the door, I think a little to the right. I don't remember, but I think his desk sat just a little to the right of the door. He ushered me out. I came right through the place—they call it a linen room—right through from his door, the only way you could get out; that's the way I went in, right back to another door that opened into a little narrow hall about, possibly, 5 or 6 feet wide, 6 or 7 feet maybe. This was the same hall that I crossed in going to Mr. Mason's place. I came out the same door that I went in, out of this linen room, or the big room of some kind. That hall leads from—There is a door enters into that hall from Bay street. I didn't go in from Bay street. I came in directly from the lobby across. And there's a kind of little passageway that leads from this hall back into the main lobby, possibly 6 or 7 feet from the hall, which makes a kind of ell like, and the door is back, going into the lobby; is back 6 or 7 feet as near as I can guess. That door was a solid door, and it was closed. The hall was the hall that I had come down from the lobby in going into Mr. Mason's office, the lobby that the bell boy had shown me out.

"As soon as I got out of the door, the hall was very dark, very dark, and I never thought for a moment but I knew the way back into the lobby just as I came out; and of course I walked right on through, attempting to go where I could find the door I came out of. I didn't know of any other opening there—only the opening on Bay street at the end of the hall. I attempted to leave through the same passage I came in. The next thing I knew I was on my way down into the basement. I was too completely paralyzed to realize or know anything for some little time. I knew I had fallen into something, but I didn't know what, because I didn't know there was an elevator shaft open anywhere in that hall. I knew the position of all the elevators that opened into the main lobby because I had been up and down them a number of times. They all were in a row right along, going up and down. And this elevator, it seems, was the first one, I believe, was the first one to the right as you come out of the main lobby, and to the left, to the right as you were coming back. It was the first elevator shaft, which is right almost directly in a straight pathway of the little hall that leads back to the lobby. If I had walked 2 feet more to the left, I never would have—I don't believe I would have—fallen into an elevator, because it is not more than 2 feet from the elevator shaft to the little passageway that leads back into the hall. This hallway must be about 50 or 60 feet long from the door that I went out of to Bay street. I don't know, but just as an estimate, about 50 or 60 feet, something like that. It was cloudy and drizzling rain. I don't believe the door I passed out of had a closing door to it, I don't know whether it did or not. The only thing I remember was after I stepped out of this room into the hall that the hall was perfectly dark."

There was other evidence tending to show actionable negligence by the defendant and resulting injury to the plaintiff as alleged.

It is contended for the defendant in error that the plaintiff below was injured by going into a private part of the hotel on business

not connected with the hotel, and that the action of the hotel clerk and bell boy in directing him to the room where the manager of the hotel had his office was unauthorized, making the plaintiff a bare licensee, to whom the defendant owed no duty except to refrain from active negligence that would injure the plaintiff while on the premises.

The evidence tends to show that the plaintiff was not a mere licensee, and that the circumstances imposed upon the defendant a duty to exercise ordinary care for the safety of the plaintiff by providing a safe exit for him from a room in the hotel into which he had been shown and directed by those whose duty it was to serve those lawfully entering the hotel. The evidence tends to show that the plaintiff attempted to leave the room by the same passageway through which he had been shown in entering the room to speak to the hotel manager, and that such passageway was not safe because insufficiently lighted, and because of an unprotected opening, into which the plaintiff fell.

It cannot be justly said that no evidence was submitted upon which the jury could lawfully find a verdict for the plaintiff; therefore, the statute quoted above does not authorize a directed verdict for the defendant. *King v. Cooney-Eckstein Co.*, 66 Fla. 246, 63 South. 659.

The judgment is reversed, and a new trial granted.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, C. J., and ELLIS, J., disqualified.

STATE ex rel. RAILROAD COM'RS v. FLORIDA EAST COAST RY. CO.

(Supreme Court of Florida. April 5, 1916.)

(Syllabus by the Court.)

1. MANDAMUS \S 165—PROCEEDINGS—DEMURRER—ADMISSIONS.

A demurrer to the return to an alternative writ of mandamus admits the truth of all such matters of fact as are sufficiently pleaded.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 360½-364; Dec. Dig. \S 165.]

2. MANDAMUS \S 164(2) — PROCEEDINGS—RETURN—SUFFICIENCY.

In an application by the Railroad Commissioners for a writ of mandamus to compel a railroad corporation to establish and maintain an agency station at a certain designated point on the line of its railroad, where it appears in the return of the respondent, which was demurred to by the relators, that the respondent has an agency station on either side on its line, one of which is "situated a trifle more than 2 miles from" and the other "only 1.8 miles from O.," such designated point on its line, and that the principal amount of business transacted at such point O. is during a period of four months, during which time the respondent kept and maintained a "temporary agent" at such point, such matters of fact set out in the return, which are admitted to be true by the demurrer, show that

the order made by the relators for the establishment and maintenance of an agency station at such point is unreasonable, and that no necessity exists for the establishment of such agency station.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 345; Dec. Dig. ¶164(2).]

Original proceedings by the State, on relation of the Railroad Commissioners, for mandamus to the Florida East Coast Railway Company. Demurrer and motion to strike return to alternative writ overruled, with leave to relators to join issue.

D. C. McMullen, of Tallahassee, for relators.
Alex. St. Clair-Abrams, of Jacksonville, for respondent.

SHACKLEFORD, J. This is an original application to this court for a writ of mandamus requiring the respondent, the Florida East Coast Railway Company, to conform to an order of the Railroad Commissioners requiring and directing the respondent to establish and maintain an agency station at Ojus, Fla. Such order of the Railroad Commissioners is as follows:

"Order No. 466.

"File No. 3603.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Establishment of an Agency Station at Ojus.

"After due and lawful notice to all parties in interest, the Railroad Commissioners of the state of Florida met in session at Tallahassee on the 16th day of December, 1914, at 10 o'clock in the morning, to hear and consider whether or not they ought to require the Florida East Coast Railway Company to erect a depot building at Ojus and to establish there a permanent agency. The petitioners in the said matter appeared by their attorney, R. H. Seymour, and the Florida East Coast Railway Company, having filed its written answer in the said matter, appeared by its attorney, Alexander St. Clair-Abrams. And after hearing all who desired to be heard, the said Commissioners took the matter under advisement.

"And now on this day, the Railroad Commissioners of the state of Florida, being advised in the premises, do find that the Florida East Coast Railway Company has voluntarily maintained for many years at Ojus aforesaid a nonagency station at which local passenger trains have been accustomed to stop on flag and at which freight has been received and delivered; that the said station is 2.8 miles from Hallandale and 1.8 miles from Fulford, both regular agency stations; that Ojus, having been voluntarily established by the said company as a station, ought to be provided with proper and adequate facilities for the accommodation of patrons of the said station; that the facilities now maintained and heretofore maintained at Ojus aforesaid are inadequate and insufficient for the proper accommodation of the patrons of the said company desiring to use the said railway station; that the freight and passenger traffic handled at the said point is already extensive and is increasing; that the gross earnings of the said company derived from the said station were, for the year ended June 30, 1913, \$22,920.48, and for the year ended June 30, 1914, \$48,470.34; and that the proper handling of the traffic at the said point requires the maintenance of an agency station until such time as the Commissioners may find the business done at said point insufficient to warrant the maintenance of an agency.

"It is therefore considered, ordered and adjudged by the Railroad Commissioners of the state of Florida that the Florida East Coast Railway Company be and is hereby required to provide adequate additional facilities at Ojus aforesaid by establishing and maintaining at the said point an agency station, and by remodeling the present station building so as to provide a waiting room for white passengers which shall contain at least 180 square feet of floor space, and a waiting room for colored passengers which shall contain at least 180 square feet of floor space.

"And it is further ordered that the said station shall be equipped with suitable closets, one for each sex for the use of white passengers and one for each sex for the use of colored passengers; and that the said station shall be provided with suitable approaches thereto and walks alongside the track and adjacent to the station building for the convenience and comfort of passengers entraining and detraining.

"And it is further ordered that the said agency shall be established on or before the 1st day of February, 1915, and shall be maintained thereafter, and the facilities herein required shall be provided and this order fully complied with on or before the 15th day of March, 1915.

"Done and ordered by the Railroad Commissioners of the state of Florida in session at their office in the city of Tallahassee, the capital, this 14th day of January, A. D. 1915.

"[Signed] R. Hudson Burr, Chairman."

An alternative writ of mandamus issued, which is as follows:

"The State of Florida to Florida East Coast Railway Company—Greeting:

"Whereas, by petition filed in this our Supreme Court of the state of Florida, wherein R. Hudson Burr, Newton A. Blitch and Royal C. Dunn, as Railroad Commissioners of the state of Florida, are the relators, and the Florida East Coast Railway Company, a corporation, is the respondent, it has been made to appear:

"(1) The Florida East Coast Railway Company is a railroad corporation created and existing under the laws of the state of Florida and doing business in said state as a common carrier of goods and passengers; that said company is now maintaining, and has for many years last past voluntarily maintained a nonagency station at Ojus, on its line of railway in Dade county, Florida, and has been engaged in the business of transporting goods and passengers to and from said nonagency station as such common carrier for hire.

"(2) That on, to wit, the 7th day of December, 1914, the Railroad Commissioners of the state of Florida did issue their Notice No. 65, wherein and whereby they notified the said Florida East Coast Railway Company that on the 16th day of December, 1914, they would hold a session at their office in Tallahassee for the purpose of considering and determining whether or not they ought to make an order requiring the said company to establish and maintain an agency at Ojus aforesaid and to maintain an agent at said station, and to consider and determine whether or not they ought to require the said company to erect a depot building at Ojus aforesaid of suitable and necessary dimensions and arrangement, and to consider such other matters as might arise in the premises.

"(3) Pursuant to said notice the Railroad Commissioners of the state of Florida were duly in session on the date last mentioned, whereupon the Florida East Coast Railway Company appeared by its attorney, Hon. Alexander St. Clair-Abrams, and filed its written answer in the said matter, setting forth the amount of business done by the said company at the said station, among other things, and urging its reasons why an order should not be entered in the premises; and there also appeared on be-

half of the petitioners Mr. R. H. Seymour, of Miami, Florida. And after hearing all who desired to be heard, the Commissioners took the matter under advisement.

"(4) Thereafter, on, to wit, the 14th day of February, 1914, the Railroad Commissioners did make and enter their Order No. 466 in the aforesaid matter, wherein and whereby they did order that the Florida East Coast Railway Company provide adequate additional facilities at Ojus aforesaid by establishing and maintaining at the said point an agency station, and by remodeling the present station building so as to provide a waiting room for white passengers which shall contain at least 180 square feet of floor space, and a waiting room for colored passengers, which shall contain at least 180 square feet of floor space. And it was further ordered that the said station be equipped with suitable closets, one for each sex for the use of white passengers and one for each sex for the use of colored passengers, and that the said station be provided with suitable approaches thereto and walks alongside the track and adjacent to the station building for the convenience and comfort of passengers entraining and detraining. And it was further ordered that the said agency station should be established on or before the 1st day of February, 1915, and be maintained thereafter, and the facilities therein required be provided and the said order fully complied with on or before the 15th day of March, 1915. A copy of the said Order No. 466 is hereto attached and made a part hereof as Exhibit A.

"(5) The said Florida East Coast Railway Company has violated, disregarded and refused to obey, and continues to violate, disregard and refuse to obey, the aforesaid Order No. 466, in that it did not, on or before the 1st day of February, 1915, and has not from thence hitherto, established an agency station at Ojus aforesaid, and has not at any time since the entry of the said order maintained an agency at Ojus; and in that the said company has not on said date, and has not at any time since the entry of the said order, remodeled the existing station building so as to provide the waiting rooms and other facilities required in and by said Order No. 466.

"The Railroad Commissioners of the state of Florida, and the people of said state, are without adequate remedy in the premises unless it be afforded by the interposition of this court through a writ of mandamus.

"Now, therefore, we, being willing that full and speedy justice shall be done in the premises, do command you, the Florida East Coast Railway Company, forthwith

"To establish and maintain an agency station at Ojus, Florida; and

"To so remodel the present station building at Ojus as to provide a waiting room for white passengers with not less than 180 square feet of floor space and a waiting room for colored passengers with not less than 180 square feet of floor space;

"To equip the said station with suitable closets, one for each sex for the use of white passengers and one for each sex for the use of colored passengers, and provide suitable approaches thereto, and walks alongside the track and adjacent to the station building for the comfort and convenience of passengers entraining and detraining.

"And in all respects to comply with, observe and obey the said Order No. 466.

"Or that you appear before the justices of this our Supreme Court sitting within and for the state of Florida at the courtroom in the city of Tallahassee, the capital, on the 26th day of October, 1915, at 10 o'clock in the morning of that day, and show cause why you refuse so to do.

"And have you then and there this writ.

"Witness the Honorable R. F. Taylor, Chief

Justice of the Supreme Court of the state of Florida, and the seal of the said court, at Tallahassee, the capital, this 12th day of October, A. D. 1915.

"[Seal.]

G. T. Whitfield,
"Clerk Supreme Court, State of Florida."

To this writ was attached as an exhibit a copy of the order, which we have set out above. The respondent filed the following return:

"Now comes the Florida East Coast Railway Company, by its attorney and solicitor, Alex. St. Clair-Abrams, and for return to the alternative writ herein issued, says:

"(1) It admits as true the allegations of the first paragraph of the alternative writ.

"(2) It admits as true the allegations of the second paragraph of the alternative writ.

"(3) It admits as true the allegations of the third paragraph of the alternative writ in so far as it recites the appearance of the attorney for the respondent and the attorney for petitioners; but this respondent says that, if the last sentence of said third paragraph is intended to create the impression that any others than the two attorneys were heard at said hearing, the allegations of said sentence are not true; that no other persons were heard at said meeting than R. H. Seymour, attorney for the petitioners, and Alex. St. Clair-Abrams, attorney for the Florida East Coast Railway Company; that no witnesses whatsoever were introduced to sustain the subsequent action of the Commissioners; that, if the Commissioners saw or examined any witnesses to sustain the petition, they did so ex parte and outside of the presence of the attorney for the respondent and this respondent was never given any opportunity to confront or to cross-examine said witnesses; that, as a matter of fact, not one single word of testimony was taken at said hearing; that all that occurred there was the argument and statements of R. H. Seymour, the attorney for the petitioners, against which argument this respondent's attorney repeatedly protested and repeatedly called to the attention of the Commissioners that the assertions and argument of the said R. H. Seymour were not testimony and that there was nothing before the said commissioners in the shape of a single witness or any testimony of any kind to sustain the demands of the petitioners; that at the hearing the said R. H. Seymour offered to produce ex parte evidence, but this respondent, through its attorney, declined to consent to his doing so and insisted on its right to confront the witnesses and examine them in relation to the matters and things set forth in the petition.

"And this respondent says that it was entitled as of right to be advised of the evidence upon which the action of the Commissioners was based; that it was entitled as of right to confront the witnesses and to examine all evidence brought before the Commissioners and to meet and rebut the same if it could; but this respondent says that, except the petition and the speech or argument of R. H. Seymour, attorney for the petitioners, not a single witness appeared before the Railroad Commissioners in the presence of this respondent's attorney, or any of its officers; and that by reason hereof the respondent was deprived of its constitutional right of due process of law.

"This respondent further says that not until after the hearing did the respondent obtain a list of the names of the petitioners; that nothing but a copy of the petition, without the petitioners' names was ever served upon or sent to this respondent until after the hearing; that this respondent before the hearing requested a list of the petitioners for the purpose of making an investigation before the hearing; but did not receive them until after the hearing had taken place and after the respondent had offered to pay for a copy of the list of petitioners.

"And further answering this respondent says that, after the hearing and after obtaining a copy of the list of petitioners, this respondent caused an investigation to be made and ascertained that a large number of the alleged signers were either only temporary residents making a single crop or residents doing their business at other stations on the line of this respondent's road; that of the alleged 110 signers of the petition, 56 only were residents of Ojus, including 5 women, the wives or connections of the male signers; that 22 were nonresidents, some of whom had no business whatever at Ojus, or had previously and were then doing their business at Fulford or Hallandale; that 15 of the alleged signers had either left the place or could not be found or had never been known to be there; that 8 of the alleged signers were only temporary residents and had no permanent home in the vicinity; that 7 of the alleged signers were minors, children of the signers of the petition; that one signer resided within 2 miles of Hallandale and did all his business there.

"This respondent further says that investigation showed that a number of the alleged signers had no recollection of ever signing the petition, while others had requested their names to be taken therefrom before the petition was forwarded to the Railroad Commissioners.

"And this respondent further answering alleges that not a single one of the signers of the petition, except R. H. Seymour, the attorney for the petitioners, ever appeared before the Railroad Commissioners at the hearing and testified to a single fact warranting the making of the order for the establishing of a station agency at Ojus.

"And this respondent further says that R. H. Seymour does not live at Ojus or near there, but that he is an attorney at law residing in Miami and having his office and place of residence in that city.

"(4) And for an answer to the fourth paragraph of the alternative writ this respondent says that it is true that on the 14th day of February, 1915, the said Railroad Commissioners did make and enter their Order No. 466 in manner and form as set forth in said paragraph 4; but this respondent says that said order was unreasonable and unjust for the following reasons, to wit: That the flag station at Ojus is situated on the main line of the Florida East Coast Railway between Jacksonville and Miami, over which main line a large number of freight and passenger trains pass every day; that some time before the issuing of this order this respondent was required to establish a regular agency station at Hallandale, situated a trifle more than two miles from Ojus; and this respondent, after giving due consideration thereto, established said regular agency station at Hallandale; that still later the Railroad Commissioners, by their Order No. 434, dated the 17th day of February, 1914, required this respondent to establish a regular agency station at Fulford, only 1.8 miles from Ojus; and, although this respondent did not think the business at Fulford called for the establishment of a regular agency station, nevertheless, because of the existence of Ojus, 1.8 miles north of Fulford and to enable all persons living and doing business between Hallandale and Fulford to have the advantage of two agency stations, this respondent established a regular agency station at Fulford; and that said regular agency stations at Fulford and Hallandale existed at the time of filing the petition from Ojus and still exist; and this respondent says that from Fulford to Ojus and from Ojus to Hallandale is a county road paved with rock, affording quick and easy transit to all persons living between Hallandale and Fulford to drive to either station and transact business with a regular agent at either Fulford or Hallandale; that, in addition thereto, beginning the 2d of March, 1915, this respondent established a temporary agent at Ojus during

the shipping season, which temporary agent was still at Ojus at the time of filing this return. although this respondent says that the presence of said temporary agent at Ojus was not necessary for the prompt and faithful transaction of business there; but that he was established there to afford further facilities to shippers at Ojus during the shipping season.

"And further answering paragraph 4 this respondent says that during the months when there is no temporary agent at Ojus the business is easily and efficiently transacted by the respondent's conductors on trains and the train crews; that the close proximity of Fulford and Hallandale and the excellent county roads from Fulford to Ojus and Ojus to Hallandale and also the numerous private settlement rock roads enable all persons desiring to communicate with any established regular agency, to speedily and quickly visit either Hallandale or Fulford for that purpose. Annexed hereto is a plat or map showing the location of the three stations of Fulford, Ojus and Hallandale with the surrounding territory of each, the roads and the accessibility from Ojus to both Hallandale and Fulford, which plat is marked Exhibit 1, and this respondent prays it may be taken as a part of this return.

"And this respondent respectfully submits that it is impracticable and unreasonable to require a railroad company to establish regular agency stations in such close proximity to each other as Order No. 466 requires; and that it is not unreasonable to require the public to travel a short distance to transact business with a regular agent.

"And further answering paragraph 4 of the alternative writ this respondent says that the main line of respondent's road is already overcrowded with regular agency stations at short distances from each other, most of which have been established by order of the relators (the Railroad Commissioners), over the protests and objections of this respondent and only ultimately complied with to avoid litigation and conflict with said Railroad Commissioners, the effect of which is necessarily to impede and delay the movement of all of its trains and to render it more difficult to properly and efficiently perform its corporate functions in the speedy transit of passengers and freight; that it is unreasonable and unjust to require the respondent with its limited business to establish regular agency stations as close as 1.8 miles apart, and to thereby impose upon this respondent a fixed annual additional charge and an additional permanent investment, as hereinafter set forth.

"And further answering paragraph 4 this respondent says that, to establish a general agency station at Ojus, it will be necessary not simply to remodel the existing building, but to construct a freight and passenger station building and also a residence for the agent there; that the average cost of constructing such buildings with the necessary supplies and equipment would be \$4,170, and the annual cost of maintaining such agency would not be less than \$1,388; that in addition thereto, this respondent would have to obtain the money with which to make this permanent investment, thereby adding an annual charge of approximately \$250 and imposing upon this respondent an additional annual expense of approximately \$1,600.

"And further answering paragraph 4 this respondent says that for the fiscal year ending June 30, 1913, the entire gross earnings of the station at Ojus were \$22,920.48, of which the freight forwarded, exclusive of rock, amounted to \$16,233.25; that of this \$16,233.25, \$15,750.42 was forwarded during the months of February, March, April and May, leaving a balance of \$482.83 during the remaining eight months; the earnings from freight received amounted to \$3,645.67, of which \$1,890.47 were during the months of February, March, April and May, leaving \$1,755.20 for the remaining eight

months; the passenger earnings in and out amounted to \$2,496.05, of which \$1,318.40 were during the months of February, March, April and May, leaving \$1,177.65 for the remaining eight months; that of the entire gross earnings of \$22,920.48, \$18,959.29 were during the four months of February, March, April and May, leaving only \$3,961.19, which included \$545.51 from rock forwarded, for the remaining eight months of the year. And this respondent says that during these eight months the presence of a resident agent at Ojus was unnecessary; that he would have but little or nothing to do.

"And this respondent says that for the fiscal year ending June 30, 1914, the gross earnings at Ojus station increased to \$48,470.34; but this respondent respectfully shows that this increase was purely temporary; that during the fiscal year ending June 30, 1914, the freight from oranges, lemons and limes increased to \$1,322.93, while the receipts from vegetables decreased to \$7,441.46 (being less than half the amount of the receipts for the previous year); that the receipts from shipment of rock increased from \$545.51 for the fiscal year ending June 30, 1913, to \$32,006.64, being practically two-thirds of the entire gross business of Ojus; that of \$40,937.36 of freight forwarded during the fiscal year ending June 30, 1914, \$32,006.64 was for rock, leaving \$8,930.72 from all other sources of freight. Of this sum \$7,551.79 was shipped during the months of February, March, April and May, leaving only \$1,378.93 for the remaining eight months of the year, or an average of \$172.37 per month; that of \$4,269.91 from freight received, \$1,740.70 was during the months of February, March, April and May, leaving \$2,523.21 for the remaining eight months; that of \$3,263.07 earned from passengers in and out, \$1,029.25 was during the months of February, March, April and May, leaving \$2,233.82 for the remaining eight months; that the entire gross earnings at Ojus for the fiscal year ending June 30, 1914, exclusively of rock, amounted to \$16,463.70, of which \$10,327.74 were during the months of February, March, April and May, leaving \$6,135.96 for the remaining eight months of the year. And this respondent says that during these eight months the presence of a resident agent at Ojus was unnecessary; that he would have but little or nothing to do.

"And this respondent says that for the fiscal year ending June 30, 1915, the gross earnings at Ojus station were \$55,858.52; that of this amount \$36,114.21 was for rock; that of \$9,157.62 from freight forwarded exclusively of rock, \$3,536.64 was during the months of February, March, April and May, leaving only \$620.98 for the remaining eight months of the year; that of \$5,984.10 from freight received, \$2,612.98 was during the months of February, March, April and May, leaving \$3,371.12 for the remaining eight months; that of \$4,602.59 earned from passengers in and out, \$1,465.38 was during the months of February, March, April and May, leaving \$3,137.21 for the remaining eight months; that the entire gross earnings at Ojus for the fiscal year ending June 30, 1915, exclusive of rock, were \$19,744.81, of which \$12,615 were during the months of February, March, April and May, leaving \$7,129.31 for the remaining eight months of the year. And this respondent says that during these eight months the presence of a resident agent at Ojus was unnecessary; that he would have but little or nothing to do.

"The respondent annexes hereto statement of freight forwarded from Ojus for fiscal year ending June 30, 1913, including all classes except rock, marked Exhibit 2; statement of freight received at Ojus for fiscal year ending June 30, 1913, marked Exhibit 3; statement of passenger business at Ojus for fiscal year ending June 30, 1913, marked Exhibit 4; statement of freight forwarded from Ojus for fiscal year ending June 30, 1914, including all classes except rock, marked Exhibit 5; statement of freight re-

ceived at Ojus for fiscal year ending June 30, 1914, marked Exhibit 6; statement of passenger business at Ojus for fiscal year ending June 30, 1914, marked Exhibit 7; statement of freight forwarded from Ojus for fiscal year ending June 30, 1915, including all classes except rock, marked Exhibit 8; statement of freight received at Ojus for fiscal year ending June 30, 1915, marked Exhibit 9; statement of passenger business at Ojus for fiscal year ending June 30, 1915, marked Exhibit 10; a statement of the rock forwarded from Ojus for the fiscal year ending June 30, 1913, marked Exhibit 11; statement of rock forwarded from Ojus for fiscal year ending June 30, 1914, marked Exhibit 12; statement of rock forwarded from Ojus for the fiscal year ending June 30, 1915, marked Exhibit 13.

"And this respondent further answering says that this business in rock is necessarily temporary in its character and cannot form the basis for requiring the establishment of a permanent agency station and maintaining a permanent agent at Ojus; that, exclusive of rock, for the fiscal year ending June 30, 1913, the entire business at Ojus amounted to \$22,374.97; that during the fiscal year ending June 30, 1914, exclusive of rock, the entire business at Ojus was only \$16,463.70, showing a decline of nearly \$6,000 from the business of the previous year; that during the fiscal year ending June 30, 1915, exclusive of rock, the entire business at Ojus was \$19,744.81, showing a decline of \$2,630.65 from the business of 1913.

"And this respondent further answering says that the regular and legitimate business at Ojus consists of vegetables and fruits, the great mass of which is moved during three or four months each year, leaving but very small business during the balance of the year; and that this business is all that the respondent can look to from Ojus station as a matter of permanent source of income; that, as a matter of fact, as hereinbefore set forth, the rock business described and set forth is neither received at nor forwarded from Ojus station proper, but is simply credited to Ojus for convenience, there being no station of any kind at the Ojus rock pit spur, which consists of a spur constructed to the pit and maintained by this respondent.

"And this respondent further answering says that, while the earnings from rock are credited to Ojus and billed from Ojus, as a matter of fact, all of these rock shipments are handled from the Ojus rock pit spur, some six-tenths of a mile from Ojus station on conductors' waybills and at estimated weights and that it is not necessary that an agency station be established at Ojus for the convenience of shipments of rock, because, even if there was an agent established at Ojus, it would be necessary, for the prompt and efficient operation of this company's freight trains, to still receive and handle this rock at the Ojus rock pit spur and to ship the same on conductors' waybills.

"And this respondent says that the shipment of this rock is temporary, being for road purposes; that this freight is handled at such a low rate for the purpose of encouraging road building as to be almost at the cost of transportation, and leaves this respondent but little or no profit for the handling of the freight; that necessarily this business will cease with the completion of the roads and, as a matter of necessity, cannot be permanent.

"This respondent further answering says that the freight received during the fiscal year ending June 30, 1914, amounted to \$4,269.91, being only \$624.24 in excess of the freight received during the fiscal year ending June 30, 1913; that, while all of this freight is credited to Ojus station, as a matter of fact, a large part of it was delivered at Ojus rock pit spur for the convenience of the workmen engaged in getting out the rock; that the total amount received from passengers out had decreased \$14.40 for the fiscal year ending June 30, 1914, and for

passengers in had increased \$781.42, but this increase was practically all due to passengers getting off at Ojus station and proceeding to Ojus rock pit spur to work in getting out rock.

"This respondent further answering says that during these months the public patronizing the agency is kept fully advised and informed of the arrival and departure of all freight and passenger trains; that these trains, save in exceptional cases, arrive and depart regularly according to schedule time, delays being infrequent and due solely to causes that could not be foreseen or guarded against; that during these months the conductor and train crew of all freight and passenger trains fully perform all the duties that would be imposed upon employees regularly stationed there; that they receive and deliver freights promptly; that passengers are not put to any inconvenience or expense; that there is now at Ojus a flag station building affording the most adequate facilities; in fact, during the year being far in excess of any requirements either of passengers or freight.

"And further answering said paragraph 4 this respondent says that a number of the signers of the petition reside at Miami Gardens, a settlement about equal distance from Fulford and Ojus; that at the time of the signing of the petition and at the present time nearly all of the residents of Miami Gardens receive their mail and transact their business at Fulford; that a number of the signers of the petition are actually closer to Hallandale than they are to Ojus; that others are actually closer to Fulford than they are to Ojus; and that practically the entire population doing business at Ojus could transact their business at Hallandale and Fulford without having to travel exceeding $2\frac{1}{2}$ miles in any direction. And this respondent says that it established a flag station at Ojus when there was no regular agency station at either Hallandale or Fulford for the local convenience of the settlers; but that, after the establishing of a regular agency station at Hallandale and at Fulford, it was and is unjust and unreasonable to require this respondent to establish a third regular station between Hallandale and Fulford, the distance between Hallandale and Fulford being only about 4 miles; that this respondent proposes to continue the nonagency station at Ojus and every year during the shipping season during the months of February, March, April and May, at Ojus to place a temporary agent there; but insists that the facts herein set forth show that it is unreasonable and unjust to require a regular agent there during the remaining 8 months of the year and to impose upon this respondent a large additional permanent investment and a large additional annual expenditure for the maintenance of another regular agency station.

"And further answering this respondent says that the freight business at Ojus is fluctuating, uncertain and dependent largely upon climatic conditions, as shown by the freight earnings hereinbefore set forth and the exhibits attached; and that the passenger traffic is also largely fluctuating, as shown by the earnings hereinbefore set forth and the exhibits attached.

"And further answering this respondent says that, under and by virtue of the orders emanating from the relators (the Railroad Commissioners of Florida), it has already been forced to construct regular agency stations unreasonably close to each other; that it has heretofore submitted to these orders, after protesting against them, to avoid litigation with the relators (the Railroad Commissioners of Florida), and to comply as much as possible with the rules and orders of the relators; that these stations are now so multiplied in close proximity to each other as to already hinder and delay the movements and operations of trains, some of these regular agency stations being already closer to each other than the average distance between

regular agency stations on the Pennsylvania Railroad where the population and business are enormously greater than on the line of the respondent, the average population on which, according to the census of 1910, being but a trifle over 9 persons to the mile; that, by reason of the orders of the relators (the Florida Railroad Commissioners) heretofore made establishing regular agency stations on the line of this road, the investment, expense and the annual expenditures of the road have been increased already 'so unreasonably out of proportion to the convenience afforded to the public as to impose an unlawful burden' on this company, and that the proximity of a regular agency station at Fulford, only 1.8 miles from Ojus, and a regular agency station at Hallandale, only 2.8 miles from Ojus, affords to the public at Ojus all reasonable convenience, in addition to the facilities already afforded the public there, as hereinbefore set forth; and that to establish a regular agency station at Ojus in such close proximity to the regular agency stations at Fulford and Hallandale will be to impose upon this respondent a burden out of proportion to any added convenience to the public at Ojus.

"And for answer to the 5th paragraph of the alternative writ this respondent says that it is true that this respondent has not obeyed the order of the said commissioners because this respondent says that said order is unjust, unreasonable and oppressive; that it was made without evidence as to the necessity for the establishing of a regular agency station at Ojus, or if any evidence was taken, it was taken ex parte and the witnesses were seen, or written received without this respondent having an opportunity to confront and cross-examine said witnesses, or to rebut their testimony, or to examine any written testimony or address cross-interrogatories to those giving the written testimony; and that throughout the proceedings this respondent was deprived of its constitutional right of due process of law and in disregard of the decisions of this court.

"And further answering the fifth paragraph this respondent says that the financial condition of the Florida East Coast Railway does not warrant the expenditure necessary to establish a regular station agency at Ojus or the annual fixed charges necessarily following the establishment of such agency; that the Florida East Coast Railway Company never has and it is not now earning a reasonable profit on its investment.

"And further answering this respondent says that, while in previous years there has been only a small increase in the freight business but a good increase in its passenger business, for the fiscal year ending June 30, 1915, the passenger traffic of this respondent decreased \$170,614.78 and the freight business increased \$142,915.64; the aggregate gross business being \$4,863.54 less than the previous year; and, as heretofore stated, nothing but the most drastic economies practiced during the fiscal year ending June 30, 1915, enabled this respondent to show an increase of gross profits; and, as heretofore and hereinafter stated, this limitation of expense cannot continue; that, on the contrary, the expenditures are likely to increase while there is no immediate prospect for any large increase in the gross business of the company.

"And the respondent further answering says that its total earnings and total expenditures for the fiscal year ending June 30, 1911, were as follows:

Gross earnings	\$4,121,277.80
Expenses, less taxes, interest and other charges	2,608,716.19
Net earnings	\$1,577,567.61
Interest, taxes and other charges	1,510,437.78
Surplus	\$ 67,129.83

"And of this small surplus over \$25,000 was from interest received on deposits, and was not money received from the operation of the road.

"And the Florida East Coast Railway Company, the respondent, further answering, says that of the \$1,510,437.78 expended for interest, taxes and other charges, \$1,295,000 was paid in interest, to wit, 4½ per cent. on its first mortgage bonds and 4 per cent. on its second mortgage, or income bonds, the balance, to wit, \$215,437.78 representing taxes, hire of equipment and other necessary expenditures.

"And this respondent further answering says that its total earnings for the fiscal year ending June 30, 1914, had increased to \$5,334,653.08, and its gross expenses, including taxes, hire of equipment and rentals, amounted to \$4,074,439.70, showing an increase of gross earnings over 1911 of \$1,153,875.28, while the total expenditures of 1914 had increased over the expenditures of 1911, \$1,188,784.04, or a decline of net earnings of \$35,408.76; that during the fiscal years ending June 30, 1912-1913-1914, the net earnings averaged somewhat less than \$1,100,000 per annum, applicable to payment of interest and dividends on stock, being less than the net earnings during the fiscal year ending June 30, 1911, showing that the increase of expenditures during these three years has been greater than the increase of business during the same years.

"And this respondent further answering says that its total earnings for the fiscal year ending June 30, 1915, were \$5,392,782.32, showing a decrease from the total earnings for the fiscal year ending June 30, 1914, of \$1,863.54. By reason of the most drastic economy the operating expenses were reduced from \$3,716,213.73 for the year ending June 30, 1914, to \$3,337,336.36 for the year ending June 30, 1915. In addition the Water Line Transportation operated for the year showed a profit of \$40,000.85, making a total income of \$2,094,946.81. From this, however, must be deducted \$1,881,627.47 for taxes, uncollectible railway revenue, hire of equipment, joint facility rents, miscellaneous rents, interest on funded debt, interest on car trust certificates, etc., leaving only \$213,319.34 applicable to dividends on stock.

"This respondent further says that the actual net earnings applicable to payment of interest on bonds and dividends on stock amounted to \$1,753,319.34, or about 3½ per cent. on the capital invested in the company and less than 3 per cent. on the present value of respondent's property.

"And this respondent says that the respondent has not yet earned a reasonable profit on its investment. This respondent further says that the very limit of economy has been reached and that, unless the business of the company shall largely increase during the present fiscal year, it is improbable that this respondent will be able to earn as much as it did during the fiscal year ending June 30, 1915.

"A copy of the earnings, expenses, etc. for the fiscal year ending June 30, 1915, with a comparison with the earnings, expenses, etc. for the fiscal year ending June 30, 1914, is hereto annexed marked Exhibit 14, and this respondent prays that it may be taken as part of this return.

"And further answering this respondent says that the property of this respondent represents an investment of over \$50,000,000 and the present value of its property is over \$50,000,000; that it has outstanding \$12,000,000 of first mortgage bonds upon which interest at the rate of 4½ per cent. per annum is paid; that it has outstanding \$25,000,000 of second mortgage, or income bonds, the interest on which is limited by the terms of the mortgage to 5 per cent. per annum, and the interest on which was fixed by the board of directors at 4 per cent. per annum, but on which for the three successive years of 1912, 1913 and 1914, only a 2½ per cent. in-

terest per annum has been paid; that for the fiscal year ending June 30, 1915, the respondent, because of economies in the operation of the road, has been able to pay 4 per cent. on the second mortgage bonds, but during a period of four years past the average interest on these bonds has been less than 3 per cent. per annum; that it also has outstanding \$400,000 of car trust certificates bearing interest at 5 per cent. per annum, principal payable annually in sums of \$50,000 during eight successive years; that it has in addition \$10,000,000 of common stock outstanding on which no dividends whatsoever are or have been paid; that all of these bonds and stocks have been sold and paid for at par.

"And the respondent further answering says that the small surplus is utterly inadequate to meet extraordinary contingencies; that it has no sinking fund of any kind; that it is compelled to keep up its railroad and equipment to the highest standard of condition; that, under the decision of this court, now on writ of error to the Supreme Court of the United States, this respondent is threatened with a further reduction of revenue aggregating \$20,000 per annum, by order of the relators (the Railroad Commissioners of Florida) abolishing the arbitrary rate of 5 cents across the bridges at Palatka and Jacksonville; and that this respondent is threatened with a further reduction of \$50,000 per annum by the order of the relators (the Railroad Commissioners of Florida) amending rule 18, which order was sustained by this court and now on writ of error before the United States Supreme Court; that, in addition to this, under the law and under the orders of the Florida Railroad Commission and the Interstate Commerce Commission, this respondent is required to make large increases of expenditures; that the freight produced on its line of road consists principally of fruit and vegetables which fluctuate greatly in volume and cannot be depended upon for any regular or steady income; that there is no cotton, phosphate or kaolin produced on the line of this respondent's road; that its lumber business is purely local, and that its business in naval stores is very small; that the other principal railroads in the state of Florida transport more fruit and vegetables than this respondent's road transports; that the tonnage per mile of the two principal roads is much greater than that of this respondent's road, as shown by the following comparison, as officially submitted under oath to the Railroad Commissioners of Florida, for the fiscal year ending June 30, 1911:

Comparison of Freights.

Perishable High-Rate Freight	Whole Tons.
Florida East Coast Railway, fruits and vegetables	124,392
Atlantic Coast Line, fruits and vegetables	249,111
Seaboard Air Line, fruits and vegetables	216,120
Dead Freight Produced in Florida.	
Florida East Coast, lumber, naval stores and forest products	122,451
Atlantic Coast Line, lumber, naval stores, forest products, phosphate and other mining products, and cotton	2,686,624
Seaboard Air Line Railway, lumber, naval stores, forest products, phosphate and other mining products, and cotton	1,916,342

The tremendous discrepancy between the roads in this regard is to be seen from the following comparison of freight:

Florida East Coast, produced on line of road	247,343
Atlantic Coast Line, produced on line of road	2,935,735
Seaboard Air Line, produced on line of road	2,132,462

"We have excluded the Southern Railway from these comparisons because this road has

little or no mileage in the state of Florida. In its most important run it uses the tracks of the Atlantic Coast Line and the Seaboard Air Line Railway to find access into Jacksonville.

"The mileage of the Atlantic Coast Line Railroad in Florida is less than four times that of the Florida East Coast Railway, and that of the Seaboard Air Line Railway in Florida is less than three that of the Florida East Coast Railway, while the Atlantic Coast Line Railroad in Florida handles more than five times the entire tonnage of the Florida East Coast Railway and the Seaboard Air Line Railway in Florida handles 3¼ more than the entire tonnage of the Florida East Coast Railway. The aggregate tonnage of each road on all freights handled in Florida, whether produced on the line of road or not, for the fiscal year ending June 30, 1911, is as follows:

Florida East Coast Railway.....	737,653
Seaboard Air Line Railway.....	2,830,088
Atlantic Coast Line Railroad Company..	4,087,839

"And this respondent further answering says that the mileage of the other main roads in this state continues largely in excess of that of the Florida East Coast Railway, and that the population on the line of the Florida East Coast Railway is much less per mile than that on the other principal railroads in this state; that at the time of filing this return this respondent has not received a later statement of the traffic of the Atlantic Coast Line Railroad and the Seaboard Air Line Railway, but that it still continues per ton mile largely in excess of this respondent's line of road, notwithstanding the depression in lumber, naval stores and phosphate business, caused by the existence of the war in Europe.

"And further answering this respondent says that it operates its road as economically in every way as is possible, with due regard to the safety of property and passengers; that it pays no higher wages to its employes than it is compelled to pay for the services of competent and experienced men; that it purchases supplies and equipment at the lowest possible prices commensurate with the kind and quality it is compelled to have in the transaction of its business; that it has never yet earned a reasonable compensation for the many millions of dollars invested in its road; that it has reached the limit of economy in expenditures and that, unless its earnings increase during the present fiscal year in proportion to the necessary increase of its expenditures hereafter, it will not be able to pay as much interest on its second mortgage bonds as it has paid during the last fiscal year; that its increase of freight business has been largely due to the extension to Key West in freights shipped to and from Cuba; that, on account of competition with ocean steamers, this freight is necessarily carried at only a fraction over the cost of transporting it.

"And further answering this respondent repeats that it is unjust and unreasonable to require it to establish a regular agency station at Ojus; that there does not exist any necessity for establishing such an agency at this place; that the passengers and shippers and receivers of freight are served promptly and efficiently; that there are no delays either in the receipt or transmission of freight and no just cause whatsoever for any complaint as to the transaction of business at Ojus; that all persons desiring to transact business with a regular agent can always find one at Fulford, 1.8 miles from Ojus, or at Hallandale, a fraction over 2 miles from Ojus.

"The premises considered and having fully answered all the allegations of the alternative writ and standing ready to prove all and every the allegations of this answer, the respondent prays that said alternative writ be dismissed with its costs."

We omit the exhibits attached to the return.

To this return the following demurrer was interposed:

"The relators, by their attorney, demur to the return filed by the respondent and say that the same is bad in substance.

"Grounds of Demurrer.

"(1) The return does not show that the order of the Railroad Commissioners, on which this suit is based, was unreasonable and unjust.

"(2) The return does not show that respondent was deprived of any constitutional right.

"(3) The fact that no witnesses were examined by the Railroad Commissioners does not warrant the conclusion that there was no evidence before them as to the necessity for an agency at Ojus.

"(4) The return does not show that there was no evidence before the Commissioners.

"(5) The return shows on its face that the Commissioners had evidence before them in the shape of the sworn answer of the company giving the amount of earnings from this station.

"(6) The fact that if an agency is installed at Ojus * * * it will result in a pecuniary loss to respondent does not give rise to a conclusion of unreasonableness in the order requiring such facilities.

"(7) An order requiring facilities at a station, which is not otherwise unreasonable, must be complied with even if it results in a pecuniary loss to respondent.

"(8) If the facilities required are in fact necessary they must be supplied even if by so doing respondent will thereby incur a loss.

"(9) The fact that respondent has not been able to pay a reasonable rate of interest on its outstanding bonds and other obligations does not excuse it from the performance of a duty which is reasonably necessary for the comfort and convenience of its patrons.

"(10) Inquiry into the necessity for an agency at Ojus is an administrative function. The question as to the necessity for an agency is concluded by the action of the Commissioners which finds that an agency is in fact necessary.

"(11) It does not appear from the return that compliance with the order will impose burdens on respondent so out of proportion to the benefits to be derived therefrom by the public as to render the order arbitrary and unreasonable.

"(12) The return shows that the business at said station is large and increasing; that respondent voluntarily established an agency there during certain months of the past year.

"(13) The return presents no valid defense to the writ."

At the same time the relators filed their motion to strike certain portions of the return. We see no occasion for setting out this motion. It is sufficient to say that it is addressed practically to the entire return, at least to the material parts thereof, and seeks to reach the same matter and accomplish the same result as is sought by the demurrer.

[1, 2] It is contended by the respondent that the instant case is ruled by the case of *State ex rel. Railroad Commissioners v. Florida East Coast Railway Co.*, 69 Fla. 165, 67 South. 906. There is a difference of opinion among the members of the court as to whether or not we can say in the instant case, as a majority of the court held in the cited case, that:

"It appears in the return of the respondent which was demurred to by the relators that no testimony was taken by the Railroad Commis-

sioners to show any necessity for the establishment of such agency, that no witnesses were examined, that there was no evidence before the Commissioners of any delay on the part of the respondent in handling, receiving or delivering freight at the said point, and that the order was made without evidence as to the necessity for establishing such an agency."

It may be that as to the return in the instant case showing that no testimony was taken by the Railroad Commissioners, that no witnesses were examined, and that there was no evidence before the Commissioners of any kind as to the necessity for establishing an agency station the instant case can be differentiated from the cited case. Be that as it may. We are of the opinion that there is no necessity for discussing and deciding this point. We think that the matters of fact set out in the return in the instant case make a stronger showing in favor of the respondent than was made by the return in the cited case. It is elementary that a demurrer to a pleading admits the truth of all such matters of fact as are sufficiently pleaded. It is clearly and distinctly set forth in the return that the respondent has an agency station at Hallandale, "situated a trifle more than 2 miles from Ojus," and another "agency station at Fulford, only 1.8 miles from Ojus." It further appears from the return that the principal amount of business transacted at Ojus is during a period of four months, during which time the respondent kept and maintained a "temporary agent" at such station. It also further appears from the return that a large portion of the business credited to the station of Ojus consists of rock, which "rock shipments are handled from the Ojus rock pit spur, some six-tenths of a mile from Ojus station on conductors' waybills and at estimated weights, and that it is not necessary that an agency station be established at Ojus for the convenience of shipments of rock, because, even if there was an agent established at Ojus, it would be necessary, for the prompt and efficient operation of this company's freight trains, to still receive and handle this rock at the Ojus rock pit spur and to ship the same on conductors' waybills."

In other words, we are of the opinion that the matters of fact set out in the return, which we have copied above, and admitted to be true by the demurrer, show that the order is unreasonable, and that no necessity exists for the establishment of an agency station at Ojus, as required by the order of the Railroad Commissioners, which we have copied above. In this respect we think that the principles enunciated in the cited case, which we shall not repeat here, are controlling.

It necessarily follows that the demurrer and motion to strike are overruled, with leave to the relators to join issue upon the averments of the return, as they may be advised.

TAYLOR, C. J., and COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

WHITFIELD, J. (concurring). The statute confers upon the Railroad Commissioners authority to "require the erection of such freight and passenger depots, etc., with all necessary conveniences as the safety, convenience, and comfort of passengers and the proper handling, care, protection, and prompt delivery and transportation of freight may require. Subdivision 5, section 3, chapter 6527, Acts of 1913, § 2893, Compiled Laws of 1914. Authority to make an order in the premises appearing, the question to be determined is whether the order as made is enforceable by mandamus. Orders made by the Railroad Commissioners within their statutory authority are as a matter of organic law not conclusive. If such an order is made without a legally sufficient evidentiary basis to support it, the order is not enforceable. See *Seaboard Air Line Ry. v. Railroad Commission of Georgia*, 240 U. S. 324, 36 Sup. Ct. 260, 60 L. Ed. —; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *State of Washington ex rel. Oregon R. & Navigation Co. v. Railroad Commissioners of State of Washington*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863; *Great Northern Ry. Co. v. State of Minnesota ex rel. State Railroad & Warehouse Commission*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, text 91, 92, 33 Sup. Ct. 185, 57 L. Ed. 431; *Florida East Coast Ry. Co. v. United States*, 234 U. S. 167, text 185, 34 Sup. Ct. 867, 58 L. Ed. 1267; *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; *Interstate Commerce Commission v. Great Northern R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *State ex rel. R. R. Comm'rs v. Florida East Coast R. Co.*, 64 Fla. 112, 59 South. 385; *State ex rel. Railroad Commissioners v. Florida East Coast Ry. Co.*, 69 Fla. 165, 67 South. 906.

Under the statute all presumptions are in favor of the action taken by the Commissioners, and the order made by them "shall be deemed and held to be reasonable and just, and such as ought to have been made in the premises, and to have been properly arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears." This statutory provision apparently extends the inquiry in proceedings of this character to errors in making orders, whereas prior to the enactment of the statute the inquiry was confined to questions of exceeding statutory powers, and to abuses of authority, questions of mere error not being considered. *State ex rel. Railroad Commissioners v.*

Florida East Coast R. Co., 67 Fla. 83, 64 South. 443.

In view of the above-quoted statute if it be made to appear by admissions in the pleadings having the effect of "clear and satisfactory evidence," that the order in this case is not "reasonable and just," or that the order is not "such as ought to have been made in the premises," or that the order was not "properly arrived at in due form of procedure," or that the order is not "such as can and ought to be executed," the order should not be enforced by mandamus. If the order is in whole and in every part thereof invalid or unenforceable, it should not be enforced either wholly or partially; and the provision of the statute to the effect that if any part of the order "shall be found invalid, the court shall proceed to enforce such portion thereof as may be valid if the same can be done," can have no application.

To afford reasonably adequate facilities at its own stations is primary duty of the carrier, and the burden of furnishing such facilities does not unlawfully invade the carrier's property rights, when the requirements are not in fact unreasonable and arbitrary.

While the duty of furnishing reasonably adequate depot facilities may be enforced, the nature and extent of facilities required to be furnished should be determined after a due consideration of all pertinent facts, including the expense to the carrier and the relative benefits to the public to be served. State ex rel. Burr v. Atlantic Coast Line R. Co., 70 South. 941.

In determining the validity and reasonableness of an order requiring depot facilities to be furnished, regard should be had for considerations that show whether the facilities may justly be required for the convenience and safety of the public to be served, and whether the expense to the carrier is so out of proportion to the advantage thereby afforded to the public or so affects its earnings as to impose an unlawful burden upon the carrier. See State ex rel. Railroad Commissioners v. Florida East Coast Ry. Co., 69 Fla. 165, 67 South. 906.

When it does not clearly appear that the order is unreasonable as to the nature or extent of the facilities required or as to the expense involved, and the order is otherwise valid, it will be enforced, and doubts if any will be resolved in favor of the order. State ex rel. Railroad Commissioners v. Florida East Coast R. Co., 67 Fla. 83, 64 South. 443. It is within the province and duty of the Railroad Commissioners and the carrier to anticipate and provide for the reasonable requirements by prospective growth of the business done by the carrier. State ex rel. Railroad Commissioners v. Florida East Coast R. Co., 67 Fla. 83, text 101, 64 South. 443; Louisville & N. R. Co. v.

Railroad Comm'rs, 63 Fla. 491, 58 South. 543, 44 L. R. A. (N. S.) 189.

But where an order requiring depot facilities to be furnished is shown by the admissions of the pleadings to be so unreasonable with reference to the past and present conditions affecting the matter as to unlawfully invade the carrier's property rights, the order should not be enforced by mandamus, particularly when it appears that the prospective growth of the carrier's business does not clearly warrant the requirements of the order sought to be enforced.

The functions of a demurrer to a return to an alternative writ of mandamus is to raise a question of law as to the right of the relator on the pleadings to the relief sought. All the allegations of fact that are, as a matter of pleading, sufficiently averred in the return, are for the purposes of the demurrer admitted to be true as averred. The law applicable to the facts duly stated and admitted is to be determined by the court; and the essential question, when properly presented, is whether the facts thus alleged and admitted are in law sufficient as a defense to the writ. State ex rel. Railroad Commissioners v. Louisville & N. R. Co., 62 Fla. 315, 57 South. 175; State ex rel. Railroad Commissioners v. Florida East Coast R. Co., 64 Fla. 112, 59 South. 385; State ex rel. Railroad Commissioners v. Atlantic Coast Line R. Co., 67 Fla. 441, 63 South. 729.

From the admissions of the demurrer herein as set out in the main opinion, it "plainly appears," as if shown "by clear and satisfactory evidence," that the order is not "reasonable and just," and is not "such as ought to have been made in the premises" and is not "such as can and ought to be executed"; therefore in accordance with the provisions of the statute the order should not be enforced.

INGRAM-DEKLE LUMBER CO. v. GEIGER.

(Supreme Court of Florida. April 5, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — LIABILITIES FOR INJURIES—"RAILROAD COMPANY."

A corporation or company engaged in the operation of a sawmill and as an incident to such business operates a steam railroad about six or seven miles long, commonly known as a log road, is not "a railroad company" within the terms and meaning of sections 3148, 3149, and 3150 of the General Statutes of 1906.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.

For other definitions, see Words and Phrases, First and Second Series. Railroad Company.]

2. COMMON LAW — APPLICATION AND OPERATION.

The common law is in force in this state, except where it has been modified by competent governmental authority.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. § 11.]

3. NEGLIGENCE \Leftrightarrow 80—CONTRIBUTORY NEGLIGENCE—EFFECT.

In actions for the recovery of damages to a person or his property, alleged to have been occasioned by the negligence of the defendant, the common-law principle which prevents a recovery of the plaintiff's own negligence contributed proximately to his injuries has not been modified or changed, except as modified by sections 3148, 3149, 3150, of the General Statutes of 1906, and chapter 6521 of the Acts of 1913.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 84, 85; Dec. Dig. \Leftrightarrow 80.]

4. MASTER AND SERVANT \Leftrightarrow 177, 179—INJURIES TO SERVANT—FELLOW SERVANTS.

At the common law where the master himself has performed his duty, he is not liable to one of his servants for personal injuries received by such servant in the course of his employment, through the negligence of a fellow servant or coemployé of such servant, when engaged in the same undertaking or common work or enterprise, unless such fellow servant or coemployé sustains a representative relation, such as vice principal, to the master. This common-law principle is in force in this state, except as modified by sections 3148, 3149, 3150, of the General Statutes of 1906, and chapter 6521 of the Acts of 1913.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352-358; Dec. Dig. \Leftrightarrow 177, 179.]

5. NEGLIGENCE \Leftrightarrow 108(1) — ACTIONS — PLEADING.

In actions for negligent injuries it may be necessary to allege only the relations between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 180; Dec. Dig. \Leftrightarrow 108(1).]

6. PLEADING \Leftrightarrow 11—FORMS OF ALLEGATIONS—ULTIMATE FACTS.

A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. As a general rule, only ultimate facts need be alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. \Leftrightarrow 11.]

7. MASTER AND SERVANT \Leftrightarrow 258(13)—INJURIES TO SERVANT—ACTIONS—PLEADINGS.

In an action whereby it is sought to recover damages for personal injuries alleged to have been occasioned by the negligence of a railroad company or corporation, a count in the declaration alleging "that the said track and rails were wet, and the said locomotive engine and tender leaked in such a way the water therefrom fell upon the rails of said track, and the sand box on said locomotive engine was in such a defective condition that sand would not fall therefrom upon the rails of said track, by reason whereof the said locomotive engine upon which plaintiff was riding could not be stopped and collided with the said derailed locomotive engine," is not demurrable for failing to allege the acts or omissions of the defendant which caused the plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 828; Dec. Dig. \Leftrightarrow 258(13).]

8. MASTER AND SERVANT \Leftrightarrow 198(5)—INJURIES TO SERVANT—FELLOW SERVANTS.

Except as modified by statute, an engineer and a track repairer, though in different departments of the railroad company, are fellow servants engaged in the same common work or enterprise, and where such track repairer, while riding on the engine in charge of such engineer

to the place where such track repairer has to work, received injuries by reason of the negligence of such engineer in operating the engine, there can be no recovery by the track repairer against the railroad company, the engineer not sustaining a representative relation, such as vice principal, to the defendant company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 500; Dec. Dig. \Leftrightarrow 198(5).]

9. PLEADING \Leftrightarrow 395 — ISSUES AND PROOF — CONFORMITY OF EVIDENCE TO PLEADING.

The allegata and probata must meet and correspond, the issues being made by the pleadings to which the proofs must be confined. There can be no recovery upon a cause of action, however meritorious it may be, that is in substance variant from that which is pleaded by the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1333-1335; Dec. Dig. \Leftrightarrow 395.]

Error to Circuit Court, Pasco County; F. M. Robles, Judge.

Action by J. A. Geiger against the Ingram-Dekle Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

McKay, Withers & Phipps, of Tampa, for plaintiff in error. H. S. Hampton, of Tampa, and J. A. Hendley, of Dade City, for defendant in error.

SHACKLEFORD, J. J. A. Geiger instituted an action at law against the Ingram-Dekle Lumber Company, a corporation, for the recovery of damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The amended declaration consists of two counts, the first of which is as follows:

"Whereas, on the 16th day of September, A. D. 1910, the defendant maintained and operated a railroad known as a log road in Pasco county, state of Florida; and on said date plaintiff was in the employ of the said defendant, and was directed by defendant, with other employés of said defendant, to board a locomotive engine of the defendant, neither the plaintiff nor the said employés so directed to board the said locomotive engine were employed on or about any locomotive engines or cars of defendant, and they were directed to ride on said locomotive engine to a point on said railroad of said defendant where another locomotive engine of the defendant had been derailed, and to assist the other said employés who boarded said engine with plaintiff in placing the said derailed locomotive on said railroad track; that in consideration of the performances of plaintiff's services in connection with this employment it became and was the duty of the said defendant to use reasonable and proper care to provide the plaintiff with a reasonably safe place in which to work, and not to subject him to any extraordinary hazard or risk in the course of his duty or employment; yet the said defendant heretofore, to wit, on the 16th day of September, A. D. 1910, not regarding its duty in this behalf did not use reasonable and proper care to provide the plaintiff a reasonably safe place in which to discharge his duties and work, as aforesaid, but wholly failed to do so, and to the contrary did subject him to extraordinary risk and hazard in the course of his duty and employment in this, to wit, that the said defendant, through its agents and employés in charge of the operation

of said locomotive engine upon which the plaintiff was then riding, so negligently operated the same that it collided with the said derailed locomotive engine, and just prior to said collision plaintiff and the other said employees, who were employed on or about the said locomotive engine, saw that a collision with said derailed locomotive engine could not be avoided, and in order to save his life plaintiff jumped from said locomotive engine upon which he was riding, and in jumping therefrom plaintiff struck a stump standing close beside the said track, which caused his said leg to be thrown back on the track, and by reason thereof it was mashed by the said locomotive engine; and by reason thereof the muscles and bones of the plaintiff's said leg were so mashed, torn, and lacerated that it became necessary to amputate plaintiff's said leg; and the plaintiff was thereby permanently injured, and was so greatly bruised, broken and damaged in his body and limbs that he became and was thereby made sick, sore and lame and disordered, and so remained for a long space of time, to wit, for 4 months; that the same will and does permanently affect and impair the health, strength and activities of the plaintiff, and that the plaintiff since the said accident has continuously suffered great pain of body and anguish of mind, and by reason of said accident plaintiff was compelled to employ the services of physicians, and was forced to expend large and divers sums of money in payment of the services of said physicians, nurse hire, and for medicine; that at the time of the said accident the plaintiff was 41 years of age, and was earning \$2.25 per day; and that by reason of said accident the said plaintiff is not able or in a condition to earn a livelihood; wherefore plaintiff claims he has sustained damages to the amount of \$15,000."

The second count of the declaration contains the allegations of the first count, except that the negligence of the defendant is particularized as follows:

"That the said track and rails were wet, and the said locomotive engine and tender leaked in such a way the water therefrom fell upon the rails of said track, and the sand box on said locomotive engine was in such a defective condition that sand would not fall therefrom upon the rails of said track by reason whereof the said locomotive engine upon which plaintiff was riding could not be stopped and collided with the said derailed locomotive engine."

To this declaration the defendant interposed a demurrer, setting forth certain substantial matters of law to be argued in support of the same separately as to each count. This demurrer was overruled, whereupon the defendant filed the following pleas:

"And now comes the defendant in the above-entitled cause by its attorney and for pleas to the amended first and second counts of the declaration says:

"First. That it is not guilty in manner and form as in said counts is alleged.

"Second. That if the plaintiff was injured in the manner complained of in said amended first and second counts, the injury was caused by the neglect or default of a fellow servant of the said plaintiff, for which this defendant is not legally responsible.

"Third. That if the plaintiff was injured in the respect complained of by him, it was due to his own negligence in recklessly jumping from the locomotive and unnecessarily subjecting himself to danger of injury.

"Fourth. That the plaintiff was not injured through any negligence on the part of the defendant, but was injured solely through jumping from a moving locomotive, and it was not necessary for said plaintiff to expose himself to the

danger of injury from jumping from said locomotive as is alleged in said counts of said declaration.

"Fifth. That the plaintiff voluntarily entered upon the service mentioned in the declaration, and in so doing had full knowledge of the surroundings and the dangers thereof, and thereby assumed all risk of injury incident thereto."

The cause was submitted to a jury upon the issues joined, with the result that a verdict was rendered in favor of the plaintiff for the sum of \$2,000, upon which judgment was entered, and which judgment the defendant has brought here for review and has assigned numerous errors. We shall consider only such assignments as we deem necessary for a proper disposition of the case.

[1-3] The evidence establishes that the defendant was engaged in the operation of a sawmill, and as an incident to such business owned and operated a steam railroad about 6 or 7 miles long, commonly known as a log road. This being true, it necessarily follows under the decisions of this court that the defendant is not a railroad company within the terms and meaning of sections 3148, 3149, and 3150 of the General Statutes of 1906. See *Taylor v. Prairie Pebble Phosphate Co.*, 61 Fla. 455, 54 South. 904, and *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680. The right of the plaintiff to recover in the instant case must be based upon the common-law liability of the defendant. As we have several times held, the common law is in force in this state, except where it has been modified by competent governmental authority. See *Co-operative Sanitary Baking Company v. Shields*, 70 South. 934, decided here at the present term, and prior decisions therein cited. We also held in this cited case, following numerous prior decisions of this court, that, in actions for the recovery of damages to a person or his property, alleged to have been occasioned by the negligence of the defendant, the common-law principle which prevents a recovery if the plaintiff's own negligence contributed proximately to his injuries has not been modified or changed, except as modified by sections 3148, 3149, 3150, Gen. Stats. of 1906, and chapter 6521, Acts of 1913.

[4] Another principle of the common law which we have had occasion frequently to announce is that where the master himself has performed his duty, he is not liable to one of his servants for personal injuries received by such servant in the course of his employment, through the negligence of a fellow servant or coemployee of such servant, when engaged in the same undertaking or common work or enterprise, unless such fellow servant or coemployee sustains a representative relation, such as vice principal, to the master. See *Coronet Phosphate Co. v. Jackson*, 65 Fla. 170, 61 South. 318; *Stearns & Culver Lumber Co. v. Fowler*, supra; *Prairie Pebble Phosphate Co. v. Taylor*, 64 Fla. 403, 60 South. 114; *Camp v. Hall*, 39 Fla. 535, 22 South. 792. We held in these cited

cases, as well as in others both prior and subsequent, that this common-law principle was in force in this state, except as modified by the statutes above cited. As we said in *Co-operative Sanitary Baking Co. v. Shields*, 70 South. 934, decided here at the present term, if this common-law principle is to be still further modified, it must be done by the Legislature, as it is beyond the power and province of the courts.

[5-7] We are clear that the first count of the declaration is not open to attack by demurrer. As we have frequently held:

"In actions for negligent injuries it may be necessary to allege only the relations between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted."

See *Co-operative Sanitary Baking Co. v. Shields*, supra, and authorities there cited. As we have also often held:

"A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. As a general rule, only ultimate facts need be alleged."

Neither do we think that the second count was demurrable. See *Seaboard Air Line Railway v. Rentz*, 60 Fla. 429, 54 South. 13; *Aultman v. Atlantic Coast Line R. R. Co.*, 71 South. 283, decided here at the present term; *Logan Coal & Supply Co. v. Hasty*, 68 Fla. 539, 67 South. 72.

We now direct our attention to the testimony adduced. The plaintiff testified in his own behalf as follows:

"My name is J. A. Geiger. I was employed in the month of September, 1910, by the Ingram-Dekle Lumber Company and on the 16th day of September, 1910, I didn't have anything to do with the operation of their locomotives or log trains. I was directed by Mr. Kendrick, the superintendent, to proceed to where another locomotive was derailed and assist in putting it on the track. At the time I was working out on the road keeping up track and building track. I was a laborer and foreman of the gang. Mr. Rivenbark was engineer of the engine on which I rode and I had nothing to do with the operation of it. I had no authority over Mr. Rivenbark or the fireman. I went out that morning to take up the wreck and we started down the hill and the engine got away from the engineer and somehow got faster and faster and when we got in about 40 yards, something like that, he threw himself around right quick and says, 'Boys, I have done everything I can do.' I was sitting on the fireman's seat and the negroes all swarmed to the door and I couldn't get out. There were about 16 or 17 of us on there, and when I jumped I didn't know anything until it was all over. The engineer jumped before I did. When I came to I found my right foot was gone. Before we got to the hill the engine was not running so very fast; the engineer turned down as he generally run it. I saw they put on brakes and tried to stop engine after it struck that hill, and the brakes didn't have a bit of effect on the speed of the engine, and when the engineer turned and says, 'Boys, I have done everything I can,' and jumped off, I jumped too. In falling or jumping off the engine I don't know if my foot or leg struck a stump; I don't know anything about it after I hit the ground. When I made my jump there was a clear place there and right over yonder a piece there was a

stump, and when I hit the ground I didn't know anything more for a few minutes, and when I came to my foot was lying back to the track and these four teeth (indicating) was knocked out and my head busted around the skin here about three inches, and I was lying around the stump. After I was injured I was taken to the mill and was carried to the house and my leg dressed. The company paid the doctor's bill. I make no claim against the company for doctor's bills. I was 41 years old at the time I was injured, and was earning \$2.25 a day. The company paid for my medicine and nursing, and paid my wages for a month and a half, and have paid me nothing since that time. I was in bed 41 or 42 days, and was incapacitated from work 5 or 6 months and they allowed my wages for a month and a half. I have suffered pain from the injury practically all the time since I was hurt, and am now wearing an artificial wood limb and haven't been able to earn what I usually earned since. I am not able to work as I did before."

On cross-examination, the witness testified:

"I had been in the employ of the defendant company from January 1st to September 16th, a little over 9 months up to the time I was hurt. I was employed building and keeping up the road—the track. I built and actually superintended the building of this particular track on which the accident occurred and had a gang of men working under me and directed them in laying the cross-ties and rails and putting it in shape for the trains to run over it, and after that was daily engaged in inspecting the track and keeping it in order."

And thereupon the following questions was propounded to the witness, to which he gave answer:

"Q. And in the course of that employment you made use of the trains, the track, cars, and engines that ran up and down the road didn't you, in moving about you rode on the engines and on the cars up and down that road? A. I went down on the engine every morning and in at night. Q. And when you wanted to go from one place to another and the train happened to be passing by, you got on and rode didn't you? A. Yes, sir. I was looking after the track and Mr. Rivenbark and Smith were looking after the running of the locomotives. The train crew attended to the cars and coupling the same and the men attended to cutting down trees and sawing up the logs and loading them on the cars; that is, the common laborers did, and I rode up and down on that train from time to time. Except for a few days I rode on that particular locomotive that Mr. Rivenbark was running previous to the time I was hurt every day, night and morning. It carried us out every morning and brought us in at night, and I generally rode in the cabin with the engineer. I saw how he operated it. I hadn't had enough experience to run the locomotive over those hills; I didn't know how to operate the levers, but had ridden on that locomotive on the hill where the accident occurred. I know the hill where the accident occurred. I had been riding on the engine every night and morning, and had gone over the road on the same locomotive very recently before I was hurt."

The witness testified to some further matters on his cross-examination, but this portion of his testimony is not material here. The plaintiff was also recalled in rebuttal in his own behalf and was examined and cross-examined, from which we copy the following portion:

"On cross-examination the witness testified as follows: 'Q. Mr. Geiger, you say Mr. Kendrick gave you permission to go up and down on the locomotives after you told him the men com-

plained about killing too much time with the lever car? A. Mr. Ingram; that was Mr. Ingram. Q. You told him, and he said well, you can go up and down on the locomotive? A. No; the men was kicking about going out and coming in on their time and I told Mr. Ingram about it, and he said the engine is going out every morning and comes in every night, go on it. Q. It was up to you to do as you pleased about it? A. He told me to go on the engine. Q. And from that time you were accustomed to going on the engine? A. Yes, sir. Q. The night before when you and the crew went down to the scene on that engine didn't you take your jacks and blocks down there with you that night? A. No, sir. Q. Didn't take anything with you? A. No, sir. Q. You did go down there? A. Yes, sir. Q. Went down on engine 42? A. Yes, sir."

On redirect examination the witness testified:

"Q. Did the superintendent know you were going on 42? A. Yes, sir."

On recross-examination the witness testified:

"Q. How do you know he knew it? A. I told him I was going. Q. Did you tell him you were going on 42? A. Yes, sir."

J. T. Rivenbark was the first witness introduced by the plaintiff in his behalf, and his testimony on the direct and cross-examination covers nearly 20 typewritten pages. Among other things, he testified that he was the engineer in charge of the engine on the morning that the plaintiff was injured and had the sole charge of it, that a boy was firing for him, an engineer and fireman comprising the crew of an engine for its operation, that he had been a log train engineer for 3 or 4 years and had been working for the defendant, operating such engine for about 6 months prior to the accident, "operating it daily, almost every day, running about 50 or 75 miles a day." The witness also testified:

"There were some little things the matter with the engine. The air pump was not working at that time. The engine had an air pump, but it was not working. It had been out of order about a month and a half. I used the reverse lever to stop the engine. I had to reverse the engine and put on steam to stop it and could also use the hand brakes on the tender. Some of the woodwork under the tender was a little bit faulty and had settled down on the brake beam lever; that is, a part of the truck frame under the tender was faulty and bore down on the reach irons that went between. The reach irons were rods that went from the dead lever, and from there to a chain, and then around a rod that wound up and tightened. It was a part of the brake attachment. This kept the hand brake from being as effective as it had been before. On that account the locomotive would not be as easily controlled. One brass on the locomotive had burst I believe and there were some small leaks in the boiler that didn't amount to much. I am not sure whether the engine was leaking at the time we started out with Mr. Geiger that morning. We had a collision with the derailed engine, but I couldn't say whether the boiler was leaking at that time or not. I don't know if the boiler was leaking the night before. It had been leaking at different times. It had had some small leaks previous and we sometimes would take a small cork or two—but it hadn't been mended and I don't remember exactly, but it was probably a few days or a week before the accident since I

had noticed any leaks, and the boiler hadn't, in the meantime, been repaired."

On motion of the defendant, the court struck out that portion of the testimony of the witness with reference to leaks in the boiler because the witness had testified that he did not know whether it was leaking on the day of the accident, and instructed the jury to pay no attention to the testimony of the witness as to any leakage in the boiler or engine.

We also copy the following proceedings from the examination of such witness:

"And the witness further testified that at the time he started out with the engine on the morning of the accident he was running it backwards because there was no way of turning it around, provided by the defendant.

"Said witness further testified that there had been some trouble about one of the brake shoes knocking off the locomotive at times, but didn't remember whether all the shoes were on the locomotive on the morning of the accident or not.

"And thereupon questions were propounded to the witness and answers given to them as follows: 'Q. Now, how did you run the engine that day, did you run it in going down there, did you run it as slow as you generally ran it? A. Yes, sir. Q. Do you recall seeing the locomotive that was derailed before you got there, before you got to it? A. Yes, sir. Q. Now, on getting close to the place where you knew the locomotive that was derailed was lying, what did you do? A. I jumped off. Q. Didn't you do anything before you jumped off? A. I told the other fellows I had done all I could. Q. What did you mean that you had done? A. Tried my best to stop it. Q. Oh! You tried to stop it; tried to stop the engine, did you, when you got near where you knew the engine was? Wouldn't the engine stop? A. No, sir. Q. Why wouldn't it stop? A. Because couldn't hold it. Q. Why couldn't you hold it? A. The reversing of the engine, what brake we put on it wasn't sufficient to stop it. Q. The reversing of the engine with the brake you put on it wasn't sufficient, that is what you say? A. Yes, sir. Q. Didn't you do everything that was possible to stop it with the means at your hand? A. Yes, sir. Q. When the brakes were put on this tender, state whether they held or had any effect upon the speed of the engine. A. They didn't seem to have any effect on it. Q. Now, why did you jump? A. Because I was almost certain there would be a collision. Q. What did you expect would be the result if you stayed in that engine in case of a collision? A. Would be likely to be smashed up and killed. Q. When you turned to the people on the engine and says, 'Boys, I have done all I can,' was Mr. Geiger then on the engine? A. Yes, sir. Q. You didn't jump until after you had said that? A. No, sir.'"

The witness further testified:

"The engine I was on collided with the derailed engine. I had reported some of the defects in the engine to the superintendent or foreman; I don't know when exactly. I was in the habit of making reports like that at different times all along. I had noticed one of the brake shoes gone before that day, but I don't remember whether we had fixed it or not. It had run some little time without one and I don't know whether we fixed it at that time or not. I made no examination on that morning to see if the brake shoe had been put on. The sand box wasn't in working order, and we never did keep any specially prepared sand for it. The engine wasn't equipped with sand and the sand box wasn't working that day. It had been like that all the time I had been there. When the engine or boiler or brakes got out of order I did any small

repairs myself, such as putting in a shoe on the brake."

And thereupon the plaintiff propounded to the said witness the following question:

"Q. Did the brakes work any better that day going out, the 16th, than usual?"

To which question the witness answered:

"A. No, sir."

And thereupon the plaintiff propounded to the said witness the following question:

"Q. And they were in the same condition, that is, they worked no better on that morning than they had been working before; that is what you started to say, wasn't it?"

To which question the witness answered:

"A. Yes, sir."

And the said witness further testified:

"It was not my duty to fix the decayed timbers underneath the tender. The company didn't have any special man, they usually got some mechanic or blacksmith or some man who could do the work."

On cross-examination, the witness testified:

"I went out on the road on the morning of the accident in charge of the locomotive as engineer. I was familiar with the track it had to run over, knew the curves, hills, and hollows. I knew it was early in the morning, but didn't know there was any dew on the rails, but knew there was dew at times."

The witness further proceeded to testify on cross-examination:

"I didn't jump before we got over the crest of the hill. I stayed on the locomotive until just a little bit after we passed the summit of the last little knoll, maybe about the center of it. I don't remember whether all the men jumped off or not. I know some of them did. Mr. Geiger was the only one seriously hurt, except a darky who was knocked unconscious for a day. I don't know what the percentage of the grade was, but it was a pretty sharp descent. Mr. Geiger, the plaintiff, had been employed there for some time. I had known him 2 or 3 years. He had been employed there all the time; I had been there about 6 months. He was there when I came. He was track foreman. He was in charge of keeping up this track that we were running over that morning. He was superintendent or foreman of the men who looked after the track. He was accustomed to riding up and down on that train which I operated in and about performing his duties. He got on the locomotive from time to time and rode down with me. He did so frequently. He rode with me almost every day on the locomotive. That is the same locomotive we were operating the morning he was hurt. The air pump was not working and hadn't been depended on much since I had been there. I had been operating that locomotive with a train of cars attached to it by the hand brake on it and the steam brake; that is, the reversal of the throttle. I didn't depend on the air pump."

And thereupon the following questions were propounded to the witness:

"Q. Did you tell Mr. Kendrick about that brake, make complaint to him that it was out of order? To which the witness answered as follows: A. I don't remember telling him anything about it. Q. You didn't think it was of any importance, did you? You didn't depend on it at all, did you? A. I didn't think it was much because when it did run it was of so little effect. Q. When the pump was working the air, you put on the hand brake just the same and reversed the lever? A. Yes, sir; the hills were so long the air would give out before you got down and you had to fall back on this. Q. How

many of these log roads in this territory have you ever worked on that had locomotives equipped with air brakes? A. About two of them, I reckon. Q. About two. Didn't any of the companies have all of them equipped that way? A. Might have one or two locomotives equipped with air brakes, but most of them used the throttle and hand brakes. Q. You think it had been out of order for a month or more, and you said you didn't report that to Mr. Kendrick? A. I don't remember whether I did or not. Q. Now, you said some of the woodwork under the tender had settled down on the brake beams and bore down on the reaches connecting with the brake attachment. How long had the woodwork been in that condition? A. It had been gradually settling down for a month or so, I guess. Q. Gradually settling down for a month or so? A. Gradually rotting. Q. Gradually rotting or wearing away by the friction, which? A. It was rotting. Q. Did you report that to Mr. Kendrick? A. I don't know whether I did it or not. Q. You didn't consider it serious enough to make the locomotive dangerous did you? A. I don't remember whether I considered much about it or not. Q. You were willing to risk yourself on it weren't you, and did so from day to day? A. Yes, sir. Q. Now you said that one brass was burst. Was that one of the brasses inside of the hub where the axle runs into the hub, you mean that? A. No; it was in one of the main brasses on the crank pin. Q. On the crank pin. Now what connection did that have with the brake system on the locomotive? It didn't have anything to do with the brakes; didn't have anything to do with stopping and starting the engine, so far as applying the brakes was concerned, did it? A. No, sir. Q. And you say that the lime sediment in the water from time to time stopped up any little leaks so that they were not regular, it would drop water at times and sometimes be closed up? A. Yes, sir. Q. And you don't remember whether the brake shoes had all been put on the tender at the time or not, do you? A. No, sir. Q. And you ran it that morning just the same as you had been accustomed to running it every other time you went out on the track with it? A. Yes, sir. Q. And when you got to that hill and started down the hill and found you couldn't stop it, you told the others that you had done everything you could and to look out for themselves, is that what you said to them? A. Yes, sir; that was about what I said. Q. And you had reversed the engine at that time? Now when you reversed the throttle that reversed the wheels and stopped them, didn't it? That is, they reversed the other way? A. They generally spun around the other way. Q. And you did all you could to stop it? A. Yes, sir. Q. And you say the brakes didn't seem to have any effect. Now, Mr. Rivenbark, isn't it a fact that you started out that morning with that locomotive, and you had these men on the engine with you, and that you were going at a pretty good rate of speed, and when you got to the crest of the hill the track was wet with dew and the grade was steep, and you found you couldn't control it on account of the steepness of the grade and the wet track, isn't it a fact, and isn't that the reason the engine went down hill instead of because you didn't have all those brake appliances to put on it? A. I didn't think it would be any trouble to control it, just the engine without any cars, because I had been going down there with cars behind it. Q. How is that? A. I was in the habit of going down there with empty cars on behind it, and I didn't think it would be any trouble because it was just the light engine and no cars behind it, and it naturally wouldn't pull down as fast as it would— Q. You thought it would do just as well as it usually did, didn't you? Then it ran that morning just as well as it usually did, didn't it? A. It run faster than it usually did. Q. You put more steam on it, didn't you? A.

No, sir; I didn't put steam on it then only in trying to stop it. Q. You were running it faster that morning than you usually ran it, didn't you? A. No, sir; but it ran faster; that is, it ran faster when it started down the grade. Q. I see. Then you didn't take into consideration the effect of going down that grade with an empty engine or an engine without any cars attached to it would have on being able to stop it, is that it? A. (No answer.) Q. Is that the reason it got away from you? A. The reason it got away, all I could see, was the dew on the track and the grade, the steep grade and the insufficiency of the brakes. Q. All three of them went into it? A. Yes, sir. Q. Because the brakes wouldn't hold, and because the track was wet, and because the grade was steep? A. Yes, sir. Q. How long was that hill from the crest of the hill to where the other locomotive was derailed, how far was it? A. It was nearly a half mile, I guess. Q. Nearly half a mile. Was it a steady downgrade? A. About two-thirds of it was. It was a steady downgrade, and then there was a little rise over a little knoll, and then down again. Q. And the last knoll, it was passed the last knoll when you jumped? A. About the top of the last one. Q. About the top of the last one? A. Yes, sir. Q. About how far was it from the top of the last knoll to where this locomotive was derailed? A. About 30 or 40 yards. Q. And you jumped at about 30 or 40 yards from where the two locomotives came together? A. Yes, sir."

Said witness further testified:

"I reversed the steam at the top of the big hill just like I had been doing every day; as I had been operating it every day, and I didn't get the results that I usually did. The sand box was on the boiler ahead of the steam pump in front. That is the usual place for a sand box on a locomotive, and, if there had been sand in the sand box that morning, it wouldn't have helped any because we were running backwards. I talked with several people about this wreck at the time it happened—Mr. Geiger, Mr. Smith, and Mr. Kendrick, and different people. I haven't said anything to Mr. Hendley recently, but I have talked with Mr. Hampton to-day and with Mr. Geiger to-day and yesterday. It had been 2 years before that time since I had seen Mr. Geiger. I have had three or four letters from him in the meantime. My recollection is pretty clear now of all the things I have testified to. I don't remember the details in the same way now as I did the day after the accident; I was more shocked then, but I knew what had happened and had been working on the locomotive for 6 or 8 months every day, and knew the condition of the locomotive pretty well. I couldn't say that my mind was clear right then; I couldn't testify as to the clearness of my mind then."

J. Arthur Smith was also introduced as a witness on behalf of the plaintiff, and testified as follows:

"My name is J. Arthur Smith. I remember the engine on which Mr. Geiger was injured, on the 16th of September, 1910. I don't remember if the engine was leaking before we started out or not."

This same witness was also called on behalf of the defendant, and testified as follows:

"My name is J. A. Smith. I was employed by Ingram-Dekle Lumber Company at the time Mr. Geiger's foot was cut off and was on the train that morning. I was on the train at the time it went over the crest of the hill. The train came pretty near to a stop at the crest of the hill, after it came up on the top of the hill. As soon as it turned downgrade the further it went the faster it got, after it turned over—down the hill. I stayed on the locomotive until it hit the

other engine. I was not hurt enough to amount to anything, just scratched a little. I didn't jump."

On cross-examination the witness testified as follows:

"I was on the locomotive that morning."

And thereupon the plaintiff propounded to the said witness the following question, which was answered:

"Q. Mr. McKay has asked you if you stayed on the engine, and you said you did. I ask you what impressed that fact upon you, why is it that you remember now that you stayed on the engine? A. Why, I stayed on the engine for the purpose of stopping it until I found that it was running too fast to get off without getting hurt, and I rather risk staying on it and hitting the other one than to risk jumping off."

W. H. Kendrick was introduced as a witness by the defendant and testified that he was the superintendent of the defendant company at the time the plaintiff was injured, and proceeded to testify as follows:

"I know Mr. Rivenbark. He was engineer on that locomotive. From the time I went on duty as superintendent of the mill until Mr. Geiger was hurt he never reported to me that engine No. 42 was out of repair or in a defective condition in any respect. He was on it daily. He never applied to me for any repairs to be made on it that I recall. If anything serious had been the matter with it, it would have come to my attention, and I would have given orders to have it repaired. I know I didn't give any orders for its repair. I remember when engine No. 43 got off the track beyond the hill the night before Mr. Geiger was hurt. I learned it had been derailed after the log train came in that night. They came in on the log train. It was about a quarter or a half a mile from the switch where the log road was operating at that time to where the wreck was, and they came in on the log train that night and was talking about it. Smith reported to me first. Smith was running the engine. Mr. Geiger saw me that night at supper time. It was part of his duties as a track foreman to clear the track of wrecks and to help to put locomotives and cars that might get off the track back on. He did that right along. These things happen frequently on log roads."

This witness also gave the following testimony:

"Q. What was the condition of that track at the place of the wreck with reference to the grade? A. Well, sir, it was a tremendous grade, something that there is not but very few grades in Florida any worse than it was; it was right over a tremendous steep hill. Q. Mr. Geiger built that piece of track, didn't he? A. I suppose he did. Q. You were not there when that was done? A. No, sir; I wasn't. Q. His duties carried him over it from day to day, didn't it? A. Yes, sir. Q. He knew the condition of it and the slope of the grade? A. He knew the track all right; yes; and knew the condition of it. Q. Mr. Kendrick, I wish you would state whether or not a locomotive on that grade with that track being wet with dew or slippery with water, could have been stopped by the ordinary application of brakes? A. I would hate to say whether it could be done or not, but I would hate awfully bad to try it. Now, the fact of the business is that it was a tremendous grade and with a wet track, I believe it would have slid down there from the top of the hill to the bottom without—if it had been locked without there had been sand or something on the track to have prohibited. Q. You were familiar with the road when the accident occurred, wasn't you? A. Yes, sir. Q. And

you tell these gentlemen that that was a very high hill, a bad hill, was it? A. Yes, sir. Q. And from your knowledge of engines and engine 42, you believe that brakes or nothing else would have stopped her that morning; that she would have gone right on down that grade? A. I certainly do."

And thereupon the said plaintiff propounded to the said witness the following questions:

"Q. How could that grade have been obviated?"

But to the question as propounded, defendant did then and there object on the ground that the same was immaterial and irrelevant.

But the said judge did then and there overrule the said objection and permit the said witness to answer the said question as follows:

"A. By cutting the hill down."

To which ruling defendant did then and there except.

"Q. That is the way it is done, isn't it? A. That is the way all railroads are built."

Ernest Tomax was also introduced as a witness by the defendant, and testified:

"My name is Ernest Tomax. I live at Dade City. I was at the Ingram-Dekle Company mill right north of Dade City in September, 1910, at the time Mr. Geiger's foot was cut off in an accident. Was there the night before. I know engine 42 that was used at the time. That engine went down the night before to the scene of where engine No. 43 was off the track. It went down and came back without accident. I went along. Mr. Geiger went along. It was about 7:30 o'clock when we went down, and about 9, as I remember it, when we came back; it went down and came up all right the night before. I don't know if Mr. Kendrick, the superintendent, knew Mr. Geiger was going down on the engine. He was in charge of everything at the mill. I don't know if he saw the parties actually getting on the engine."

[8] We are of the opinion under the decisions of this court that the plaintiff and the engineer, Rivenbark, were fellow servants. See especially *Parrish v. Pensacola & Atlantic R. R. Co.*, 28 Fla. 251, 9 South. 696, wherein we held as follows:

"Prior to the enactment of chapter 3744, Laws of 1887, a master was not liable or responsible to one servant for personal injuries received in the course of his employment through the negligence of a fellow servant, when engaged in a common work or in the same general undertaking.

"The engineer, fireman, brakemen and shovelers on a gravel train engaged in loading, hauling and unloading gravel in repair of the road-bed are fellow servants engaged in the same common work, and the employer company, prior to the passage of said statute, was not liable to one of such shovelers for personal injuries received in consequence of the negligence of the engineer in putting the handling of his engine in the hands of his fireman who was either careless or unskilled in the management of such machines."

Also see the authorities cited in the opinion, especially *Gillshannan v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; *Ohio & Mississippi R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *St. Louis & S. E. Ry. Co. v. Britz*, 72 Ill. 256. We would also refer to

Norfolk & Western R. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342, wherein it was held:

"A track repairer and engineman, though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must therefore be considered to have been in contemplation of the other when service under the common master was accepted."

This would seem to be well in point. Also see *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841, and *White v. Kennon*, 83 Ga. 343, 9 S. E. 1082. Other illustrative cases will be found in 4 *Labatt's Master and Servant* (2d Ed.) chapter LX, especially pages 4080, 4081. We would also again refer to *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680.

At the request of the plaintiff, the trial court gave the following instruction to the jury:

"The defendant has filed a second plea in which it sets up as a defense that the injury to the plaintiff, if caused as alleged, was due to the acts and negligence of a fellow servant, and I charge you that, in order to be a defense, you must find that the plaintiff, and the engineer, or person in charge of said locomotive on which the plaintiff was injured, were connected in the same common employment. If you find from the evidence that the work which the plaintiff was employed to do had no relation or connection with the operation or equipment of said locomotive, and that at the same time and place the plaintiff had no control or voice in the operation of the same, I charge you that, under such circumstances, they cannot be regarded as fellow servants."

In the light of the decision which we have just cited, we are of the opinion that this instruction was erroneous, and that the assignment based thereon must be held to have been sustained. We do not think the testimony establishes that Rivenbark, the engineer, sustained a representative relation, such as vice principal, to the defendant. It necessarily follows from what we have said that the plaintiff and the engineer being fellow servants, if the testimony establishes that the proximate cause of the injury to the plaintiff was the negligence of such fellow servant, the plaintiff cannot recover. In *South Florida R. R. Co. v. Weese*, 32 Fla. 212, 13 South. 436, we refused to adopt what has been called "the separate department distinction" and have adhered to this holding. See *Stearns & Culver Lumber Co. v. Fowler*, supra, and prior decisions of this court there cited. It may well be doubted, to state it mildly, if the testimony establishes that the negligence of the engineer was the proximate cause of the injury to the plaintiff. We shall not undertake an analysis or discussion of the testimony, the portions of which bearing upon the cause of the injury inflicted upon the plaintiff we have set forth above, but we are of the opinion that it does not sustain the allegation of the plaintiff in the first count of the declaration, "that the said defendant through its agents and employees in charge of the operation of said locomotive

engine upon which the plaintiff was then riding so negligently operated the same that it collided with the said derailed locomotive engine," as a consequence of which negligence the plaintiff was injured, therefore there could be no recovery under the first count.

We will add that we do not think the testimony shows contributory negligence upon the part of the plaintiff, as we are of the opinion that he was warranted in jumping from the engine under the existing circumstances.

[9] We are further of the opinion that the testimony fails to establish the allegation in the second count of the declaration as to the cause of the injury, which we have copied above. It may be true that the track and rails were shown to be wet, but that would seem to have been caused by the dew, and not by leakage from the engine and tender, as no proof was adduced that they were leaking on the morning that the injury occurred. The testimony further establishes that the sand box on the engine was in a defective condition, and was not in working order, and was not working that day, but the testimony further shows that no "specially prepared sand" was ever kept for such sand box, and that the engine was not equipped with sand. Rivenbark, the engineer, the plaintiff's witness, testified that it had been like that all the time he had been there as such engineer, a period of about 6 months, and that "if there had been sand in the sand box that morning, it wouldn't have helped any because we were running backwards," having previously testified that he was running the engine backwards because there was no way of turning it around provided by defendant. Even if the absence of sand had been the proximate cause of the injury, which was not shown, the plaintiff might well have been held to have assumed such risk, since such a condition had existed about 6 months, and the plaintiff had been riding on the engine almost daily. As no place had been provided by

the defendant to turn the engine around and in consequence it had to be run backward and the sand box could not be used, the plaintiff might well have been held to have assumed that risk. The witness Rivenbark further testified that the reason the engine got away from him was "the dew on the track and the grade, the steep grade, and the insufficiency of the brakes," but none of these things were alleged in the declaration as the cause of the injury. It is a well-settled principle of law, which we have announced time and again, that the allegata and probata must meet and correspond, the issues being made by the pleadings to which the proof must be confined. See *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and *Rentz v. Live Oak Bank*, 61 Fla. 403, text 414, 55 South. 856, where other decisions will be found. As we have also frequently held:

"There can be no recovery upon a cause of action, however meritorious it may be, or however satisfactorily proven, that is in substance variant from that which is pleaded by the plaintiff."

See *Parrish v. Pensacola & Atlantic R. Co.*, 28 Fla. 251, 9 South. 696; *Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 29 Fla. 636, 11 South. 231, 16 L. R. A. 337; *Walsh v. Western Ry. Co.*, 34 Fla. 1, 15 South. 686; *Wilkinson v. Pensacola & A. R. Co.*, 35 Fla. 82, 17 South. 71; *Louisville & N. R. Co. v. Guyton*, 47 Fla. 188, 36 South. 84; *Pensacola Electric Terminal R. Co. v. Haussman*, 51 Fla. 286, 40 South. 196; *Dexter & Connor v. Seaboard Air Line Ry.*, 55 Fla. 292, 45 South. 887; *Coons v. Pritchard*, 69 Fla. 362, 68 South. 225, L. R. A. (N. S.) 1915F, 558.

There would seem to be no occasion for further discussion. The judgment must be reversed.

TAYLOR, C. J., and COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

YAZOO & M. V. R. CO. v. W. C. CRAIG & CO. (No. 17819.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

INTEREST §62—RECOVERY.

Where interest is not due by the terms of the contract, but is simply an incident thereto recoverable as damages, the payment of the principal is a bar to its subsequent recovery.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 140-144; Dec. Dig. §62.]

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action by W. C. Craig & Co. against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment ordered for defendant.

Mayes, Wells, May & Sanders, of Jackson, for appellant. McLaurin & Armistead, of Vicksburg, for appellee.

SMITH, C. J. In April, 1909, appellee, W. C. Craig & Co., cotton merchants, filed with appellant, Yazoo & Mississippi Valley Railroad Company, four claims against appellant for loss on cotton shipped over appellant's railroad, and in March or April, 1910, appellee filed with appellant a claim of similar character, which several claims were paid by appellant in February, 1911, the several amounts thereof being, respectively, \$241.11, \$276.53, \$256.88, \$412.72, and \$264.85. All these payments were made by vouchers issued by the appellant railroad company, the vouchers being uniform, except as to date and amount, and were as follows:

The Yazoo & Mississippi Valley R. R. Co. to
W. C. Craig & Co., Dr.

BNS 2/6/11 Vicksburg, Mississippi.

F. A. C. Y 52169

1910

February 1 3003 53882 Cotton

For loss on ten bales of cotton shipped from Vicksburg, Miss., consigned order notify Baltic Mill, Baltic, Conn.

Amount \$276.53.

Approved for payment:
Comptroller.

Audited:

Auditor of Disbursement.

Received Feb. 25th, 1911, of the Yazoo & Mississippi Valley R. R. Co. two hundred seventy-six ⁵³/₁₀₀ dollars, in full of the above account.
W. C. Craig & Co.

Some months after these claims were settled this suit was instituted in the court of a justice of the peace by appellee to recover of appellant the sum of \$145.19, representing interest on these several claims at the rate of 6 per cent. per annum from the day they were filed with appellant until they were paid. Appellee obtained judgment in the court of the justice of the peace, and, an appeal having been prosecuted to the circuit court, a jury was there waived and the cause submitted to and decided by the judge, who returned a judgment in favor of appel-

lee, from which judgment this appeal is taken.

Leaving out of view the rule announced in Clayton v. Clark, 74 Miss. 499, 21 South. 505, 22 South. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521, the judgment of the court below nevertheless must be reversed; for the interest here sought to be recovered is not due by virtue of a contract providing for the payment thereof, but is simply a legal incident to the original debt (Buckner v. Pipes, 56 Miss. 306), recoverable as damages in an action for the recovery of the principal; and the rule is that, if interest is not due by the terms of the contract, but is simply an incident thereto recoverable as damages, the payment of the principal is a bar to its subsequent recovery (Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 74 S. E. 418, Ann. Cas. 1913E, 578, 40 L. R. A. [N. S.] 588, and authorities cited therein and in note thereto; 16 Am. & Eng. Enc. Law [2d Ed.] 1033; 22 Cyc. 1572).

Reversed, and judgment here for appellant.

YAZOO & M. V. R. CO. v. HEARN.

(No. 17760.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

1. CARRIERS §278(1)—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE—JURY QUESTION.

In an action by a passenger for damages for being carried beyond her station, the question of the railroad company's negligence held properly submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1080; Dec. Dig. §278(1).]

2. CARRIERS §277(6)—CARRIAGE OF PASSENGERS—MEASURE OF DAMAGES.

Where a female passenger was negligently carried beyond her station being forced to walk back four or five miles in the daytime, when the weather was cold and the ground muddy, an award of \$450 was justified; it appearing she was put to some expense, and that her walk aggravated her sore eyes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084; Dec. Dig. §277(6).]

Appeal from Circuit Court, Warren County; T. G. Birchett, Judge.

Action by Ida Hearn against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Anderson, Vollar & Kelly, of Vicksburg, for appellee.

SYKES, J. Suit was instituted by the appellee in the circuit court of Warren county for damages alleged to have been sustained on November 14, 1912, by her for failure of one of the passenger trains of the appellant company to stop at King's Crossing for her to debark from its passenger train, upon which she had taken passage at Redwood for King's Crossing, both being small stations in Warren county. The uncontradicted facts in

the case show that on the above date the appellee here, plaintiff below, Miss Ida Hearn, lived with her brother about a mile from King's Crossing; that she had lived in the country in Warren county about 22 years; that on the day in question she had been visiting her sister, who lives about one mile from the station of Redwood; and that she and her niece, Miss Middle Smithart, walked from her sister's house to Redwood and purchased tickets to King's Crossing, paying the sum of 20 cents for each ticket; that they boarded a passenger train of the appellant, but that said train failed to stop for them at their point of destination, King's Crossing, and took them to Vicksburg, about six or seven miles further on from King's Crossing. When appellee reached Vicksburg, she and her niece hired a carriage for \$1, and were driven to the city cemetery. The testimony shows that appellee was not familiar with the surroundings of the city of Vicksburg at the station, but that she had been to Vicksburg through the country at various times, and was familiar with the road passing by the city cemetery, and it was for this reason that she hired the driver to transport them to the cemetery. The testimony further shows that the reason she did not hire the driver to take her all the way to her brother's home was because she did not have sufficient money with her to pay the hack fare. After getting out at the cemetery, she and her niece walked from there to her brother's home, part of the distance, or about two miles, over the park road, which seems to be a graveled or macadamized road, and the balance of the distance, three or four miles, over a dirt road. The appellee states that, in all, she walked about six miles. They arrived in Vicksburg about 12 o'clock in the day, and she and her niece reached her brother's home before dark—somewhere in the neighborhood of 5 o'clock in the afternoon. The testimony further shows that had she gotten off at the station of King's Crossing, she and her niece would have then walked to her brother's home, a distance of about one mile. Plaintiff in the court below, in her instructions to the jury, only asked to recover the actual damages sustained by her on account of the negligence of the railroad company. These actual damages, as testified to by her, consisted, in addition to the dollar and twenty cents expended for hack hire and ticket, of having to take the extra walk of about four or five miles in bad weather on a cold, damp day, over a muddy road, as a result of which she suffered with a bad cold for about a week, and also with her eyes. The testimony shows that her eyes were weak, and she suffered with them more or less all the time, and that whenever she caught cold it aggravated this trouble, and that on this occasion the cold settled in her eyes, caused by the wind. She further testi-

fied that her eyes were always sore, but that they were not so bad when she did not have to go in the wind. Upon this statement of facts, the jury returned a verdict in favor of the plaintiff for \$450, and judgment of the lower court was entered accordingly. From which judgment this appeal is here prosecuted.

[1, 2] The question of negligence was properly submitted to the jury and was decided by them in favor of the plaintiff in the court below. The only question before this court is whether or not the verdict of the jury was grossly excessive, evincing passion and prejudice. The testimony of the plaintiff in the court below, the appellee here, which the jury believed, shows that because of the negligence of the defendant company, she was forced to take an additional walk of four or five miles in the daytime, when the weather was cold and the ground muddy; that as a result thereof her sore eyes were aggravated and she contracted a cold, from both of which she suffered for about a week. It was therefore a question of fact for the jury to say what amount would compensate her therefor.

Affirmed.

YAZOO & M. V. R. CO. v. SMITHART. (No. 17761.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

CARRIERS—277(6) — CARRIAGE OF PASSENGERS—ACTIONS—DAMAGES.

Where a passenger was carried beyond her station and walked home, suffering fatigue, becoming wet and hungry and missing a meal, an award of \$500 was excessive, it appearing that her only pecuniary damage was the expenditure of 20 cents for a ticket, and the award cannot be sustained for more than \$100.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084; Dec. Dig. 277(6).]

Appeal from Circuit Court, Warren County; T. G. Birchett, Judge.

Action by Middle Smithart by next friend, Mrs. M. C. Watkins, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition that plaintiff enter remittitur; otherwise reversed and remanded as to question of damages.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Anderson, Voller & Kelly, of Vicksburg, for appellee.

SYKES, J. This case is a companion case to the one of Yazoo & Miss. Valley Railroad Co. v. Miss Ida Hearn, 71 South. 561, this day decided by us. Miss Middle Smithart is a niece of Miss Ida Hearn, and was with Miss Hearn on the trip from Redwood to King's Crossing. For a statement of the facts in this case, reference is made to the opinion of the court in the case of this same appellant against Miss Hearn.

The pecuniary damage suffered by the appellee in this case was the sum of 20 cents paid for her ticket. Her actual damages, as testified to by her, consisted simply and solely of the fact that she had to take this additional walk of four or five miles, that the wind was blowing, and it was muddy, and she was tired and hungry and did not have any dinner that day. On this testimony, the jury returned a verdict in her favor for \$500. This verdict is grossly excessive. If the plaintiff will remit the excess over \$100, the case will be affirmed; otherwise it will be reversed and remanded as to the question of damages only.

MARX v. SMITH et al. (No. 17792.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

1. ADVERSE POSSESSION ¶41—TIME—CHARACTER OF POSSESSION.

Possession under color of a tax title open, notorious, and adverse from 1900 until 1911 is sufficient to establish title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 184-206; Dec. Dig. ¶41.]

2. ADVERSE POSSESSION ¶45—SUFFICIENCY—EFFECT OF SUIT.

Where before holding possession for ten years plaintiff sued to confirm the tax title by which he held, defendant's cross-bill, filed after plaintiff had held for ten years, did not relate back to the commencement of the plaintiff's suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. ¶45.]

3. APPEAL AND ERROR ¶843(1)—SCOPE OF REVIEW—MATTERS NOT NECESSARY TO DECISION.

Where determination of a single issue on appeal necessitates reversal of the decree, other questions presented by the record need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3335, 3337-3341; Dec. Dig. ¶843(1).]

Appeal from Chancery Court, Calhoun County; J. G. McGowen, Chancellor.

Suit by J. S. Marx against T. B. Smith and others. Plaintiff obtained a decree by confession. Thereafter defendant Smith filed a cross-bill and plaintiff dismissed his original bill, and judgment went for defendant Smith on his cross-bill, and plaintiff appeals. Reversed, and decree entered dismissing the cross-bill.

Frierson & Hale, of Columbus, for appellant. Haman & Bates, of Pittsboro, for appellees.

HOLDEN, J. The appellant filed his bill in the chancery court of Calhoun county against the appellees, in September, 1909, seeking to confirm his tax title to the land involved in this case, and obtained a decree by confession. Subsequently, within two years from the date of filing the bill, the appellees,

in July, 1911, filed an answer and cross-bill praying for the cancellation of appellant's tax title and confirming the title of the land in appellees and decreeing possession thereof.

The appellant dismissed his original bill, and the cause was heard on the cross-bill of appellees and the answer of appellant, cross-defendant in the court below, and a decree granting the relief prayed for in the cross-bill was granted, and the cross-defendant appeals here.

The appellant contends that this cause should be reversed for three reasons: First, that the proof shows conclusively that the appellant had title by adverse possession of the land from 1900 to July, 1911, more than ten years; second, that appellant's tax title to the land was good and valid; third, that appellant by actual occupation of the land for three years under a tax title (section 3095, Code 1906) acquired a good and valid title to the land.

[1-3] The evidence in the court below shows conclusively that the appellant entered and occupied the land under color of a tax title before the year 1900 and held it openly, notoriously, and adversely until July, 1911, when the appellees filed their cross-bill against the appellant, contesting the title and possession of the land. We do not understand by what rule or reasoning the chancellor reached the conclusion that the appellant had not acquired a good and perfect title to the land by adverse possession. It appears from the record that the adverse possession of the land by the appellant extended without a break from 1900 to July, 1911; and the fact that the appellee at that time, July, 1911, filed a cross-bill contesting the title to this land could not make this action, by cross-bill, relate to and revert back to the time, September, 1909, when the appellant filed the said original bill. The statute of ten years' adverse possession ran in favor of the appellant from 1900 until it was stopped by the filing of the cross-bill in July, 1911, and, it having run more than ten years, the appellant acquired a good title to the land by adverse possession. As this conclusion ends the case in favor of appellant, it is unnecessary for us to pass on the other two questions presented in this record.

The decree of the lower court is reversed, and decree entered here dismissing the cross-bill of appellees.

YAZOO & M. V. R. CO. v. WILLIS. (No. 17754.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

CARRIERS ¶196 — CARRIAGE OF GOODS — CHARGES—LIMITATION OF ACTIONS.

While the federal law (Act Feb. 4, 1887, c. 104, 24 Stat. 379) requires common carriers of interstate commerce to charge and collect freight rates according to the tariff schedules fixed by

the Interstate Commerce Commission and gives a carrier a right of action, where the amount charged did not equal the rate fixed by the Interstate Commerce Commission, the right of action is governed by the state law, and a state statute of limitations which affects only the remedy will bar the action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879-887; Dec. Dig. § 196.]

Appeal from Circuit Court, Hinds County; E. L. Brien, Special Judge.

Action by the Yazoo & Mississippi Valley Railroad Company against Floyd Willis. From a judgment for defendant, plaintiff appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Watkins & Watkins, of Jackson, for appellee.

HOLDEN, J. The appellant railroad company, plaintiff in the court below, sued the appellee, Floyd Willis, defendant in the court below, and from a judgment in favor of appellee it prosecutes this appeal.

Statement of Facts.

The agreed statement of facts is here set out:

"Floyd Willis, the defendant herein, was a cotton dealer in the city of Jackson, Miss., and on October 23, 1906, he shipped over the Yazoo & Mississippi Valley Railroad Company's line 100 bales of cotton from said city of Jackson to Williamsville, Mass., shipper's order notify Woodward & Stillman, New York City, the said cotton weighing 51,200 pounds, subject to correction, marked 'S. H. E.' as per original bill of lading hereto attached and marked Exhibit A. The freight was prepaid on the said shipment, and amounted, as paid, to the sum of \$296.96.

"The tariffs of the carriers handling the said shipment were filed with and approved by the Interstate Commerce Commission at Washington, and were so filed at the time of the said shipment, and said tariffs were published in the office of the plaintiff at Jackson, Miss., as required by law, and the correct amount of freight upon the said shipment from Jackson, Miss., to Williamsville, Mass., was the sum of \$348.16, as shown by the said tariffs, and not \$296.96, as collected by the agent at Jackson, Miss., the said rate as so shown by the said tariffs being 68 cents per 100 pounds, instead of 58 cents per 100 pounds, as charged and collected by the said agent. The agent at Jackson, Miss., of the plaintiff was acting in good faith in collecting the said amount of freight, and likewise, in good faith, was in error in quoting a rate of 58 cents to the defendant, instead of the correct rate of 68 cents.

"That Floyd Willis had an order from Williamsville, Mass., for 100 bales of cotton; that before making a price thereon he inquired of the agent of the plaintiff company the rate on said cotton to said point, and was informed that the rate was 58 cents per 100 pounds; that said Floyd Willis, as a matter of fact, was ignorant of said rate, and quoted to the purchaser in Massachusetts the cotton at a price based on the freight rate of 58 cents per 100 pounds, and in quoting said price based on a rate of 58 cents per 100 pounds, and on paying said rate did so in perfect good faith, believing that to be the proper rate. The difference between the freight collected and that which should have been collected is \$51.20, and it is agreed that the plaintiff's agent at Jackson, Miss., should have collected the additional sum of \$51.20, sufficient to make the correct freight charge.

"It is agreed that the lawful rate of interest in Mississippi is 6 per cent., and that the interest upon the said sum of \$51.20 from October 23, 1906, to February 6, 1914, the date of filing this suit, is the sum of \$22.38, making the total amount of plaintiff's demand the sum of \$73.58.

"It is agreed that, if the plaintiff is entitled to recover in this cause, the amount of said recovery should be said sum of \$73.58.

"It is agreed that this cause be submitted to the court, a jury being waived, upon this agreed statement of facts, and that the question for determination by the said court shall be whether the said demand is barred by the three or the six year statute of limitations of the state of Mississippi, it being agreed that this suit was not filed until more than six years after the said sum became due and owing to the plaintiff by the said defendant."

Opinion.

It will be observed from the statement of facts that the only question before us for decision is whether or not the state statute of limitations applies and bars a recovery by the appellant in this case.

The appellant contends that this action is based upon, and grows out of, the federal act, which requires common carriers of interstate commerce to charge and collect the freight rates, according to the tariff schedules as fixed by the Interstate Commerce Commission, for carrying freight, and penalizing such interstate carriers for any failure to observe such tariffs, rates, and charges, and that "the statute gets its life from the police power of the government, to regulate the affairs of the shipper and carrier in the matter of interstate shipments, and that, in the absence of any statute of limitations by the Congress affecting its authority under said power, no state statute of limitations is applicable, and a fortiori no statute of limitation applies."

Under the federal act in question here the appellant would undoubtedly be entitled to recover from appellee the difference between the freight rate charged in the bill of lading and the rate fixed by the Interstate Commerce Commission, if the right of action is not barred by the state statute of limitations. It is a sound and well-established rule of law that:

"A statute of limitations pertains to the remedy, which is regulated as to the form and duration by the law of the forum." *Rucks v. Taylor*, 49 Miss. 552; *Amer. & Eng. Encl. of Law* (2d Ed.) vol. 22, p. 1385; 25 Cyc. 1004.

The appellant railroad company is a quasi public corporation, and it is suing in a private capacity, the same as an individual, to recover an amount claimed to be owing to it, growing out of a private transaction with one of its customers. In transporting this freight it exercised no governmental authority, and is not a governmental agency, but stands in the same attitude of a private person seeking to recover an amount claimed against another person, in a state court, relying upon a Federal Interstate Commerce Act for its right to recover. It is not a suit by the government against an individual. This being true, we see no reason why the state statute of limitations, being the law of the forum,

should not apply and bar the recovery in this case, the same as it would in a case between any interstate corporation and an individual, upon any other kind of a claim, where the cause of action had accrued more than six years before the filing of the suit. Therefore we hold that the right of recovery of the appellant is barred by the state statute of limitations.

Affirmed.

ISLAND CITY NAT. BANK v. BANK OF INVERNESS et al. (No. 17630.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

EQUITY §105—PARTIES—WHO MAY JOIN AS PLAINTIFFS.

Where one induced to purchase goods by false representations has given his note therefor which has been discounted by a bank's giving its certificate of deposit, which certificate has gone into the hands of a third party who is suing thereon, the defrauded purchaser may join with the bank in suing such third party for a rescission and cancellation of the note and certificate of deposit and enjoining the suit by the third party, inasmuch as the defrauded party has no adequate remedy at law and the other parties are necessary to a suit in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 268-270; Dec. Dig. §105.]

Appeal from Chancery Court, Sunflower County; E. N. Thomas, Chancellor.

Injunction by the Bank of Inverness and another against the Island City National Bank. From a decree overruling demurrer to the petition, defendant appeals. Affirmed, with leave to answer.

On March 24, 1913, appellees, the Bank of Inverness and W. B. Catlette, filed a bill in the chancery court against the appellant, Island City National Bank, for the purpose of enjoining the prosecution of a certain suit at law filed by appellant against the Bank of Inverness. The bill alleges that in October, 1911, an agent of the National Assurance Company, a corporation, entered into a contract with Catlette, whereby it was to sell ten shares of its capital stock to Catlette for \$1,000, and that Catlette executed his note for the sum of \$1,000 payable in one year after date to the Bank of Inverness or bearer, and the Bank of Inverness by agreement issued to the National Assurance Company its certificate of deposit for \$900 payable one year after date and bearing interest at 4 per cent. per annum, it being the intention of the parties that the notes of Catlette should be discounted by the Bank of Inverness in the manner above set out, and in consideration thereof the said National Assurance Company was to sell and deliver to Catlette a certificate for ten shares of the stock of said company. It is further alleged that false and fraudulent representations were made by the agent of said insurance company to Catlette, and that no capital stock was

ever issued to Catlette, but that certain income-bearing certificates were sent him which he would not accept; and that afterwards the certificate of deposit came into the hands of the Island City National Bank, which brought an action at law against the Bank of Inverness to recover the amount due on said certificate of deposit. The prayer of the bill is for a rescission and cancellation of the contract and note issued by Catlette and held by the Bank of Inverness, and for a cancellation and surrender of the certificate of deposit issued by the Bank of Inverness and held by the Island City National Bank, and that said Island City National Bank be enjoined from further prosecution of the suit begun by it to enforce the payment of the certificate of deposit. The appellant demurred to the bill, alleging a misjoinder of Catlette as a party complainant, as Catlette had no community of interest with said bank and was not interested or connected with the suit at law sought to be enjoined. The court overruled the demurrer, and the defendant was granted an appeal to the Supreme Court.

Chapman & Johnson, of Indianola, for appellant. Moody & Williams, of Indianola, for appellees.

SMITH, C. J. Conceding for the sake of the argument that the remedy at law of the Bank of Inverness is adequate, that of Catlette is not, and the Bank of Inverness and the holder of the certificate of deposit are necessary parties to any suit in which full relief is granted him; for he can only escape liability on the note by establishing the non-liability of the Bank of Inverness on the certificate of deposit. The court below therefore committed no error in overruling the demurrer, and, since this is the only question presented to us by this record, its decree is affirmed, with leave to appellees to answer within 30 days after the filing of the mandate in the court below.

Affirmed.

PLANTERS' LUMBER CO. v. TOMPKINS et al.

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

MECHANICS' LIENS §184—RIGHT TO LIEN—ENFORCEMENT.

Code 1906, § 8058, declares that every building that may be erected or repaired shall be liable for labor done or material furnished; while section 3000 declares, if such building be erected or repaired at the instance of a tenant or other person not the owner, only the building shall be subject to the lien. A husband, with knowledge of his wife, contracted for the repair of her dwelling; the wife understanding that the material and labor should be purchased on the husband's personal credit. *Held*, that he was a person other than the owner, and so a materialman was entitled to a lien on the house, but not the land.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 323; Dec. Dig. §184.]

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Suit by the Planters' Lumber Company to enforce a mechanic's lien against Effie L. Tompkins and another, begun in justice court, and appealed to circuit court. From a judgment there against plaintiff, it appeals. Reversed and remanded.

Percy & Percy, of Greenville, for appellant. Sam Montgomery, of Greenville, for appellees.

HOLDEN, J. The appellant, Planters' Lumber Company, plaintiff below, filed this suit to enforce the statutory lien under sections 3058 and 3060, Code 1906, for material furnished and used in building and repairing a house on a lot known as No. 808 Broadway, in the city of Greenville. From a verdict and judgment in favor of appellees, Effie L. Tompkins and C. H. Tompkins, defendants in the court below, the case is appealed here.

The facts are as follows: The appellees, Mrs. Effie L. Tompkins and her husband, T. H. Tompkins, were living together in their residence, known as No. 808 Broadway, in Greenville. The house and land were owned by the wife, Mrs. Effie L. Tompkins. The husband, C. H. Tompkins, contracted with and purchased of the appellants, solely on his own account, a bill of lumber which was delivered and used in the repair and construction of the said residence building occupied by the appellees. The wife was present at the house and knew that the lumber was being used in the repair and construction of her house; she understanding from her husband that the lumber was furnished on the individual account of her husband alone, and that her husband was solely liable, and he was to pay appellants for the material so furnished. The husband paid part of the bill due, but upon his failure to pay the balance of \$170 the appellant lumber company filed its claim against appellees in the court of a justice of the peace to enforce its lien against the house only, in which the lumber and material were used, and not against the land. After judgment the case was appealed to the circuit court; and, with this state of facts before that court, the appellant lumber company, on its second count, asked for and was refused the following instruction:

"The court instructs the jury for the plaintiff that, if you believe from the evidence that the contract for the material furnished was made by C. H. Tompkins with the plaintiff, and the material was used in the construction of the house in question, then you will find for the plaintiff under the second count of the declaration, and assess its damages at \$——, declaring a lien on the house alone."

And the failure of the court below to grant this instruction is assigned as error by the appellant. It is urged by appellant that it

was entitled to this instruction, under the facts in this case, relying upon sections 3058 and 3060, Code 1906. We here set out the statutes referred to:

(3058) "Every house, building or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, and every boat or other water craft, railroad or railroad embankment erected, constructed, altered, or repaired, shall be liable for the debt contracted and owing for labor done or materials furnished about the erection, construction, alteration, or repairs thereof; and such debt shall be a lien thereon from the time of making the contract. If such house, building, structure, or fixture be in a city, town or village, the lien shall extend to and cover the entire lot of land on which it stands and the entire curtilage thereto belonging; or, if not in a city, town or village, the lien shall extend to and cover one acre of land on which the same may stand, if there be so much, to be selected by the holder of the lien. * * *"

(3060) "If such house, building, structure, or fixture be erected, constructed, altered or repaired at the instance of a tenant, guardian, or other person not the owner of the land, only the house, building, structure, or fixture, and the estate of the tenant or such other person, in the land, shall be subject to such lien, unless the same be done by the written consent of the owner."

Under the facts in this case, the question squarely presented to us is whether or not the appellant acquired a lien upon the dwelling house (only) here in question, by furnishing material to go into the house at the instance of the husband, who lived with the wife in the house, under the last-named section 3060, Code 1906, which provides, in short, that:

"If such house * * * be * * * repaired at the instance of a tenant, guardian, or other person not the owner of the land, only the house * * * shall be subject to such lien. * * *"

We hold that the husband, occupying, with the wife, the house in which the material was placed, is such a person as is embraced in the meaning of the language of the statute, "at the instance of a tenant, guardian, or other person not the owner of the land," and therefore, under the facts here, appellant has a lien upon the house (only) for the material furnished, which may be enforced in the manner provided by law. And so it follows that the lower court erred in not granting to appellant the instruction asked.

In the cases of *Fairbanks Co. v. Briley*, 25 South. 354, *Flake v. Central Hardware Co.*, 96 Miss. 838, 51 South. 461, and *Schiaffino v. Christ*, 96 Miss. 801, 51 South. 546, decided by this court, it will be seen at a glance that the questions presented and passed upon in those cases are different from the question presented in this case; consequently they are not in point here.

Reversed and remanded.

CAHN v. WRIGHT. (No. 17407.)

(Supreme Court of Mississippi, Division A.
March 27, 1916. Suggestion of Error
Overruled April 24, 1916.)

LANDLORD AND TENANT §206—ATTORNEYMENT.

Where a tenant is paying rent to a creditor of the landlord authorized by the latter to collect rents until his debt is satisfied, upon transfer of the property by the landlord, the tenant's right to possession depends on payment of rent to the transferee unless the tenant is in possession under a valid rental contract made prior to the transfer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 812-815; Dec. Dig. § 206.]

Appeal from Circuit Court, Leflore County; J. A. Teat, Special Judge.

Action by Mrs. Rose M. Cahn against Samuel Wright. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See, also, 66 South. 782.

One Weeden was the owner of a house and lot in the city of Greenwood upon which there was a first deed of trust in favor of the Bank of Commerce and a second deed of trust in favor of Alfred Stoner. Afterwards H. E. Cahn, guardian, made a loan to Weeden, the proceeds of which were used to satisfy the first deed of trust held by the bank, and Stoner also canceled his deed of trust. Weeden then placed the property in the hands of Stoner, who rented the property to appellee, Wright, collected the rent, charged 10 per cent. commissions for making the collection, and applied the balance of the rent to the indebtedness due by Weeden to him (Stoner). Thereafter, and before Stoner had collected an amount in rents sufficient to pay off the amount due him, Weeden, having defaulted in the payment of the indebtedness due H. E. Cahn, guardian, conveyed the property to Mrs. Rose M. Cahn, the wife of H. E. Cahn; the consideration being the assumption by Mrs. Cahn of Weeden's indebtedness to H. E. Cahn, guardian. The deed of trust was duly recorded, and Mrs. Cahn thereafter demanded of the tenant, Wright, the payment of the rent, and, Wright having refused to pay her, Mrs. Cahn brought this action of unlawful entry and detainer. On the trial in the circuit court a judgment was entered for the defendant, and Mrs. Cahn appeals.

J. W. Dulaney, Jr., and Gwin & Mounger, both of Greenwood, for appellant. Gardner, McBee & Gardner and Alfred Stoner, all of Greenwood, for appellee.

SMITH, C. J. As we understand the evidence, Weeden, the former owner of the property, verbally agreed with Stoner that he (Stoner) might rent the property, collect the rent, and apply it to the debt due him by Weeden. Stoner acted upon this agree-

ment and rented the property to appellee, collecting the rent when due, and charging Weeden 10 per cent. upon the amount collected for his services in so doing. The terms of the contract by which Stoner rented the property to appellee do not appear, the case having been fought out on the theory that appellee was Stoner's tenant, and as such was entitled to possession of the property until the rent collected therefrom by Stoner should be sufficient to discharge the debt due him by Weeden. At the time of the trial, the amount of rent collected by Stoner was less than the amount due him by Weeden. This theory finds no support in the evidence, for Stoner was not a tenant of Weeden, but had simply been authorized to rent the property by Weeden; and appellee's right to remain in possession thereof after Weeden's sale of the property depends upon whether or not he was in possession thereof under a valid rental contract made prior to the sale of the property by Weeden. It appears from the evidence that, at the time of the trial, the house in question was vacant; appellee having removed therefrom. The case, however, proceeded upon the theory that he was still withholding possession thereof from appellant.

Reversed and remanded.

DINSMORE v. HARDISON. (No. 17787.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

APPEAL AND ERROR §1167—JURISDICTION—OBJECTION.

Under Const. 1890, § 147, declaring that no judgment or decree shall be reversed on the ground of want of jurisdiction, because of any error as to whether the cause was of equity or common-law jurisdiction, but, if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which can best determine the controversy, a decree overruling a demurrer to a bill seeking relief for breach of contract will not be reversed, though the only relief sought was damages, and the action should properly have been brought in a court of law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §1167.]

Appeal from Chancery Court, Noxubee County; J. F. McCool, Chancellor.

Bill by J. M. Hardison against James A. Dinsmore. From a decree overruling the demurrer to the bill, defendant appeals. Affirmed, and cause remanded.

T. W. Brame and O. D. Smith, both of Macon, for appellant. Jacobson & Brooks, of Meridian, for appellee.

SYKES, J. This is an appeal from a decree overruling a demurrer to a bill filed in the chancery court of Noxubee county, which bill, in substance, alleges the following facts:

The complainant is engaged in the business of buying cotton, and has an agent in the city

of Macon, Miss., who buys cotton there in the open market for him; that his agent, during the year 1913, made a contract with the appellant here for the purchase of 60 bales of cotton which the appellant represented that he had already harvested from his fields; the 60 bales of cotton were to be delivered during the months of September, October, and November, 1913, on a price basis of middling cotton at 10½ cents per pound, and that complainant was to pay for the cotton as the same was delivered to him; that in pursuance of this contract the defendant executed and delivered to the complainant a written acknowledgment of the same as follows:

"Macon, Miss., August 16, 1913.

"I have this day sold to J. M. Hardison sixty bales of cotton to be delivered during the months of September, October and November, middling and above, at 10½ cents, less weighing, the cotton to be paid for as delivered; any cotton below middling to be settled for at existing differences. [Signed] James A. Dinsmore."

Complainant alleges that the consideration of this contract was that the defendant was thereby placed in a position of knowing the exact price he was to get for his cotton, and was enabled to go ahead with his business contracts and agreements with the assurance of the sum certain to be realized from the sale of this cotton; that the contract price was a fair and adequate consideration for said cotton. The bill then alleges that it was never the purpose of the defendant to perform his contract and deliver the cotton, and that in executing the contract he perpetrated a fraud upon the complainant, for the above reason; that, relying upon his contract with the defendant, the complainant sold to his patrons or customers the 60 bales of cotton purchased from the defendant, and that after the month of November had passed complainant was compelled to buy 60 bales of cotton in the open market at the market price in order to make up for the failure of the defendant to deliver the said cotton; that middling cotton at this time, in the open market, was worth the sum of 12½ cents per pound, and that complainant was therefore compelled to pay \$12 a bale more for this cotton than he had agreed to pay defendant, and for this reason he alleges that he has been damaged in the sum of \$720. Complainant states that it is necessary for an accounting to be had between him and the defendant to ascertain the amount of damages he can recover, and prays that the court appoint a commissioner to state an account of the amount of damage which he has suffered. The demurrer to this bill alleges as grounds for same: First, that the chancery court has no jurisdiction; second, that the bill does not show any ground for equitable relief; third, that the bill does not show facts constituting a fraud; fourth, that the bill shows on its face that it is a suit for damages for breach of contract, for which complainant has his

remedy at law, and that the case should be transferred to the circuit court.

It is the contention of appellant in brief that this is simply a suit for damages arising from the breach of a contract, and that the same should have been brought in the circuit court, and that the chancery court has no jurisdiction thereof. The chancellor, however, assumed jurisdiction of this case, and section 147 of the Constitution of Mississippi, which reads as follows:

"No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy"

—settles this question against the appellant. *Hancock v. Dodge*, 85 Miss. 228, 37 South. 711.

Affirmed, with leave to appellant to answer the bill within 60 days after the mandate of this court reaches the chancery court.

ILLINOIS CENT. RY. CO. v. JACKSON OIL & REFINING CO. (No. 17752.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

LIMITATION OF ACTIONS ~~§~~39(2)—RUNNING OF STATUTE—THREE-YEAR STATUTE—"OPEN ACCOUNT."

Code 1906, § 3097, declares that all actions for which no other period of limitation is prescribed shall be commenced within six years after accrual. Section 3099 declares that actions on an open account, or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years after accrual. A railroad company transported a car of cotton seed under a bill of lading, providing for delivery to plaintiff, and some of the seed was lost in transit. Held that, though the bill of lading did not specify the amount of seed to be transported, an action for the loss is one on a written contract, instead of on an "open account" or unwritten contract, and so is governed by the six-year statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 191; Dec. Dig. ~~§~~39(2).

For other definitions, see Words and Phrases, First and Second Series, Open Account.]

Appeal from Circuit Court, Hinds County; E. L. Brien, Special Judge.

Action by the Jackson Oil & Refining Company against the Illinois Central Railway Company, begun in justice court and appealed to circuit court. From a judgment there for plaintiff, defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Green & Green, of Jackson, for appellee.

SYKES, J. This suit originated in a justice of the peace court in Hinds county, Miss., upon the following statement of facts:

On February 5, 1910, appellee (plaintiff in the court below) shipped a carload of cotton seed from Bogue Chitto, consigned to itself at Jackson, Miss. In transit there was lost an amount of said seed whose market value is agreed to be \$75. It is further agreed that, if the plaintiff in the court below is entitled to recover any damages whatever, then the amount of recovery is to be \$75. The original bill of lading issued to the appellee by the appellant at the point of origin of the shipment in part reads as follows:

"Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, * * * the property described below, consigned to Jackson Refining Oil Company, Jackson, Miss. Car initial, C. & N. W. No. 73328. Description of articles: O/L Cotton seed"

—signed by the agent of the carrier. More than three years elapsed after the shortage was discovered and before the filing of this suit. Suit was filed within six years after the issuing of the bill of lading. Appellant pleaded the bar of the three-year statute of limitations. The only question to be decided by this court is whether the three or the six year statute of limitations applies to a suit of this character. It is the contention of the appellant in this case that the carrier contracted to carry a carload of cotton seed. A part thereof became lost. Therefore the obligation upon its part to pay for the same is implied in law, and the demand is barred by the three-year statute.

Section 3099 of the Code of 1906 provides as follows:

"Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

This is not a suit based on an open account, or stated account not acknowledged in writing, signed by the debtor. Neither is it a suit on an unwritten contract, express or implied. The suit is founded upon an express contract to transport a carload of cotton seed. It makes no difference whether the bill of lading stated the number of pounds constituting the carload or not. In the case of *Washington v. Soria*, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555, on this question the court said:

"The action is not upon a contract provable by parol, but is one provable by a writing. Whether the action which might have been brought at law could have been on the promise contained in the deed, treating it as the deed of the defendant because of his acceptance, and the estoppel operating upon him to deny it to contain his written contract, as the decided weight of authority holds may be done, or whether, as is held by the Massachusetts courts, no action could have been maintained on the deed, but the plaintiff must have sued upon the promise implied by law from the acceptance of the deed by the defendant, is, we think, immaterial. In either event the prom-

ise of the defendant, whether it be express or implied, is to perform a contract, the terms of which are written, and not unwritten. The promise to pay is implied by law, but it is a promise to perform a written, and not an unwritten, contract."

In the case of *Fowlkes v. Lea*, in 84 Miss. on page 515, 38 South. on page 1037 (68 L. R. A. 925, 2 Ann. Cas. 466), this court says:

"The principle with which we are concerned is this, sharply stated: Is the recital that the grantor conveyed the land to the grantee in consideration of \$400 a sufficient statement of the terms of the contract to make the statute of limitations relating to written promises the only one applicable? On this precise proposition we quote the following authorities above referred to. In the case of *Ames v. Moir & Co.* [27 Ill. App. 88] there was an action of assumpsit for goods delivered on an instrument containing the following recital: 'Contract. Chicago, June 9, 1870. I have this day bought of Robert Moir & Co., one hundred (100) barrels highwines, "iron bound," at one dollar and seven cents (\$1.07) per proof gallon. [Signed] Wilson Ames.' After reviewing several cases, the court says: 'There may be a contract in writing, although it contains no express promise to pay the consideration. Strictly speaking, there is no such express promise in Ames' contract. But when a state of facts is acknowledged in writing to exist, which imports an obligation to pay, the law implies the obligation, but the contract is not thereby reduced to parol. *Ashley v. Vischer*, 24 Cal. 322, 85 Am. Dec. 65. Such a contract is found in the passbook of a depositor in a bank. The entries in the book are not express promises to pay, but the law implies such promises, and the liability thereunder has been held not to be barred in five years. *Jasoy v. Horn*, 64 Ill. 379.' It is clear here that there was no express promise on Ames' part to pay, but a state of facts was acknowledged in writing to exist, which imported the obligation; but, although the law implied the obligation, the contract was held to be a contract in writing with respect to the statute of limitations applicable. This case covers our case perfectly. There is no express promise on the part of the grantee to pay four hundred dollars, but there is a statement of facts—to wit, that the land was sold for the consideration of \$400—which statement of facts is acknowledged in writing, and from which statement of facts the law imports the obligation to pay."

See *Musgrove v. Jackson*, 59 Miss. 390; *Madison County v. Collier*, 79 Miss. 220, 30 South. 610; *Lindenmayer v. Gunst*, 70 Miss. 693, 13 South. 252, 35 Am. St. Rep. 685.

Section 3097 of the Code of 1906 provides:

"All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

In this case, by the terms of the bill of lading, the railroad company expressly agreed to transport and deliver a carload of seed to the appellee at the point of destination. This promise is in writing, and is the foundation of the action. Section 3097 of the Code of 1906, above quoted, is the one which governs the time within which this suit could be brought.

The judgment is therefore affirmed.
Affirmed.

STANDARD OIL CO. v. GOLDSTEIN.
(No. 18039.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

1. CLERKS OF COURTS — FEES—RECORD ON APPEAL—UNNECESSARY MATTER.

Under rule 2 (101 Miss. 904, 59 South. vii), providing that the transcript should not contain any part of the case except pleadings, evidence, instructions, bills of exceptions, and the order, judgment, or decree appealed from, unless appellant requests in writing that other matters be included, and such request is annexed to the transcript, the clerk cannot have fees for including the summons and return, the certificate of mailing summons, or notice to stenographer to transcribe notes where the record shows no request therefor.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 55; Dec. Dig. —24.]

2. CLERKS OF COURTS — FEES—RECORD ON APPEAL—UNNECESSARY MATTER.

It being necessary to style and number the case, and include the citation to the Supreme Court, fees therefor may be allowed the clerk for the actual number of words, but not on a page basis.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 55; Dec. Dig. —24.]

3. CLERKS OF COURTS — FEES—RECORD ON APPEAL—UNNECESSARY MATTER.

The clerk cannot be allowed fees for including his fee bill in the transcript; it being necessary only for the purpose of collecting the fees.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 55; Dec. Dig. —24.]

4. CLERKS OF COURTS — FEES—RECORD ON APPEAL—UNNECESSARY MATTER.

Since only 10 cents per 100 words may be allowed the clerk for making the transcript, he cannot have a flat rate of 30 cents per page.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 55; Dec. Dig. —24.]

On motion to retax costs. Sustained.

See, also, 71 South. 21.

PER CURIAM. The judgment in this case was affirmed on a former day, and appellant now moves the court to retax the costs and disallow certain transcript fees claimed by the clerk of the court below. The portions of the clerk's fee bill objected to are that he charged 30 cents each for pages 2, containing style and number of case; 7, containing copy of summons and sheriff's return; 8, containing copy of the certificate of the mailing of summons to defendant in Louisville, Ky.; 9, containing certificate of the mailing of summons to defendant in Jackson, Miss.; 20, containing copy of notice to stenographer to transcribe his notes; 22, being citation of appellee to the Supreme Court; 23, being his fee bill; and 28, being his certificate to the record; that he has charged 30 cents for each page of the record when a large number of them contained considerably less than 200 words, the difference between the amount charged and the amount actually due under the last of these items

being, according to counsel for appellant, \$6.80.

[1] Under rule 2 of this court (101 Miss. 904, 59 South. vii) a transcript should "not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing request other matters specified to be embraced in the transcripts, a copy of which request shall be annexed to the transcript." This record contains no copy of such a request, so that the clerk should not have included in the transcript the matters set out in pages 7, 8, 9, and 20; consequently he is not entitled to fees therefor.

[2-4] It is, of course, necessary, independent of any rule of the court, for the clerk to properly style and number the case, and also for him to include in the transcript either the original or a copy of the citation to the Supreme Court, so that the clerk is entitled to fees therefor, but only for the number of words contained therein, and not 30 cents per page. He is not entitled to an allowance for making out his fee bill; it being no part of the transcript proper, though necessary to be made by the clerk in order that he may obtain his fees. Only 10 cents per 100 words for making a transcript of the record can be allowed under the statute, so that the costs will be retaxed, and the clerk below allowed not 30 cents per page, unless the page contains 300 words, but 10 cents per 100 words for those matters which should properly have been included in the transcript, as hereinbefore set out.

Sustained.

THOMAS et al. v. TOWN OF LONG BEACH.
(No. 17747.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

1. MUNICIPAL CORPORATIONS — EXCLUSION OF TERRITORY — INTEREST OF INHABITANTS—EVIDENCE.

On petition of residents and property owners of territory embraced in an extension of a town, to exclude such territory from the corporate limits of the town, brought under Code 1906, § 3307, giving an appeal on the question as to whether the existing limits are reasonable, evidence held not to sustain a verdict and judgment declaring the limits of the town, including the extension, to be reasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 91; Dec. Dig. —33(6).]

2. MUNICIPAL CORPORATIONS — TERRITORY—EXTENSION.

In determining whether an extension to the corporate limits of a town is reasonable, the question is whether the interests of the inhabitants of the town as it would remain if the territory were to be excluded, and of the inhabitants of the territory sought to be included, will be conserved by its retention within the town's corporate limits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 73; Dec. Dig. —29(3).]

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Petition by James Thomas and others against the Town of Long Beach. Judgment for defendant, and the petitioners appeal. Reversed and remanded.

The town of Long Beach was incorporated in 1905 under the Code chapter on municipalities. In 1907, the boundaries were extended so as to embrace certain territory about a mile in length and half a mile in width, a large part of which was cultivated as truck patches and was sparsely settled. It seems from the record that the reason for extending the corporate limits was that at the time the extension was made it was feared that a liquor saloon would be opened in this territory, which at that time was just adjacent to the corporate limits of the town of Long Beach, and the town council, being opposed to the issuance of liquor licenses, extended the limits so as to embrace this territory and thus avoid the possibility of a liquor saloon in the immediate proximity. On January 1, 1909, a state prohibition law went into effect, so that the necessity which prompted the municipal council to take this action no longer exists. In December, 1913, appellants, who are residents and property owners of the territory embraced in the extension referred to, filed a petition, under section 3307 of the Code of 1906, praying the board of mayor and aldermen to exclude the territory in question from the corporate limits of said town. Section 3307 of the Code provides that:

"If the limits of any city, town, or village shall be unreasonably extended or contracted, any person interested may, after two years from the time when the limits were fixed, whether fixed under this chapter or heretofore, petition the municipal authorities thereof for a contraction or extension of the limits."

This section also provides that either party may appeal to the circuit court, and that the question to be tried shall be whether the existing limits be or be not reasonable, and that the circuit court shall direct the municipal authorities to pass an ordinance conforming to the judgment of the court, in case the limits are found to be unreasonable. It is further provided that:

"Reasonable and unreasonable as used in this section must be construed as relating to the interests of the entire municipality."

On the trial it was shown that the territory was sparsely settled and that the territory in this extension paid about 20 per cent. of the taxes of the municipality annually and received very little benefit in the way of improvements made by the municipality, and it further appeared that out of the entire population of about 1,100 people only 31 resided in this territory. It further appeared that about one-half of the taxes paid in this territory were paid by the Louisville & Nashville Railroad Company and

Gulf Coast Traction Company, both of which had lines running through the town, and neither of which joined in the petition to exclude the territory. The case was submitted to a jury under instructions of the court and a verdict returned declaring the present corporate limits to be reasonable, and the petitioners appealed.

T. M. Evans, of Gulfport, J. O. Thomas, of Biloxi, and A. H. Longino and Robt. B. Ricketts, both of Jackson, for appellants. Hanun Gardner, of Gulfport, for appellee.

SMITH, C. J. The verdict of the jury finds no support in the evidence, for the reason that it is manifest from the evidence, in which there is no material conflict, when viewed in the light of the rule announced in *Forbes v. Meridian*, 86 Miss. 243, 38 South. 676, that neither the interests of the inhabitants of the town of Long Beach as it will remain in event the territory here in question shall be excluded therefrom, nor of the inhabitants of the territory here sought to be excluded, will be in any wise conserved by the retention of such territory within appellee's corporate limits.

Reversed and remanded.

JULIUS LEVY SONS CO. v. ORLANSKY. (No. 17883.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

1. PLEADING ~~§~~222 — DEMURRER — RIGHT TO PLEAD OVER — PREREQUISITES.

While Code 1906, § 755, requiring an affidavit to the merits of a defense as a prerequisite to pleading over after demurrer to the declaration is overruled, is mandatory, it may be waived by the adverse party.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. ~~§~~222.]

2. PLEADING ~~§~~222 — DEMURRER — RIGHT TO PLEAD OVER — PREREQUISITES — WAIVER.

Where demurrer to the declaration is overruled and the defendant, without objection by plaintiff, secured permission to answer, the requirement of an affidavit to the merits of the defense under Code 1906, § 755, was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. ~~§~~222.]

3. GUARANTY ~~§~~86 — DEFENSES — PLEADING.

A plea of the surety whose contract provided for liability until terminated in writing, that the creditor expressly agreed to cancel the contract of suretyship and release the surety, states a good defense and is not demurrable.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 100; Dec. Dig. ~~§~~86.]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Action by the Julius Levy Sons Company against H. Orlansky. From a judgment overruling a demurrer to defendant's plea, plaintiff appeals. Affirmed.

S. F. Davis, of Indianola, for appellant. Herring & Wiley, of Ruleville, and James L. Williams, of Indianola, for appellee.

HOLDEN, J. This is an appeal from the circuit court of Sunflower county in which the appellant, Levy Sons Company, sued H. Orlansky, the appellee, and from a judgment overruling a demurrer to the defendant's pleas, Levy Sons Company appeal to this court.

Appellant, Julius Levy Sons Company, wholesale merchants of Memphis, sold a bill of goods to B. Bindusky, a retail merchant at Drew, for which, it is alleged, the appellee, H. Orlansky, guaranteed the payment in writing. Bindusky failed to pay for the goods, and suit was entered by Levy Sons Company against H. Orlansky, appellee, to recover the amount under the written guaranty executed and delivered to appellant. Here is a copy of the guaranty:

"Memphis, Tenn., Aug. 26, 1910.

"I hereby agree to be responsible for a certain account to be made by Mr. B. Bindusky of Drew, Miss., to the amount of two hundred and fifty (\$250.00) dollars, more or less, with Julius Levy Sons Co., of Memphis, Tenn., and this guarantee to hold good until revoked by me in writing.
H. Orlansky."

The defendant in the court below demurred to the plaintiff's declaration, which demurrer was by the court overruled, and the defendant, without objection by appellant, was granted leave by the court to plead further, and did subsequently file four separate pleas to the declaration, numbered 1, 2, 3, and 4, whereupon, several days after the order was granted, the appellant moved to strike the pleas, because the defendant had failed to make and file an affidavit setting out his defense in the manner prescribed by section 755, Code of 1906. This motion was overruled by the court, and thereupon the appellant demurred to all of said pleas, 1, 2, 3, and 4, and the court sustained the demurrer to pleas 3 and 4, and overruled the demurrer as to pleas 1 and 2, and the plaintiff declining to plead further, the court entered a final judgment for the defendant, and the plaintiff prosecutes this appeal.

We here set out appellee's special plea No. 2:

"Comes the defendant, by his attorneys, and for further plea in this behalf, says that the plaintiffs ought not to have or maintain their aforesaid action against him, because he says that on the 2d day of January, 1911, at a time when the said B. Bindusky did not owe plaintiffs anything on account by reason of the alleged guaranty sued on in this case, the said plaintiffs expressly agreed with the said defendant that they would cancel the said guaranty, and released the defendant from all further liability thereunder; and that, by reason thereof, the defendant was released from all further liability on account of said guaranty; and this the defendant is ready to verify."

We deem it necessary in passing upon this case to deal with only two of the questions presented: First, whether or not the lower court erred in permitting the defendant below to plead to the declaration after his demurrer was overruled, without first comply-

ing with section 755, Code of 1906; second, whether or not the defendant's plea No. 2 stated a good defense to the cause of action alleged in the declaration.

It will be observed from the record that when the defendant's demurrer was overruled there was no objection interposed by the plaintiff to the action of the court granting leave to the defendant to file his pleas to the declaration, but the plaintiff, without objection being made by him to the order of the court, a week afterwards, and the next day after the pleas were filed, moved the court to strike the pleas from the file, which motion was overruled.

[1, 2] We concede that the statute (section 755 of the Code of 1906) is mandatory in requiring that an affidavit of the merits of the defense must first be made, and that this court, in *Feazell v. Staltzfus*, 98 Miss. 893, 54 South. 445, held that "the court is left no discretion as to whether the affidavit shall be filed," yet, we think that this statutory requirement may be waived by a party to the litigation, and that a party waives it when he fails to object to, and acquiesces in, the action of the court in granting leave to plead further. The pleas here were filed by leave of court, first had and obtained, in open court, without objection. We hold that the plaintiff below waived the statutory requirement, and cannot now complain.

[3] As to the second question, we think that the defendant's plea No. 2, upon its face, sets up a good defense to the cause of action; therefore, the action of the lower court in overruling the demurrer to this plea was correct, and the judgment of the lower court is affirmed.

Affirmed.

GRIFFIN v. STATE. (No. 18985.)

(Supreme Court of Mississippi, Division A.
May 8, 1916.)

BURGLARY \S 41(4) — EVIDENCE — BREAKING AND ENTRY.

Evidence only that the lock of the door out of which accused came had been tampered with held insufficient to establish breaking and entry necessary to burglary under Code 1906, \S 1073. [Ed. Note.—For other cases, see *Burglary*, Cent. Dig. \S 97; Dec. Dig. \S 41(4).]

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Henry Griffin was convicted of burglary, and appeals. Reversed and remanded.

W. E. Mollison, of Vicksburg, for appellant. Ross A. Collins, Atty. Gen., and E. N. Floyd, of Meridian, for the State.

HOLDEN, J. In December, 1915, the appellant, Henry Griffin, a negro boy about 16 years of age was indicted and tried for the crime of burglary of a storehouse in the city of Vicksburg, and from a conviction and

sentence of 3 years' imprisonment in the penitentiary, he appeals here.

The testimony offered by the state at the trial in the lower court showed that the appellant was in the employ of the Katzenmeir Bakery in the city of Vicksburg, and one night during the month of October was found in the storeroom connected with the bakery. When he was discovered in the storeroom he ran out of the door and pushed by two or three persons, dropping his hat, and was afterwards identified at the trial by these state witnesses. It further appears from the testimony that the appellant had gotten together some groceries in the storeroom, which he left there in his hasty departure from the building.

This ignorant negro boy had no counsel to represent him at the trial. He introduced no evidence, nor did he testify in his own behalf, but sat in silence throughout the trial. At the conclusion of the testimony for the state the jury retired, and promptly returned a verdict of guilty as charged, which charge in the indictment was that he "feloniously and burglariously did break and enter," etc.

The appellant assigns but one error here for reversal, and that is that the state failed to prove the appellant guilty of burglary, in that it failed to show by any testimony the "breaking and entering." After reading the record in this case carefully, the only testimony for the state that we are able to find which tends to prove that the appellant "did feloniously and burglariously break and enter" is the following testimony of Mr. Katzenmeir, which we here quote verbatim et literatim:

"Q. Mr. Katzenmeir, tell the jury the condition of that door that he came out of; was the lock tampered with? A. You know where the lock comes in (indicating); it had been tampered with."

The above testimony includes all there is on the subject of the appellant breaking and entering the storehouse. This testimony is not sufficient to show beyond a reasonable doubt that there had been a "breaking" by the appellant, or any other person. "Breaking and entering" is a very necessary essential of burglary. William Blackstone; section 1073, Code 1906. This testimony is so unsatisfactory that no court or jury could, by any reasonable construction of it, or inference drawn from it, safely say that the storeroom in question was broken into on this occasion. This evidence does not even show that the door was closed, or was locked, and was opened by the appellant. Therefore a conviction upon such uncertain proof cannot rightfully stand in any court. Here was a young negro boy, a human being, charged with a felony, being tried in a tribunal of justice; ignorant, poor, and friendless, without the aid of counsel to speak for him, and unable to speak in his own behalf, he is condemned and consigned to prison upon this

character of proof. With this setting of the stage, and these obvious conditions before it, the learned court should have especially required that the testimony offered by the state, establish the "breaking and entering," as charged in the indictment. In failing to do this the lower court committed error, for which the judgment must be reversed, and the case remanded.

Reversed and remanded.

BARNES v. JONES. (No. 17809.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

CONTRACTS \S 187(4)—RIGHTS OF THIRD PERSON—ASSUMPTION OF PAYMENT OF DEBT—LIABILITY.

A grantee who as part of the consideration for a deed to him assumes the payment of the grantor's debt to his vendor becomes personally liable to the vendor, who may recover the amount of the debt.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 800; Dec. Dig. \S 187(4).]

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

Bill by J. T. Jones against L. F. Barnes and Mrs. Lillie V. Barnes, his wife. Decree pro confesso, followed by final decree against the defendants, and defendant Mrs. Lillie V. Barnes appeals. Affirmed.

J. M. Morse, Jr., of Gulfport, and W. E. Morse, of Jackson, for appellant. Hanun Gardner, of Gulfport, for appellee.

SMITH, C. J. Appellee exhibited his bill in the court below against L. F. Barnes and Mrs. Lillie V. Barnes praying for a personal decree against them for money alleged to be due him as part of the purchase price of certain land and for a foreclosure of a vendor's lien on the land by which the payment of the money alleged to be so due him was secured. The bill alleged that L. F. Barnes purchased the land from appellee, executing to him his promissory note for \$275 in part payment thereof, to secure the payment of which a vendor's lien was expressly reserved in the deed to the land executed by appellee, and that some time thereafter L. F. Barnes sold and conveyed the land to Mrs. Lillie V. Barnes, his wife, "who by the terms of the purchase thereof assumed and obligated herself to pay off the amount of the vendor's lien on said property as represented by the note hereinabove described." The defendants, having been duly served with process, failed to appear in response thereto, so that, when the cause came on to be heard, a decree pro confesso, followed by a final decree in accordance with the prayer of the bill, was rendered against them. The land was sold by the commissioner appointed by the court for that purpose, his report of the sale was confirmed, and Mrs. Barnes now brings the case to this court and complains of the rendi-

tion of the personal decree against her, the ground of her complaint being that she was not a party to the note, and therefore had incurred no liability to appellee thereon. There is no merit in this contention; for, where the grantee, as part of the consideration for the deed executed to him, assumes the payment of a debt due by the grantor to a third person, he becomes personally liable to such third person for the payment thereof, who can recover of him the amount of such debt in an action instituted for that purpose. 39 Cyc. 1655; 27 Cyc. 1344; *Dodge v. Cutrer*, 100 Miss. 647, 56 South. 455.

Affirmed.

CITY OF MERIDIAN v. HUDSON.
(No. 17750.)

(Supreme Court of Mississippi, Division A.
April 24, 1916.)

MUNICIPAL CORPORATIONS — §399 — PUBLIC IMPROVEMENTS — LIABILITY FOR PROPERTY DAMAGED—WAIVER.

Where a property owner joined in petitioning for the opening and grading of a street, he waived claim for damages to his property by such grading, if properly done, especially where the street formerly extended to his line, since he then was charged with notice that it would be continued on an appropriate grade conformable with that already established.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 958-961; Dec. Dig. §399.]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Suit by H. P. Hudson against the City of Meridian. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Amsis & Dunn, of Meridian, for appellant.
Fewell & Cameron, of Meridian, for appellee.

SYKES, J. Suit was filed in the circuit court of Lauderdale county by H. P. Hudson, the appellee, against the city of Meridian, for damages to real property owned by the appellee, caused by the grading and paving of A street, upon which appellee's property fronts, from Ninth to Eleventh avenue. A verdict for \$200 was rendered in favor of the appellee, upon which judgment was entered, and from which judgment this appeal is prosecuted.

The uncontradicted facts in this case show that 30 or 40 years before the opening of A street, in front of the block in which the property of the appellee is situated, an ineffectual attempt was once made to dedicate this part of the street to the city; that at a later period and a short time before the institution of this suit, the appellee and others, who claimed to be the owners of the property upon which this part of A street is now located, dedicated it to the city, and that the city accepted same. Ordinances authorizing the opening up and grading of this part of A street were duly passed by the city council.

The testimony of appellant is that the appellee requested the mayor and one of the councilmen, at different times, to open and grade A street from Ninth avenue, in front of the block upon which appellee's property is situated, after the passage of the above ordinances. It seems that A street had previously been opened to Ninth avenue, which is the northeast boundary of the block in which the Hudson property is located, and that part of A street opened up runs in a southwesterly direction in front of this property. The only question to be decided by this court is whether or not the lower court erred in refusing the following instruction asked by the defendant, viz:

"No. 5. The court further charges the jury for the defendant that if from all the testimony in the case they believe that the plaintiff joined in the making of a map laying out and dedicating that part of A street opposite his property, and afterwards persuaded and induced the defendant city to open, grade, and improve said street by personal solicitations to members of the city council, and that the council of said city thereafter and pursuant to such request did open, grade, and improve said street in a reasonable, careful, and prudent manner, under all the facts and circumstances, then the defendant is not liable to plaintiff for any damages he may have sustained by reason thereof, and the jury should find for the defendant"

—and in giving the following instruction for the plaintiff:

"No. 3. The court charges the jury for the plaintiff in this case that the doctrine of estoppel does not apply to actions of tort, and that in this case the plaintiff cannot be held estopped by reason of any inducements or requests upon the defendant to do the grading and cutting in question, if from all the evidence you believe he has suffered damages."

It is the contention of the appellant that by the dedication of the property by the appellee and others to the city for the opening up and grading of A street, and that by his requesting the mayor and city councilmen to grade and open up this street, he is thereby estopped from claiming any damages for the proper grading and opening up of said street. It is to be borne in mind that A street had already been opened up and graded to Ninth avenue, the northeast boundary of the block upon which the appellee's property is located and appellee is bound to have known of the grading and condition of A street and Ninth avenue at their intersection on the corner of this block; and when he requested the city to open up A street through his block, if he made such request, then he knew and expected that said street would be opened up to conform to the proper grade of that part of A street already opened; and by these requests, in connection with his dedication of the land for the opening up of the street, he is estopped from claiming any damages for the proper grading of said street. In this case, it makes no difference whether or not he knew at what grade the street would be made in front of his real-

dence. He is bound to know, and is charged with the knowledge, that the city would properly grade that part of the street in connection with that part already opened up and graded, providing, of course, for suitable drainage; and the testimony of appellant in this case shows that this was done. It is further shown that the appellee knew when the work of grading and paving was being done, and made no objection in any way thereto.

It is the contention of the appellee that the case of *Robinson v. City of Vicksburg*, 99 Miss. 439, 54 South. 858, settles this case against the appellant. In that case, however, Mulberry street, for a number of years, had been opened up, and Robinson joined in a written petition to the municipal authorities only to pave this street. There was nothing whatever in said petition about the street being graded, or the grade thereof being changed. The sole idea of said petition was to have the street paved. The city, however, changed the grade of the street, and in so doing damaged the property of Robinson. Robinson sued for damages and the city claimed that by signing the petition he was estopped from claiming damages. In delivering the opinion of the court, Judge Anderson in part said:

"* * * Or may a waiver be implied by his signing the petition with the knowledge that in paving the street the city might find it necessary to change its grade? We think not. In our judgment such conduct ought not to operate as an estoppel. A constitutional right may not be so lightly waived. There is nothing whatever in the petition, nor in the conduct of the appellant as disclosed by the record, which evidenced a purpose on his part to waive his constitutional right to claim damages to his property, caused by raising the grade of the street."

In the case at bar, however, the testimony introduced by the appellant is to the effect that the appellee requested the mayor and one of the city councilmen to open up and grade this street. In the *Vicksburg* Case, the attention of Robinson was neither directly nor indirectly directed to the grading of the street, consequently no estoppel against him could be claimed; but in the instant case the appellee expressly requested the grading of the street. In the *Robinson* Case, if any damage had been done to Robinson caused alone by the paving of the street, certainly he would have been estopped from claiming damages therefor; and in the case at bar, if the jury believe the testimony of the appellant, then the appellee will be estopped from claiming these damages. In the case of *City of Texarkana v. Talbot*, 7 Tex. Civ. App. 202, 26 S. W. 451, in passing upon a similar question the court in part says:

"Upon an examination of the evidence contained in the statement of facts, we find that it was proven, without controversy, that, prior to the construction and establishment of the grade upon Maple street, plaintiff, joining with a large number of others owning property abutting upon said street, petitioned the council of the city of Texarkana, in writing, to establish and construct a grade upon Maple street, presenting

strong and urgent reasons for the prayer of the petitioners. This was a most important fact in the case, which the trial court appears to have entirely ignored. * * * It is not stated in the court's findings whether the grade was regarded as a proper grade, nor whether the work of constructing the grade was done skillfully or negligently. Under this state of the findings of fact, we are led to the conclusion that the court below was of the opinion that plaintiff was entitled to recover for the damage done his property, notwithstanding the grade was a proper one, and its construction skillfully executed. It must have been the view of the trial court that the petition of the plaintiff to the city council, asking for the establishment and construction of the grade, did not affect his right to recover for injuries incident to and consequential upon the construction of such grade. It would hardly be reasonable to give the law a construction which would authorize one to influence a city council by petition to fix and construct a grade upon a street, and then permit him to recover damages for injuries which are incident to a proper construction of such work. We think it would be more in harmony with good conscience and sound reason to treat such an act as a consent to the construction of the grade, and a waiver of such damages as are incident to its proper construction. When the plaintiff signed and presented his petition to the city council, praying for the fixing and construction of the grade upon Maple street, he consented, in the meaning of the Constitution, to all such damage as was incident to a proper and skillful construction thereof, and could only recover for injuries resulting from negligence of the city in constructing the work consented to by plaintiff. Absolute right to compensation for the damage, provided by the Constitution, no longer existed after he consented to the work, and his rights must be determined under the common law."

See, also, *Ball v. City of Tacoma*, 9 Wash. 592, 38 Pac. 133; *Vaile v. City of Independence*, 116 Mo. 333, 22 S. W. 695.

It therefore follows that the lower court erred in refusing the above instruction requested by the appellant, and in giving the above instruction given for the appellee.

Reversed and remanded.

OLIVER et al. v. CITY OF MACON.
(No. 17820.)

(Supreme Court of Mississippi, Division A.
May 8, 1916.)

Appeal from Chancery Court, Noxubee County; J. F. McCool, Chancellor.

Bill by the City of Macon against Mrs. S. M. Oliver and another. Decree for complainant, and defendants appeal. Affirmed.

The mayor and board of aldermen of the city of Macon, a municipality which operated under chapter 99 of the Code of 1906, passed an ordinance designating the manner of laying sidewalks and constructing curbs and making the cost of same a lien upon the property of the abutting owners, and thereafter ordered sidewalks laid along certain streets, in front of the property of a large number of owners, among whom were appellants, and ordered appellants and others to construct sidewalks in accordance with the specifications set out in the ordinance. Ap-

pellants having failed to comply with the resolution of the municipality, were legally notified to appear and show cause why they should not comply therewith. After receipt of this notice the appellants signed the following document, to wit:

"To the Honorable Board of Mayor and Aldermen of the City of Macon, Miss. We, the undersigned owners of property and lots fronting, lying alongside and abutting Eighth street, being apprised of the fact that our respective sidewalks have been condemned and sidewalks of concrete in accordance with the ordinance of the city of Macon have been ordered laid, including any grading and curbing, if necessary, and realizing the fact that our sidewalks are considerably out of repair, and that the ordinance and resolution of the city are in every respect according to law, and that we, the undersigned, are the parties to be benefited in part, by the construction of said walks, do hereby waive the notice of the resolution to be published as an ordinance is required to be published for twenty-one days; and we further waive the notice of twenty days, which shall be given after said notice, and the five days' notice, after the twenty days' notice shall have been given, and all other notices as required by law, and agree for said sidewalks to be laid in front of our property, including any grading and curbing, if necessary, and that the construction of same shall be a lien upon our respective property, as provided in section 3411 and 3412 of the Code of Mississippi of 1906. And agree that same shall be a lien upon our said property, to be collected as provided by said sections of said Code and the laws of said city, which lien shall be paramount to all other liens except that of state and county taxes. In other words your petitioners waive every essential to the end that said sidewalks shall be laid at once in front of their respective property, and the parties charged with the respective cost of laying each respective walk, to be a lien against their respective property as provided by said sections of said Code and the laws of said city. And petitioners pray that the mayor and board of aldermen will at once contract to have said sidewalks laid of concrete, one foot from the property line and five feet in width, doing such grading as the city may deem necessary in front of their respective property on Eighth street, the respective amounts to be a lien on their respective property to be paid as provided by the city ordinance or as the city may require. Hereby agreeing to pay for same in such amount and at such time as the city may fix, the city of Macon holding a lien as provided by law, until such payments shall have been fully paid; and if any payments are deferred we agree to pay six per cent. thereon, accrued interest payable annually.

Mrs. S. M. Oliver.
"L. Oliver."

Thereafter the city constructed the curbing and sidewalk and presented a bill to the appellants for the cost thereof. Appellants thereupon claimed that their property had been damaged by the construction of the curbing and sidewalk and the lowering of the grade, and that they had been put to a large expense in constructing an approach to their property and rebuilding a wall which had fallen on account of the excavation made by the city in lowering the grade for the construction of the sidewalk. The city thereafter filed a bill in chancery, seeking to hold the appellants for the cost of the construction of the sidewalk, and appellants answered, making their answer a cross-bill, and

prayed for a decree against the city for damage to their property. From a decree in favor of the complainants and against appellants this appeal is prosecuted.

A. T. Dent, of Macon, and H. H. Brooks, Jr., of Meridian, for appellants. Geo. Richardson, of Macon, and Green & Green, of Jackson, for appellee.

HOLDEN, J. This case does not come within the rule announced in the case of Robinson v. Vicksburg, 99 Miss. 439, 54 South. 858, as there is a marked difference in the facts, but this case is controlled by the decision in City of Meridian v. H. P. Hudson, No. 17750, 71 South. 574, handed down by Justice Sykes of this court on April 24, 1916.

Affirmed.

GRAND LODGE COLORED K. P. v. YELVINGTON et al. (No. 17725.)

(Supreme Court of Mississippi, Division B. April 17, 1916. Suggestion of Error Overruled May 15, 1916.)

EQUITY \Leftrightarrow 419—DISCRETION OF COURT—VACATION OF DECREE PRO CONFESSO.

Though the defendant did not file a motion asking an extension of time in which to plead, under Code 1906, § 601, providing that the court may allow additional time to plead until one day after the return day, which motion was overruled, and a pro confesso and final decree entered, the court's action in overruling a motion to set aside the decree, accompanied by a sworn answer setting out a complete defense, amounted to an abuse of discretion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. \Leftrightarrow 419.]

Appeal from Chancery Court, Attala County; J. F. McCool, Chancellor.

Action by James Yelvington and others against the Grand Lodge Colored Knights of Pythias. Decree for plaintiffs, and defendant appeals. Reversed and remanded.

W. J. Latham, of Jackson, for appellant. Crawley & Glass, of Kosciusko, and Jas. R. McDowell, of Jackson, for appellees.

COOK, P. J. This case was begun in the chancery court by appellees to recover upon an endowment policy it is alleged was issued by appellant upon the life of one Judge Yelvington, payable to his estate. Process was issued and served on appellant on the 23d day of January, the return day being February 2d. On the 3d day of February the defendant filed a motion asking for 60 days in which to plead, which motion was overruled, and a decree pro confesso and final decree entered at once. Whereupon defendant filed a motion to set aside the pro confesso and final decree, tendering a sworn answer to the bill, which answer set out a complete defense. This motion was promptly overruled, and defendant appeals to this court.

We think the chancellor erred. The de-

defendant should have been afforded an opportunity to try its case on the merits. The substantial rights of litigants should not be denied upon a narrow construction of the statutes governing the time for filing of pleadings. But for the fact that defendant did not file his motion for time to plead on the first day of the term, it would seem that section 601, Code 1906, would have entitled him, for the asking, to a reasonable time, during the term, to plead. However that may be, we believe the refusal of the trial court to set aside the decrees and permit defendant to file his answer amounted to an abuse of discretion.

Reversed and remanded.

STANDARD DRUG CO. v. PIERCE. (No. 18017.)

(Supreme Court of Mississippi, Division A.
May 8, 1916.)

1. TAXATION — 421(1)—TAX TITLES—ASSESSMENT DESCRIPTION.

An assessment roll giving the owner's name and designating the property by block, lot, and subdivision, with the name of the city at the top of the column headed "Lots," sufficiently described the property, though there were two subdivisions of the name given, where only one of them had a lot and block corresponding to the one so assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720, 733, 735; Dec. Dig. — 421(1).]

2. TAXATION — 775 — TAX DEED — DESCRIPTION.

A tax deed describing land as "south $\frac{1}{2}$ of north $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2," Forrest county, Miss., held sufficient to make competent the assessment roll and parol testimony identifying the land as being in a certain city.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1543; Dec. Dig. — 775.]

3. TAXATION — 764(2)—TAX DEED—DESCRIPTION.

A description of land in tax deed as "south $\frac{1}{2}$ of north $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2," Forrest county, Miss., together with the showing on the assessment roll and parol testimony identifying the description, held sufficient to identify the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1520, 1521; Dec. Dig. — 764(2).]

4. TAXATION — 761—TAX DEED—DATE.

Under Code 1906, § 4328, amended by Laws 1908, c. 199, permitting the continuation of tax sales from day to day, but not providing for a record of such continuance, and Code 1906, § 4332, providing form for tax collector's deed, and not requiring the fact of continuance to be recited in such a deed to land sold on a day subsequent to the first day of sale, a deed dated the day after the day fixed for law for the sale of delinquent tax lands is not for that reason invalid, but proof of continuance may be given by parol.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. — 761.]

Appeal from Chancery Court, Forrest County; J. M. Stevens, Chancellor.

Suit by the Standard Drug Company

against W. S. Pierce. From a judgment for defendant, plaintiff appealed. Affirmed.

Sullivan, Conner & Sullivan, of Hattiesburg, for appellant. N. C. & C. E. Hill, of Hattiesburg, for appellee.

SMITH, C. J. Appellant filed its bill in the court below to cancel a tax deed held by appellee to the land here in question as a cloud upon its title thereto. This land was described in the tax deed as "S. $\frac{1}{2}$ of N. $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2," Forrest county, Miss. The form in which it was assessed on the roll under which it was sold for taxes was as follows:

Owner's Name.	City of Hattiesburg Lots.	Blocks.	Surveys.
Polly & E. G. Dean	S ² N ² 5	113	Kamper & Whinnery No. 2

Over the objection of appellant parol testimony was introduced explaining that the description of the land in the deed and on the assessment roll covered the land in controversy; the only portion of this testimony that we deem of any material value being that there was no Kamper & Whinnery subdivision or survey No. 2 in any city, town, or village in Forrest county except in the city of Hattiesburg. Two Kamper & Whinnery subdivisions No. 2 are recorded in the plat books of the city of Hattiesburg, in one of which there appears a lot No. 5, block 113, but in the other no such lot or block appears.

The day fixed by law for the sale of delinquent tax lands is the first Monday of April. The first Monday of April, 1911, was the 3d day of that month; and the deed recited that the sale of land here in question took place on the 4th day of April, 1911. Section 4328, Code 1906, provides that sales of land for taxes "shall be continued from day to day within the hours for sheriff's sales until completed."

The contention of appellant is that the tax deed under which appellee claims title is void:

First, "because there is no valid and definite description of the land attempted to be conveyed on the assessment roll of the county for the year 1909, that being the year for which taxes were assessed in Forrest county, the year in which the taxes were delinquent;" second, "because the description of the land in the tax deed is void for uncertainty in this: The land is described as the south $\frac{1}{2}$ of north $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2, and the tax deed does not show on its face that the land so attempted to be described is located in the city of Hattiesburg, or in any other town in Forrest county and state of Mississippi where land is described by lots, blocks, and surveys; also because that part of the description as 'Kamper and Whinnery No. 2' is incomplete and insufficient in itself, and does not refer to any map, plat, or survey in any city, town, or village in said county and state;" and, third, "because

the tax deed shows on its face that the land described therein was not sold on the first Monday of April, 1911, which was the 3d day of April, 1911, but that said land was sold on the 4th day of April, 1911, which was, as a matter of fact, Tuesday."

[1-3] We think the description of the land contained on the assessment roll was sufficient without the aid of parol testimony, and that the description of the land in the tax deed was sufficient to make competent evidence aliunde the deed, which here consists of the assessment roll and the parol testimony heretofore referred to, and that by such evidence it was made certain that the land here in question was the land intended to be conveyed. *Reed v. Heard*, 97 Miss. 743, 53 South, 400.

[4] Section 4328, Code 1906, amended and brought forward into Laws 1908 as chapter 199 thereof, permits the continuing of tax sales from day to day, but does not provide for the making of a record of such continuance; and section 4332 of the Code, which provides the form for a tax collector's deed, does not require that the fact that a tax sale was continued from day to day be recited in the deed to lands sold on a day subsequent to the day on which the sale must begin. The failure to recite this fact in a deed therefore does not avoid it; and the only way such fact can be proven, in event proof thereof becomes necessary, is by parol testimony; so that no error was committed in permitting its introduction here.

Affirmed.

TYNES v. KERR. (No. 17748.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between A. M. Tynes and John Kerr. From the judgment, Tynes appeals. Affirmed.

F. V. Brahan, of Meridian, for appellant. Cochran & McCants, of Meridian, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. JOHNSON. (No. 17830.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Roberta Johnson. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Brewer, Brewer & Brewer, of Clarksdale, for appellee.

PER CURIAM. Affirmed.

MILLER v. ILLINOIS CENT. R. CO. (No. 17951.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action between Henry Miller and the Illinois Central Railroad Company. From the judgment, Miller appeals. Affirmed.

W. J. Lamb, of Corinth, for appellant. Boone & Worsham, of Corinth, and Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

SOUTHERN RY. CO. IN MISSISSIPPI v. NEAL et al. (No. 17940.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

Action between the Southern Railway Company in Mississippi and Jim Neal and others. From the judgment, the Railway Company appeals. Affirmed.

Catchings & Catchings, of Vicksburg, for appellant. Kimbrough & Kimbrough and Lomax & Tyson, all of Greenwood, for appellees.

PER CURIAM. Affirmed.

COLLINS v. STATE. (No. 18991.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Thelma Collins was convicted of unlawfully selling liquor, and appeals. Affirmed.

Halsell & Welch, of Laurel, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. GRAY. (No. 18315.)

(Supreme Court of Mississippi. April 26, 1916.)

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Jr., Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and John Gray. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HEMMER v. SMITH. (No. 18958.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action between H. Hemmer and H. L. Smith. From the judgment, Hemmer appeals. Affirmed.

Currie & Smith, of Hattiesburg, for appellant. Currie & Currie, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

STATE v. ALEXANDER. (No. 18632.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Attala County; H. H. Rogers, Judge.

J. N. Alexander was indicted for crime, and from a judgment sustaining demurrer to the indictment, the State appeals. Affirmed.

Lamar F. Easterling, Asst. Atty. Gen., and J. A. Teat, of Jackson, for the State. T. P. Guyton and J. A. Niles, both of Kosciusko, for appellee.

PER CURIAM. Affirmed.

ALEXANDER LUMBER CO. v. BANK OF ANGUILLA. (No. 17827.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Chancery Court, Sharkey County; E. N. Thomas, Chancellor.

Action between the Alexander Lumber Company and the Bank of Anguilla. From the judgment, the Lumber Company appeals. Affirmed.

Campbell & Cashin, of Greenville, for appellant. W. H. Clements, of Rolling Fork, and Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

ROYAL INDEMNITY CO. v. WAINWRIGHT. (No. 17299.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between the Royal Indemnity Company and M. E. Wainwright. From the judgment, the Indemnity Company appeals. Affirmed.

Flowers, Brown & Davis, of Jackson, for appellant. O. B. Taylor, of Jackson, for appellee.

PER CURIAM. Affirmed.

GREEN BAY LUMBER CO. v. MANGUM. (No. 17832.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Rankin County; A. J. McLaurin, Judge.

Action between the Green Bay Lumber Company and Wiley P. Mangum. From the judgment, the Lumber Company appeals. Affirmed.

Wells, May & Sanders, of Jackson, for appellant. J. P. Edwards, of Mendenhall, and J. C. Jones, of Braxton, for appellee.

PER CURIAM. Affirmed.

TYNES et al. v. O'SHIELDS et al. (No. 17932.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, Prentiss County; T. L. Lamb, Chancellor.

Action between Mrs. Minerva Tynes and another and E. L. O'Shields, executor of the estate of Paul Faille, and others. From the judgment, Mrs. Tynes and another appeal. Affirmed.

W. D. & J. R. Anderson, of Tupelo, for appellants. Cox & Cox, of Baldwin, and J. Q. Robins, of Tupelo, for appellees.

PER CURIAM. Affirmed.

HOUSTON BROS. et al. v. CLIFFORD. (No. 17814.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between Houston Bros. and another and C. J. Clifford. From the judgment, Houston Bros. and another appeal. Affirmed.

Wells, May & Sanders, of Jackson, and Dabney & Dabney, of Vicksburg, for appellants. A. M. Bonelli, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

HAND v. HATHORN. (No. 17600.)

(Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, Lamar County; R. E. Sheehy, Chancellor.

Action between James Hand and F. O. Hathorn. From the judgment, Hand appeals. Affirmed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. A. A. Hearst, of Sumner, and T. E. Salter, of Purvis, for appellee.

PER CURIAM. Affirmed.

FULMER v. WILLIAMS et al. (No. 17930.) (Supreme Court of Mississippi. April 24, 1916.)

Appeal from Chancery Court, De Soto County; J. G. McGowen, Chancellor.

Action between J. D. Fulmer, trustee, and Mrs. Mattie C. Williams and others. From the judgment, the trustee appeals. Affirmed.

St. John Waddell, of Memphis, Tenn., for appellant. J. J. Williams, Jr., of Memphis, Tenn., for appellee.

PER CURIAM. Affirmed.

HARRIS v. RAGSDALE. (No. 18216.) (Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Copiah County; P. Z. Jones, Chancellor.

Action between R. B. Harris, Executor, and G. I. Ragdsdale. From the judgment, the executor appeals. Dismissed.

PER CURIAM. Appeal dismissed.

ILLINOIS CENT. R. CO. v. HICKS. (No. 18561.)

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Action between the Illinois Central Railroad Company and Herbert Hicks. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

YAZOO & M. V. R. CO. v. KEY. (No. 17817.) (Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and H. H. Key. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

LAMB v. JOHNSON et al. (No. 17950.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Alcorn County;
Claude Clayton, Judge.
Action between W. J. Lamb and Ben Johnson
and others. From the judgment, Lamb appeals.
Affirmed.

W. J. Lamb, of Corinth, in pro. per. Thos. H.
Johnston, of Corinth, for appellees.

PER CURIAM. Affirmed.

SMITH v. JAMISON et al. (No. 18007.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Chancery Court, Jefferson County;
R. W. Cutrer, Chancellor.
Action between Virginia L. Smith and John
Jamison and others. From the judgment, Virginia
L. Smith appeals. Affirmed.

Anderson, Voller & Kelly, of Vicksburg, for
appellant. Torrey & Logan, of Fayette, for
appellees.

PER CURIAM. Affirmed.

**JACKSON et al. v. PEOPLE'S STATE
BANK OF RULEVILLE.** (No. 17760.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Chancery Court, Sunflower County;
E. N. Thomas, Chancellor.

Action between Lillie V. Jackson and others
and the People's State Bank of Ruleville. From
the judgment, Lillie V. Jackson and others appeal.
Affirmed.

Jas. R. McDowell, of Jackson, and F. E.
Everett, of Indianola, for appellants. Herring
& Wiley, of Ruleville, and J. L. Williams, of
Indianola, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. BEHR.
(No. 18506.)
(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Quitman County;
W. A. Alcorn, Jr., Judge.

Action between the Yazoo & Mississippi Valley
Railroad Company and Minnie Behr. From the
judgment, the Railroad Company appeals.
Dismissed.

PER CURIAM. Appeal dismissed.

**MILLSAPS v. BURROUGHS ADDING
MACH. CO.** (No. 18189.)
(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Copiah County;
D. M. Miller, Judge.

Action between Webster Millsaps and the
Burroughs Adding Machine Company. From the
judgment, Millsaps appeals. Dismissed.

PER CURIAM. Appeal dismissed.

CHAMBLISS v. STATE. (No. 18934.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Montgomery
County; H. H. Rogers, Judge.

Jim Chambliss was convicted of unlawfully
selling liquor, and appeals. Affirmed.

Knox & Wilburn, of Winona, for appellant.
Lamar F. Easterling, Asst. Atty. Gen., for the
State.

PER CURIAM. Affirmed.

RIVERS v. STATE. (No. 18992.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Jones County;
Paul B. Johnson, Judge.

Pearl Rivers was convicted of unlawfully selling
liquor, and appeals. Affirmed.

Sharborough & Bullard, of Laurel, for appellant.
Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

ALABAMA & V. RY. CO. v. WILLING.
(No. 17993.)
(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Hinds County;
W. A. Henry, Judge.

Action between the Alabama & Vicksburg
Railway Company and Mrs. R. P. Willing.
From the judgment, the Railway Company appeals.
Affirmed.

R. H. & J. H. Thompson and Fulton Thompson,
all of Jackson, for appellant. Alexander
& Alexander, of Jackson, for appellee.

PER CURIAM. Affirmed.

DAVIS v. PHILLIPS. (No. 18176.)
(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lafayette County;
H. K. Mahon, Judge.

Action between John Davis and O. L. Phillips.
From the judgment, Davis appeals. Dismissed.

PER CURIAM. Appeal dismissed.

BALKIN v. SOUTHERN RY. CO. IN MISSISSIPPI.
(No. 18173.)
(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Leflore County;
F. E. Everett, Judge.

Action between Sam Balkin and the Southern
Railway Company in Mississippi. From the
judgment, Balkin appeals. Dismissed.

PER CURIAM. Appeal dismissed.

Ex parte BROWN. (No. 18058.)

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Winston County; H. H. Rodgers, Judge.

Ex parte T. C. Brown. From a judgment, an appeal is taken. Dismissed.

PER CURIAM. Appeal dismissed.

**O. J. & BRUCE KNOX v. CREED.
(No. 17895.)**

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Clay County; T. B. Carroll, Judge.

Action between O. J. & Bruce Knox and I. C. Creed. From the judgment, O. J. & Bruce Knox appeal. Dismissed.

PER CURIAM. Appeal dismissed.

**YAZOO & M. V. R. CO. v. McCURDY.
(No. 18510.)**

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Annie McCurdy. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

**YAZOO & M. V. R. CO. v. MARKS.
(No. 18398.)**

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Lena Marks. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

**YAZOO & M. V. R. CO. v. ERICKSON.
(No. 17795.)**

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Warren County; T. G. Birchett, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Gus Erickson. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders and Mayes & Mayes, all of Jackson, for appellant. Anderson, Voller & Kelly, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

**WATKINS v. STATE OF MISSISSIPPI.
(No. 18628.)**

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Montgomery County; H. H. Rogers, Judge.

Richmond Watkins was convicted of unlawfully selling liquor, and appeals. Affirmed.

Knox & Wilburn, of Winona, for appellant. Ross A. Collins, Atty. Gen., and E. N. Floyd, of Meridian, for the State.

PER CURIAM. Affirmed.

McINNIS v. PIERCE et al. (No. 18336.)

(Supreme Court of Mississippi. April 25, 1916.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action between John W. McInnis and S. L. Pierce and others. From the judgment, McInnis appeals. Dismissed.

PER CURIAM. Appeal dismissed.

**YAZOO & M. V. R. CO. v. GRAY.
(No. 18313.)**

(Supreme Court of Mississippi. April 25, 1916.)

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Emma Gray. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

SOUTHERN RY. CO. v. McCORD & WALTHALL. (No. 17955.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action between the Southern Railway Company and McCord & Walthall. From the judgment, the Railway Company appeals. Affirmed.

W. J. Lamb, of Corinth, for appellant. T. H. Johnston, of Corinth, for appellee.

PER CURIAM. Affirmed.

(139 La.)

No. 20255.

RIZAN v. RIZAN et al.(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied April 24, 1916.)*(Syllabus by the Court.)***1. INTEREST §67—VERBAL CONTRACTS—QUANTUM OF EVIDENCE.**

The uncorroborated testimony of the maker of a note promising to pay a fixed sum with interest, upon which the past-due interest exceeds \$500, is insufficient to establish, as against his coheirs of the deceased holder, a verbal agreement with such holder that no interest would be charged.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 155, 156; Dec. Dig. §67.]

2. DESCENT AND DISTRIBUTION §100—SUCCESSION—COLLATION.

A debt, due by way of interest, but alleged to have been remitted, is subject to collation as is any other debt.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. §109.]

8. EVIDENCE \Leftrightarrow 230(5)—STATEMENTS OF VENDOR.

The statements of the deceased vendor, though made out of the presence of the vendee, in regard to a sale, attacked as fraudulent, simulated, or a disguised donation, are admissible in evidence to show such vendor's attitude of mind towards the transaction, though not, of itself, sufficient to prove fraud or illegality in the vendee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 848; Dec. Dig. \Leftrightarrow 230(5).]

Appeal from Twentieth Judicial District Court, Parish of Lafourche; W. P. Martin, Judge.

Action by Mrs. Marie Rizan, wife of Albert J. Le Blanc, against Pierre N. Rizan and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Caillonet, Caillonet & Howell, of Thibodaux, for appellant. J. A. O. Colignet, of Thibodaux, for appellee Pierre N. Rizan. Beattie & Beattie, of Thibodaux, for appellee René Rizan.

Statement of the Case.

MONROE, C. J. Plaintiff brings this suit against her two brothers and coheirs, Pierre and René Rizan, praying that two, "so-called" sales of real estate, the one of date March 20, 1911, from Pierre to their mother, and the other, of date August 2, 1911, from their mother to René, be decreed—

"fraudulent simulations, in the interest and to the advantage of the said Pierre Rizan and René Rizan, and part and parcel of a scheme of the two to acquire the property in question free and unincumbered, as herein alleged; and that Pierre Rizan collate and pay into the succession of his mother * * * the balance, due on the purchase price of the property acquired by him from his mother on August 20, 1884, represented by his notes of \$1,666.66% each, dated the same day, bearing interest at the rate of 8 per cent. per annum from date until full and final payment, and due March 1, 1886, and 1887, respectively, for partition among the heirs; or, if the court should hold the so-called sale from Pierre N. Rizan to his mother * * * on March 20, 1911, to be real and for a sufficient consideration, then, the so-called sale from Mrs. * * * Rizan to René Rizan, of date August 2, 1911, is a mere sham and fraudulent simulation, devised to conceal a disguised donation, and that the same be collated and returned to the succession by the said René Rizan, for partition among the heirs; or, if the court should find that there was a consideration given and paid for the property, then, that the sum was inadequate and below the actual value of the property at the time, and that there was an undue advantage given by Mrs. Rizan to the said René Rizan over her other children, and ordering said advantage to be collated by the said René Rizan and returned to his mother's succession for partition among the heirs, according to law."

The two defendants affirmed the good faith and validity of the transactions which are attacked, and the trial court gave judgment in their favor. Plaintiff prosecutes the appeal.

It appears from the evidence that the father of the litigants died in 1881, and we infer that his succession was settled, and

that the heirs received their respective portions. Pierre Rizan, at the time of his father's death, was 16 years old, and René 11, and they, with their sister (plaintiff herein), continued to live with their mother, who appears to have owned the home in which they lived, and in which, also, a business of some kind was conducted in the name of Rizan & Rossie, of which firm Mrs. Rizan was the senior member. The property was situated in the village of Longueville, on the left bank of Bayou Lafourche, and the lot measured, say, 54 feet front on the bayou by an average depth of, say, 224 feet. Mrs. Rizan also owned a lot in Lockport, on the right bank of the bayou, the dimensions of which are not given. According to his testimony, Pierre Rizan was employed, in January, 1882, by Rizan & Rossie, as clerk, at \$30 a month (he being then 17 years old), and, while in that employment, in October, 1883, he was married and took his wife to his mother's house, where he himself lived. In August, 1884, Mrs. Rizan executed an act of sale, purporting to convey to Pierre the two properties owned by her, for the price of \$6,031.66%, of which \$1,031.66% are said to have been paid in cash, and the balance of \$5,000 by three notes, of \$1,666.66% each, of even date with the act, bearing interest at 8 per cent. from date and made payable March 1, 1885, 1886, and 1887, respectively. He says that in January, 1885, the stock in trade, open accounts, and business of Rizan & Rossie were turned over to him in consideration of his assuming the debts of the concern, amounting to about \$1,700; that the stock in trade was worth about \$1,000, and that he collected \$1,200 or \$1,300 of the open accounts, and paid the debts in March, following his acquisition of the business; that he conducted the business for his own account for 4 or 5 months, and then took Le Blanc into partnership with him; and that, at the expiration of some 18 or 24 months, the firm failed and paid nothing to its creditors; that he "loafed" for 2 months and then opened a barroom, in the same place in which he had been conducting his business, and carried it on for 10 or 11 years, in the name of his wife; that he then gave up the barroom and was employed by his brother, René (who appears to have opened a store in place of the barroom), as a clerk, and so remained until April, 1912, after which he again "loafed" for 5 months, when, having been advised that the judgments which had been obtained against him had become prescribed, he again went into business for himself.

He testifies that when, in August, 1884, he bought the properties from his mother, he made the cash payment of \$1,031.66% from money which he had received from the succession of his father; that he made a further cash payment in January, 1885, from

proceeds of the sale of the lot in Lockport, which he had acquired from his mother and which he sold, during that month, for \$3,090, and that he paid \$2,000 more in 1886, thus reducing his original indebtedness for the price of the property to \$2,000, which was represented by one of the notes for \$1,666.66% and a balance of \$333.33½ due upon the remaining note. He also testifies that his mother "had agreed not to charge him any interest on the notes, and she was to remain in the building;" that he charged her nothing for her board while she stayed with him; that she took into the house an orphan girl (for whom he made no charge), though at what time does not appear, and he admits that the girl was married and left the house in 1888, and that while in the house she did some of the housework. He also testifies that his mother had his brother René in the house, and that he attended school; and he refers to the presence of his sister, but admits that she was married, and left the house in 1884. He nowhere definitely states that it was agreed between his mother and himself that she should remit the interest on his notes as a consideration for her board and lodging or that of his brother and of the orphan girl. On the other hand, the impression which the evidence, taken as a whole, leaves upon the mind, is that defendant's mother continued to be a very active and efficient member, if not the mistress, of the household, after defendant's marriage, as she had been before. We infer, for instance, that prior to his marriage she had done the cooking for the family, and perhaps the housework as well. Defendant was probably between 18 and 19 years of age when he brought his wife to the house, and he testifies that she thereafter did the cooking, and that the orphan girl, after her arrival, did some of the housework; but he also testifies that his wife gave birth to children, and it is fair to presume that some of them were born between the date of his marriage, in October, 1883, and that of his departure from the house, in 1890, and that their mother did no cooking, or other work, during her confinements. Moreover, though defendant's examination in regard to his mother's activities during that period seems to have been somewhat overlooked, the evidence is abundant to the effect that, during all the subsequent years of her life, from 1890 until within 6 weeks of her death, in October, 1911, she was always a busy woman, assisting in the care of the house, and, particularly, of her grandchildren, and looking after the raising of chickens, etc. Referring to those years when René Rizan was "in charge" of the house, Mrs. Le Blanc (speaking of her mother) says:

"It was she who attended to the children. She assisted in attending to the children, and it was she who did the greater part of the kitchen work. * * * She cooked and would put things to rights afterwards. Q. Did she do this occasionally or habitually? A. Generally."

And there are other (disinterested) witnesses who corroborate Mrs. Le Blanc, to the effect that her mother (during her stay with René) assisted with the children, and who also testify that she attended to the chickens and did a little of everything about the house, including the cooking (not meaning, however, that she did all of the cooking). Pierre Rizan himself testifies as follows on that subject (quoting in part):

"Q. What did she do while René Rizan was living with her, before she was taken sick? A. What did she do? Q. Did she perform any of the household duties? A. She stayed there with my brother. * * * Q. Did she do any sort of work about the house? A. Oh, I guess she did. Q. Don't you know, Mr. Rizan, that she did the cooking for that family? A. No, sir; she didn't do all the cooking. Q. Didn't she assist in doing the cooking? A. She helped his wife. * * * Q. She helped to do what? A. Well, she helped, she gave help to raise the children, and everything."

Having testified that the business and assets of Rizan & Rossie were turned over to him in January, 1885, in consideration of his assumption of the debts of that concern, that the stock on hand was worth \$1,000, that he collected \$1,200 or \$1,300, and was unable to say how much more, from the open accounts, and that the debts amounted to about \$1,700, and were paid by him within 3 months, he further, and in another connection, says that Rizan & Rossie failed in 1884. "They lost everything they had. I call it bankruptcy. I don't know what it is. * * * She [his mother] was sued and judgments obtained against her and Rossie." And he says that, thereafter, his mother has had no business, and hence that he was not her agent, which is his explanation of a professed total ignorance of the disposition made by her of the \$4,000 in cash, which he says he paid her within a period of 2 or 3 years, though he knew of no safe place in the house where she could have kept it, no one ever heard of her spending any money after he left the house, in 1890, and she left absolutely nothing, so far as known, at her death.

René Rizan was married in 1890 (at the age of 20 years), and he, too, brought his wife to the common dwelling, whereupon Pierre, with his family, moved elsewhere, and the theory of the defense is that René, who up to that time we are to suppose was maintained at the expense of his mother and brother, at once took charge of the house, and thereafter maintained his mother, until her death in October, 1911, and his own family, increased by 13 children, of whom 10 were living at the time of the trial. We hear nothing of any charge by Pierre against René for the latter's occupancy of the premises, but both of the sons charge their mother for her occupancy from 1890 to 1911, in addition to the charge which Pierre makes for the period from 1884 to 1890.

On March 20, 1911, Pierre executed an act reconveying to his mother, for the recited consideration of \$2,000 cash, that portion of

the premises (constituting, approximately, one-half of the lot) upon which is situated the house wherein she with René and his family lived, reserving the other half for himself. He testifies that the real consideration was the surrender and cancellation of his two notes, to which we have referred, representing, in principal, \$2,000, and, with interest, the additional sum of, say, \$4,253.33. On August 2d, following, Mrs. Rizan executed an act purporting to convey the property so acquired to René, for the recited consideration of \$1,000 cash, after which, on October 16, 1911, she died, leaving nothing of value, so far as known.

René testifies that he was not aware of the conveyance from Pierre to his mother; that he did not ask his mother to convey the property to him; that she made the offer; that the bargain was made in a single conversation; that he was unable to remember in what part of the house or at what time of day it had taken place, or whether 1, 2, or 3 weeks, a month, 6 months, a year, or 2 years before the conveyance to him. He was then asked whether it was 3 years, and he replied: "Oh, no; now you are going too far;" and he finally stated that it might have been a couple of weeks, he could not say.

The \$1,000 was counted, at his particular request, by the two witnesses to the act, and one of them testifies that it was handed to the notary, and that the notary handed it to Mrs. Rizan, which was all that he knew of the matter. It appears that 2 weeks after the act had been executed, Mrs. Rizan paid her daughter a visit, and plaintiff's counsel offered her as a witness to testify that Mrs. Rizan then told her daughter "that the money, if any had been paid on the occasion of the sale, was, as soon as counted out, taken back by the said René Rizan, immediately after the officers of the sale and the witnesses had left the room, and that she (Mrs. Rizan) had received no part of the money," which testimony, upon objection by defendants' counsel, was excluded by the court. Mrs. Rizan, shortly afterwards, was taken sick, and died after an illness of 6 weeks. René Rizan testifies that she left no money that he knew of, and the \$1,000 which is said to have been paid to her remains unaccounted for.

His testimony reads, in part, as follows:

"Q. Your mother never had a cent during the whole time she was with you? A. I paid everything she wanted. Q. She never bought anything? A. I could not say as to that. * * * Q. You supplied her with everything that she needed? A. Everything, sir; her clothes, paid her medicines, and everything. * * * Q. Your mother died, when? A. In October. * * * Q. She didn't have a nickel? A. I don't know. * * * Q. She died at your house? A. Yes, sir. Q. You paid her funeral expenses? A. Yes, sir. Q. So there was not a cent to bury her? A. I don't know; I didn't see it. Q. Now, Mr. Rizan, if your mother had had money, would you not, necessarily, have found it after her death? A. I have not found it; she went to my sister's 2 weeks after the

sale was done. Q. How long did she remain at your sister's? A. Fifteen days. * * * Q. The bargain was that you were to give her \$1,000? A. Yes, sir. Q. That was the whole bargain? A. And some other consideration. Q. What was the other consideration? A. I just told you—by keeping her at home and giving her everything that she needed. Q. What was that consideration valued at? A. Well, I had the doctor's bill; I paid at least \$700 or \$800, because she stayed sick for 3 or 4 years, off and on. * * * Q. You had no bargain or arrangement with her in regard to the compensation that she was to make you for the services rendered to her? A. No, sir.

It is admitted that Mrs. Rizan was never sick in bed prior to the occasion of her last illness, and no witness was called to corroborate the testimony of the defendant as to medical bills, or any other bills, paid for her account.

Opinion.

[1] Construing the testimony of Pierre Rizan to mean that there was an agreement to the effect that, in consideration of her board and lodging, Mrs. Rizan was to remit the interest on the notes, the most that could be said would be that the interest was remitted up to 1890, when Pierre left the house and René took charge of it; but, as against his indebtedness for interest, evidenced by written instruments, Pierre is charging his mother for board and lodging from 1884 until March 20, 1911; and, as part of the price of the property conveyed to him in 1911, René is charging his mother for board and lodging from 1890 until her death on October 16, 1911; so that there is a double charge, for the same thing, for the period between 1890 and 1911.

[2] Pierre Rizan's testimony, however, though sufficient to show that he made no charge against his mother for board and lodging, is insufficient, in view of his written promise, of the fact that his mother is no longer living, of the testimony itself, and of the surrounding circumstances, to prove the agreement that she was to charge him no interest on the notes. She had just turned over the business of Rizan & Rossie to him, and, by the sale of her property, she had put him in a position to realize \$3,000 (of which over \$1,000 was cash) in January, 1885, by the sale of the lot in Lockport, from which latter circumstance it is evident that if she retained a mortgage and vendor's privilege to secure the credit portion of the price of the property, when she sold it to Pierre, she must have abandoned that security and have given him a free hand to dispose of the property and pay her as, and when, he pleased; and, as he had been but recently married and was thus enabled to make a start in business, and the person who assisted him was his mother, who had turned over to him the last bit of property that she had in the world, including the home in which she lived, he might very well have agreed, as he did, to make no charge for allowing her to remain where she was, or for provid-

ing her with food while she so remained. Moreover, the condition in life of the parties, the character and habits of Mrs. Rizan, and all of the surrounding circumstances considered, we are satisfied that Mrs. Rizan's services in and to the family were worth more than her board and lodging. On the other hand, if there was any agreement, when the act of conveyance was signed, that Pierre was to pay no interest on the notes, it meant that she was, in effect, to pay \$400 a year (being 8 per cent. interest on \$5,000 that she was to lose) for her board and lodging, which would have been an utterly unreasonable amount to have exacted. As matters stood, in 1911, when Pierre reconveyed part of the property to her, she held his notes, aggregating \$2,000, upon which the past-due interest amounted to \$4,253.33, and we have only his uncorroborated testimony to the effect that his written obligation to pay that interest had been canceled by a verbal agreement with the holder of the notes who is no longer living to give her version of the matter. The testimony, we think, all the circumstances considered, is insufficient. C. O. 2277; State ex rel. Carl v. Judge, 37 La. Ann. 380; Lazarus v. Friedrichs, 117 La. 714, 42 South. 230. And the amount due for the interest should be collated to the extent necessary to satisfy the demands of plaintiff.

[3] The testimony of plaintiff, to the effect that her mother told her that the \$1,000, which was handed to her upon the occasion of the conveyance to René Rizan, had been immediately returned to him, was admissible, at least for the purpose of showing the attitude towards the transaction of Mrs. Rizan. *Guidry v. Grivot*, 2 Mart. (N. S.) 13, 14 Am. Dec. 193; *Martin v. Reeves et al.*, 3 Mart. (N. S.) 22, 15 Am. Dec. 154; *Groves v. Steel et al.*, 2 La. Ann. 480, 46 Am. Dec. 551; *Erwin v. Bank of Kentucky*, 5 La. Ann. 1; *Carrollton Bank v. Cleveland*, 15 La. Ann. 616; *Hoose & Victor v. Robbins*, 18 La. Ann. 648. Without that testimony, the transaction bears the earmarks of a disguised donation, but we prefer that the witness should be heard. It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment in favor of plaintiff and against the defendant Pierre N. Rizan in the sum of \$1,417.77, with legal interest thereon from judicial demand, being the one-third part of the collation due by him on account of unpaid interest on his notes, surrendered to him by the decedent, his mother, on March 20, 1911. It is further ordered that said defendant be allowed one year within which to pay said sum, upon his furnishing plaintiff with his obligation, payable at the expiration of that period, bearing interest at the rate of 8 per cent. per annum from date, and secured by special mortgage

on unincumbered immovable property in the parish of Lafourche.

It is further decreed that, as to the claim against the defendant René Rizan, the case be remanded, with instructions to the district court to hear the testimony of the plaintiff concerning statements said to have been made by the decedent, Mrs. Widow Pierre Rizan, in regard to, and after, the alleged sale by her to René Rizan, of August 2, 1911, and as to her receipt and return of the price, as also, such competent testimony as defendant may offer in rebuttal thereof.

It is further decreed that defendants pay the cost of the appeal; that defendant Pierre N. Rizan pay one-half of the costs of the district court, and that the question of liability for the other half await the final judgment as between plaintiff and the other defendant.

(189 La.)

No. 20285.

WATSON v. FEIBEL.

(Supreme Court of Louisiana. March 20, 1918.
On Application for Rehearing, April
24, 1916.)

(Syllabus by Editorial Staff.)

1. CONTRACTS \Leftrightarrow 187(4)—PARTIES—ASSUMING DEBT TO THIRD PERSON—ASSENT.

Where a contract required the purchaser to assume the vendor's notes held by a third person, such third person was not a party to the contract in the absence of acceptance of the new obligation by him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 800; Dec. Dig. \Leftrightarrow 187(4).]

2. VENDOR AND PURCHASER \Leftrightarrow 104—SALES—RESCISSION BY VENDOR—ACTION—NECESSARY PARTIES.

Where the holder of the vendor's notes had never consented to assumption thereof by the purchaser, he was not a necessary party to the vendor's suit to rescind, nor did he become a necessary party on the purchaser's tender of performance after default; such holder's rights accruing under Civ. Code, art. 1890, only on his assenting to the assumption.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. \Leftrightarrow 104.]

3. VENDOR AND PURCHASER \Leftrightarrow 169—SALES—PERFORMANCE—TENDER AFTER DEFAULT.

Where the vendor demands that the purchaser perform, thus putting him in default, under Civ. Code, art. 1911, the purchaser may still make valid tender of performance, which the vendor must accept, unless time of performance is the essence of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 343; Dec. Dig. \Leftrightarrow 169.]

4. VENDOR AND PURCHASER \Leftrightarrow 169—SALES—PERFORMANCE—"PUTTING IN DEFAULT."

Under Civ. Code, art. 1911, stating how the debtor may be put in default, the act of putting in default is a simple demand for performance, but does not cut off the right to perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 343; Dec. Dig. \Leftrightarrow 169.

For other definitions, see Words and Phrases, Second Series, Put in Default.]

5. STATUTES ¶214 — CONSTRUCTION—ADOPTION FROM FOREIGN STATE.

The statute as to defaults having been taken from the civil law, in construing it, the construction of the civil law by courts and law-writers may be consulted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 290; Dec. Dig. ¶214.]

6. CONTRACTS ¶211 — TIME — ESSENCE OF CONTRACT.

Time of performance is of the essence of the contract when it is of such importance that the parties would not have contracted without it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938-943; Dec. Dig. ¶211.]

7. CONTRACTS ¶277(2)—PERFORMANCE—PUTTING IN DEFAULT—FUNCTION.

The function of the act of putting the debtor in default by demand that he perform is simply to warn him that damage for delay in performance will be demanded, and that time of performance is required to be strictly complied with.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1228-1232; Dec. Dig. ¶277(2).]

8. VENDOR AND PURCHASER ¶93—SALES—RESCISSON—SECONDARY REMEDY.

Enforcement of the resolatory condition of a credit sale contract is a secondary remedy to be enforced only when the primary one of enforcing payment fails.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. ¶93.]

9. CANCELLATION OF INSTRUMENTS ¶59 — PERFORMANCE—RESOLUTORY CONDITIONS—TIME—RELIEF TO DEFENDANT.

Where immediate performance of a contract pending suit is impossible, the court may, by direct provision of Civ. Code, art. 2047, allow a reasonable time for performance.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. ¶59.]

10. CONTRACTS ¶252—RESCISSON—RIGHT—IMPLIED CONDITIONS.

The resolatory condition must be expressly reserved, and is not implied.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1145; Dec. Dig. ¶252.]

11. VENDOR AND PURCHASER ¶93—SALES—RIGHT TO RESCIND.

The dissolution of the contract of sale never becomes the creditor's absolute right, since Civ. Code, art. 2047, gives the court power to allow a reasonable time for performance after suit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. ¶93.]

12. CONTRACTS ¶301—PERFORMANCE PENDING SUIT—RIGHT TO PERFORM.

Though the debtor has been put in default, he may perform pending suit, since until the contract is judicially dissolved, it is in existence, and not only permits, but calls, for performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1388-1397; Dec. Dig. ¶301.]

13. CANCELLATION OF INSTRUMENTS ¶1 — EFFECT OF BRINGING SUIT.

Bringing suit to dissolve a contract creates no new right nor removes any, but merely enforces those already existing.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 1-6; Dec. Dig. ¶1.]

14. VENDOR AND PURCHASER ¶185—SALES—DELAY IN PERFORMANCE—EFFECT.

Especially in sales of immovables delay in performance should not be allowed to be cut off by putting in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. ¶185.]

15. CONTRACTS ¶264 — RESCISSON — PRE-REQUISITES—PUTTING IN DEFAULT.

Civ. Code, art. 1912, making putting in default prerequisite to rescission of the contract, applies only to contracts whereof time is not of the essence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1184, 1185; Dec. Dig. ¶264.]

16. CONTRACTS ¶264 — RESCISSON — PRE-REQUISITES—PUTTING IN DEFAULT.

Putting in default, before rescission of the contract, as required by Civ. Code, art. 1912, is not necessary in suits for rescission for fraud or error or lesion beyond moiety, or for any cause of nullity.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1184, 1185; Dec. Dig. ¶264.]

17. COURTS ¶92 — DECISIONS — EFFECT IN OTHER CASES—OBITER DICTUM.

Where the court, in a case wherein the defendant had not been put in default, stated in its opinion, without inquiry as to its soundness, that tender after default was too late, such expression was obiter dictum and of no weight.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. ¶92.]

18. SALES ¶170—CONTRACTS—PERFORMANCE—DELIVERY—TIME.

A party under obligation to deliver goods at once cannot wait two years in spite of frequent demands and then seek to compel the other to receive them, but such party does not forfeit his right to deliver by waiting formal demand for delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 424; Dec. Dig. ¶170.]

19. VENDOR AND PURCHASER ¶6—SALES—CONTRACTS — VALIDITY — OWNERSHIP OF PROPERTY.

A contract to sell the property of another is null.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 4, 5; Dec. Dig. ¶6.]

20. COURTS ¶107 — OPINIONS — CONSTRUCTION—FACTS OF CASE.

Though the language of a decision applies generally to all contracts, it must be construed together with the facts of the case decided.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. ¶107.]

21. CONTRACTS ¶264 — DISSOLUTION — PUTTING IN DEFAULT.

Putting in default under a contract containing the express resolatory condition has no analogy to putting in default where such condition is only implied and takes place only after decree.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1184, 1185; Dec. Dig. ¶264.]

22. CONTRACTS ¶277(1) — PERFORMANCE — PUTTING IN DEFAULT—EFFECT.

The act of putting in default by demand for performance merely creates a legal situation of default, but does not otherwise affect the rights of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1217-1227; Dec. Dig. ¶277(1).]

**23. VENDOR AND PURCHASER §185—SALES—
TIME FOR PERFORMANCE—TENDER AFTER DE-
FAULT MADE.**

Since by Civ. Code, art. 2563, the purchaser, who stipulates that the sale shall be dissolved of right in case he does not pay the price within the term, may nevertheless make payment after the expiration of the term if judicial demand has not been made, the same right extends to the purchaser who has not made a definite resolutive condition.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. §185.]

**24. VENDOR AND PURCHASER §185—SALES—
TIME OF PERFORMANCE — ALLOWANCE OF
FURTHER TIME.**

That the purchaser has been dilatory in performance is no ground for refusing to allow him further time in which to perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. §185.]

**25. VENDOR AND PURCHASER §185—SALES—
TIME OF PERFORMANCE — ALLOWANCE OF
FURTHER TIME.**

The mere fact that a purchaser, having learned of possible cloud upon the title, sought to discover the purported holders of the title which made a cloud, is insufficient to show that he was seeking to undermine the title so as to prevent allowance of further time in which to perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. §185.]

**26. VENDOR AND PURCHASER §99, 186—SALES
—ACTIONS—DEFENSES—CLOUD ON TITLE.**

A cloud on title to land which one has agreed to buy, instead of being a reason for refusing a purchaser further time in which to perform, is a full justification for refusal to pay under Civ. Code, art. 2557, and a peremptory defense to action for rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 167-169, 341, 373; Dec. Dig. §99, 186.]

**27. VENDOR AND PURCHASER §92—SALES—
RESCISSION—EFFECT OF TENDER PENDING
SUIT.**

A sale will not be rescinded on the ground of noncompliance with its conditions when full performance is tendered in answer to the suit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. §92.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suit by Ivie M. Watson against Benno Feibel. Judgment for plaintiff, and defendant appeals. Judgment set aside, and suit dismissed on condition.

Thigpen & Herold, of Shreveport, for appellant. Joseph H. Levy, of Shreveport, for appellee.

PROVOSTY, J. This is a suit to rescind a sale of real estate for nonpayment of the purchase price. Plaintiff put defendant in default by making upon him in the manner prescribed by law a demand to pay, and then the next day brought this suit. Defendant failing to answer, plaintiff caused a default to be entered; and then the defendant made to plaintiff a tender of payment in full, including costs of court. Plaintiff refused to accept, assigning as his reason that an offer of performance

comes too late after a putting in default. Defendant then answered, renewing the tender, and pleading in the alternative, that the suit should have been accompanied by a tender of some notes held by a third person, which defendant had assumed to pay as part of the purchase price.

[1, 2] This third person has never accepted this promise to pay his debt, and therefore has never become a party to the contract. Such being the case, this third person was not a necessary party to the suit, and there was no necessity of tendering his notes. C. C. arts. 1902; 1890; Marcadé, vol. 5, p. 284. In the case of Bryant v. Stothard, 46 La. Ann. 489, 15 South. 76, cited by defendant, the court found, as a fact in the case, that the third person had accepted the promise made in his favor.

[3] But we think plaintiff should have accepted the tender. The said proposition, that offer of performance comes too late after putting in default, upon which the refusal to accept the tender was based, is not good law, and cannot possibly be. To demand of the debtor that he carry out the contract cannot possibly, in reason, be held to have the effect of ipso facto cutting off his right to carry it out; and to put in default is nothing else than to demand of the debtor that he carry out the contract. The Code expressly says so. The debtor is put in default by the act of the party, says article 1911, "when at or after the time stipulated for the performance, he demands that the contract shall be carried into effect." We can understand that such a thing might be as that after the time stipulated for performance has passed the debtor should no longer be in time to perform; or, in other words, should no longer have the right to perform; but certainly such a thing cannot be as that the demand of him that he do perform, or, according to the technical expression, the putting him in default, can have the legal effect of destroying his right to perform. It would be making the creditor address the debtor in effect after this fashion: I demand of you that you perform; but, mind you, my object in doing so is not to require that you perform, but to cut you off from the right to perform. To put upon the articles of the Code a construction of that kind would be making them speak in a Pickwickian sense. Such a thing, we say, is not possible, as for instance, that a man under obligation to deliver should be cut off from the right to deliver by demand to deliver being made upon him.

[4] In further proof of what we have here said, let us see what putting in default is — what is meant by it? The Code does not define it, but prescribes in article 1911, just quoted, the manner of it, which is in effect a definition. It is, says that article, to demand of the debtor that he carry out the contract. And the Code also informs us what

its effects are. It declares that they are, namely, that the debtor owes damages from that moment, and that the thing to be delivered is at his risk. Articles 1910, 1932, and 1933. But it nowhere says that it shall have the effect of cutting off the debtor's right to perform. Toullier, vol. 6, No. 240, says:

"If the obligation is pure and simple, if the term has expired, or the condition been accomplished, the contract must be executed at once and without delay, failing which the debtor is tardy, and is in default in the ordinary sense of that word; but is he liable to damages by reason solely of this delay? Is he in default in the judicial sense of that word in which it is a technical term expressing that kind of tardiness which subjects the debtor to damages?"

The learned author here says that putting in default is a technical term expressing that kind of tardiness which subjects the debtor to damages. He does not say it is an instrument with which the law has armed the creditor for cutting off his debtor's right to perform.

Laurent, vol. 16, p. 234, says:

"To put in default is a purely technical expression, meaning that the debtor is tardy in the fulfillment of his obligation, and that he is liable for the damages which the delay may occasion to the creditor."

This definition of putting in default is quoted approvingly by this court in *Murray v. Barnhart*, 117 La. 1024, 42 South. 489.

In *Taylor v. Chase*, 18 La. 91, this court said:

"A putting in default * * * is when the party claiming the performance of the contract demands of the other party to carry it into effect."

The Code mentions putting in default in no other connection than this. It nowhere refers to it as a means of cutting the debtor off from the right to perform.

Dalloz Repertoire de Legislation, vo. Mise en Demeure, says:

"C'est le fait de demander à un individu de remplir un engagement." Anglice: "It is the act of demanding of a person that he fulfill his engagement."

Carpentier and du Saint, Rep. du Droit Français, vo. Condition, No. 771, says:

"Inasmuch as putting in default presupposes the desire on the part of one of the parties that the contract should be carried out, this formality becomes objectless when the dissolution of the contract is being demanded by both sides."

Citing decisions and text-writers.

And again, the same work, vo. Dommages — Interests, No. 143:

"Putting in default presupposes on the part of one of the contractors the desire that the contract should be carried out. Were the setting aside of the contract mutually demanded, the putting in default would cease to have any object."

In line with this are our own decisions, to the effect that putting in default becomes a vain ceremony to which the law will compel no one whenever there is a refusal, or an acknowledged inability, to perform. *Allen, West & Bush v. Steers*, 39 La. Ann. 586, 2 South. 199; *Southern Sawmill v. Ducote*,

120 La. 1052, 46 South. 20, and the cases cited in these two decisions.

[5, 6] Putting in default is not a thing invented by the framers of our Code. It was taken by them from the civil law. And it was thus taken in the same condition in which it was there found. Hence, in determining what is its nature and proper function we may in all safety go to that system as expounded by its courts and law-writers. And we there find that putting in default means nothing more, and has no other function than as has been just stated; that it does not destroy the contract or the right of the debtor to perform, but that, except in cases where the contract otherwise stipulates, or where from the nature of it time is of the essence (by which we mean is of such importance that the parties would not have contracted without it), the debtor is in time to perform until final judgment pronouncing the dissolution. Thus, *Huc*, on article 1184, C. N., Obligations, No. 271, says:

"What, then, is going to be the effect of the nonfulfillment of the contract when that nonfulfillment has been established by a putting in default?"

"Article 1184 answers that the contract is not resolved of right: the resolution must be demanded judicially, and a delay may be accorded the defendant according to circumstances."

"Hence the debtor may yet execute the contract after having been put in default; he may still execute it after suit has been filed and up to judgment; and if the judgment has granted him a delay, he may execute it up to the last day of the delay."

To the same effect, *Aubry & Rau*, vol. 4, sec. 302; *Mourlon* on article 1184, C. N., which is our article 2046, and other commentators on same article; and for decisions of French courts, see *Dalloz*, Code Civil, art. 1184, Nos. 83 and 91.

Thus, *Demolombe*, des Contrats, liv. III, tit. III, chap. 111, Nos. 532 and 544:

"The rule, we say, is that the putting in default, once it has been incurred by the debtor, accrues to the creditor. But from this we must not conclude that this default is irreparable, that the debtor cannot relieve himself from it. There would be for this no reason. Hence, on the contrary, the default may cease, either from the act of the debtor, or from that of the creditor. The default is done away with by the act of the debtor when he makes to the creditor an offer of performance followed by a regular deposit. It must be well understood, however, that this tender puts an end to the effects of the default only in so far as the future is concerned, and that it could not deprive the creditor of the results which the putting in default has theretofore produced in his favor, dating from the day on which it was incurred. *Toullier*, vol. 3, Nos. 256 et seq., *Duranton*, vol. 10, No. 488; *Zacharias, Aubry et Rau*, vol. e, p. 66."

Thus, *Carpentier et du Saint*, Rep. Droit Franc., vo. Mise en Demeure, No. 3.

"As a general rule, default once incurred by the debtor accrues immediately to the creditor. But the debtor may be relieved from it either by his own act or by that of the creditor."

The reasons why the vendee may pay after suit brought are given by *Demolombe* on

Contracts, p. 490, Nos. 514 and 505, as follows:

"The judgment of the court does not confine itself to recognizing and declaring the resolution of the sale. It goes further. It, itself, creates, and then applies, it. So that, very justly it is said that in such a case the resolution is judicial.

"515. This rule is important. It results from it that so long as the judgment which pronounces the resolution has not been rendered, the contract continues to exist; and if it continues to exist, it continues to have its effect: and, in consequence, the defendant can, so long as the suit is pending, escape from the resolution by carrying out his contract. For, in last analysis, this performance of the contract is what always the plaintiff is seeking, although his prayer is for the resolution of the contract. The suit in resolution is an extreme measure to which he has recourse only because he has not obtained performance and has despaired of obtaining it. Hence, it is not going against his demand in resolution, for cause of nonperformance, to answer it by performance. Then, again, the cause of the resolution must exist at the moment of the judge's decree; and this cause has ceased to exist in the case where performance has taken place."

"517. Nay, more. It is not only before judgment that the demand in resolution may be thus stopped and the resolution no longer be allowed, but it is even after judgment. It is clear that if there is an appeal, which reopens the question passed on by the judgment, the parties will in the appellate court find themselves in the same situation in which they were in the trial court. See Pothier, *du Contrat de Vente*, No. 476; Duranton, *Trop long des Contrats Aléatoires*, Nos. 297 et seq.; Larombière, T. 2, art. 1184, Nos. 21 and 46."

"530. The seller has two actions: One principal, and the other subsidiary. The logical order of the most elementary ideas requires that he begin by his principal action before having recourse to the subsidiary. For, what is the right which the contract has engendered in his behalf? It is the right to demand payment. Hence, his principal action, the one which springs from the contract itself, has for its object the obtaining of payment. The action in resolution is but subsidiary, supplementary: it is but an extreme measure which, for want of something better, the law offers to the litigant, as a last resort, and despairing of the situation."

To the same effect, Baudry-Lacantinerie, *Obligations*, sec. 927, thus:

"The resolution being brought about only as an effect of the judgment, the contract continues to exist so long as the judgment has not been rendered. So that, as long as the case is pending the defendant is in time to avoid the resolution by executing the obligation."

Carpentier and du Saint, *Rep. Juris*, vo. Vente, No. 2095:

"Since the resolution of the sale does not take place of right, the purchaser can avoid it by paying the price, after the institution of suit, subject to liability for costs."

Laurent, vol. 17, sec. 135, says:

"Can the debtor prevent the resolution by executing his engagements; and, if so, up to what moment? One answers, and with reason, that the debtor may pay up to the time that the judge pronounces the resolution. In effect the creditor never has an absolute right to resolve the sale, for it does not exist by virtue of the contract, but it is the court that pronounces it from motives of equity. * * * The resolution does not become definitive until the judgment has acquired the authority of the thing ad-

judged. The defendant may appeal; the appeal destroys the judgment of the trial court; the contract preserves its force, and, as a consequence, the debtor has the right to pay pending the appeal."

Larombière, vol. 2, p. 353, § 46:

"The action is brought before the court and issue is joined. The defendant then admits that he has not executed his obligation. Is he simply in default of his obligation in such manner that he can still execute it? This he may as long as the case is before the court. * * * Even after judgment of the trial court which has decreed the resolution, the defendant has only to appeal in order to place himself in the position to execute his obligation. In a word, the defendant is not barred from the right of paying until the resolution is definitively adjudicated in favor of the plaintiff; that is to say, when the judgment which has been rendered has become definitive and final."

Aubry & Rau (5th Ed.) vol. 4, § 302, p. 130:

"The defendant may execute his obligation up to the time that the judgment pronouncing the resolution becomes final and definitive."

See note 83 to text above cited as follows:

"In a case in which the judge fixes the delay, if after the expiration of the delay a second action is necessary to bring about the resolution, the defendant may even pay pending the second suit. Indeed, he may pay during the pendency of the appeal."

Baudry-Lacantinerie on *Obligations*, § 927:

"Section 914: The tacit resolutive clause has been designed by the legislation as a guarantee to the creditor against the ill will of the debtor. From this point of view, it resembles the penal clause, that only applies when inexecution is brought about by default of the debtor. This is settled. It is the same with the tacit resolutive clause. Having the same object as the penal clause, it ceases, as the other, to have any application when its enforcement would not tend to accomplish its object. The provision of article 1184 of the Code of Napoleon being of an exceptional nature must be strictly construed."

"Section 917: The fact of demanding execution of an obligation does not imply renunciation of the tacit resolutive condition; that, as we have seen, is of a merely subsidiary character. Its utility appears only when the party invoking it cannot obtain execution of the contract."

The same author in his treatise on "Sales" says:

"Section 550: The resolution of the sale, not taking place of itself, the purchaser can pay the price until the resolution has been judicially decreed, even pending the suit brought by the vendor to enforce it; but he must pay the cost of the court due to the suit. Can he pay even after the judgment which has pronounced the resolution? Certainly not, if the judgment is a final one. If the judgment is susceptible of appeal, the purchaser can, on taking appeal, set aside the resolution of the sale, by payment at any time until it has been definitely decreed."

From Fuzier-Herman, *Code Civil*, art. 1184, No. 68, we take the following:

"Inasmuch as the resolution does not take place of right, the debtor escapes from it by the fact itself that he executes the obligation before the resolution is pronounced, and notwithstanding the fact that the suit for resolution is pending."

See to same effect Aubry & Rau, vol. 4, No. 388, p. 96, Laurent, vol. 16, No. 236. The latter, at No. 244 of same volume, says:

"Default is legal tardiness. It gives certain rights to the creditor as long as it continues.

But nothing prevents the debtor from fulfilling his obligation by tendering or delivering the thing. For in that moment he ceases to be in default, and as a consequence damages cease to accrue against him, and the thing to be delivered ceases to be at his risk. It goes without saying that the effects already produced by the default do not cease. The creditor is entitled to damages so long as the default lasts; if the debtor executes the obligation the damages already incurred continue to be due."

See to the same effect Fuzier-Herman, Code Civ. Annoté, art. 1139, Nos. 33, 34, citing a number of text-writers.

In fact, multiplication of citations is needless, since there is no difference of opinion on this point in France.

The only difference of opinion in this matter in France would seem to be on the points whether the damages to which the debtor is made liable by the putting in default include or do not include those already suffered by the creditor at the date of the putting in default; and whether the debtor has not yet a "moral delay," within which to perform, after the service of citation in the case provided for by article 1656, C. N., our article 2563, which reads:

"If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been placed in a state of default, by a judicial demand, but after that demand, the judge can grant him no delay."

It may be interesting to note that putting in default, as found in our law, is not known at common law; and that this court has had occasion more than once to animadvert upon its adoption into our law, as will appear from the following:

The first case in which this requirement of putting in default was invoked in our jurisprudence was *Erwin v. Fenwick*, 6 Mart. (N. S.) 231, where the court, through Porter, J., said of it:

"With the exception of the case of *Bryan v. Cox*, 3 Mart. (N. S.) 574, which went off on another ground, this is the first time in our experience that such a defense has been offered, though the cases in which it might have been made have frequently presented themselves. It is one which cannot but be felt to have but little relation to the merits of the case, and not likely to promote its equity. Yet so clear and positive is our legislation on this subject that we have been compelled, though slowly and reluctantly, to come to the conclusion that it must prevail.

"The doctrine on which it rests, like most of the others in our jurisprudence, had its origin in the Roman law. In that system, however, it was limited in such a manner as to meet, in general, the intentions of the parties, and was entirely conformable to reason and common sense. It was confined to those cases, where, by the terms of the contract, no particular time was fixed for the performance, and the necessity of calling on the obligor before there was, in the eye of the law, a breach of his agreement, arose from the consideration that it was presumable it was to be discharged at the demand of the obligee, and not before. From Rome, this principle was carried into France, where it was extended to all agreements, whether a certain period was fixed for discharging them or not.

The utility and wisdom of such regulations are certainly not obvious to this court. But, considerations of this kind belong to that branch of the government which makes laws; not that which expounds them. Our Legislature have adopted, in its entire extent, the rules which are established in France, and we have no alternative but to enforce them. *Toullier*, vol. 6, lib. 3, cap. 3, No. 241."

In *Sewell v. Hennen*, 8 Rob. 216, this court, speaking of a defense of not putting in default which on a previous occasion it had sustained, said that it was "so technical, that it is not easy to give a common-sense reason for the conclusion to which we came; and we could only say, and say it with an expression of regret, *sed ita lex scripta est*."

In *Sewell v. Willcox*, 5 Rob. 87, this court, Bullard, J., said:

"We have, on more than one occasion, expressed our regret that such subtleties should have found their way into the Code."

In *Stewart v. Paulding*, 6 La. 154, this court, Matthews, J., said that this rule as to putting in default was "purely arbitrary."

In *Berje v. T. & P. R. R. Co.*, 37 La. Ann. 470, the court said:

"This court very early remarked the inutility and unwisdom of the requirement even in cases of passive breaches of contracts."

[7] We do not think that this requirement of putting in default is fairly open to these reproaches, since it is dictated by the same spirit of justice which leads the courts of equity at common law to grant further time to perform, and simply establishes into a rule the principle which thus actuates these courts; the same which deprecates the taking of snap judgment, and hence compels the creditor to give fair warning to the debtor if he desires the contract to be performed strictly on time, in all those cases where time is not material. But if putting in default were to be wrenched from this its proper function of giving warning in order that the debtor may perform, and converted into an instrument for destroying the right to perform, it would deserve, and richly so, this severe arraignment of it.

[8] Another point upon which the French courts and text-writers are agreed is that this remedy of enforcing the resolutory condition is not a primary remedy, but only a secondary one, to be exercised only in case the primary cannot be made available. This has already appeared from the extracts hereinabove transcribed. We will give some further extracts, as the point is important.

Pothier, Vente, No. 476, after calling attention to the fact that the Roman law did not allow a credit sale to be resolved for non-payment of the purchase price, proceeds as follows:

"But as it often happens that one cannot compel payment without considerable trouble and expense this principle has had to be departed from, and the vendor is now allowed to demand the resolution of the contract of sale for non-payment of the purchase price, even in the absence of a clause that for want of payment of the price the sale shall be of right dissolved."

It is thus seen that this right to demand the resolution of the sale has been allowed only as a means of obtaining payment.

Toullier, in his work on Contracts, expressed the view that by bringing suit to enforce the contract, the creditor debarred himself from suing in rescission; but in his later work on Presumptions, vol. 10, 191, he frankly acknowledges that this was an error on his part, and he quotes Merlin approvingly, as follows:

"This results from what I have said in commenting on the provisions of art. 1184, which are applicable to all synallagmatic contracts, and results more specially still from article 1655 (La. Code, art. 2562), which, when the resolution of the sale has not been expressly stipulated in the contract, authorizes the judge to decree it only after the vendor has exhausted every remedy for obtaining payment."

Note what is here said: The resolution of the sale is allowed "only after the vendor has exhausted every remedy for obtaining payment." Can a vendor to whom payment in principal, interest, and costs is tendered and who refuses to accept be said to have exhausted every remedy for obtaining payment?

In *Canal Bank v. Copeland*, 15 La. 79, this court, in discussing the point whether by first bringing suit against the purchaser for the purchase price the vendor did not debar himself from thereafter bringing suit for the resolution of the sale, said:

"From the above articles, it should seem that a previous suit for a specific performance of a contract, far from being a bar to a subsequent action for its rescission, is by our law considered as one of the preliminary steps to be resorted to."

In *Perkins v. Frazer*, 107 La. 393, 31 South. 773, this court said:

"The spirit of the law is against the enforcement of the resolatory condition, and in favor of the contract being carried out if possible."

[9] Not only does our law in cases where immediate performance is possible and is tendered pending suit require the creditor to accept it, but in the case of contracts not thus susceptible of immediate performance, it authorizes the judge in his discretion to grant time in which to perform. C. C. art. 2047.

[10] "By the law of England," says Benjamin on Sales, book V, part 1, p. 622, of 2d London Ed., "differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved."

In other words, the resolatory condition is not implied. Benjamin is dealing with sales of personal property; but the same is, doubtless, true in the case of sales of real estate in the sense in which the resolatory condition is understood and operates in our law.

The wisdom of its adoption into our law may well be doubted. Troplong, in his com-

mentary on article 1654 of the C. N., our article 2561, says:

"Art. 1654, which we are now going to analyze, is exceedingly grave. To the securities accorded to the vendor by the chapter on privileges, it adds the faculty of having the contract resolved, notwithstanding the changes to which real estate sold may have been subjected, notwithstanding the mortgages that may have been placed upon it, notwithstanding any judicial sale that may have been made of it, notwithstanding even any distribution that may have taken place of the price of any such sale among the creditors of the vendee who, confident in the common pledge of this property have distributed its value among themselves. I have shown in my commentary on privileges and mortgages and in the preface to the first volume of that work, in what respect this right to resolve the contract infringes upon the rights of creditors and purchasers, and how it constitutes a cog which the legislator has not succeeded in fitting into the hypothecary machine.

"The jurisconsults of Rome had conceived on the subject of sales ideas less favorable to the rights of the vendor than we have, but better adapted in their results to come in aid of, and foster, individual credit. It is not that I think that the jurisconsults of Rome had the least idea in the world of developing a priori by combinations of jurisprudence individual credit. This element of public prosperity is as yet quite new in law, and has hardly as yet claimed recognition in it. But in reality the Roman jurisconsults had, without premeditation or scheming, lighted upon a theory which may one day arise out of the neglect in which our modern ways have left it, to take a place among the plans of reform inspired by the desire to procure for individual credit more stability and security."

How well grounded these remarks are is illustrated every day by those cases wherein by the enforcement of the resolatory condition the property sold is made to return to the vendor free of the incumbrances to which it may have become subject while in the hands of the vendee.

[11] Nothing can bring into a stronger light the true spirit and intent of our law in allowing at all the dissolution of sales in this manner than that provision of article 2047 by which the whole matter of allowing the dissolution or not, or of granting further time or not, is left to the judge, so that the dissolution of the contract never does become a matter of absolute right on the part of the creditor.

[12, 13] The ground upon which the French commentators base themselves for holding that the debtor is in time to perform, so long as the resolatory condition has not been judicially declared, is that until then the contract has not been dissolved or put an end to, but continues to be in full force and vigor, and therefore is not only susceptible of performance, but calls for it. This ground appears to be very solid. But whatever may be thought of it, and whether these jurists are correct or not in their view that the contract remains open to performance until then, we do not think there can be in reason any ground for not holding that the debtor is not cut off from performance by the formal demand made upon him to perform, but that

a reasonable time should be allowed him to comply with this demand. If the Code had intended that putting in default should have the effect of cutting off the right to perform it would have prescribed a different mode of putting in default than that of demanding of the debtor that he perform. What this reasonable delay should be, would depend naturally, upon circumstances; and we do not believe it could be unseasonably cut short by the bringing of suit. The bringing of suit does not confer new rights, or take away any, but merely enforces those already existing.

[14] Especially in sales of immovables should the delay for performance not be allowed to be cut off by a putting in default.

Says Troplong, *Vente*, No. 667:

"This exception of article 1183 [our article 2563] must not be extended to sales of movables accompanied by an express resolutive condition. In such sales the resolutive condition is accomplished by the mere expiration of the delay fixed in the contract. The vendor has no need of causing an official notice to be served upon the vendee to put him in default, and the latter is not allowed to pay after the time stipulated. But in sales of immovables, the law-maker has thought it well to be less rigorous, and here is the reason why. The resolution in such a case entails very grave consequences, it necessitates the payment of stamp dues, it disturbs possessions of long standing, it affects the rights of third persons. Hence, he has had to adopt the ideas of prudent legislation, and be willing to accept all that may save the purchaser and his assigns from such disturbance, without injuring the interests of the vendor."

[15, 16] Article 1912 of our Code contains a provision not found in the Code Napoleon, namely, that putting in default "is a prerequisite to the rescission of the contract." The article in full reads as follows:

"The effects of being put in default are not only that, in contracts to give, the thing, which is the object of the stipulation, is at the risk of the person in default, but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract."

The said provision not contained in the Code Napoleon was designed simply to settle a point controverted under the Code Napoleon—whether putting in default is a prerequisite to an action in rescission. Laurent, *vol.* 24, par. 379; Dalloz, *Codes Annotés*, art. 1184, No. 65. It brought no change in our law from the French law. The thought that dictated it was the same precisely which requires that the debtor shall be put in default; i. e., shall be fully warned, before damages can be required of him. Our law provides that he shall be put in default; i. e., fully warned, before either damages shall be demanded of him, or the rescission of the contract shall be demanded. This merely in a spirit of equity. This putting in default, it will be observed, is necessary only in those contracts which can be performed as well at one time as at another, or, to use the common-law expression, where time is not of the essence. It is not neces-

sary in suits in rescission for fraud or error or for lesion beyond moiety, or for any other cause of nullity. *Copley v. Flint*, 16 La. 386.

Having thus arrived at clear ideas on these subjects of putting in default and of the enforcement of the implied resolutive condition, we are in a better position to review intelligently the decisions in which the said proposition of offer of performance coming too late after putting in default has been announced as being good law.

The first of these cases in time, and the one which has been accepted by all the others as authority for that proposition, is *Moreau v. Chauvin*, 8 Rob. 161. The facts in it were, as follows: Plaintiff had bought from defendant a slave upon which rested a minor's mortgage, the defendant engaging to have this mortgage released within 40 days. Defendant failed to cause the mortgage to be released, and plaintiff, long after the expiration of the 40 days, and after repeated demands, but without observance of the formalities prescribed by the Code for putting in default, brought suit to rescind the sale. The court recognized that defendant had not been put in default in the manner prescribed by the Code, or, in other words, had not, legally speaking, been put in default at all. In deciding the case it said:

"But the counsel for the appellants urges that the plaintiff cannot maintain this action, because he has not put the defendants in mora, pursuant to the several provisions of the Civil Code, which require this formality as a prerequisite to the recovery of damages, or the rescission of a contract. Articles 1906, 1906, 1907. There has not been, on the part of plaintiff, a strict compliance with these articles, in the manner in which the defendants have been called upon to execute their contract; but the evidence shows that they were several times requested to have the mortgage erased; that the plaintiff was prevented from selling the slave, by reason of this incumbrance. * * * It appears to us that, in a case like the present, it was not necessary to put the defendants in default in the manner pointed out by the articles of the Code relied on by the counsel. The object of putting in default is to secure to the creditor his right to demand damages, or a dissolution of the contract, so that the debtor can no longer defeat this right, by executing or offering to execute the agreement. After the debtor has been put in mora, his offer to execute his engagement comes too late, and cannot be listened to. 6 Toullier, No. 255."

[17] It will be observed that defendant had not been put in default; that he had not offered to perform; nay, that it had not been in his power to perform; so that the proposition of an offer to perform coming too late after putting in default had absolutely nothing to do with the case, and was the purest obiter. And it will be observed further that this proposition was thus quoted without any appositeness whatever and without any inquiry into its soundness.

In the next case in time (*Morrison v. Wimberly*, 14 La. Ann. 713) the facts were as follows: Plaintiff had sold a tract of land to defendant on a credit, and, defendant failing

to pay, plaintiff brought suit to set aside the sale for nonpayment of the purchase price. Defendant pleaded that he had not been put in default, and the court sustained that defense and dismissed the suit. Plaintiff then made a formal demand of payment for putting the defendant in default, and then, at once, as we understand, renewed the suit. Defendant then tendered payment, and the plaintiff refused the offer, as coming too late after default, and the court, on the authority of the Chauvin Case and of a passage from Toullier, which we shall show was quoted in error, held that an offer of performance comes too late after a putting in default, and sustained plaintiff to the extent of throwing the costs on defendant; but, by an exercise of its discretion under article 2047 of the Code, compelled plaintiff to accept the offer.

This proposition of an offer of performance coming too late after default, was thus adopted in these two cases without any discussion of its merits, and, apparently, without any inquiry into its soundness, simply and purely upon the authority of two passages from Toullier. One of these passages we shall show relates to a different subject-matter, and was quoted in error; and the other was, as we shall endeavor to show and we believe shall succeed in showing, was misunderstood. And upon no better foundation than this, and with no more examination or discussion than this, was this same proposition repeated in the several other cases cited by plaintiff's learned counsel, which we now proceed to review.

In *Pratt v. Craft*, 19 La. Ann. 180 and *Id.*, 20 La. Ann. 291, the facts were, that in December, 1865, the defendant had received \$1,000 from the plaintiff in part payment of 13 bales of cotton at 47 cents per pound to be delivered on plaintiff's plantation, the remainder of the price to be paid on delivery of the cotton. No mention was made of any date for the delivery. More than a year later, the plaintiff sued for \$4,000 damages because of the nondelivery of the cotton, and the defendant pleaded that plaintiff had never paid the remainder of the purchase price, and, besides, had never put him in default. The plaintiff had made repeated demands for delivery, but had not observed the legal forms for putting in default. The defense of failure to put in default was sustained, and the suit dismissed. Plaintiff then made formal demand for the purpose of putting in default, and the defendant tendered the cotton in compliance with the demand. This was 2 years after the date of the contract. The court held that the contract called for the delivery of the cotton at once, and added:

"Had the defendant delivered the cotton immediately after the War, the plaintiff would have received it then, but when the offer or tender was made it was too late."

The court then quoted from *Moreau v. Chauvin*, 8 Rob. 161, to the effect that:

"After the debtor has been put in mora, his offer to execute his engagement comes too late, and cannot be listened to."

[16] On its facts the decision is, of course, perfectly correct. A party under obligation to deliver goods at once cannot wait for 2 years notwithstanding repeated demands, and then seek to compel the other party to receive them—especially after the market price of the goods has fallen as rapidly as the price of cotton did from the high level it attained immediately after the War. But the doctrine of the case, namely, that a party under obligation to deliver forfeits his right to deliver, if he waits until a formal demand has been made upon him to deliver, cannot possibly be correct.

In *City v. Rigney*, 24 La. Ann. 235, notes had been given for the rent of a public market, in pursuance of a lease stipulating that any failure to pay the notes at maturity "shall operate to annul and cancel this contract." At the maturity of the notes they were formally presented for payment, and were protested for nonpayment, and suit was brought under said clause to cancel the lease. The defendant contended that he had the right to make payment at any time before judicial demand, basing himself upon article 2563 of the Code. The court held that this article had reference only to the sale of immovables, and that the said clause in the contract was the law of the case. The court then added, as an additional ground of decision, that an offer to perform comes too late after putting in default, and cited the *Chauvin* and *Pratt* Cases, and *Toullier*. The suit was distinctly founded upon the said clause of the lease, and hence this additional reason given by the court was entirely unnecessary for the decision of the case. If the case were founded exclusively upon this proposition of performance coming too late after default, its doctrine would be that failure to pay a note on formal demand cuts the debtor off from the right to make payment on the next day, or even a few hours later, and subjects the contract in consideration of which the note was given to annulment; a doctrine which, we imagine, no one would be willing to stand sponsor for.

In *Enders v. Gingras*, 38 La. Ann. 773, plaintiff was to deliver lumber at an agreed price, and defendants were to deliver furniture. Plaintiff defaulted in his contract, and defendants regularly put him in default. He then went through the forms of putting defendant in default, and, on the strength of it, brought suit to annul the contract. The court found that he himself was in default, and therefore in no position to put the defendant in default. The court cited with approval *Moreau v. Chauvin* and *Morrison v. Wimberly*, *supra*, but the proposition of offer of performance coming too late after default, was not involved in the case. The case did not present the feature of there

having been an offer of performance after putting in default.

[19] In *Clover v. Gottlieb*, 50 La. Ann. 568, 23 South. 459, defendant agreed to sell a plantation which he did not own, and plaintiff agreed to buy it. The date of this agreement was April, 1896, and the price was \$5,720. The act of sale was to be passed in March, 1897, and plaintiff was to make then a cash payment of \$750. In the meantime, he was to deliver a certain number of horses in part payment. Defendant was to deliver possession on the 1st of January, 1897. A few days after entering into this agreement of sale, defendant secured from the owners of the plantation an agreement to make title to it in his favor or in favor of whomsoever he might designate at any time before March 1, 1897, for \$3,300, of which \$750 was to be cash on date of sale, and the balance on a credit. Plaintiff delivered the horses according to contract, but when the first day of January came, the plantation had not yet been acquired by defendant, and the plaintiff made repeated demands upon him in vain to deliver, and on the 18th of January made a formal demand for putting in default. The next day he brought suit to annul the agreement of sale, and defendant on that same day tendered possession, and pleaded this tender in defense to the suit. The reason why defendant did not offer sooner to deliver possession is not stated in the decision. It is not said there was a refusal to deliver. The court decided against defendant on the ground that an offer of performance comes too late after putting in default. The court apparently made no inquiry into the soundness of that proposition, but accepted it as axiomatic upon the authority of the cases which we have hereinabove been reviewing. If, as stated in the decision, the engagement on the part of defendant was to sell the property of another, and not merely to procure title to the property of another, it was null for the reason that the sale of the property of another is null. *Charpoux and Vallette v. Bellocq*, 31 La. Ann. 169. But of the ground upon which the decision was put, that by demanding delivery on the 18th the creditor cut the debtor off from the right to deliver on the 19th, all we can say is that it cannot possibly be sound.

In *Woodstock Iron Works v. Standard Pulley Mfg. Co.*, 115 La. 829, 40 South. 236, the plaintiff, an iron manufacturer, after having ineffectually made repeated attempts to induce the defendant to accept delivery of certain iron called for by the contract, and put the defendant regularly in default, sued in damages for the profit that would have been made under the contract had delivery been accepted; and the authorized representative of the defendant in giving his testimony in the case offered to receive the iron and carry out the contract. The court very properly held that the right to damages

which had thus accrued to plaintiff could not be defeated by a tardy offer of performance. But the court went on and dealt with the testimony of the defendant's authorized representative as if it had been a regular suit against plaintiff to compel plaintiff to deliver the iron, whereas there was no pretense in the case of anything of that kind, but simply an effort to defeat the claim to damages by the tender of a willingness to receive delivery. Had defendant instituted a suit against plaintiff for delivery, plaintiff, doubtless, could have defeated it, not on the ground of putting in default having cut off the right to perform (as a matter of fact there had been no putting of plaintiff in default), but on the ground that circumstances had changed since the time when delivery was due and was tendered under the contract.

In *Johnson v. Levy*, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722, which was a suit against the heirs of a man for his alleged breach of a promise of marriage, while the court cited approvingly the cases hereinabove referred to, and quoted from the case of *Moreau v. Chauvin* the excerpt hereinabove transcribed, it did so merely in support of the proposition that by the putting in default a right to damages accrues to the creditor, and that this right cannot be defeated by any subsequent offer to perform—a proposition founded upon the provisions of the Code upon the subject of putting in default and therefore unquestionably sound. But had the defaulter in that case, instead of dying, offered to carry out his contract, plaintiff would have been in a poor position to sue in damages for breach of promise. Her right to such damages as she had suffered up to the time of the offer to perform would, of course, not have been defeated by this offer, and would have been enforceable, if for one cause or another no marriage had taken place; or if a marriage having taken place, such a suit were maintainable by a wife against her husband.

Opposed to the foregoing cases is that of *Perkins v. Frazer*, 107 La. 390, 31 South. 773. In that case plaintiff had accorded a right of way through his land for defendant's irrigation canal, and had agreed to cultivate a specified number of acres in rice, and to receive and pay for irrigation water from the canal. When the time came for furnishing water for the rice crop of the second year of the contract, defendant refused to do so, unless plaintiff first paid a balance that was due on the water furnished the first year; and plaintiff made a formal demand upon defendant for putting defendant in default. In answer to this demand defendant announced that he would not furnish water unless the amount due was paid, and plaintiff announced that then he would consider the contract to be at an end. Four days later, things being intact, and no harm done, defendant announced that he had

changed his mind and would furnish the water. Plaintiff held this offer to have come too late after default, and cited the cases hereinabove reviewed. The court held that the putting in default does not cut off the right to perform; that it does not put an end to the contract.

That decision is in full accord with the Code, and with the views of the French courts and law-writers on the corresponding provisions of the Code Napoleon.

[20] The learned counsel for plaintiff cites *Murray v. Bernhart*, 117 La. 1034, 42 South. 489, where the court repeated this proposition of offer of performance coming too late after default, and gave as authority for it the case of *Pratt v. Craft*, supra. In this *Bernhart* Case there had been no putting in default, and what the court decided was that in an oil lease, or, in other words, in a lease whereof the consideration is the development of the land for oil within a fixed date, the time thus fixed is of the essence of the contract in the sense of being of so great importance that it is to be presumed the parties would not have contracted without it. The language used in the decision, by the way, would be applicable to all contracts, but it must be read in connection with the facts of the particular case. As said by the Supreme Court of the United States in the case of *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. —, recently decided:

"According to a familiar rule, * * * this language should be regarded as restrained by the circumstances in which it was used."

We said we would show that the passage from *Toullier* quoted in *Morrison v. Wimberly*, supra, was thus quoted in error. The court does not give the derivation of the excerpt, and this confirms us in the suspicion that it was taken in blind confidence from the brief of counsel, for we are satisfied that if the court had had before its eyes the passage as a whole it would never have quoted it as it did. The quotation is from Nos. 567, 568, and 569 of volume 6. We will transcribe here sufficiently of the text to show what subject *Toullier* was discussing, and will italicize the parts which are quoted in the *Wimberly* Case. It will be seen that the point *Toullier* was dealing with was whether in the case of a sale of real estate where the contract has stipulated that in the event of nonpayment of the price within the term agreed on the sale shall be dissolved of right; in other words, whether in the case provided for by article 1656 of the C. N. (article 2563 of ours) the debtor is entitled to a "moral delay" after citation in which to perform. That article, it will be remembered, provides that:

"Art. 2563. If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been

placed in a state of default, by a judicial demand, but after that demand, the judge can grant him no delay."

The passage from *Toullier*, omitting an irrelevant part, reads as follows:

"No. 567. Summary process is available for those contracts authentic in form and importing an order of execution in the name of the king. * * * If the case be one of a sale with resolatory condition, the vendor may, after the accomplishment of the condition, make a legal tender in restitution of the price to the purchaser, and at the same time cause a judicial demand to issue, and a summons to abandon possession in default by which the vendor will be put in possession by the court.

"No. 568. If the contract provides that no putting in default shall be necessary, the purchaser can no longer, after this judicial demand, do away with the effects of the default, nor prevent the resolution of the contract, by offering to pay at the time of the judicial demand. If the contract does not so provide, if it only provides that the contract shall be resolved of right, or from the mere expiration of the term for payment, the purchaser may prevent the resolution by paying immediately, at the moment itself that he is cited. *If he does not pay immediately, the resolution of the contract accrues in favor of the vendor, without the purchaser being allowed to do away with the default by tardy offers subsequent to the judicial demand.*

"No. 569. However, very estimable juriconsults have thought that the summons did not have the effect of putting the debtor immediately in default; that its sole effect was to notify the debtor to pay; that a moral delay sufficient to afford him an opportunity to perform had to be allowed him, and that this delay could not be less than 24 hours. This opinion appears to us to be manifestly erroneous; it is contrary to the text of article 1656 which prohibits the judge from granting any delay after the debtor has been put in default by a judicial demand—contrary to article 1139 which provides that the debtor is put in default by a summons or other equivalent act, and even without the need of any demand, when the creditor is dispensed from it by the contract; and, finally, it is contrary to the spirit of the Code as manifested by articles 1153, 1657, 1661. The Code has but followed the dictates of reason and of exact justice in desiring that contracts, which are the law of the parties, should be literally carried out. The object of the demand, as we have already observed, is to establish that the debtor is in default, because of his failure to have kept his money ready against the day of payment; *it has the same effect as a protest, which is nothing else than a demand destined to make patent the failure to pay a note or bill of exchange.*"

['] Thus, it is seen, *Toullier* was not dealing with ordinary putting in default, which is nothing more than a demand that the debtor do perform, and from the effects of which, except as to those already accrued, the debtor may relieve himself by an offer of performance so long as the resolution of the contract has not been decreed by a final judgment (the rendering of which judgment is entirely within the discretion of judge in so far as mere time is concerned); but was dealing with the putting in default that results from a citation in a suit in resolution under article 2563, which provides that the debtor may perform so long as a judicial demand has not been made upon him—unmistakably implying that after such judicial demand he can no longer perform. That the

judicial demand in such a case where the resolutory condition is express and takes place of right has no analogy with the ordinary putting in default in a case where the resolutory condition is merely implied, and takes place only after having been decreed by a final judgment, is perfectly plain; and that the court cited this passage in error, and probably without having read the whole of it but only the quoted part (taken probably from the brief of counsel), is also perfectly plain. Upon such an error as this is this *Wimberly* decision in part founded. It is also founded upon the obiter dictum in the *Moreau v. Chauvin* Case, which dictum is the result, as we believe we can show, of a misconstruction of another passage of the same work of *Toullier*. That passage, transcribed as a whole, reads as follows:

"No. 254. After having seen how the debtor may be put in default we must see what are the effects of the default, and how it may be avoided.

"The effect of the default is to confer upon the creditor an acquired right to the fruits of the thing and to the penalty incurred from failure of execution, to indemnity or damages, and to the increased value which the thing to be delivered may have acquired since the default if it has perished since then. Before the default there existed only the principal obligation to give, to do or not to do; but from the moment the debtor has been put in default, he is subjected to the accessory obligations of the restitution of the fruits, of the penalty incurred, and of damages.

"No. 255. The creditor having, as an effect of the default of the debtor, acquired a right to the accessory obligations of which we have just spoken, it follows from this that the latter can no longer liberate himself from these obligations by offering to perform the principal obligation; his tardy offers can no longer be received without the consent of the creditor, who has the option either to cause the contract to be resolved, in order to confine himself to the damages resulting from the inexecution, or to demand the execution without prejudice to his right to the damages resulting from the delay."

While *Toullier* does say here that the debtor's "tardy offers can no longer be received without the consent of the creditor, who has the option to cause the contract to be resolved," and therefore apparently says and apparently means that the putting in default, *ipso facto*, and *presto*, as it were, cuts off the right of the debtor to perform, he did not mean, and cannot possibly, have meant, anything of that kind. He had but just detailed what were the effects of putting in default, and in doing so he had not mentioned this one, which would have been the most important of all, the one most obviously needing to be mentioned, if it had been one of these effects. Had he meant anything of that kind he would have been the one solitary jurist in his country entertaining such a view. Read in the light of other parts of his own work, and in the light of the writings of the other commentators on the *Code Napoleon*, this passage loses all ambiguity. He means nothing more than what is expressed in the first part of the same sentence, namely, that:

"The creditor having, as an effect of the putting in default of the debtor, an accrued right to the accessory obligations just mentioned, it follows that the latter cannot liberate himself from these obligations by offering to execute the principal obligation."

He is here giving his opinion upon a controverted point, some writers having maintained that by performing the principal obligation the debtor relieved himself from these accessory obligations also. When he adds that the creditor has the option of causing the contract to be resolved, or to insist on performance he is merely stating what the creditors may do in case the debtor does not voluntarily perform after the putting in default. He could not possibly have meant that the calling upon the debtor to perform would have the effect of destroying his right to perform. Any one reading the whole of his commentary upon this matter of putting in default cannot fail to observe that he has no intention whatever of expressing any dissent from the prevailing sentiment on this point, of the right of the debtor to perform after default, in all those cases where time is not of the essence; and that the sole effect of putting in default is to fasten upon the debtor the consequences of his tardiness, and not to cut off the right to perform. The legal situation after putting in default is expressed by *Fuzier-Herman*, at Nos. 33 and 34 of note to article 1139, as follows:

"32. The general rule is that the default once incurred by the debtor accrues immediately to the creditor. But the debtor may be released from it either by his own act or that of the creditor.

"33. The default is done away with by the act of the debtor when he makes a real tender to the creditor followed by a deposit. It will be noted, however, that this tender and deposit arrest the effects of the default only for the future and leaves them in full force so far as concerns the past."

In support of this the authorities are cited, and among them the very passage from *Toullier* which we have transcribed above. All of the French writers agree that the debtor may prevent the dissolution of the contract by an offer to perform. What they differ on is as to whether the liability fastened upon him by the putting in default includes the damages already accrued at the time of the default. See *Laurent*, vol. 17, p. 135. *Carpentier* and *du Saint*, vo. *Damages*, No. 5, expresses the prevailing opinion on that point as follows:

"It is to be noted, however, that consignment arrests the effects of the default only for the future, and leaves in full force those already accrued at the time of the consignment."

See *Demolombe*, vol. 24, No. 533; *Duranton*, vol. 10, No. 448.

And *Toullier* in the above-transcribed passage means no more than to range himself on that side of the controversy.

[22] It would seem to stand to reason that putting in default can have no greater, or other, effect than to create a legal situation

in which a debtor is in default. Now article 1933 provides that:

"When the breach has been passive only, damages are due from the time that the debtor has been put in default."

And article 1935 provides that:

"The damages due for delay in the performance of an obligation to pay money are called interest."

And article 1938 provides that:

"All debts shall bear interest * * * from the time they become due."

It results from these articles, in combination, therefore, that the debtor of a sum of money is in default from the time payment becomes due. Now, if it were true that a debtor in default is no longer in time to perform, would not the logical conclusion be that the debtor of a money debt is no longer in time to pay after the maturity of the debt. This would go to show that a debtor is still in time to perform after he has been put in default.

[23] By article 2563 of the Code a buyer of real estate who has stipulated in the contract that the sale shall be dissolved of right in case he does not pay the price within the term agreed on, may nevertheless make payment after the expiration of the term as long as a judicial demand has not been made upon him, or, in other words, as long as citation has not been served upon him. Now, will it be seriously argued that the buyer has this time when the resolatory condition has been expressly stipulated and takes place of right; but that he has not this time when the resolatory condition has not been stipulated but is only implied and does not take place of right, or at all until decreed by a final judgment? If such is the law, vendors may well beware stipulating the resolatory condition expressly, for they are better off if they leave it simply implied. But that such is not the law, and cannot possibly be, need hardly be stated, as it ought to go without saying. Plainly, the distinction is this: That where the resolatory condition has been expressly stipulated and takes place of right, the purchaser has until official demand in which to pay; but where it is only implied and takes place only as the result of a final judgment, he has until final judgment in which to pay.

That conclusion is one as to which there is not, and never was, any difference of opinion among the courts and law-writers of France. It is one for the contrary, of which there is absolutely no foundation in the Code; but which, on the contrary, is irreconcilable with those provisions of the Code by which the manner of putting in default is prescribed and the effects of it are declared.

[24-26] The learned counsel for plaintiff argues that because of the defendant's delays in paying, and because he sought to undermine the title to the property, further time should not be granted him. If defendant were seeking further time, which he

is not, the fact that he had been dilatory or delinquent in his payment would not be a reason for not allowing further time. If that were a reason, the same reason would apply in all cases, and the consequence would be that further time would never be granted. As for seeking to undermine the title, we find no foundation whatever in the facts for such an accusation. The facts in that connection are these: Plaintiff's vendor acquired the property from a Mrs. McQueen, a widow, who had acquired it during her marriage, and during the existence of the community of acquets and gains, without any mention having been made in the act, as we understand, of the acquisition having been made for her separate interest as an investment of her paraphernal funds of which she had the administration, and this apparent flaw in the title having been discovered, defendant sought in a quiet way to discover who and where the heirs of Mrs. McQueen were, so as to perfect the title, if necessary—the property having increased in value as the result both of his improvements upon it and of the natural increase in the value of property in that neighborhood, and he being therefore anxious to perfect the title. This cloud upon the title, and any efforts the defendant may have made to remove it, instead of being a reason for defusing him further time in which to pay, would be a full justification to him for refusing to pay. Article 2557, C. C. And is a peremptory defense to an action for rescission. 39 Cyc. 1371.

[27] But we repeat, the defendant is not asking for further time. Further time is not necessary. He is simply asking that plaintiff be compelled to accept a tender of payment that has been and is being made to him. There is a vast difference between asking for further time in which to perform a contract, and asking that the plaintiff be compelled to accept immediate and full performance of the contract. In an aggravated case of delay this court, speaking through Justice White, said:

"We see no reason to rescind a sale on the ground of noncompliance with the condition thereof when a full performance is tendered in answer to the suit." *Charpoux v. Vallette & Bellocq*, 31 La. Ann. 169.

And, indeed, it would take strong eyes to see any. Eyes strengthened by the desire to profit by the increased value accrued to the property from the improvements put upon it and by natural increase.

The learned counsel for plaintiff does not make the point that the citation of the defendant in the case had the effect of conferring any rights upon his client that the latter did not have before, or of taking away from defendant any rights that he had before; but we have thought that we might as well note, in passing, that if such a contention were made it would certainly be without merit. There would be found nothing in the

Code upon which to base it. The Code attributes such an effect to citation only in the case where the resolutive condition has been expressly stipulated in the act of sale.

The judgment appealed from is therefore set aside, and the plaintiff's suit is ordered to be dismissed upon the defendant's depositing in court, subject to the orders of plaintiff, the amount due the plaintiff in capital and interest, and upon his paying all the costs incurred in this suit up to the time of the tender heretofore made by him to plaintiff. All other costs to be paid by plaintiff.

MONROE, C. J., concurs in the decree.

On Application for Rehearing.

PROVOSTY, J. The decree in this case is amended so as to read as follows:

The judgment appealed from is therefore set aside, and the plaintiff's suit is ordered to be dismissed, upon the defendant's depositing in court, subject to the order of the plaintiff, within 10 days from the filing of this judgment in the lower court, the capital of the amount due plaintiff, as well as all interest accrued on said capital up to the time such deposit shall have been actually made; the assumpsit by defendant of the notes executed by plaintiff in favor of Lawrence to remain unaffected by this suit. Defendant to pay all costs incurred in this suit up to the time of the tender heretofore made by him to plaintiff. All other costs to be paid by plaintiff. In case of failure of defendant to have made such actual deposit within such 10 days, then the judgment appealed from to stand affirmed and subject to execution.

Rehearing refused.

(139 La.)

No. 20411.

HYMAN v. HIBERNIA BANK & TRUST CO. et al.

(Supreme Court of Louisiana. March 20, 1916.
Rehearing Denied April 24, 1916.)

(Syllabus by Editorial Staff.)

1. LANDLORD AND TENANT §251(2)—RENT—LIEN—REMOVAL OF PROPERTY.

A bank, which did not assume payment of the rent of leased premises, was liable to the lessor, suing ex delicto, for removing and selling goods of the successor of the lessee on the leased premises pursuant to conspiracy with the successor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1027; Dec. Dig. § 251(2).]

2. LANDLORD AND TENANT §251(2)—RENT—LIEN—REMOVAL OF PROPERTY—CONSPIRACY.

Where a company which absorbed another company, lessee of premises, taking over all its assets, as well as the possession of the leased premises, pledged the goods on the leased premises to its creditor bank, which conspired with it to deprive the landlord of his lessor's right of pledge and privilege on the goods, so removing

and selling them, the bank applying the proceeds to the payment of its debt to an amount more than sufficient to pay the landlord's claim for rent, knowing that its debtor company was insolvent and that the only possible chance the landlord had of making good his claim for rent was against the property removed and sold, the bank and the company committed an actionable tort, since the landlord's right of pledge and superior privilege was property, and illegally depriving him of it by conspiracy was a violation of his rights, and a tort.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1027; Dec. Dig. § 251(2).]

3. LIMITATION OF ACTIONS §104(1) — PRESCRIPTION — INTERRUPTION OF PERIOD — FRAUDULENT CONCEALMENT OF CAUSE OF ACTION.

Where a bank and its debtor, successor of another company, paid rent for the premises leased by such other company to lull the landlord into a false security and keep him from discovering that they were removing from the premises goods subject to his lessor's right of pledge and privilege, the prescriptive period of limitation to the landlord's action for the tort committed upon him began to run from the date of the last payment of rent, since one who by some act succeeds in concealing from a creditor his cause of action cannot be allowed to reap the benefit of his own wrong.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 511; Dec. Dig. § 104(1).]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by Henry Hyman against the Hibernia Bank & Trust Company and another. From a judgment for defendants, plaintiff appeals. Judgment set aside, plea of no cause of action overruled, plea of prescription refused to merits, and case remanded.

Howe, Fenner, Spencer & Cocke, of New Orleans, for appellant. Charles Rosen, of New Orleans, for appellee J. C. Wolff Co. McCloskey & Benedict, of New Orleans, for appellee Hibernia Bank & Trust Co.

PROVOSTY, J. Plaintiff brings this suit sounding in damages ex delicto against J. C. Wolff Company and the Hibernia Bank & Trust Company on the allegation that they conspired together to remove from leased premises goods upon which he had a lessor's privilege and right of pledge for the security of the payment of rent due him. Amount is claimed equal to the rent due.

Plaintiff alleges that his lessee, J. L. Morrison & Co., was absorbed by the defendant J. C. Wolff Co., and all its assets, as well as the possession of the leased premises, taken over; that J. C. Wolff Co. pledged the goods on the leased premises to its codefendant, the Hibernia Bank & Trust Co., and that these two conspired together to deprive him of his lessor's right of pledge and privilege on the goods on the leased premises, and in pursuance of said conspiracy removed and sold these goods, the Hibernia Bank & Trust Company attributing the proceeds to

the payment of its debt to an amount more than sufficient to pay his said claim, knowing all the while that the said J. C. Wolff Co. was insolvent, and that the only possible chance he had of making good his said claim for rent was against the property thus removed and sold.

The defendants interposed an exception of no cause of action.

[1] In support of this exception, the learned counsel for the bank argue that the defendant bank did not assume the payment of this rent, and that therefore there is no cause of action.

This argument would have force if the plaintiff were suing *ex contractu*. But he is not. He is suing *ex delicto*.

[2] Next, the same learned counsel argue that the conspiring by one creditor with a debtor to deprive another creditor, or a superior right which he has by law over the property of the common debtor, does not constitute an actionable tort.

In support of the same exception the learned counsel for J. C. Wolff Co. argue broadly that the pledgee of goods subject to a lessor's right of pledge and privilege has the right to remove them, subject only to the right of the lessor to seize them within 15 days from their removal, provided they have not, after their removal, been transferred to some third person ignorant of the lessor's rights.

These arguments are utterly without foundation in law. The law is that:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

If by the unlawful act of the two defendants the plaintiff has been deprived of a right which he had, and thereby has sustained a loss, the defendants are bound to repair it.

There can be, under the allegations, no question but that plaintiff has sustained the loss, and that it has been caused by the act of the defendants; the only question, therefore, must be whether the act was unlawful.

That question was considered in *Dennistown v. Malard*, 2 La. Ann. 14. In that case a lessee sought to prefer the claim of his vendor to that of his lessor, and, after the goods had been removed and sold by the creditor thus sought to be preferred, the lessor brought suit against this creditor, and was given judgment for the amount of his rent. The principle of the case is announced in these words:

"It cannot be contended that Hunt & Co. [the creditor sought to be preferred] could place themselves in a better position by fraudulently removing the goods beyond the landlord's reach and frustrating his search."

In *Worrell v. Vickers*, 30 La. Ann. 204, the court said:

"The rights of the lessor cannot be affected by a sale made by a lessee to one of his creditors, and a fraudulent removal of the property from

the leased premises by an agent of the purchaser for the purpose of placing it beyond the landlord's reach" (citing *Dennistown v. Malard*, 2 La. Ann. 14).

Dennistown v. Malard, 2 La. Ann. 14, was inferentially approved in *De Egana v. Jackson*, 5 La. Ann. 430, where the court said:

"We do not consider the evidence as proving a fraudulent combination, so as to bring the case within the ruling in *Dennistown v. Malard*, 2 La. Ann. 16."

In *Hewitt v. Williams*, 47 La. Ann. 754, 17 South. 273, Justices Watkins and Miller, dissenting on the question of whether a privilege follows the property into the hands of a third person as does a mortgage, said:

"Then let us suppose that the lessee has disposed of the property which is subject to the lessor's privilege; what is his recourse? A. provisional seizure in disregard of the third possessor's rights? Not at all. We find an answer to the question in the case of *Dennistown v. Malard*, 2 La. Ann. 14."

The latter decision is reviewed approvingly.

In *Carroll v. Bancker*, 43 La. Ann. 1082, 10 South. 187, where the lessor was denied the right to enforce his right of pledge after 15 days from the removal of the property from the leased premises, the court distinguished the case from *Dennistown v. Malard*, saying that the goods had not been fraudulently removed, as in the *Malard Case*, in violation of the lessor's rights; that if this feature had appeared in the case the conclusion would have had to be different.

In *Fetter v. Field*, 1 La. Ann. 80, the court held that a vendor does not lose his privilege as against a third person who has taken the property in payment with knowledge of the insolvency of the debtor, and of the price for the goods not having been paid. The court based the decision on the principle that the third person could not acquire "without violating the rights" of the vendor.

"Inducing another, or conspiring with him, to break his contract, is an actionable tort." *Bigelow on Torts* (8th Ed.) p. 261.

Bigelow, at page 256, states the general principle as follows:

"A., having knowledge or notice of the existence of a contract between B. and C., owes the duty to B. not to procure C. to break his contract, to B.'s damage."

It is said that J. C. Wolff Co. had not assumed the obligations of the lease, and were not the lessees of plaintiff; that they violated no contractual obligations by removing the property. This is not so clear, under the allegation that J. C. Wolff Co. "absorbed" *Morrison & Co.*, and took over all its assets. But conceding that there was no contractual obligation to be violated, there was the right of pledge and superior privilege of which plaintiff might be deprived, and the conspiracy to deprive plaintiff of this right constituted a tort. This right was property; and the illegally depriving plaintiff of it was a violation of his rights and a tort.

Carpentier et Du Saint. vo. "Privileges," No. 433, expresses the opinion that if the person who has removed the goods is no longer in possession of them, so that the lessor has lost his recourse against the goods, the lessor is not thereby bereft of all remedy; that he may sue the third person who has removed the goods in damages for the tort committed in depriving him of his right upon them.

In *Cooper v. Cappel*, 29 La. Ann. 213, the syllabus reads:

"The attempt of a lessee, or his vendee, to forcibly remove from the leased premises property subject to the lessor's privilege is a trespass, sounding in damages."

What a vendee cannot do, a pledgee cannot do; and fraud is no better legal ground to stand on than force.

In 19 A. & E. E. of L. p. 350, it is said:

"In many cases it has been held that a stranger, acquiring possession of property subject to a landlord's lien, with notice of the lien, holding it as the tenant held it, subject to the lien, is guilty of a tort, to the damage of the landlord, if he disposes of the property so as to prevent the enforcement of the lien, and for this tort an action on the case will lie at the suit of the landlord."

"Any person who knowingly, by purchase or otherwise, deprives the landlord of the opportunity of enforcing his lien is guilty of a tort, and the landlord has a right of action for the damage sustained." 24 Cyc. 1267.

The Alabama reports furnish numerous cases the exact parallel of the present one.

It is argued that the pledgee might have caused the property to be seized and sold to satisfy the pledged debt, and that in such case the sole remedy of the lessor would have been to intervene in the suit and claim a superior right. That is true, but in such a case the lessor would not have been deprived of his opportunity to make good his right. And, again, in such case, the pledgee would be exercising his legal right; whereas when he conspires with the tenant, or the person standing in his place, to remove the goods for the purpose of defeating the superior right of the lessor, he is not exercising a legal right, but is illegally depriving the lessor of his superior right of pledge, and therefore committing a tort.

The defendants interposed also pleas of prescription of 15 days and 1 year, 15 days to the right of the lessor to seize the goods, and 1 year to the suit in damages *ex delicto*. The first of these pleas need not be noticed further than to say that the plaintiff is not seeking to seize the goods. The other plea has been submitted on the face of the papers, and therefore has to be so disposed of.

[3] For the purpose, doubtless, of forestalling it, the plaintiff alleged that in order to lull him into a false security, and keep him from discovering the removal of the goods, the defendants continued to pay the rent after all the goods had been removed until all the goods had been sold, and that this suit was brought within the year from and after the last payment of rent. And the question arises

whether by these acts of the defendants, whereby the removal of the goods is alleged to have been sought to be prevented from being discovered, the course of the prescription was suspended.

For the negative it is said that the rule, "*Contra non valentem agere non currit prescriptio*," is not recognized in this state; and the case of *Cox v. Von Ahlefeldt*, 105 La. 584, 30 South. 175, is cited. In that case the court recognized that this rule did apply to certain cases exceptional in their features. A further exception must be recognized, we think, in a case like the present, where the inability of the plaintiff to act was brought about by the practices of the defendants. Otherwise the defendants would be profiting by their own wrong—a thing inadmissible in law. A defendant, who has kept a plaintiff in close confinement during the prescriptive period so as to preclude his bringing suit, could certainly not be allowed to invoke prescription against plaintiff's suit, and thereby reap the fruit of his own wrong. And between incapacitating a plaintiff by confining his body and incapacitating him by fraudulently lulling his mind into a false security and keeping him in ignorance there is no difference in principle. The one mode of preventing the bringing of suit, if equally effective, is as bad as the other. It is equally a wrong of which the perpetrator cannot be allowed to reap the benefit.

In the case of *Jones v. T. & P. R. R. Co.*, 125 La. 542, 51 South. 582, 136 Am. St. Rep. 339, the court held that prescription began to run only when the cause of action had—"manifested itself with sufficient certainty to be susceptible of proof in a court of justice."

In *Woodward-Wight v. Engel Land & L. Co.*, 123 La. 1093, 49 South. 719, the court held that prescription could not begin to run against a redhibitory action for defects in a machine so long as these defects were not understood to be of such a character as to justify the action.

These two cases are subsequent in date to *Cox v. Von Ahlefeldt*. Other illustrative cases antedating that case are abundant.

In *Hernandez v. Montgomery*, 2 Mart. (N. S.) 422, prescription of an action upon a marshal's bond for the proceeds of a sale made by him, for which he had failed to account, was held not to have begun to run so long as the right of the plaintiff to these proceeds had not been determined in another suit in which it was contested.

In *Landry v. L'Eglise*, 3 La. 219, held that, where a clause in the contract precluded plaintiff from suing until he had exhausted another certain remedy, prescription did not begin to run until he had exhausted this remedy. The court said that the party pleading the prescription—

"certainly opposes with a bad grace prescription to a demand, which through his own fault, the creditor was prevented from enforcing earlier by suit."

The provisions of the Code Napoleon in regard to the interruption and the suspension of prescription, are the same as ours. Our article 3521, reads:

"Prescription runs against all persons, unless they are included in some exception established by law."

This article is a verbatim translation of article 2251 of that Code. Such being the case, the following quotation from Boyle v. Mann, 4 La. Ann. 170 (where the defendant had gone to Mexico to avoid being cited) are apposite:

"We consider this a proper case for the application of the rule, '*contra non valentem*.' All acts or hindrances—voies de fait et empêchemens—coming from the debtor, which deprive the creditor of the remedy and forum contemplated at the time of the contract, suspend prescription. 2 Troplong, Prescription, 725. The Commercial Code of France establishes, for bills of exchange, a prescription similar to that which is here pleaded. It has been held there that this prescription cannot be opposed by the drawer of a bill, who, before the expiration of the 5 years, obtained it confidentially from the holder, and wrongfully kept it beyond the time at which prescription would have accrued. 2 Troplong, loco citato. And again, after the drawer of a bill of exchange has failed, and the bill has been placed by the holder in the hands of the syndic, if the syndic fails or refuses to return it, the prescription of 5 years is suspended from the day of such failure or refusal. Dalloz, 1845, 1st part, p. 28."

In Hardee v. Dunn, 13 La. Ann. 161, where the pendency of oppositions had delayed the appointment of a receiver, the court held that prescription could not run.

And so in Guilliet v. Erwin, 7 La. 581, where absence of the defendant from the state had made it impossible to bring suit.

By article 2512 of the Code prescription does not run against the redhibitory action when the seller has knowledge of the defects of the thing sold and fails to make them known to the purchaser.

In Martin v. Jennings, 10 La. Ann. 553, the court held that prescription does not run so long as the plaintiff is prevented from suing by some act or hindrance of the defendant.

Referring to that case, and to Boyle v. Mann, supra, this court said in Rabel v. Pourciau, 20 La. Ann. 181, that they fell in that category of cases where the debtor has done same act to prevent the creditor from availing himself of his action.

In Succ. of Farmer, 32 La. Ann. 1037, held that prescription did not run on the claims of an administratrix against the succession represented by her.

In McKnight v. Calhoun, 36 La. Ann. 408, held prescription did not run on the claims of a succession against the beneficiary heirs so long as one of these heirs was administrator of the succession. The court said:

"But, being forcibly reminded, by their knowledge of jurisprudence, of the doctrine of '*Contra non valentem*,' etc., which had been practically recognized in the early stages of our jurisprudence, they hastily retreat on the position that the doctrine is inconsistent with the spirit of our legislation, and they intrench themselves within the protection of the decision in the case of

Smith v. Stewart, 21 La. Ann. 67, 99 Am. Dec. 7093, in which the court, as then composed, laid down the opinion that the doctrine had no application in our system of jurisprudence, which admits of no other mode of suspending prescription beyond the means enumerated in the Civil Code.

"It is evident that counsel have not yet considered the decision in the case of the Succession of Farmer, 32 La. Ann. 1037, which unreservedly recognizes the doctrine and has thus restored jurisprudence to the former position occupied by this court."

The expression here is evidently too broad, and is not meant to be approved by being reproduced.

In Succ. of Ball, 43 La. Ann. 342, 9 South. 45, held that prescription does not begin to run against an action for reduction of an excessive donation until the solvency or insolvency of the succession has been ascertained.

It might not be out of place to observe that, in the decision in Cox v. Von Ahlefeldt, one of the justices took no part, and two of them concurred in part and dissented in part; and that the justice to whom the justices who took no part had succeeded on the bench had dissented; and that, at most, the decision is authority only for the proposition that mere ignorance, not brought about or fostered by the machinations of the party opposing prescription, is not good ground for invoking the maxim, "*Contra non valentem*." The decisions of Smith v. Stewart, 21 La. Ann. 75, 99 Am. Dec. 709; Soulie v. Ransoh, 29 La. Ann. 161, and Succ. of Winn, 33 La. Ann. 1392, are opposed to universal jurisprudence, and were severely criticized by the Supreme Court of the United States in Levy v. Stewart, 11 Wall. 254, 20 L. Ed. 89, and were expressly overruled by this court in Succ. of Farmer, 32 La. Ann. 1037, and in McKnight v. Calhoun, 36 La. Ann. 408.

In 25 Cyc. 1218, the rule is laid down as follows:

"The general statement of the rule as to the effect of a fraudulent concealment of a cause of action, where such rule is applicable, is that when a party against whom a cause of action exists in favor of another by fraud or concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered, or might have been discovered, by the exercise of diligence."

In Decennial Dig. § 104, vo. "Limitations," the rule is stated as follows:

"Concealment and fraud constitute an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his wrong by setting up the statute."

A case markedly in point is Boyd v. Boyd, 27 Ind. 429, at page 430, where the court said:

"But it does not occur to us that [for the statute not to run] it needs to be concocted after the accruing of the cause of action, provided it operates afterwards as a means of the concealment, and was so intended. In other lan-

guage, the defendant must not, at any time, do anything to prevent the plaintiff from ascertaining, subsequently to the transaction out of which the right of action arises, the facts upon which that right depends, either by affirmatively hiding the truth, enhancing the natural difficulties of discovering it, or by any device avoiding inquiry which would result in discovery; and if he do thereby escape suit for a time, the statute of limitations will not run during that time."

In *Findley v. Stewart*, 46 Iowa, 656, the syllabus reads:

"*Statute of Limitations—Fraud.* When a party against whom a cause of action exists, by fraud or actual fraudulent concealment prevents the party in whose favor it exists from obtaining knowledge of it, the statute only commences to run from the time the right of action is discovered, or might, by the use of diligence, have been discovered."

Same in *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93.

In *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124, where the defendant had covered up the defective work in a road so that the defects developed only after the prescriptive period had run, prescription was held not to apply.

The remarks of the court in that case are apposite in this:

"On principle there can be but one opinion. In this the moral sense of all mankind must occur. The defendants undertook to perform a piece of business for the plaintiffs, and were paid for it. In the performance of their contract they acted fraudulently and deceitfully, to the detriment of the plaintiffs. Upon the discovery of the fraud, and within the time limited for bringing this species of action, the plaintiffs demand redress of the wrong which they have received. By the pleadings, all this is acknowledged by the defendants; but they say the plaintiffs cannot recover, because more than 6 years have intervened since they received the plaintiffs' money, and since they completed the road in the manner in which they made it. Is this an answer which ought to be deemed satisfactory in a court of justice? I think not. * * * The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud."

We do not cite the civil law authorities further than has been done for the reason that the rule, "*Contra non valentem, agere non currit prescriptio*," is there recognized in its full scope and operation.

The decision in *Cox v. Von Ahlefeldt* in no wise militates against the proposition that a wrongdoer cannot be allowed to reap the fruits of his wrong because of the fact that through further fraud and deceit he keeps the injured person in ignorance of what has been done until the prescriptive period has run.

"The doctrine of equitable estoppel may, in a proper case, be invoked to prevent defendant from relying upon the statute of limitations, it being laid down as a general principle that when a defendant, electing to set up the statute, previously by deception or any violation of duty toward plaintiff has caused him to subject his claim to the statutory bar, he must be charg-

ed with having wrongfully obtained an advantage which equity will not allow him to hold." 25 Cyc. 1016, *Limitation of Actions*.

"Where a defendant has, by deception or by any violation of duty towards plaintiff, caused him to subject his claim to the bar of limitations, equity will not permit him to hold the advantage thus obtained." *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68.

"A court of equity may enjoin a defendant in an action at law from using the statute of limitations fraudulently, and this even where the cause of action did not arise out of a fraudulent act, if defendant has misled plaintiff in regard to it." *Holloway v. Appelget*, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827.

"The general statement of the rule as to the effect of a fraudulent concealment of a cause of action, where such rule is applicable, is that when a party, against whom a cause of action exists in favor of another, by fraud or concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence." 25 Cyc. p. 1213, *Lim. of Actions*.

"Those who claim exemption from prescription by reason of ignorance resulting from fraud must allege and show that such ignorance was neither willful nor negligent." *Cox v. Von Ahlefeldt*, 105 La. 543, 30 South. 175.

This point, in connection with the removal of goods by a lessee, has been considered by the French writers. The view taken by them is that the mere removal of the goods, though operated clandestinely—for instance during the night—will not suffice for suspending the course of the prescription of 15 days (under the Code Napoleon, 15 days in the case of houses, and 40 in the case of lands), but that if, not content with merely removing the goods secretly, the parties have recourse to some device for keeping the lessor in ignorance of their removal, for instance, bribe the watchman, then that this fraud will suspend the course of the prescription. *A Carpentier et Du Saint, vo. "Privileges," No. 429.*

In the case at bar, the allegation is that the parties had recourse to the continued payment of the rent, and that this device proved effective. The allegation is that this rent was in reality paid by the *Hibernia Bank & Trust Co.*

The bank did not owe this debt, and if the contention of defendants be correct that *J. C. Wolff Company* did not succeed to the contractual relations of *Morrison Company* as lessee, *J. C. Wolff Company* did not owe it, from which it would follow that these payments were not made in satisfaction of any debt, and that as it is not pretended that they were made by way of charity, or as gifts dictated by affection or friendship, the motive for making them must be sought and found in the reason alleged by plaintiff, namely, that they were made as a device to lull him into a false security and keep him from becoming aware of the removal of the goods.

If, as contended, *J. C. Wolff Company* was not lessee, and stood in no contractual relation towards plaintiff, the sole reason there could be for rent being paid to the plaintiff

was because of the goods being on the leased premises. Continued payment of rent was therefore in the nature of a representation that the goods continued to be on the leased premises. The defendants, having actively contributed to keep the plaintiff in ignorance, are not in a position to say that this ignorance was due to a lack of diligence on the part of plaintiff.

The judgment appealed from is therefore set aside, the plea of no cause of action is overruled, the plea or prescription is referred to the merits, and the case is remanded, to be proceeded with according to the law.

O'NIELL, J., dissents.

MONROE, C. J. (concurring in the decree). I concur in the decree in this case for the following reasons:

Each of the eight successive Constitutions of this state have, in about the same language, prohibited the General Assembly from adopting any system or code of laws by general reference, and it is well known historically that the prohibition was originally and is now, leveled at the common-law and equity systems which existed, and now exist, in England and in other states of the American Union. The only authority, therefore that a Louisiana court can find for administering "equity," as that term is generally understood, is contained in the following article of the Civil Code, to wit:

"Art. 21. * * * In all civil matters, *where there is no express law*, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, *where positive law is silent*." *LeBlanc v. City of New Orleans*, 138 La. 243, 70 South. 217.

A portion of the "express" and "positive" law which is to be found in the Code reads as follows:

"Art. 3457. * * * Prescription is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law. * * *

"Art. 3521. * * * Prescription runs against all persons, unless they are included in some exception established by law.

"Art. 3522. * * * Minors and persons under interdiction cannot be prescribed against, except in the cases provided by law. * * *

"Art. 3536. * * * The following actions are also prescribed by one year.

"That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses. * * *

"Art. 3537. * * * The prescription, mentioned in the preceding article runs:

"With respect to the merchandise, injured or not delivered, from the day of the arrival of the vessel, or that on which she ought to have arrived.

"And in the other cases from that on which the injurious words, disturbance, or damages were sustained. * * *

"Art. 3540. * * * Actions on bills of exchange, notes, * * * are prescribed by five years, reckoning from the day when the engagements were payable.

"Art. 3541. * * * The prescription mentioned in the preceding article, and those de-

scribed above in paragraphs I and II [being the prescriptions, *liberandi causa*, of one and three years] run against minors and interdicted persons, reserving, however, to them their recourse against their tutors or curators. They also run against persons residing out of the state."

It will be observed that the exception in favor of minors and persons under interdiction, contained in article 3522, to the general rule established by article 3521, and the exceptions to that exception (contained in article 3541) emphasize the purpose of the law-maker to apply article 3521 to "*all persons, unless they are included in some exception established by law*"; and the same idea is conveyed by other articles, such, for instance, as those which except husbands and wives from the rule established by article 3521. The maxim, "*contra non valentem agere non currit prescriptio*," appears to have been first applied by this court in a case (*Querry's Ex'rs v. Faussier's Ex'r*, 4 Mart. [O. S.] 609), which came up before the adoption (in 1825) of the present Civil Code (re-enacted in 1870), and its application related to an act of the Legislature (passed about the time of, or shortly after, the battle of New Orleans), which prohibited the institution of any civil suit during a period of 120 days, it being held by the court that the prescription against the action in question was suspended during that period. Inasmuch, however, as the law, in establishing the prescription, had done so with reference to the existence of the right of action, and had fixed the limit of time within which that right should be exercised, it would seem to follow that, when the law, then, suspended the right of action, against which alone the prescription was directed, there was nothing left for the prescription to operate on, and that the conclusion of the court might have been reached by so holding, and without invoking any doctrine or principle of equity.

The next application of the maxim in question was made in *Morgan v. Robinson*, 12 Mart. (O. S.) 77, 13 Am. Dec. 366 (also decided under the Code of 1808), in which, it appeared that the defendant, in a redhibitory action, had, for a while, absented himself from the state, though it does not appear that plaintiff did not know, or could not have ascertained, where he had gone. The court said, however (referring to the plaintiff, who contended that the prescription against his suit was suspended during defendant's absence):

"He relies principally on the maxim, '*Contra valentem agere, non currit prescriptio*,' as adopted and recognized by the Spanish law, and [as] being an axiom, or first principle of natural law and justice, and therefore applicable to every system of jurisprudence wherein the contrary is not expressly established by legislative power.

"In this view of the subject we agree with counsel of the plaintiff, and, notwithstanding the express terms of limitation in our Code, it is thought that they ought not to be interpreted as to conflict with this universal maxim of justice."

Since the adoption of the Code of 1825 (re-enacted in 1870 and now in force), the maxim in question has frequently been invoked, and sometimes applied, and at other times held to be inapplicable, but, always recognized as a rule founded in the jurisprudence, and not the law of the state.

Thus, in *Hatch v. Gilmore*, 3 La. Ann. 508, it appeared that defendant, sued on a promissory note, had executed the note in Mississippi and had continued to reside there for more than 5 years after its maturity, when he came to Louisiana, where the suit was brought. In avoidance of his plea of prescription the plaintiff relied on the maxim, "Contra non valentem," etc., and the court held it to be inapplicable, saying, through Mr. Justice Slidell:

"This maxim has been lauded by some jurists; has been found fault with by others as opening a door to abuse, by reason of its vagueness and generality. It is not our purpose, on the present occasion, to attempt to lay down any rules for its application, except so far as indispensable for the case before us. To do so would be a task not free from difficulty, and it is better to leave various cases as they arise to be considered upon their proper merits.

"Express legislation has provided various terms of prescription adapted to the various transactions and interests of individuals, and has, in many cases, expressly declared exceptions to the application of the general limitations of actions so established. The exception contained in the maxim under consideration, so far at least as the class of contracts now in question is concerned, rests, not upon the Code, but upon jurisprudence. From these considerations it seems to us a just conclusion that, if the exception, 'Contra non valentem,' is to be applied to cases where the Code has declared no exception, it should be done with caution, and only where the manifest spirit and intention of the express law is not violated."

The learned judge then refers to the law, to the effect that the prescription against promissory notes runs against even minors, and, after referring to their inability to protect themselves, says:

"Hence it is that the Code abounds with exceptions in favor of minors; and when we find them expressly bound, in this particular case, by the prescription of 5 years, it seems to us that we should be doing violence to the spirit of the written law to let in an exception resting merely in jurisprudence.

"* * * In the views we have expressed we have taken it for granted * * * that the maxim, 'Contra non valentem,' etc., would apply to the case before us, were the contract not of the class comprehended by articles 3505 and 3506 [now 3540 and 3541]. We do not wish, however, to be considered as expressing an opinion upon that point, as it is not necessary now to do so."

In *Boyle v. Mann*, 4 La. Ann. 170, being also a suit on a promissory note, it was found by the same court, speaking through Rost, J., that the defendant removed to a foreign country, in order to defeat the claim of the plaintiff and other creditors, and it was said:

"We consider this a proper case for the application of the rule, 'Contra non valentem.' All acts or hindrances—voies de fait et empêch mens—coming from the debtor, which deprive the

creditor of remedy and forum contemplated at the time of the contract, suspend prescription."

In *McMasters v. Mather*, 4 La. Ann. 418, it was held by the same court, through Slidell, J., that (quoting from the syllabus):

"An action against the maker of a promissory note will be prescribed by 5 years from its maturity, though the maker reside during that time in another state, where the holder was aware of the place of his residence. * * *

"The case of *Boyle v. Mann* [said the court] is not in point. There the evidence was considered as authorizing the inference of a dishonest purpose, and that the debtor had departed from the United States with the avowed purpose of baffling his creditors."

In *Suydam v. Kinney*, 9 La. Ann. 316 (also a suit on notes) the court said:

"We think * * * that the removal of the defendant to Texas has not interrupted prescription. The residence of the defendant is shown to have been well known to plaintiff, and no impracticability of enforcing the collection of this debt by legal process, at any time since its maturity, is proved. The rule on this subject is correctly stated in *McMasters v. Mather*, 4 La. Ann. 418. See, also, *Gamble v. McClintock*, 9 La. Ann. 159.

"The case of *Boyle v. Mann*, 4 La. Ann. 170, is too broadly stated."

In *J. & S. Martin v. Jennings*, 10 La. Ann. 553, it was found that defendant, in an action on a note, had absconded in order to elude his creditors, and had been found in Louisiana only after the prescriptive period had elapsed. The court, speaking through Spofford, J., said:

"This seems to be a proper case for the application of the equitable rule, 'Contra non valentem agere non currit prescriptio.' The objection that this rule is not to be found in the statute books does not impair its authority, for it is interwoven in our jurisprudence from the earliest times. * * * It is true a clear case of inability to sue by reason of some act or hindrance by the debtor, should be made out before the creditor can invoke the maxim in question (italics by the present writer).

In *Reynolds v. Batson*, 11 La. Ann. 729, plaintiff sued to recover three slaves who had disappeared from his plantation, in Alabama, and were found in the possession of the defendants, in New Orleans, after the period of prescription for their recovery had accrued. The court found, however, that defendants had acquired them in good faith, and that the maxim "Contra non valentem," etc., could not be applied.

In referring to that maxim, Merrick, C. J., said:

"It has been applied to prescriptions liberandi causa in three classes of cases:

"First. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; a class of cases recognized by the Roman law as proper for the allowance of the *utile tempus* (citing cases).

"Second. The second class of cases are those where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting. * * *

"Third. The third class of cases is where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. * * *

"Cases may arise to which it may be proper

to apply the maxim, but we do not think the present a case of this kind. * * *

"Article 3487 [now 3521] of the Code provides that 'prescription runs against all persons unless included in some exception established by law.' The plaintiff has not brought to our notice any such exception in his favor, nor do we think he has presented a case of a character evidently intended by the Legislature to be excepted from the operation of the general rule of law which it has prescribed."

Rabel v. Pourciau, 20 La. Ann. 131, was a suit on a promissory note, brought more than 5 years after the last interruption of prescription, by a partial payment. It appeared, however, that of the 5 years there were 2 years and 2 months during which all judicial action was suspended in the parish of defendant's domicile, by reason of the absence of courts and officers of courts; and the plaintiff invoked the maxim, "Contra non valentem," etc., as operating an interruption of prescription during that time. Ilsey, J., speaking for the court, said:

"This court has always considered this maxim * * * an axiom or first principle of natural law, and, notwithstanding the terms of limitation in prescription, contained in the old, as well as the new, Code, have interpreted these terms in such a manner as to harmonize with this maxim of universal justice."

But it was found that, notwithstanding the hiatus of 2 years and 2 months, every obstacle to the institution of plaintiff's suit had been removed more than 6 months before the expiration of the period required to complete the prescription, and held that, the suit being on a promissory note, the maxim invoked should not be applied. The case of Smith v. Stewart et al., 21 La. Ann. 67, 99 Am. Dec. 709, was a suit for the value of cotton alleged to have been destroyed by defendants and others, and the plea of prescription was met by the assertion, which the court found to be sustained by the evidence, that plaintiff was prevented from bringing his suit at an earlier period by the disturbed condition of affairs resulting from a state of war, the closing of the courts, etc.

The case was, at first, decided in favor of plaintiff, by the court as organized under the Constitution of 1864; but, a rehearing having been granted, there was a final judgment, concurred in by all the Justices, including Justices Howell and Taliaferro, who had been members of the former court, and had concurred in the judgment rendered by it.

The case was therefore thoroughly considered, and, in the opinion last handed down, Ludeling, C. J., as the organ of a unanimous court, held that the exceptions to the rule, declared by the code, that, "Prescription runs against all persons, unless they are included in some exception established by law," are enumerated in the Code, and, further, as follows:

"The existence of a state of war is not among the exceptions established by law; neither is the inability to sue, except in a few instances, expressly mentioned. It is manifest, therefore, that the rule 'Contra non valentem agere non

currit prescriptio' is not recognized in the Code, except in cases mentioned."

"But, notwithstanding the plain and positive provisions of the Code [the opinion proceeds], our predecessors have, in some instances, recognized the maxim, and, under its equitable rule, have relieved parties against whom prescription was pleaded. As might have been expected, when judges depart from the plain provisions of the written law to decide according to the equity or necessity of each case, conflicting opinions have been the result. And, so long as the courts continue to act under the notion that their equity powers authorize them to correct, control, moderate, or supersede the law, with the view of enforcing rights which are just, great uncertainty and confusion will ensue; and, as Mr. Justice Blackstone says, courts of equity 'will rise above all law, either common or statute, and be most arbitrary legislators in every particular case.'"

The former judgment of the court was therefore set aside, and plaintiff's demands rejected at his cost.

And, the judgment so rendered has since been cited as authority in Nelson & Co. v. Heirs of Jno. J. Scott, 21 La. Ann. 203; Bartley Johnson & Co. v. Heirs of Bosworth, 21 La. Ann. 126; Silvernagle & Co. v. East, 21 La. Ann. 261; Peet, Simms & Co. v. Jackson, 21 La. Ann. 267; Bank of Kentucky v. East, 21 La. Ann. 276; McStea v. Boyd & Blanks, 21 La. Ann. 501; Taylor v. Hill, 21 La. Ann. 626; Sampson v. Gillis & Ferguson, 22 La. Ann. 591; Smith v. Palfrey, 28 La. Ann. 616; Soule v. Ranson, 29 La. Ann. 170; Succession of Winn, 33 La. Ann. 1397; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175.

In Soule v. Ranson, 29 La. Ann. 170, Manning, C. J., as the organ of the court which succeeded that of which Ludeling was the head, said:

"The doctrine of this court in April, 1867, was that the circumstances and facts of each case, and the respective situations of the parties, must be taken into consideration in applying the plea of prescription. Munson v. Robertson, 19 La. Ann. 170. Throughout the Annual Reports of 1868 there was a hazy indefiniteness on the bench and at the bar upon this mooted question. Rabel v. Pourciau, 20 La. Ann. 131; Durbin v. Spiller, 20 La. Ann. 219; Payne v. Douglas, 20 La. Ann. 280; Marcy v. Steele, 20 La. Ann. 413; Norwood v. Mills, 20 La. Ann. 422; Lemon v. West, 20 La. Ann. 427; Schlenker v. Taliaferro, 20 La. Ann. 565. It was not until February, 1869, that this court authoritatively and unqualifiedly, declared that the maxim, 'Contra non valentem agere non currit prescriptio,' has no application in our system of jurisprudence, and thus terminated the dispute in which the chances of victory had often oscillated. Smith v. Stewart, 21 La. Ann. 67 [99 Am. Dec. 709]."

In Succession of Farmer, 32 La. Ann. 1041, the court organized under the Constitution of 1879, through Mr. Justice Poche, held that the inability of the administratrix to sue the succession must operate to shield her from the plea of prescription interposed to any legal and valid claim which she had against the succession which she administered.

"Being incapacitated from judicially enforcing her claim, by the law itself, prescription is necessarily suspended, and the doctrine of contra

non valentem, etc., is clearly applicable to administrators, curators, or tutors thus situated. The case of the Succession of Durnford, in 8 Rob. 488, and 11 Rob. 183, is in point, and is conclusive on the issue. See [Succession of Blakey] 12 Rob. 155; [In re Tutorship of Hewitt] 23 La. Ann. 682."

An examination of the rulings in the cases thus cited will show, as it appears to me, that they fall short of sustaining the view in support of which they are cited. However, that may be, in Succession of Winn, 33 La. Ann. 1397, it was urged that the prescription of certain notes was suspended during the Civil War, or, at all events, by the act of Congress, embodied in R. S. of U. S. § 1048, but the court, composed of the same members as when the decision in the Succession of Farmer was handed down, but speaking, through Mr. Justice Todd, said:

"Upon the first ground of suspension urged, whatever opinion we might entertain respecting it were the question a new one, we must consider it put at rest by repeated and uniform decisions of this court running through many years. These decisions declare in unmistakable terms that the war between the states did not operate a suspension of prescription." [Hutchinson v. Richardson] 19 La. Ann. 187; [Payne & Harrison v. Douglass] 20 La. Ann. 280; [Id., 20 La. Ann.] 363; [Marcy v. Steele, 20 La. Ann.] 413; [Lemon v. West, 20 La. Ann.] 427; [Smith v. Stewart] 21 La. Ann. 76 [99 Am. Dec. 709]; [Mechanics' & Traders' Bank v. Sanders, 21 La. Ann.] 106; [Bartley v. Succession of Bosworth, 21 La. Ann.] 126; [Jaquet v. Levert] 22 La. Ann. 111; [Perrett v. Lee] 23 La. Ann. 553; [Stewart v. Bloom, 23 La. Ann.] 748."

The court further held that it did not consider the rule of suspension of prescription established by section 1048 of the United States Revised Statutes, as having been intended by Congress to be enforced in state courts, and it declined to recognize the isolated case of Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, as authority on that subject, and overruled the decision in Aby & Catchings v. Brigham, Curator, 28 La. Ann. 840.

The court, a majority of the members of which decided the case of McKnight v. Calhoun & Lane, 36 La. Ann. 408, was composed of the same members by whom the decision in Succession of Winn, 33 La. Ann. 1397, was handed down, save that Justice Levy had been succeeded by Justice Manning, who, as Chief Justice, had handed down the opinion in Soulie v. Ranson, 29 La. Ann. 170. Neither Smith v. Stewart, 21 La. Ann. 67, 99 Am. Dec. 709, nor any of the jurisprudence predicated thereon, was referred to in Succession of Farmer, and all that was said in that case concerning the maxim contra non valentem, etc., was, that it was applicable to administrators, curators, and tutors with respect to their claims against estates administered by them, and against their wards,

a proposition which is too broadly stated and is not sustained by the cases cited in its support. It appears to me, therefore, that, in the opinion on rehearing, in McKnight v. Calhoun & Lane (from which Justices Todd and Fenner dissented, as they had dissented from the original opinion), the organ of the court went rather far in saying that the decision in Succession of Farmer—

"unreservedly recognizes the doctrine, 'Contra non valentem, etc., and has thus restored jurisprudence to the former position occupied by this court."

The opinion in Cox v. Von Ahlefeldt, 105 La. 583, 30 South. 175, does not undertake to overrule the decisions in Succession of Farmer, McKnight v. Calhoun & Lane, supra, or Norres v. Hays, 44 La. Ann. 907, 11 South. 462, for the question involved in those cases were not before the court, and it distinctly recognizes the applicability of the maxim, "Contra non valentem," etc., to cases in which a plaintiff has been prevented from exercising a right of action by fraud, perpetrated by a defendant.

No law was ever enacted which contemplated the defeat of its purpose by fraud, and no court was ever organized which would knowingly permit a litigant to profit by his own wrong. The Civil Code declares that no parol evidence shall be admitted against or beyond what is contained in a written conveyance of real estate, or as to what may have been said before, or at the time of, its execution, or since, but the condition that, if such a conveyance has been obtained by fraud, the fact may be established by parol evidence, is as much a part of that provision as though it had been written in it. "Fraud may, in all cases, be proved by parol," this court has said. Morris v. Terrenoire, 2 La. Ann. 458; And, when proved, vitiates everything that rests upon it.

And, so, it being part of the law that one may show by parol evidence that he has been fraudulently deprived thereof, and, upon so showing, may recover his land, it is also part of the law that he may show that he has been fraudulently deprived of his right of action, or of any other right, or property, and, upon so showing, may recover it.

Being of opinion, then, that one who fraudulently prevents another from exercising his right of action, can take nothing, under the law, by his fraud, I do not consider that, in holding that the prescription of an action, as declared by the Civil Code, is suspended during the time that the possessor of the right of action is so prevented, this court is thereby introducing into our law any new exception to the rule that prescription runs against all persons unless they are included in some exception established by law.

AMERICAN MERCANTILE CO. v. CIRCULAR ADVERTISING CO.

(Supreme Court of Florida. April 12, 1916.)

(Syllabus by the Court.)

1. COMMERCE §40(2)—SUBJECTS OF REGULATION—CONTRACTS—"INTERSTATE COMMERCE."

Where a party resident in one state sends an agent into another state and there through the agent makes a contract with a party resident in such other state relating to a matter of regular business, such as the making and sale of a marketable article not forbidden in commerce, which contract contemplates the actual transportation of such article from the state where made directly to the purchaser or his customers or patrons in another state, such a transaction may be regarded as interstate commerce, particularly where a portion of the subject-matter of the agreement has pursuant to the contract actually been transported in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. §40(2).]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE §40(1)—SUBJECTS OF REGULATION—COLLECTION OF PAYMENTS.

The right to demand and enforce payment for goods sold in interstate commerce is directly connected with, and essential to, such commerce and the imposition of unreasonable conditions on such right operates as a burden and restraint upon interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. §40(1).]

3. TRIAL §170—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

Where the evidence clearly shows a right of recovery in the plaintiff, and there is no evidence to sustain a verdict for the defendant, a verdict for the plaintiff may be directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-394; Dec. Dig. §170.]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Action by the Circular Advertising Company against the American Mercantile Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fleming & Fleming, of Jacksonville, for plaintiff in error. Marks, Marks & Holt, of Jacksonville, for defendant in error.

PER CURIAM. On a former writ of error herein it was held that the court erred in sustaining demurrers to the replications in the cause, since they showed that the subject-matter of the action was a part of a transaction of interstate commerce, which was not subject to the provisions of chapter 5717, Acts of 1907, set up as a defense requiring foreign corporations to file in the office of secretary of state a duly authenticated copy of their charters and to receive from such officer a permit to transact business in this state before such foreign corporations shall transact business or acquire, hold, or dispose of property in this state, and providing that every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state

before complying with the statute shall be void on behalf of the foreign corporation and its assigns, but shall be enforceable against it or them. Circular Advertising Co. v. American Mercantile Co., 66 Fla. 96, 63 South. 3; sections 2682a and 2682d, Compiled Laws of 1914. The first count is on a promissory note for \$631.83, and the second count is for \$41.30 as money payable for work and materials furnished.

After the reversal of the former judgment the trial court reinstated the replications and ordered the defendant to plead thereto in ten days, "else the facts therein set forth shall be deemed to be denied." The latter part of the order could not have harmed the defendant. He could have pleaded in ten days under the order, or on a proper showing could have obtained further time to plead. The defendant went to trial without pleading to the replications, and the plaintiff had the burden of proof on the issues tendered by the replications, which issues were impliedly accepted by the defendant. Under these circumstances the defendant cannot justly complain of the order as made by the court.

The defendant filed additional pleas to the first count averring that the note sued on was for goods not shipped, but not setting up matters to show that the note was not a part of a business contract that contemplated interstate shipments, or to show that no part of the subject-matter of the contract was actually transported in interstate commerce pursuant to the contract the basis of the note sued on. These pleas were held insufficient on demurrer. The defendant pleaded never was indebted and want of jurisdiction as to the second count. If the first count is good, the court had jurisdiction. See Georgia, F. & A. R. Co. v. Andrews, 61 Fla. 246, 54 South. 461. There was judgment on a directed verdict for the plaintiff, and the defendant took writ of error.

It appears that a contract was made in Florida by the plaintiff, a foreign corporation, through an agent with the defendant corporation, providing for the making or preparation by the plaintiff in the state of Ohio of stated articles as advertising matter which were to be shipped from Ohio direct to the defendant or its patrons in this and other states; that a large part, if not all, of the articles were shipped by interstate transportation pursuant to the contract; that a note was given for a portion of the articles covered by the contract; that the note was paid in part and a renewal note, the one sued on in this case, was given for the unpaid balance of the first note; that the \$41.30 money payable for work and material furnished the defendant was a part of the above-stated interstate transaction.

[1] Where a party resident in one state sends an agent into another state and there, through the agent, makes a contract with a

party resident in such other state relating to a matter of regular business, such as the making and sale of a marketable article not forbidden in commerce, which contract contemplates the actual transportation of such article from the state where made directly to the purchaser or his customers or patrons in another state, such a transaction may be regarded as interstate commerce, particularly where a portion of the subject-matter of the agreement has, pursuant to the contract, actually been transported in interstate commerce. See *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 13 Ann. Cas. 1103.

[2] The right to demand and enforce payment for goods sold in interstate commerce is directly connected with, and essential to, such commerce, and the imposition of unreasonable conditions on such right operates as a burden and restraint upon interstate commerce. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193; *Circular Advertising Co. v. American Mercantile Co.*, 66 Fla. 96, 63 South. 8.

In view of the above-established principles of law, there was no error in overruling demurrers to the mentioned pleas. Likewise it was not error at the trial to refuse an amendment to the first plea to the first count, which amendment sought to set up that the note was "in renewal of a previous note"; the renewal note being a part of the interstate commerce transaction.

The objections to evidence submitted by the plaintiff have been considered. No substantial error is found, and a discussion of the assignments based on such objections is not necessary.

[3] As the testimony for the plaintiff clearly shows the transaction was one of interstate commerce, and the indebtedness unpaid, and as the testimony for the defendant was uncertain and not sufficient to sustain a verdict for the defendant, there was no error in directing a verdict for the plaintiff corporation which successfully carried the burden of proof on the issues presented.

Affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

PANAMA ICE & FISH CO. v. ATLANTA & ST. A. B. RY. CO.

(Supreme Court of Florida. April 5, 1916.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS §36(3) — RIPARIAN OWNERS—RIGHTS.

The statute (section 643, General Statutes of 1906) does not vest in riparian owners an unqualified fee in the lands below high-water mark and out to the edge of the channel in navigable

streams, bays of the sea, or harbors of this state. So long as such submerged lands remain unimproved by the construction of wharves, or unreclaimed by filling in from the shore and converting the water into land, the riparian owner, though the legal title is in him, has, in so far as the statute is concerned, no greater right to the beneficial use of such submerged lands and the waters above them than any other citizen, except for the purpose of protecting from invasion the right to improve which the statute gives.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 186; Dec. Dig. §36(3).]

2. NAVIGABLE WATERS §37(2) — CONTROL — AUTHORITY OF STATE.

The state may fix the exterior lines of a navigable river if the rights of the people to the use of the waters and the shores of the river are not thereby substantially impaired; and rights in the submerged lands not within the reasonably fixed exterior lines of the river may be granted by legislative authority if such grant does not impair the rights of the whole people to the use of the waters for any purpose expressed or implied by law.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 203; Dec. Dig. §37(2).]

3. NAVIGABLE WATERS §37(4) — RIPARIAN OWNERS—RIGHTS.

The rights granted by the riparian statute of 1856 relate to the space between the shore line and the edge of the channel of navigable streams, bays, or harbors, and such rights are not controlled by the direction of lines dividing the uplands.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. §37(4).]

4. NAVIGABLE WATERS §37(4) — RIPARIAN OWNERS—RIGHTS.

As the rights granted by the riparian act of 1856 (sections 643, 644, General Statutes of 1906) extend to "all lands covered by water, lying in front of any tract of land * * * lying upon any navigable stream or bay of the sea or harbor, as far as the edge of the channel," and the right of action given the grantees to prevent encroachments extends to "all such submerged lands in the direction of their lines continued to the channel," the right of action extends to the space between lines drawn at right angles from the shore line "to the edge of the channel," where the channel runs parallel or practically so with the shore line.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. §37(4).]

5. NAVIGABLE WATERS §46(3) — RIPARIAN OWNERS—CONVEYANCE OF RIGHTS.

Assuming that the riparian rights acquired under the quoted statute by the owner of lands "lying upon" a navigable stream, bay, or harbor within the state may be alienated separate from the lands to which they attached under the statute, such alienation can carry no greater right than the original owner had by virtue of the conditions and limitations contained in the statute making the qualified grant to stated classes of riparian owners.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 287-289; Dec. Dig. §46(3).]

6. NAVIGABLE WATERS §37(4) — RIPARIAN OWNERS—CONVEYANCE OF LAND.

A conveyance of land to which riparian rights to submerged lands are attached under the statute may carry the riparian rights, un-

less such rights are reserved or a contrary intent appears from the conveyance.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

7. NAVIGABLE WATERS § 37(4) — RIPARIAN OWNERS—CONVEYANCE OF LAND.

A conveyance of uplands bordering on navigable water "with riparian rights connected therewith," covers the space between lines drawn at right angles from the shore line "to the edge of the channel" where the channel runs parallel or practically so with the shore line, no contrary intent appearing.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

Appeal from Circuit Court, Bay County; D. J. Jones, Judge.

Suit in equity by the Atlanta & St. Andrews Bay Railway Company against the Panama Ice & Fish Company. From a decree for defendant, plaintiff appeals. Reversed, with directions.

E. C. Maxwell and Sullivan & Sullivan, all of Pensacola, for appellant. Will H. Price, of Marianna, for appellee.

WHITFIELD, J. Appellant and appellee claim conflicting rights in the use of submerged land lying between certain upland lots and a channel in St. Andrews Bay, a navigable bay of the sea or Gulf of Mexico lying south and west of said lots in Bay county, Fla.

Upon the admission of Florida into the Union, the state, by virtue of its sovereignty, became the owner of all lands under navigable waters within the state, including the shores or space between ordinary high and low water marks; such state ownership being for the benefit of the people of the state to be used for purposes of navigation, commerce, fishing, etc., subject to such regulations as may be provided by law for the general welfare. The state may in the interest of the public welfare make limited dispositions of portions of the lands under navigable waters within its borders, or may permit the use thereof, when the rights of the whole people of the state as to navigation and other lawful uses of the waters are not materially impaired. *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337; *Broward v. Mabry*, 58 Fla. 398, 50 South. 826.

[1] By chapter 791, Acts of 1856, entitled "An act to benefit commerce," the law-making power of the state recited that "it is for the benefit of commerce that wharves be built," etc., and enacted that the state be divested "of all right, title and interest to all lands covered by water, lying in front of any tract of land owned by a citizen of the United States, or by the United States for public purposes, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vests the full title to

the same in and to the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in, to erect warehouses or other buildings, and also the right to prevent encroachments of any other person upon all such submerged lands in the direction of their lines continued to the channel." Section 643, Gen. Stats. of 1906; section 643, Compiled Laws 1914, and notes.

This statute "does not vest in riparian owners an unqualified fee in the lands below high-water mark and out to the edge of the channel in navigable streams, bays of the sea, or harbors of this state. So long as such submerged lands remain unimproved by the construction of wharves, or unreclaimed by filling in from the shore and converting the water into land, the riparian owner, though the legal title is in him, has, in so far as the statute is concerned, no greater right to the beneficial use of such submerged lands and the waters above them than any other citizen, except for the purpose of protecting from invasion the right to improve which the statute gives. *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189.

[2] The state may fix the exterior lines of a navigable river if the rights of the people to the use of the waters and the shores of the river are not thereby substantially impaired; and rights in the submerged lands not within the reasonably fixed exterior lines of the river may be granted by legislative authority if such grant does not impair the rights of the whole people to the use of the waters for any purpose expressed or implied by law.

[3] The rights granted by the riparian statute of 1856 relate to the space between the shore line and the edge of the channel of navigable streams, bays, or harbors, and such rights are not controlled by the direction of lines dividing the uplands.

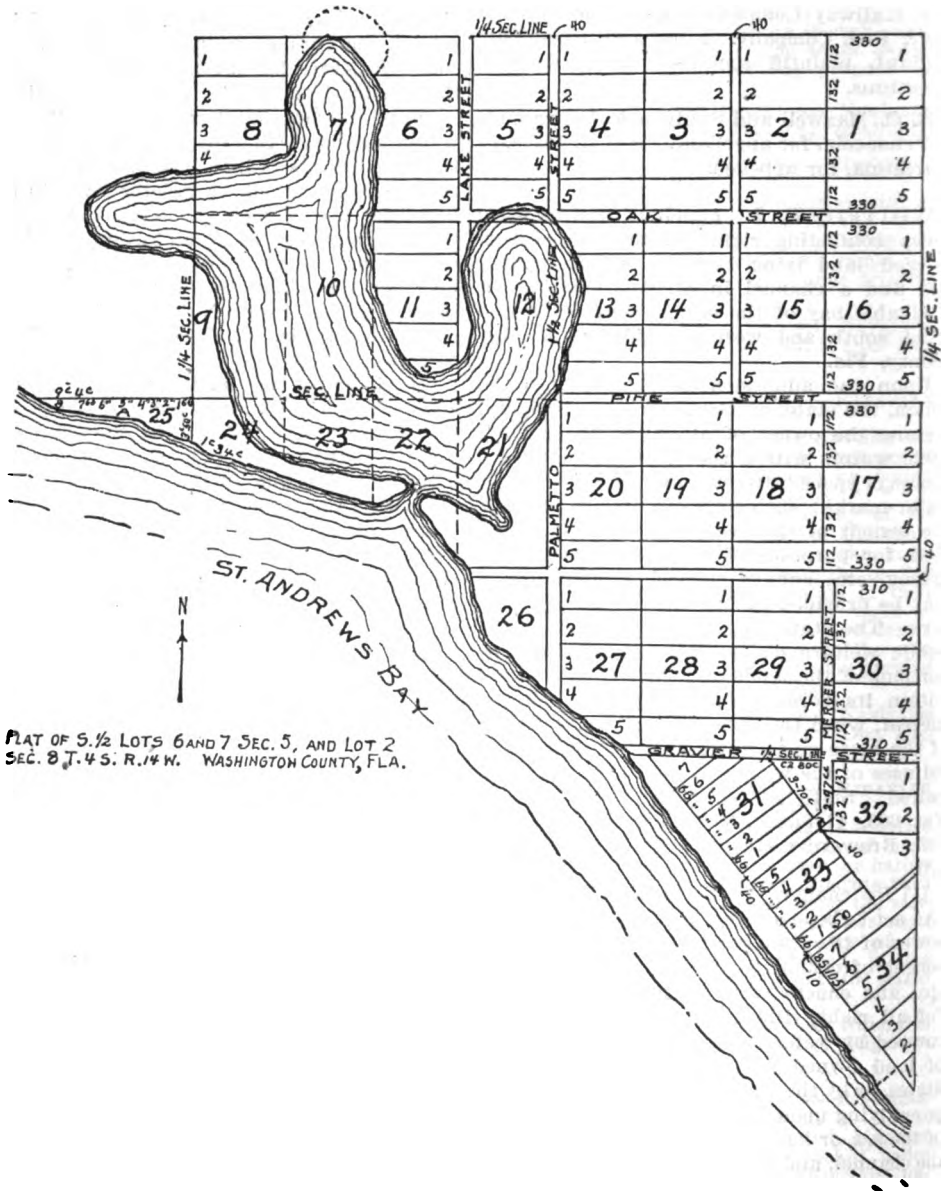
[4] As the rights granted by the riparian act of 1856 (sections 643, 644, General Statutes of 1906) extend to "all lands covered by water, lying in front of any tract of land * * * lying upon any navigable stream or bay of the sea or harbor, as far as the edge of the channel," and the right of action given the grantees to prevent encroachments extends to "all such submerged lands in the direction of their lines continued to the channel," this right of action extends to the space between lines drawn at right angles from the shore line "to the edge of the channel," where the channel runs parallel or practically so with the shore line. *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 South. 428; sec-

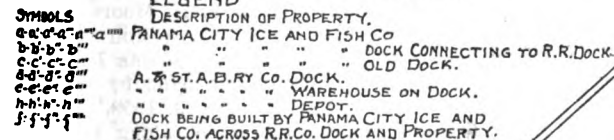
tions 643, 644, Compiled Laws of 1914, and notes.

[6] Assuming that the riparian rights acquired under the quoted statute by the owner of lands "lying upon" a navigable stream, bay or harbor within the state may be alienated separate from the lands to which they attached under the statute, such alienation can carry no greater right than the original owner had by virtue of the conditions and limitations contained in the statute making the qualified grant to stated classes of riparian owners. See *Rivas v. Solary*, 18 Fla. 122; *Sullivan v. Moreno*, 19 Fla. 200; *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189.

[6] A conveyance of land to which riparian rights to submerged lands are attached under the statute may carry the riparian rights, unless such rights are reserved or a contrary intent appears from the conveyance. *Axline v. Shaw*, 35 Fla. 306, 17 South. 411, 28 L. R. A. 391.

The railroad company owns a portion at least of block 27, and the ice company a portion of block 31 of a plat made in 1888. Both lots, as claimed by the parties, are opposite and extend to the waters of St. Andrews Bay; block 27 being northwest of block 31, the water line running northwest and southeast past these and many other blocks. See plats.





PLAT OF BAY SHORE ST. ANDREWS BAY AND
TOWN OF PANAMA CITY, FLA., SHOWING G.B.
THOMPSON'S SURVEY LOT 2 & WATER FRONT
THERETO, AND SHOWING DOCKS COPIED FROM
PLAT "LANDS OF GULF COAST DEVELOPMENT
CO. OF ST. ANDREWS BAY, FLA."

from the shore line opposite the portion of block 31 owned by the ice company. This made the wharf of the ice company intersect the wharf of the railroad company in the waters of the bay between the shore opposite block 31 and the channel of the bay opposite said block 31. The railroad company obtained a temporary injunction restraining the ice company from building its dock across the dock of the railroad company. After

filing an answer the defendant ice company filed a cross-bill praying for a decree that the space in the waters of the bay in front of the ice company's portion of lot 31 "lying between parallel lines running at right angles to the shore from the points of the intersections of the boundaries of said property with the shore line thereof, to the channel of said St. Andrews Bay," belongs to the ice company, and that the railroad company be enjoined from using such space with its wharf. The injunction restraining the ice company was made perpetual, and the cross-bill was dismissed. The ice company appealed. Each party asserts title, and also an estoppel against the right claimed by the other.

The appellant Panama Ice & Fish Company's claim of title is as follows:

G. B. Thompson, who in 1888 owned and made the record plat of the lands, in August, 1905, conveyed to G. M. West block 31, as platted by G. B. Thompson and filed for record, in N. $\frac{1}{2}$ of Sec. 8, T. 4 S., R. 14 W., "with riparian rights in bay as law directs." The plat shows an apparently open space between block 31 and other blocks to the southeast, and the waters of the bay. This space is not marked as a street as other spaces in the plat not running along the water line are marked. Block 31 is on the plat subdivided into lots, each of which fronts on the apparently open narrow space between the line of the block as platted and the water line of the bay. On October 31, 1905, G. M. West conveyed to the Gulf Coast Development Company block 31, and other property, by the plat, "together with all riparian rights appertaining to the above property." On April 9, 1908, G. B. Thompson conveyed to the Gulf Coast Development Company "all that land situated and being on and in the southwest side of the street designated as Bay street on the plat of said lands as made by G. B. Thompson in 1888 * * * in front of and opposite to block 31 * * * extending from the center of said Bay street out into the Bay of St. Andrews to the navigable channel as the law directs, with all riparian rights appertaining thereto." On May 1, 1908, the Gulf Coast Development Company conveyed to Oscar E. Williams and others, incorporators of the Panama Ice Company, a proposed corporation, a tract of land described as follows:

"Bounded by a line beginning at a point on the low-water line of the shore of St. Andrews Bay, due south of the southeast corner of block 31, of G. B. Thompson's platting of United States government lot No. 2, Sec. 8, Tp. 4 south, range 14 west, recorded at Vernon, Fla., Book 1, page 594; thence running due north to Gravier street as shown on said plat; thence due west along Gravier street 150 feet; thence due south to the low-water mark on St. Andrews Bay; thence in a southeasterly direction along said low-water mark to the point of beginning; also a tract of land lying under water of said bay bounded on the north by the above-described land, on the south by the channel of said bay, on the east and west by a continuation of the east and west boundary lines of the above-

described tract of land, running due south to the channel of said bay, with all riparian rights, except an easement for a street 60 feet wide along the bay shore, and for a belt railway line on said street. And the said parties of the first part hereby grant an easement through the lands lying between the above-described tract and the Atlanta & St. Andrews Bay Railroad for the purpose of building connecting side track for the use of the party of the second part reserving the privilege unto the party of the first part to connect with said side track, and to pass cars over the same; this conveyance is made upon the condition that the parties of the second part, their heirs and assigns, are not to use the land herein conveyed as the terminal of any railroad, but are not inhibited from making track connections with the Atlanta & St. Andrews Bay Railroad."

On August 13, 1908, O. E. Williams and others conveyed to the Panama Ice Company a tract of land bounded by a line beginning at a point on the low-water line of the shore of St. Andrews Bay due south of the southeast corner of block 31 of G. B. Thompson's platting of United States government lot No. 2 of section 8, township 4 south, range 14 west, as recorded in Book 1, at page 594, in 1888, of the records of Washington county, Fla., running thence due north through the said southeast corner of said block 31 to Gravier street; thence west along said Gravier street a distance of 150 feet; thence due south to the low-water line of said St. Andrews Bay; thence along the said low-water mark of said bay in a southeasterly direction to point of beginning.

On March 10, 1913, O. E. Williams and others executed to the Panama Ice Company a further conveyance so as to cover "all the interest which the parties [Williams and others] acquired under that certain deed from the Gulf Coast Development Company, dated the 1st day of May, 1908, which the parties [Williams and others] had not described in that certain deed executed by the parties [Williams and others] on the 13th day of August, 1908, to the" Panama Ice Company. On April 9, 1913, the Panama Ice Company conveyed the property to T. H. Moore, and on August 8, 1913, T. H. Moore and wife conveyed the property to the Panama Ice & Fish Company. A certificate made by the town clerk stated that on May 3, 1909, the town council vacated the street along the beach in Panama City as shown by the minutes of the town.

The claim of title of the Atlanta & St. Andrews Bay Railway Company, the appellee, is as follows:

On August 22, 1905, G. B. Thompson conveyed to G. M. West "block 27, except one acre on north end of said block, all the above being platted by G. B. Thompson and filed in clerk's office, * * * situated in lot (2) U. S. or commonly described as N. $\frac{1}{2}$ of Sec. 8, T. 4 S., R. 14 W., with riparian rights in bay as law directs." On October 31, 1905, G. M. West conveyed the same property to the Gulf Coast Development Company. On March 27, 1906, the Gulf Coast Development Com-

pany contracted to convey to the Atlanta & St. Andrews Bay Railway Company "one tract or parcel of land ten (10) feet in width along the water fronts of block twenty-two (22), twenty-one (21), twenty-six (26), twenty-seven (27), and a lot lying on the water front south of block twenty-seven (27) and west of a line running between said block twenty-seven (27) and block twenty-eight (28) to the bay; the south boundary of said ten (10)-foot tract of land herein mentioned being high-water mark on said bay, with all the rights of said development company in and to said tract or parcel of land lying south of same and extending as far out into the bay as the rights and interest of said development company go with riparian rights connected therewith on said bay."

[7] On August 11, 1908, the conveyance was made to the railroad company. These statements as to claims of title show that both parties claim through the Gulf Coast Development Company, which latter company received on October 31, 1905, from G. M. West a conveyance of property in the plat including "block thirty-one (31) * * * and all of block twenty-seven (27), except one acre on the north end of said block, * * * together with all riparian rights appertaining to the above property." The development company received also on April 9, 1908, a conveyance from G. B. Thompson, who platted the land and sold the blocks as above stated to West, covering "all that land situated and being on and in the southwest side of the street designated as Bay street on the plat," having reference to the space between block 31 and the bay. The Gulf Coast Development Company then apparently owned the riparian rights that were incident to block 31, which riparian rights were apparently south of the riparian rights to block 27 also owned by the development company. The property conveyed by the development company was described as "a strip of land 10 feet in width along the water front of blocks * * * twenty-seven and a lot" so described as perhaps to touch the portion of block 31 now owned by the appellant ice company, "with all rights in and to said tract or parcel of land lying south of same, and extending as far out into the bay as the rights of said Gulf Coast Development Company go with riparian rights connected therewith on the bay." It is contended for the railroad company that this last conveyance of riparian rights "lying south of" the land conveyed gave the railroad company title to the riparian rights opposite block 31. But the description used clearly indicates an intent to convey land together "with riparian rights connected therewith," which rights extend not south but southwest, and have reference not to the

lines dividing the uplands, but to the channel of the bay. If this were not the intention, more definite and sufficient words of description would have been used to make the conveyance legally effective.

This simplifies the consideration of and disposes of the appellee railroad company's claim of title to the riparian rights lying between the ice company's land in block 31 and the channel of the bay.

The first part of the description in the conveyance from the Gulf Coast Development Company to Williams and others, the predecessors in title to appellant is in effect as follows, to wit: From the water line due south of the southeast corner of block 31, thence due north to Gravier street, thence due west along Gravier street 150 feet, thence due south to the low-water mark on St. Andrews Bay, thence in a southeasterly direction along said low-water mark to the point of beginning.

This description carried the statutory riparian rights incident to the land, viz.: the lands covered by water lying in front of the tract of land so described as far as to the edge of the channel, no contrary intent appearing by reservation or otherwise. The latter part of the description in the conveyance from the Gulf Coast Development Company to Williams and others, the predecessors in title to the appellant, is as follows:

"Also a tract of land lying under water of said bay bounded on the north by the above-described land, on the south by the channel of said bay, on the east and west by a continuation of the east and west boundary lines of the above-described tract of land running due south to the channel of said bay, with all riparian rights, except an easement for a street," etc.

This description evidently covers riparian rights south of those opposite and incident to block 31, if effective for any purpose.

The evidence is sufficient to show that by silent acquiescence of its predecessors in title the ice company is estopped from complaining of the existence of the *present wharf structure* on its riparian rights between its land in block 31 and the channel of the bay. This, however, does not take from the ice company its legal rights under the statute of 1856 conferring riparian rights. The ice company may construct its wharf over or under or across the railroad company's wharf if no unnecessary injury is done to the latter wharf. Such crossing does not present the question determined in *Seaboard Air Line Ry. v. McRaney*, 69 Fla. 462, 68 South. 753.

The decree is reversed, with directions for further proceeding in accordance herewith.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

COCKRELL, J., takes no part.

WOODS v. STATE. (6 Div. 69.)

(Court of Appeals of Alabama. April 4, 1916.)

CRIMINAL LAW ⇨1182 — **APPEAL—AFFIRMANCE.**

Where the transcript contained a certificate of the trial judge that the time for tendering a bill of exceptions had expired and that no bill had been tendered within the time allowed by law, and the record proper showed that the proceedings were regular and contained no reversible error, *held* a judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. ⇨1182.]

Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge.

Ed Woods was convicted of grand larceny, and appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The transcript in this case shows a judgment of conviction entered in the trial court on the 19th day of May, 1915, and a sentence imposed upon the defendant in accordance with the verdict of the jury of three years' imprisonment in the penitentiary for grand larceny. The transcript was filed in this court on the 22d day of November, 1915 and was submitted on November 25, 1915. The transcript contains a certificate of the trial judge, certifying that the time for tendering a bill of exceptions had expired, and that no bill had been tendered within the time allowed by law. The appeal to this court was noted by the defendant on the 22d day of May, 1915, and the proceedings shown by the record proper being regular, and containing no error authorizing a reversal of the judgment, an affirmance is ordered.

Affirmed.

DOUGLAS v. STATE. (6 Div. 72.)

(Court of Appeals of Alabama. April 4, 1916.)

CRIMINAL LAW ⇨1094 — **APPEAL—AFFIRMANCE.**

A record proper showing a regular judgment of conviction on an indictment duly and regularly returned charging the offense for which defendant was adjudged guilty, and containing no bills of exceptions, after the expiration of the time for filing such bills, presented no showing of error requiring reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. ⇨1094.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Will Douglas was convicted of grand larceny, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The defendant was convicted of grand larceny on the 19th day of February, 1915, and took an appeal on the following day (February 20, 1915), when he was sentenced to an imprisonment of two

years in the penitentiary in conformity with the verdict of the jury finding him guilty of the offense charged.

The record contains no bill of exceptions, and the certificate of the clerk certifies that the time for filing has expired and that no bill of exceptions has been filed. The record proper shows a regular judgment of conviction on an indictment duly and regularly returned into court, charging the offense for which the defendant was adjudged guilty, and presents nothing showing error requiring reversal, and the judgment of conviction is therefore affirmed.

Affirmed.

GIBSON v. STATE. (No. 77.)

(Court of Appeals of Alabama. April 4, 1916.)

CRIMINAL LAW ⇨1182—**APPEAL—AFFIRMANCE.**

Where the time for presenting and having signed a bill of exceptions had expired and the transcript contained no bill of exceptions, and the proceedings shown by the record proper were regular and showed no reversible error, *held*, a judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. ⇨1182.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

E. M. Gibson was convicted of violating the prohibition law, and appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The transcript in this case contains no bill of exceptions. The proceedings shown by the record proper are regular and show no reversible error. It is shown by the judgment entry that the defendant was duly and regularly convicted on a charge of violating the prohibition law, and duly and legally sentenced in conformity with the verdict of the jury on the 11th day of January, 1915, and gave an appeal bond on the 6th day of February, 1915. The time for presenting and having signed a bill of exceptions having expired, and there being no error in the record, the judgment of conviction is affirmed.

Affirmed.

BUFFORD v. STATE. (6 Div. 971.)

(Court of Appeals of Alabama. April 20, 1916.)

1. CRIMINAL LAW ⇨351(8)—**EVIDENCE—SUBSEQUENT CONDUCT OF ACCUSED.**

On a larceny trial it is proper for the state to ask a witness if defendant made any statements to him about the stolen property or made any threats about the witness testifying in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 782; Dec. Dig. ⇨351(8).]

2. CRIMINAL LAW ⇨1144(12) — **APPEAL—RECORD.**

The introduction of a letter against objection by defendant will on appeal be presumed

proper where neither the letter nor its contents are included in the transcript.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3029, 3030; Dec. Dig. ☞1144(12).]

3. CRIMINAL LAW ☞1169(3)—OPINION—SPECIAL KNOWLEDGE.

A witness identifying defendant's handwriting is properly qualified by later testimony of defendant that the witness "is familiar with my handwriting; we have had a number of letters passed between us."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3139; Dec. Dig. ☞1169(3).]

4. CRIMINAL LAW ☞531(3)—CONFESSIONS.

A proper predicate for the admission of defendant's confession *held* laid where a witness thereto before testifying said that no one had threatened defendant or promised or made inducements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215; Dec. Dig. ☞531(3).]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Henry Bufford, alias Burfford, was convicted of grand larceny, and appeals. Affirmed.

Witness Arwood, testifying, stated that he had seen defendant write a number of letters and notes, and was familiar with his handwriting. "I had written him a letter before receiving this letter, and he had written me a letter before that (witness being shown a letter)."

Lee Cowart, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] Appellant was tried and convicted for the larceny of an animal of the cow kind. On the trial a state's witness was asked if the defendant made any statements to him about the stolen property, or made any threats about witness testifying in the case. A general objection to the question was overruled. In this there was no error authorizing a reversal. While the form of the question may have been objectionable, the evidence sought to be elicited by the inquiry was material. *Nevers Lumber Co. v. Fields*, 151 Ala. 367, 370, 44 South. 81.

[2] Objection was made by the defendant to the introduction of a certain letter. As a bill of exceptions is construed most strongly against the party presenting, the presumption will be indulged, neither the letter nor its contents being included in the transcript, that the trial court properly admitted the letter. *Yellow Pine Lbr. Co. v. Ala. State Land Co.*, 171 Ala. 77, 80, 54 South. 608.

[3] Under the doctrine announced in *Karr v. State*, 106 Ala. 1, 17 South. 328, the witness who identified defendant's handwriting was properly qualified. The weight of his testimony was a question for the jury. He, however, showed sufficient acquaintance with defendant's writing to testify. If there had been any error in this regard, it was rendered unavailing by defendant's later testi-

mony that the witness "is familiar with my handwriting; we have had a number of letters pass between us."

[4] A proper predicate for the admission of the defendant's confession was laid. Before testifying the witness had said that neither he nor any one else in his hearing or presence had threatened the defendant, nor told him it would be better to make a statement or worse if he did not, nor had he nor any one else promised the defendant any reward, or held out any inducement to make a statement, nor offered him any violence or harm if he did not make a statement. *Heningburg v. State*, 153 Ala. 18, 16, 45 South. 246.

Affirmed.

SPRINGFIELD FIRE & MARINE INS. CO. v. FERRELL (6 Div. 13.)

(Court of Appeals of Alabama. April 13, 1916.)

1. PRINCIPAL AND AGENT ☞116(1)—RESTRICTIONS 'ON AUTHORITY—NOTICE.

Restrictions upon the authority of a general agent with respect to the necessary or appropriate or usual incidents of business intrusted to him are not admissible in evidence against third persons without notice thereof, who relied on his implied authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. ☞116(1).]

2. PRINCIPAL AND AGENT ☞116(1)—TERRITORIAL RESTRICTIONS.

Territorial restrictions upon even a general agent's authority are effectual as to uninformed third persons.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. ☞116(1).]

3. INSURANCE ☞93—AGENT FOR INSURER—IMPLIED AUTHORITY—EVIDENCE AS TO LIMITATION OF AUTHORITY.

Where it was agreed that an insurance agent's authority was limited to one county, and that on a trip into another county he solicited insurance generally and wrote one policy accepted by the company, which did not know of the trip and did not hold him out as their agent in the second county, *held*, that the company was not liable for the agent's retention of premium paid for policy applied for in the second county.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 123; Dec. Dig. ☞93.]

Appeal from Circuit Court, Cullman County; Robert C. Brickell, Judge.

Action by G. F. Ferrell against the Springfield Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. A. Griffith, of Cullman, and Callahan & Harris, of Decatur, for appellant. Sample & Kilpatrick, of Cullman, and J. B. Powell, of Jasper, for appellee.

PELHAM, P. J. An agent of the appellant insurance company took from the appellee an application for a policy of fire insurance on the property of the appellee, who paid the

agent a sum of money as the premium therefor. No policy was ever issued to the appellee, and he sued the company for the amount so paid as a premium. The agent did not pay the premium to the company; it received no benefit therefrom, and had no knowledge that this policy had been applied for, or that the money was collected by the agent. The agent was authorized by the company to write policies and collect premiums, but his authority was so limited as not to cover the particular kind of property sought to be insured, and he had no authority to collect premiums on policies of insurance in advance of the issuance of the policy by the defendant. His employment was limited to Cullman county, where he resided, and he had no authority to represent the defendant in Winston county; but, notwithstanding the limitations upon his employment, without the knowledge of the company, he solicited insurance in Winston county, where the appellee lived, and in which county the property sought to be insured was situated. The company insists that the territorial limitation is effectual as to the appellee, even though he had no knowledge thereof.

[1, 2] It is well settled in this state that restrictions upon the authority of a general agent with respect to the necessary or appropriate and usual incidents of the business intrusted to him cannot avail and are not admissible in evidence against third persons who relied upon his implied authority without notice of his limitations. *Sun Insurance Office of London v. Mitchell*, 186 Ala. 420, 65 South. 143; *Syndicate Insurance Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Security, etc., v. Riley*, 157 Ala. 533, 47 South. 735. But, contrary to the weight of authority, the Alabama doctrine is that territorial restrictions upon even a general agent's authority are effectual as to uninformed third persons. *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30; *Sun Insurance Office of London v. Mitchell*, supra.

[3] The present case, in so far as the territorial limitation is concerned, materially differs from the case of *Sun Insurance Office of London v. Mitchell*, supra, in that the language of the appointment of the agent, which was in writing, in that case was "to act as agent to the said [Sun] office within the limits of Gadsden," which the court held did not exclude from his business or office in the city of Gadsden insurable property in immediately outlying districts commercially tributary to the city. The agreed statement of fact in the present case does not show that the appointment of the agent was in writing, but it was agreed "that his authority was limited to Cullman county, and he had no authority to represent the defendant in Winston county." The construction given by the Supreme Court to the appoint-

ment of the agent in the *Mitchell* case cannot be applied to the facts in this case. The territorial limitation upon the employment of the agent in the present case was effectual against the appellee. *Insurance Co. of North America v. Thornton*, supra.

The agreed statement of fact upon which this case was submitted shows that this agent, on one trip into Winston county, solicited insurance generally at the same time he received the application in question and wrote one policy, which was accepted by the company; but it is also shown that the company had no knowledge of the fact that the trip was made into Winston county, or that the agent had solicited business in that territory. It does not appear that the company had held him out as their agent in Winston county so as to clothe him with the apparent authority to take the application in the present case, or to collect the money thereon, or that the company had been guilty of such other conduct which would invoke the principle of estoppel. *Patterson v. Neal*, 135 Ala. 477, 33 South. 39.

The judgment must be reversed, and the cause remanded.

Reversed and remanded.

BROWN, J., not sitting.

COLE v. STATE. (6 Div. 898.)

(Court of Appeals of Alabama. April 18, 1916.)

1. INDICTMENT AND INFORMATION \Leftrightarrow 191(½) — PROOF AND VARIANCE.

Under a complaint for unlawful sale of prohibited liquors, a conviction may be had for either selling or acting as agent or assisting friend of the seller or buyer in procuring an unlawful sale.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 604; Dec. Dig. \Leftrightarrow 191(½).]

2. CRIMINAL LAW \Leftrightarrow 744—GENERAL CHARGE — UNCONVERTED EVIDENCE.

In a trial for unlawful sale of liquors, where defendant introduced no evidence, and the only inference from the state's evidence was that of defendant's guilt, giving the general charge for the state, *held* not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1715, 1727, 1728; Dec. Dig. \Leftrightarrow 744.]

3. CRIMINAL LAW \Leftrightarrow 701—ARGUMENT TO JURY—WAIVER.

Where, at the conclusion of the evidence, the court asked counsel if they wished to argue the case to the jury, and upon their declining gave the general charge upon the written request of the state, and thereupon the defendant asked to argue the case to the jury, and the court's declining to allow any argument, *held* not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1496-1505; Dec. Dig. \Leftrightarrow 701.]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Bird Cole was convicted of violation of liquor laws, and appeals. Affirmed.

Leith & Gunn, of Jasper, for appellant.
W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. Appellant was tried and convicted upon a complaint charging that he sold, offered for sale, kept for sale, or otherwise disposed of prohibited liquors and beverages. The complaint is in the form prescribed by the statute.

[1, 2] The evidence, without conflict, authorized the inference that the defendant either sold prohibited liquors or acted as agent or assisting friend of the seller or buyer in procuring an unlawful sale. A conviction for either offense may be had under a complaint for unlawful selling. *Bush v. State*, 12 Ala. App. 260, 67 South. 847; *Arrington v. State*, 69 South. 385. The defendant introduced no evidence, and the court gave the general charge for the state. In this there was no error, as the only inference to be drawn from the evidence introduced by the state was that of the guilt of the defendant of the offense charged.

[3] At the conclusion of the evidence, the court asked counsel if they wished to argue the case to the jury, and each replied that he did not. After this, the court, upon the written request of the state, gave the general charge. Thereupon the defendant asked leave to argue the case to the jury, and the court declined to allow any argument. The defendant had affirmatively waived his right to argument, and the court may not be put in error for acting upon defendant's waiver. 38 Cyc. 1471.

Affirmed

LEWIS v. STATE. (4 Div. 428.)

(Court of Appeals of Alabama. April 20, 1916.)

1. WITNESSES \S 358 — CROSS-EXAMINATION AS TO CHARACTER OF PARTY.

On cross-examination of a witness offered by the accused and who has given evidence of the good character of accused, it is permissible, as a test of his information and the accuracy and credibility of his testimony, to ask if the witness has not heard one or more persons of the neighborhood impute particular acts or the commission of a particular crime to the accused.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1159, 1160; Dec. Dig. \S 358.]

2. CRIMINAL LAW \S 369(1) — PREVIOUS OFFENSES.

Where accused was not indicted for violation of Code 1907, § 6419, requiring butchers to keep a record of every cow killed, it is error to allow the solicitor on cross-examination of accused over his objection to show the latter did not keep such record.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822, 823; Dec. Dig. \S 369(1).]

3. CRIMINAL LAW \S 369(2) — OTHER OFFENSES.

Testimony as to acts of accused in the transaction in question is admissible, although

showing that he had violated a statute, for which violation he was not being tried.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822, 823; Dec. Dig. \S 369(2).]

Appeal from Circuit Court, Houston County; H. A. Fearce, Judge.

Criminal trial of George L. Lewis. From a judgment, he appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, J. [1] It is permissible on cross-examination of a witness, offered by the accused and who has given evidence of the good character of the accused, to ask if the witness has not heard one or more persons of the neighborhood impute particular acts or the commission of a particular crime to the accused as a test of his information and the accuracy and credibility of his testimony. *Moulton v. State*, 88 Ala. 119, 6 South. 758, 6 L. R. A. 301; *Lewis v. State*, 68 South. 792. Under this rule, it was not error for the court to allow the question to the defendant's witness Daughtery on cross-examination if he had not heard that the defendant was accused of violating the law by selling liquors.

[2, 3] Section 6419 of the Code of 1907 provides that:

"Every butcher who fails to keep a record of every cow or animal of the cow kind killed, showing the color, earmarks, and brand of each cow or animal of the cow kind killed or butchered, and date when killed or butchered, and if purchased, from whom purchased, the residence of the person from whom the same was purchased, and when, and also the approximate gross weight at the time purchased and at the time killed or butchered, or who fails to make the required entries above specified within twenty-four hours after butchering any cow or animal of the cow kind, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars, and may be sentenced to hard-labor for the county for a period of not exceeding twelve months."

The solicitor, on cross-examination of the defendant and over his objection, was allowed to show that the defendant did not keep a record as required by this statute of cows that he purchased and paid for in the conduct of his business. The defendant was not indicted for a violation of this statute, and whether he had complied with it with reference to cattle which he had purchased previous to the transaction under investigation was wholly immaterial and could have no legitimate influence in solving the issues in the case; the only influence it could have exerted is the wholly illegitimate one of prejudicing the jury against the defendant. *Underhill*, *Criminal Evidence*, § 87; *Henson v. State*, 114 Ala. 25, 22 South. 127; *Rogers v. State*, 12 Ala. App. 196, 67 South. 781. If the testimony had been limited to the transaction in question, it would have been admissible, although it showed that the defendant had

violated this statute. *Kirkwood v. State*, 3 Ala. App. 19, 57 South. 504.

There was no error in refusing defendant charge 1, as it pretermits a consideration of all the evidence. *Roden v. State*, 69 South. 366. Charge 2 was likewise properly refused. *Williams v. State*, 161 Ala. 52, 50 South. 59; *Phillips v. State*, 162 Ala. 14, 60 South. 194; Charge 4 was well refused. *Stevens v. State*, 6 Ala. App. 6, 60 South. 459; *Welch v. State*, 156 Ala. 112, 46 South. 856.

The defendant's guilt was not entirely dependent upon the evidence of the witness Brown, non constat; the circumstantial evidence developed in the case was sufficient to carry the issues to the jury, and charges 10 and 11 were properly refused.

For the error pointed out, the judgment will be reversed, and the cause remanded. Reversed and remanded.

WERTHEIMER BAG CO. v. HILL. (6 Div. 918.)

(Court of Appeals of Alabama. April 20, 1916.)

1. CHATTEL MORTGAGES ⇐66, 67—DELIVERY AND ACCEPTANCE—NECESSITY.

The delivery and acceptance of a chattel mortgage are essential to its validity.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 136-140; Dec. Dig. ⇐66, 67.]

2. CHATTEL MORTGAGES ⇐104—INSTRUMENTS CONSTITUTING MORTGAGE — CONSTRUCTION TOGETHER.

Where, on delivery of a chattel mortgage to the mortgagee, the latter gave the mortgagor, and the mortgagor accepted, a receipt reading: "Received of [the mortgagor] one mortgage * * * to cover account due, payable \$10.00 each month. Failure to pay any monthly installment will make the whole amount fall due, payable on demand"—the two instruments constituted a single transaction, and together evidenced the parties' agreement, so that the receipt was admissible in evidence.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 188; Dec. Dig. ⇐104.]

3. CHATTEL MORTGAGES ⇐172(5)—RIGHTS OF MORTGAGOR—DEFENSES—STATUTE.

Under Code, §§ 3789, 3791, touching detinue by a mortgagee or vendor, and section 4899, providing that payment of a mortgage debt divests the title passing by the mortgage, in detinue by a chattel mortgagee, where there was no objection to the issues raised by the plea of the general issue with leave to give in evidence other matters which would be a good defense, defendant mortgagor could prove that the mortgage debt was not due, as well as prove payment as a complete defense, and put in issue the amount due on the debt, and prove a set-off or counterclaim, while proof of tender of an installment of the mortgage debt, payable by installments, made after suit brought, was admissible as tending to show a reduction of the amount due on the debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 307; Dec. Dig. ⇐172(5).]

4. CHATTEL MORTGAGES ⇐237 — TENDER — KEEPING GOOD—STATUTE.

Under Code 1907, § 5334, providing that a plea of tender of money or a thing in action must be accompanied by delivery to the clerk of the court, in detinue by a chattel mortgagee,

the mortgagor must keep good his tender of an installment of the mortgage debt by delivering the money to the clerk of the court.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 501, 502; Dec. Dig. ⇐237.]

5. APPEAL AND ERROR ⇐1027—HARMLESS ERROR—EVIDENCE.

In an action of detinue by a chattel mortgagee, error in refusing to permit defendant mortgagor to be asked regarding a custom of the mortgagee's trade, which could not have affected the result of the litigation, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4033; Dec. Dig. ⇐1027.]

6. APPEAL AND ERROR ⇐1050(3)—HARMLESS ERROR—EVIDENCE.

In detinue by a chattel mortgagee, where the record did not show that more than one week's payment was advanced, or that any bags were purchased by defendant mortgagor under an agreement, admitted in evidence, by the terms of which the mortgagee was to advance to the mortgagor \$25 a week to be used in purchasing bags such as were kept and sold in the mortgagee's business, any error in admitting the agreement in evidence was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4155; Dec. Dig. ⇐1050(3).]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Suit by the Wertheimer Bag Company against Luke Hill. Judgment for defendant, and plaintiff appeals. Affirmed.

Max J. Winkler and Victor Smith, both of Birmingham, for appellant. C. B. Powell, of Birmingham, for appellee.

PELHAM, P. J. The appellant, the plaintiff in the court below, sued in detinue to recover a wagon and two horses, with the value of the hire thereof during the detention, and relied on title by a mortgage executed by the defendant to the plaintiff, which is as follows:

"The State of Alabama, Jefferson County.

"Know all men by these presents: That for and in consideration of indebtedness to Wertheimer Bag Company in the sum of one hundred fifty-seven and ⁹⁹/₁₀₀ dollars, due by Luke Hill bearing date April, 1913, and payable on demand: Now, to secure the punctual payment of said indebtedness the said Luke Hill do hereby grant, bargain, sell and convey to said Wertheimer Bag Co. the following property, to wit: One Milburn two-horse wagon, hollow axle, color yellow; one clay bank horse, age nine years, weight about 1,000 pounds, five hands high; one bay horse, weight about 1,500 pounds, eight years old, about seven hands high; bay horse named Rowdy; also one large dark bay horse, weight 1,200 pounds, about six hands high, named Dooley—warranted free from all incumbrances and against any adverse claims. Upon condition, however, that if I pay said claim to the said Wertheimer Bag Co. or their assigns, with interest, this deed to be void; but if we fail to pay said claim in whole or in part at maturity, the said Wertheimer Bag Co., their agents or assigns, are authorized to take possession of said property, and after giving thirty days' notice by writing or verbal notice to sell the same at auction, to the highest bidder, for cash, in front of the court house door in said county, and the proceeds to be devoted to the paying, first, the expense of ad-

vertising and selling, and the payment of a reasonable attorney's fee for foreclosing this mortgage, and, second, the amount, with interest, that may be due on said mortgage and the surplus, if any, to be turned over to the undersigned. And the mortgagee or his assigns are authorized to bid and become the purchaser at said sale.

"Witness ——— hand and seal this 9th day of Apr., 1913. Luke Hill [L. S.]"

Then followed the acknowledgment.

It was not denied that the mortgage debt had not been paid in full, but the defendant offered, and the court admitted in evidence, a receipt from the plaintiff for the mortgage, bearing the same date, and contended that the two writings should be construed together, and that the receipt showed that the mortgage debt was to be paid in monthly installments of \$10 each. The receipt is as follows:

"Birmingham, Alabama, April 9, 1913. Received of Luke Hill one mortgage for \$157.49 to cover account due, payable \$10.00 each month. Failure to pay any monthly installment will make whole amount fall due, payable on demand."

The plea was the general issue with leave to give in evidence any matter which would be a good defense if well pleaded, and with leave to the plaintiff to give in evidence any matters which would be a good replication to the matters of defense.

[1, 2] Mr. Jones, in his work on chattel mortgages (5th Ed.) § 104, declares the elementary rule that:

"A delivery and acceptance of the mortgage are essential to its validity. Without these there is no mortgage, but only an attempted one, or a proposition to make one."

The mortgage, therefore, was not effective until it was delivered to the mortgagee, and since upon its delivery the mortgagee gave to the mortgagor, and the mortgagor accepted, the paper or receipt above set out, it appears that the two papers were executed in the course of and constituted one transaction, and together evidenced the agreement between the parties. The trial court properly ruled that the receipt was admissible in evidence, and that the two papers should be construed together. *Chambers v. Marks*, 93 Ala. 412, 9 South. 74; 27 Cyc. 1135.

The defendant introduced evidence tending to show that he had paid the installments regularly, and offered evidence which was admitted by the court over objection that after the suit was brought he made a tender of \$10 to be applied on account of the mortgage debt, and contended that there had been no default, and that the mortgage debt was not due at the time the action was begun. The evidence as to the tender and the default was in conflict. It is urged that the evidence as to the tender, which is shown to have been made after the suit was begun, is inadmissible.

[3, 4] There having been no objections to the issues raised by the plea of the general issue with leave to give in evidence other matters which would be a good defense, it

was competent for the defendant to prove that the mortgage debt was not due, as well as to prove payment of the mortgage debt as a complete defense, and to put in issue the amount due on such debt, and also to prove a set-off or counterclaim. Code 1907, §§ 3791, 3789, 4899; *Foster & Rudder v. Smith*, 104 Ala. 248, 16 South. 61; *Hooper & Nolen v. Birchfield et al.*, 115 Ala. 226, 22 South. 68; *Torbert v. McFarland*, 172 Ala. 117, 55 South. 311. Under the issues as framed, the proof of tender was therefore admissible as tending to show a reduction of the amount due on the mortgage debt, but, of course, was not effective unless the defendant showed that the tender was kept good by a delivery of the money so tendered to the clerk of the court. Code 1907, § 5334. The record does not show that the tender was kept good, but if the plaintiff felt aggrieved with this testimony, he might have sought relief by a motion to exclude the testimony, or by requesting a written charge, neither of which is disclosed by the record.

As a set-off to the mortgage debt, the defendant introduced evidence showing that prior to April, 1913, he had from time to time been selling and delivering to the plaintiff meal, hull, and oat sacks, about 10,000 in number, and that when the action was begun the plaintiff was due him \$250 on that account. The plaintiff's evidence was to the effect that the defendant had been paid for all the sacks that had been delivered to the plaintiff, except some that were worthless. There was a conflict in the evidence as to whether or not the worthless sacks had been returned to the defendant.

[5] The court refused to permit the defendant to be asked whether "he knew it to be the custom of dealers in sacks to reject worthless sacks and not pay for same." It is not shown that there was any express contract between the parties as to these sacks, but the transaction shows an implied agreement on the part of the plaintiff to pay the defendant no more than the reasonable value of the sacks that were delivered and accepted. If the jury believed the evidence that the sacks were worthless, they did not allow the defendant anything on that account, and therefore the custom inquired about could not have affected the result.

[6] The court admitted in evidence a contract between the parties, dated in July, 1913, by the terms of which the plaintiff was to advance to the defendant \$25 per week to be used by the defendant in purchasing for the plaintiff such bags as were kept and sold in the business of the plaintiff. The form of the pleadings was such that at the time the contract was offered there was nothing to show to the court that this contract was irrelevant. The record does not show that any bags were purchased by the defendant under the agreement, and it appears that the plaintiff advanced to the defendant only \$25 on account of this agreement, which sum was

repaid by the defendant. It is not shown that the plaintiff suffered any injury by the admission of this agreement in evidence.

It follows that the judgment appealed from must be affirmed.

Affirmed.

ALABAMA GREAT SOUTHERN R. CO. v. JOHNSON. (7 Div. 374.)

(Court of Appeals of Alabama. April 13, 1916.)

1. CARRIERS §314(2) — PERSONAL INJURY — PLEADING—NEGLIGENCE.

A count of a complaint, in a passenger's action for personal injury, setting up the relationship of passenger, and averring in general terms that plaintiff was injured "by reason of and as a proximate consequence of the negligence of the defendant," is sufficient, as where the gravamen of the action is negligence, it is sufficient merely to aver the facts out of which the duty springs, and that defendant negligently breached such duty, and that as a proximate consequence plaintiff suffered injury, without particularizing the acts of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½; Dec. Dig. §314(2); Negligence, Cent. Dig. § 182.]

2. CARRIERS §314(2) — PERSONAL INJURY — PLEADING—SUFFICIENCY.

A count of a complaint, alleging that while plaintiff was passing down the aisle of a street car looking for a seat she tripped over a suit case, projecting into the aisle and fell violently upon the floor, and that such fall and her injury were proximately caused by the defendant's servants in negligently permitting the aisle of the car to be obstructed sufficiently averred a breach of duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½; Dec. Dig. §314(2); Negligence, Cent. Dig. § 182.]

3. EVIDENCE §121(12)—RES GESTE—AMUSEMENT OF OTHERS.

In a passenger's action for injury from falling over a suit case on the floor of the car, wherein plaintiff specifically pleaded and claimed as special damages that she had been mortified on account of her fall and injury, evidence that the people in the car were much amused at plaintiff's predicament, together with what was then said, was admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 330, 331; Dec. Dig. §121(12).]

4. CARRIERS §280(1) — INJURIES TO PASSENGERS—LIABILITY—NEGLIGENCE.

The carrier of passengers for hire is not an insurer, but his duty is commensurate with the highest degree of care, and, to make it liable for injury, it must be shown that it or its servants were guilty of some negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1088, 1106, 1109; Dec. Dig. §280(1).]

5. CARRIERS §318(3)—ACTION FOR INJURIES — NEGLIGENCE—PRESUMPTION AND BURDEN OF PROOF.

The mere fact that a suit case projected in the aisle of a street car without a showing that it was under the management or control of the defendant or its servants, and that in the ordinary course of events injury to a passenger from falling over it would not have happened but for some negligence attributable to defendant, did not make out a prima facie case of negligence for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. §318(3).]

6. NEGLIGENCE §136(6)—"RES IPSA LOQUITUR."

The doctrine of "res ipsa loquitur" involves no substantive rule of law, but merely means that the attendant facts are of such probative force on the question of inferential negligence as to speak for themselves; that is, to shift the burden of proof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 285; Dec. Dig. §136(6).]

For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

Appeal from Circuit Court, DeKalb County; W. W. Haralson, Judge.

Action by Fannie Johnson against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Goodhue & Brindley, of Gadsden, for appellant. E. O. McCord, of Gadsden, and E. P. Reed, of Collinsville, for appellee.

EVANS, J. Appellee, plaintiff below, brought her action on the case to recover damages for personal injuries sustained by her while a passenger on one of appellant's trains.

[1] Appellant assigns error upon the overruling of its demurrers to each of the two counts, A and B, of the complaint. Count A sets up the relationship of passenger, and avers in general terms that plaintiff was injured and "by reason of and as a proximate consequence of the negligence of the defendant." Under the liberal system of pleading in this state, it has been repeatedly held that, where the gravamen of the action is the alleged nonfeasance or misfeasance of another, it is sufficient merely to aver the facts out of which the duty springs, and that defendant negligently breached such duty, and as a proximate consequence of such negligence plaintiff suffered injury; it is not necessary to specify the quo modo or particularize the acts of negligence. *Southern Ry. v. Burgess*, 143 Ala. 364, 42 South. 35; *Birmingham Ry., L. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27. The duty and its breach were sufficiently shown, and the demurrers to this count were without merit.

[2] Count B differs from count A in that it undertakes to specify the quo modo, alleging that:

"While plaintiff was passing down the aisle of said car, looking for a seat, she tripped over a suit case or piece of baggage projecting into the said aisle of said car, and fell, with great violence, full length upon the floor of said car." and "plaintiff avers that the said fall and the damages and injuries she sustained and suffered were proximately caused by the negligence of the servants or agents of the defendant upon said car, acting within the scope and line of their authority as such, in negligently permitting said aisle of said car to become obstructed by said suit case or piece of baggage as aforesaid."

The words, "negligently permitted said aisle of said car to become obstructed by said suit case," sufficiently aver a breach of

duty, and bring count B within the influence of Birmingham Ry., L. & P. Co. v. Weathers, 164 Ala. 23, 51 South. 303; and the demurrers were properly overruled.

[3] The court did not err in permitting witness Ruth Johnson to testify that at the time her mother fell the people in the car were much amused at her embarrassing predicament. Plaintiff had specially pleaded and claimed as special damages that she was "humiliated and mortified and caused much bodily pain and mental distress on account of her fall and injury." What was said and done at the time of the fall was part of the *res gestæ*.

Other assignments present a more serious question. There were but two witnesses, plaintiff and her daughter, Ruth Johnson. Their testimony was without conflict, and was substantially to the effect that plaintiff and her daughter boarded appellant's train at Collinsville, 9:05, on the morning of September 7th, Labor Day, bound for Irondale, a suburb of Birmingham. The conductor was upon the ground and assisted them up the steps. The car was crowded and as they proceeded down the aisle to get a seat plaintiff tripped over a dress suit case or valise and injured herself. Nothing appears from the record to show how long the dress suit case had remained in the aisle, nor who put it there, nor does it appear whether any of the servants of defendant were in the car at or shortly before the time of the accident. The defendant offered no testimony. The case was allowed to go to the jury on the theory that a *prima facie* case was made out by showing an unexplained accident to a passenger. The rule was stated in *L. & N. R. R. Co. v. Jones*, 83 Ala. 376, 3 South. 902, and quoted with approval in *Birmingham Ry., L. & P. Co. v. McCurdy*, 172 Ala. 488, 55 South. 616, that:

"Where a passenger suffers injury at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption."

But the same learned judge, delivering the opinion in *L. & N. R. R. Co. v. Jones*, *supra*, afterwards qualified his deliverance in that case, saying:

"The extract copied above from *L. & N. R. R. Co. v. Jones*, although correct in that case and in many others, is not of universal application. See *Hutchinson on Carriers*, §§ 799-801; *Railway Accident Law*, section 376. The principle is, perhaps, stated too broadly." *Ga. Pac. Ry. Co. v. Love*, 91 Ala. 432, 8 South. 714, 24 Am. St. Rep. 927.

And likewise the same learned judge who quoted with approval the rule in *L. & N. R. R. Co. v. Jones*, *supra*, in the case of *Birmingham Ry., L. & P. Co. v. McCurdy*, *supra*, should not be understood as having stated such rule as of universal application, for in *Central of Georgia Ry. Co. v. Brown*, 165

Ala. 495, 51 South. 565, he expressly points out that:

"Not in every case of injury to a passenger does a presumption of negligence on the part of the carrier arise from the happening of the injury."

Mr. Hutchinson in his work on Carriers, § 1412, says:

"The obligation of the carrier of passengers being to exercise the utmost care and diligence for their safety, it is frequently stated as a rule of evidence, in cases resting upon the question of his negligence, that proof of the accident and of the injury to the passenger thereby, without more, at once creates the presumption of negligence, which it becomes incumbent upon him to rebut. This, however, is hardly a correct statement of the law. The mere happening of the accident, aside from the circumstances by which it has been occasioned or attended, may, in every case, be consistent with the exercise of the highest degree of care and circumspection. Carriers of passengers cannot be held liable for the consequences of accidents against which no human care or foresight could have provided; and, if nothing be shown further than that an accident has happened to his vehicle, from which a passenger has sustained an injury, for aught that would appear, it may have happened from some cause for which the carrier could not be held responsible. It may have been occasioned by the act of God, which excuses alike the common carrier of goods and the public carrier of passengers, or by the act of a stranger, against which it was impossible for the carrier to guard. And the fact being that, for a large portion of the accidents which occur in the transportation of passengers, and from which they sustain injuries, the carrier is in no wise responsible, it cannot be legally inferred, in any instance from the mere proof of the accident, without showing how it occurred, that it was attributable to the negligence of the carrier or of his servants."

[4] The carrier of passengers for hire is not an insurer; his duty is relative, commensurate, it is true, with the highest degree of care, but not absolute. It must be shown that defendant or its servants were guilty of some negligence.

[5, 6] The record does not show negligence on the part of defendant, or any of its servants, by the mere presence of the dress suit case in the aisle, for non constat but that some other passenger may have set it there, and perchance but a moment before the accident. Had it been shown that some servant of defendant was in the car at the time, instead, on the contrary, on the outside, assisting passengers, it might properly have been left to the jury to say whether the servant was negligent in not being alert enough to discover the obstruction before plaintiff tripped over it. We do not consider that the bare fact of a dress suit case being in the aisle makes out a *prima facie* case; it is only where it is shown that the thing causing the injury is under the management or control of defendant or its servant and the circumstances attendant upon the accident are in and of themselves of such a character that, in the ordinary course of events, the accident would not have happened but for some negligence attributable to defendant, it can be said a *prima facie* case of negligence is made out. The doctrine of "*res ipsa loqui-*

tur" involves no substantive rule of law; it merely means that the attendant facts are of such probative force on the question of inferential negligence as to speak for themselves; i. e., to shift the burden of proof. Here, such was not the case, for no presumption or intendment can, in reason, be indulged where the proof is equally as consistent with the absence, as it is with the existence, of negligence, or, in other words, where it is left very doubtful from all the evidence whether defendant was in fact guilty of any negligence, none can, per se, be presumed. *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Levi Stern v. Michigan Central R. R.*, 76 Mich. 591, 43 N. W. 587; *Price v. St. Louis, I. M. & S. Ry.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79.

In the case of *Stimson v. Milwaukee, L. S. & W. Ry. Co.*, 75 Wis. 381, 44 N. W. 748, the facts were almost identical with the instant case. The appellate court in affirming a judgment of nonsuit said:

"It is alleged that the learned circuit judge erred in holding that there was no evidence tending to show negligence on the part of the company. It is plain that it is the duty of the company to see that the aisles of their cars are not obstructed, either by satchels or any other thing, in such a way as to endanger the safety of passengers entering or leaving such cars. This proposition must be admitted to be true, so far as to compel the company and its employees to use due care and diligence in keeping the aisles of the cars unobstructed. The question in this case is whether, upon the evidence given on the trial, it raises a presumption that there was any want of care or diligence on the part of the company or its employees in not discovering and removing the obstruction in question. * * * The rule stated in these cases is that 'there must be reasonable evidence of negligence, but where the thing [meaning the thing causing the injury] is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' In the case at bar the thing which obstructed the passage in the car was evidently personal baggage of some passenger, and not a thing exclusively under the control or management of the employees of the company; and so the mere fact that it was in the aisle or passageway of the car at the exact time of the accident does not, of itself, raise a presumption of negligence on the part of the employees of the company. There may be a duty on the part of the employees of the company to remove the personal baggage of passengers from the passageways of the cars, but, in order to make it their duty to act, there must be evidence showing, or at least tending to show, that such employees had notice of such obstruction being in the aisle or passageway, or that it had remained there so long before the accident that, in a reasonably vigilant discharge of their duties, they could have discovered the obstruction before the accident happened, and failed to remove it. The evidence in the case shows that none of the employees of the company were in the car at the time the accident happened, and, in the absence of any proof to the contrary, we must presume that the duty of the employees required them to be at some other place while the train was at the station. All we have, therefore, is the one fact that, at the exact time of the accident, these satchels were

in the aisle, and that the plaintiff fell over them and was injured. The personal baggage of passengers is not 'a thing under the management of the defendant and its servants,' within the meaning of the rule stated in the cases above cited; and it therefore becomes necessary for the plaintiff to show by other proof that the company or its servants were guilty of some negligence or want of ordinary care in regard to these satchels. It seems very clear that there is no evidence tending to prove such negligence. There is no evidence showing, or tending to show, how long these satchels had been in the aisle. It is just as reasonable to suppose that some passenger had placed them there after the train had stopped at New London as to suppose that they had been placed there before it stopped. The presumption would rather favor the conclusion that they were placed there after the train had stopped, and while the employees were performing their duty outside the car, for the reason that negligence is not presumed, and if they had been there before the train stopped, they would have been seen by the employees, or some of them, and removed from the aisle. Negligence cannot be predicated upon a state of facts which is as consistent with the exercise of care as it is with negligence. As said in the quotation above, 'there must be reasonable evidence of negligence on the part of the company or its employees,' and in this case there is no such reasonable evidence. The nonsuit was properly granted."

Again, in the case of *Burns v. Penna. R. R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811, it is said:

"Under the facts, there was no presumption of negligence. The rule is that where a passenger is injured by anything done or left undone by the carrier, or its employees, in connection with the appliances of transportation, or in the conduct and management of the business relating to the same, the burden of proof is upon the carrier to show that such injury did not result from its negligence. But to cast this burden upon the carrier, it must first be shown that the injury complained of resulted from something improper or unsafe in the conduct of the business or in the appliances of transportation. *Thomas v. R. R. Co.*, 148 Pa. 180 [23 Atl. 888, 15 L. R. A. 416]; *Ginn v. R. R. Co.*, 220 Pa. 552 [69 Atl. 992]; *Sutton v. R. R. Co.*, 230 Pa. 523 [79 Atl. 719]. The appliances of transportation referred to in these cases mean the roadbed, tracks, cars, engines, and all other machinery and equipment furnished by the railroad company and used in connection with the conduct and management of its business. A dress suit case belonging to a passenger is not such an appliance. * * * The mere fact that the personal baggage of a passenger is in the aisle of a car at the exact time of the accident does not, of itself, raise a presumption of negligence on the part of the employees of the railroad company. While it, no doubt, is the duty of the employees of a railroad company to remove the personal baggage of passengers from the aisles of cars, they must, in order to make it their duty to act, have notice that such obstructions are in the aisle, or the obstruction must have remained there for so long a time before the accident that, in the exercise of due care, they would have discovered it before the accident occurred."

Our attention is invited by appellee to the case of *Beiser v. Cincinnati, N. O. & T. P. Ry. Co.*, 152 Ky. 522, 153 S. W. 742, 43 L. R. A. (N. S.) 1050. There the court uses this language:

"We are not prepared to hold that the evidence will allow the appellant to recover on the ground that appellee was guilty of negligence in allowing the valise to remain in the

aisle until she was injured by falling over it; for, according to Booth, who alone testified on that point, the valise did not remain in the aisle where it was placed by the owner more than five minutes before the accident occurred, and, as shown by all the testimony, during that interval the conductor and brakeman of the train were not in the car at all, but were on the outside of the train, directing and assisting passengers to get thereon. Being thus engaged in the performance of their necessary duties, it is manifest that they did not know, and by the exercise of ordinary care could not have known, of the obstruction of the aisle by the valise."

It is true the plaintiff testified that "the car was very much crowded, and necessarily made somewhat dark." She also testified that it was 9:05 in the morning when she boarded the train; and appellee urges for our consideration whether a reasonable inference may not be drawn that the servants of appellant failed to use due care in not anticipating probable mishaps from the darkened condition of a crowded car; in other words, whether a reasonable inference of negligence is not deducible therefrom, requiring its presentation to the jury. Whatever of cogency there may be in this phase of the matter, it would necessarily be addressed to the count of general averment, count A, as count B, in setting up the *quo modo*, counts upon some other specialization of negligence, to wit:

"In negligently permitting said aisle of said car to become obstructed by said suit case or piece of baggage."

There was no evidence that the car was entering a tunnel or under a shed, and it will hardly be seriously contended that the utmost degree of human care and foresight would have suggested the precaution of lighting the lamps at 9 a. m. to relieve the somewhat darkened condition of a crowded car.

It follows from what we have said that, there being no presumption or inference of negligence attributable to appellant, the trial court was in error in refusing to give the general affirmative as requested by appellant both as to counts A and B. A judgment will accordingly be entered, reversing and remanding the cause.

Reversed and remanded.

SPINKS v. STATE. (1 Div. 170.)

(Court of Appeals of Alabama. April 4, 1916.)

1. WITNESSES \S 389—IMPEACHMENT—LAYING PREDICATE.

Where an issue was whether an ox was the property of a witness or of his wife, testimony of such witness, on cross-examination, that he did not remember whether B., last spring, tried to buy "some cattle from him," was not sufficient predicate for impeaching him by showing, by B., that B. had tried to buy a cow from the witness, who told him that he did not own a cow, but his wife did, for the rule requires that the occasion and substance of the conversation be stated with reasonable certainty,

so that the attention of the witness be directed in such manner that he can identify it.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1243-1245; Dec. Dig. \S 389.]

2. CRIMINAL LAW \S 408—EVIDENCE—OFFERS OF COMPROMISE AND RESTITUTION.

Offers of compromise or to make restitution of property which has been the subject of a crime, made by accused, are not admissible in evidence for or against him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 785; Dec. Dig. \S 408.]

3. CRIMINAL LAW \S 1137(6)—APPEAL—PARTY ENTITLED TO ALLEGE ERROR.

In a prosecution for crime, where the court, after excluding defendant's offered evidence that he offered to make restitution, after proper predicate was laid for the introduction of such proof to show defendant's good faith in buying a mortgaged ox, stated to defendant that he could recall his witness and make the proof, which the defendant declined to do, defendant could not complain of the exclusion of the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3007; Dec. Dig. \S 1137(6).]

4. CRIMINAL LAW \S 809—TRIAL—INSTRUCTION.

In a prosecution for crime, the charge, "Then a strong presumption arises there was no felonious intent," was elliptical and misleading, for the omission of "that" after "arises."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1961-1967; Dec. Dig. \S 809.]

Appeal from Circuit Court, Clarke County; Ben D. Turner, Judge.

Grady Spinks was convicted of crime, and he appeals. Judgment affirmed.

F. E. Poole, of Grove Hill, and T. W. Davis, of Thomasville, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BROWN, J. [1] One of the issues was whether the ox, the subject of the alleged crime, was the property of Tony Jackson, or that of his wife, Ellen Jackson. The state's witness Tony Jackson testified that the property belonged to him, and on cross-examination, in response to questions put, no doubt, to lay a predicate for his impeachment, this witness testified without objection:

"I do not remember whether Mr. Clinton Bagley last spring tried to buy *some cattle* from me. I did not tell him at that time that I did not have any *cattle*, and that all belonged to my wife. He has not been to buy any *cattle* from me."

Bagley was subsequently introduced, and was allowed to testify over the solicitor's objection that witness tried to buy a *cow* from Tony Jackson in the spring a year previous to the trial, and that Jackson told witness that he did not own a *cow* to his name; that witness would have to go to his—Jackson's—wife. After the witness had given this testimony, the court, on motion of the prosecuting attorney, excluded it. While exact precision in laying a predicate to impeach a witness by showing previous contradictory statements is not required, the rule requires

that the occasion and substance of the conversation be stated with reasonable certainty, so that the attention of the witness may be directed to the conversation in such manner that he can identify it. Jones on Evidence, § 846; Southern Ry. Co. v. Williams, 113 Ala. 620, 21 South. 328. The conversation embraced in the predicate was with reference to "some cattle," while that referred to in the excluded testimony was with reference to "a cow." It might have been true that the state's witness owned "cattle," including the ox, the subject of the crime in this case, and that he did not own a cow. If this was the fact, all that the excluded testimony stated may have occurred, yet it was not contradictory of Jackson's testimony. The predicate was not sufficient to justify the admission of the impeaching testimony and it was properly excluded.

[2] During the cross-examination of the witness Alex Gunn, Jr., the defendant proposed to show that he had offered to pay the mortgagee for the ox. The general rule is that offers of compromise or to make restitution for property the subject of a crime by the accused is not admissible either for or against him. Sanders v. State, 148 Ala. 607, 41 South. 466.

[3] After the defendant offered testimony tending to show a bona fide transaction between the defendant, Cleveland Jackson, and his mother, Ellen Jackson, and on the assumption by the defendant that the animal belonged either to Cleveland Jackson or his mother, and without any knowledge that Gunn had a mortgage on the ox, evidence showing or tending to show that defendant, after knowledge was brought to him that the animal was mortgaged, offered to pay Gunn for the ox, was clearly admissible as tending to disprove the alleged purpose to

defraud, charged in the first count of the indictment. When the defendant first proposed to make proof by the witness Alex Gunn, Jr., that the defendant offered to pay the mortgagee for the ox, no proof had been offered by the accused tending to show a bona fide transaction between the Jackson negroes and himself; on the other hand, the undisputed evidence then in the case was that accused had purchased the ox from Jackson with express notice of the existence of the mortgage held by Gunn, and the proposed testimony was not then admissible. After a predicate was laid for the introduction of this proof as above indicated, the court stated to the accused that he could recall the witness and make the proof, and he declined to have the witness recalled, and is therefore in no position to complain.

Under the evidence, the question of the defendant's guilt was for the jury, and the affirmative charge was properly refused. Talbert, alias, etc., v. State, 121 Ala. 33, 25 South. 690; McKinney v. State, 12 Ala. App. 155, 68 South. 518.

[4] In charge 3, refused to the defendant, the word "that" is omitted in the sentence, "Then a strong presumption arises [that] there was no felonious intent," and the charge was elliptical and misleading. Under the more recent holdings of the Supreme Court, the question of the felonious intent under the circumstances hypothesized was for the jury, and if this charge was otherwise correct, its refusal could well be justified as invasive of their province. Talbert, alias, etc., v. State, supra; McKinney v. State, supra.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

CHRISTOPHER et al. v. MUNGEN et al.
(Supreme Court of Florida. April 18, 1916.)

(Syllabus by the Court.)

1. ESTOPPEL \S 65 — EQUITABLE ESTOPPEL —
POSITION IN JUDICIAL PROCEEDINGS.

J. M. and E. L. were half-sisters, daughters of J. L. by slave marriages. J. L. died in 1894, leaving surviving him his widow, whom he had married in 1866, and the two daughters J. M. and E. L. by slave marriages. The widow survived her husband a short while, and died prior to 1899 without children or other known heirs. The appellants claim title to the real property under one of the half-sisters, who were held to have inherited the real property of their ancestor J. L. under the act of 1899 entitled "An act to legalize the marriages and offspring of persons of African descent" (Laws 1899, c. 4749), and were tenants in common of such property. *Held*, that appellants could not be heard to insist that the real property was inherited by the widow and at her death escheated to the state to defeat a bill for partition brought by the half-sister of their grantor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 155-158; Dec. Dig. \S 65.]

2. TENANCY IN COMMON \S 15(2) — MUTUAL
RIGHTS—"ADVERSE POSSESSION."

Mere silent possession of land by one tenant in common is not sufficient to divest the right of his cotenant. Open, notorious, continuous, adverse possession by one tenant in common for a period of seven years will ripen into title by adverse possession as against his cotenant only when the character of such possession has been brought home to his cotenant, and thereafter continued for such period of seven years.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. \S 43; Dec. Dig. \S 15(2).]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

Appeal from Circuit Court, Duval County;
George Couper Gibbs, Judge.

Suit by Jane Mungen and another against John G. Christopher and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Blasbee & Bedell, of Jacksonville, for appellants. N. P. Bryan, J. T. G. Crawford, Axtell & Rinehart, and Van C. Swearingen, all of Jacksonville, for appellees.

ELLIS, J. This is a suit brought by the appellees, as complainants below, against the appellants, who were defendants, for the partition of certain lands in Duval county. The suit was begun in September, 1909, and has been brought to this court twice before, both times by the defendants below, once from an order overruling their demurrer to the bill of complaint, and again from the decree settling and determining the equities between the parties and decreeing a partition of the lands described. In the first appeal the order overruling the demurrer was affirmed, and in the second the decree was affirmed. Christopher v. Mungen, 61 Fla. 513, 55 South. 273; Christopher v. Mungen, 66 Fla. 467, 63 South. 923.

The report as made by the commissioners appointed to make partition of the lands de-

scribed in the bill shows that as to the lands described in the bill as "all that part of East Lewisville lying east of the Shell road or Talleyrand avenue according to map in Plat Book 1, page 25, of the Public Records of Duval County, Florida," the commissioners divided the same into lots extending from Talleyrand avenue to the channel of the St. Johns river, and awarded them to Jane Mungen, Julia A. Wilson, and John G. Christopher, except a strip of land 217.8 feet wide lying immediately north of the southern line of East Lewisville extended to the river's channel, which strip was allotted to no one.

John G. Christopher, Julia A. Wilson, and H. A. Wilson filed an exception to the report on the ground that the "report is based upon an erroneous conception and understanding of the identity and boundaries of the property described in the bill of complaint and decree of partition," in that the report "includes and proposes to partition land bordering upon the St. Johns river which said land is not described in the bill of complaint and decree of partition herein."

By leave of the court the complainants amended the bill of complaint so as to describe more particularly the land lying east of the Shell road or Talleyrand avenue. The words appearing in the original bill descriptive of this tract were stricken out, and the following inserted:

"Also all of that certain tract of land lying in said county and state particularly described as follows: Beginning on the east side of Talleyrand avenue, as now located, at the point of intersection with the south line of East Lewisville; thence east along the south line of East Lewisville to the channel of the St. Johns river; thence northerly to the north line of East Lewisville extended to the channel of the St. Johns river; thence westerly along the north line of East Lewisville so extended to the east side of Talleyrand avenue; thence southwesterly along the east side of Talleyrand avenue to the place of beginning."

By leave of court the defendants John G. Christopher, Julia A. Wilson, and H. A. Wilson thereupon filed their answer to the bill of complaint as amended. This answer set up the same defenses as were contained in the answer filed July 14, 1911. The answer also contained a demurrer to the bill: First, for want of equity; and, second, that at the time the rights of these defendants or those under whom they claim accrued the law of the state of Florida evidenced by the Constitution, statutes, and decisions gave no inheritable blood to the offspring of slave marriages, and the same had become a rule of property assuring to these defendants a vested right, and granting to the plaintiff the relief prayed for in the bill would be a repudiation of the said rule of property and the impairment of the obligation of a contract contrary to the Constitution of the United States, and a deprivation of defendants' property without due process of law contrary to the Fourteenth Amendment to the Consti-

tution of the United States. It was also urged in the answer that the cause of action did not accrue within three, four, nor seven years, and as to so much of the bill as prayed relief with respect to the lands or property rights not mentioned or described in the original bill of complaint the cause of action did not accrue within three, four, nor seven years.

A stipulation was entered into between the solicitors for the defendants Christopher and Wilson and the complainants to the effect: That the defendant Christopher had expended the sum of \$3,050 on account of the following items: Improvements and maintenance of the property, costs and expenses and attorney's fees in the ejectment suit against W. R. Thompson, and for abstracts of title. That these several expenditures were in themselves reasonable charges against the defendant Christopher, but complainants reserve the question as to whether each of the several charges was for such purpose as would bind a cotenant to contribution. This constitutes the fifth paragraph of the stipulation.

On the 3d day of April, 1915, a final decree was made and entered; the parties having submitted no further evidence. The decree allotted and set off to Jane Mungen certain portions of the property described, and declared her to be the owner in fee simple and entitled to the possession thereof, and certain other portions of the property were allotted and set off to John G. Christopher and Julia A. Wilson, respectively, and they were declared to be the owners in fee simple and entitled to the possession thereof. The complainants were required to pay to the defendants Christopher and Wilson certain sums of money on account of taxes and searches and to W. A. McLean, Jr., as trustee, the sum of \$212.14, and declared said amounts so ordered to be paid to be liens upon the land allotted to Jane Mungen. No part of the \$3,050 expended by J. G. Christopher according to the stipulation was decreed to be paid by the complainants. From this decree the appeal was taken, and four errors are assigned as follows: First, the court erred in allotting and setting off to Jane Mungen certain lands described and declaring her to be the owner in fee simple and entitled to possession thereof; second, the court erred in allotting and setting off to Jane Mungen that portion of the property not included in the original bill of complaint; third, the court erred in not dismissing the bill of complaint; and, fourth, the court erred in not allowing to the appellant Christopher as against the complainants one-half of the expenditures mentioned in the stipulation, paragraph 5.

The questions involved in and discussed under the first and third assignments of error, except those involving the three and four year clauses of the statute of limitations, were settled in the former opinions, and the

questions there decided constitute the law of the case. *Ross v. Savage*, 66 Fla. 106, 63 South. 148; *Harper Piano Co. v. Seaboard Air Line Ry. Co.*, 65 Fla. 490, 62 South. 482; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910. That Jane Mungen and Eliza Lewis were children of customary slave marriages, and James Lewis was their father, that upon the death of James Lewis his wife, Elizabeth, whom he married in 1866, and by whom he had no children, took only a dower in his property, and upon her death the title reverted to the children of James Lewis, who were Jane Mungen and Eliza Lewis, that both complainants and defendants claim title to the lands described in the bill under James Lewis, to whose heirs, Jane and Eliza, the beneficial interest in his lands passed, as the trust deed or power of sale given by Lewis to McLean carried no title or estate to the heirs of McLean upon his death, and that the complainant was not guilty of laches, are points in this litigation which have been settled by the former decisions in this case.

[1] Defendants insist: That there was no reversion to Jane Mungen, because children born in slavery could not be heirs of their parents, and such was the state of the law when James Lewis died, which was in the year 1894. Not until the year 1899 did the Legislature enact the statute entitled "An act to legalize the marriages and offspring of persons of African descent." Laws 1899, c. 4749. That at his death therefore his wife, Elizabeth, became his sole heir at law under the statute of descents, and that she, and not Jane Mungen, inherited the property. If this is true, it applies also to Eliza L. Lewis, the half-sister of Jane, and under whom the defendants claim. There is nothing whatever in the record to show that the defendants' title is connected with Elizabeth Lewis or any person claiming under her. At the time of her death she was an ex-slave, and died without children or other heirs so far as the record shows to the contrary. If this is true, the property escheated to the state. The defendants cannot complain that the court found that the law confined Elizabeth to her dower, and that the Legislature by the act of 1899 made it possible for the children of James Lewis to inherit his estate, and thereby prevented an escheat. *Johnson et al. v. Wilson*, 48 Fla. 76, 37 South. 179.

[2] The record does not show that the defendants had acquired title to any part of the lands involved by adverse possession as against Jane Mungen. In the former opinion the court found no acts of the defendant showing continuous notorious adverse occupation of the property, nor do we find such evidence as to the land which it is claimed was not embraced in the original bill and included in the bill as amended. The three and four year clauses of the statute of limitations do not apply. A tenant in common of lands cannot by mere silent possession alone divert the right of his cotenant. Nothing

less than an open, notorious, adverse possession brought home to his cotenant and continued for the period of seven years will ripen into a title by adverse possession of the land theretofore held in common. Gracy et al. v. Fielding, decided at this term, 70 South. 625.

We find no reason for disturbing the conclusion of the chancellor on the question of the expenditure by J. G. Christopher and made the subject of the fifth paragraph of the stipulation.

There is no error in the decree, and it is therefore affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD JJ., concur.

RUGE et al. v. WEBB PRESS CO., Limited.
(Supreme Court of Florida. April 18, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §248(1)—LANDLORD'S LIEN—PRIORITY.

Under section 2237, General Statutes of Florida 1906, Compiled Laws of 1914, the landlord's lien provided for in the second subdivision of the section is not superior to a lien acquired by another prior to the bringing of the property upon the leased premises or prior to the commencement of the tenancy under the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1006, 1006-1008, 1017; Dec. Dig. §248(1).]

2. CHATTEL MORTGAGES §138(3)—PRIORITY OF LIEN—LANDLORD'S LIENS.

A written lease of lots which provided that the time should begin to run from a date in the past, executed between the owner of the lots and a tenant subsequently to the bringing upon the lots of personal property which was immediately mortgaged to secure a balance due for its purchase price, will not be given a retroactive effect in order to defeat the superiority of the mortgage lien over that of the landlord.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 280; Dec. Dig. §138(3).]

Appeal from Circuit Court, Franklin County; E. C. Love, Judge.

Bill in equity by the Webb Press Company against John G. Ruge and another. From a decree for complainant, defendants appeal. Affirmed.

Fred T. Myers, of Tallahassee, for appellants. R. Don McLeod, Jr., of Apalachicola, for appellee.

ELLIS, J. During the year 1911 a corporation was organized at Apalachicola, Fla., to engage in the cotton compress business at that place. Before the organization of the corporation was completed, two of the subscribers for stock were appointed by their associates to purchase the necessary compress machinery, boilers, etc. This commission was executed by the two representatives of the proposed stockholders of the compress company entering into an agreement with the

Webb Press Company, the appellee, for the purchase of the necessary machinery. The contract, which was in writing, provided that the compress should be erected in Apalachicola, and that the amount then remaining due upon the purchase price of the machinery should be evidenced by four notes of \$1,250 each and payable one each year beginning with May 1, 1912; that said notes should be secured by first mortgage on the entire compress plant of the Apalachicola Compress Company, and the title to the machinery, which was described in the instrument, should remain in the Webb Press Company "until fully settled for as herein provided." This contract was dated July 11, 1911.

In April, 1911, and before the company was organized, one of the proposed stockholders of the company began negotiations with appellants for a lease upon the wharf lots described in the bill, and it was understood by the appellants that the lease was to be taken in contemplation of erecting upon the lots a cotton compress. The proposition was made to Mr. Henderson, who was one of the proposed stockholders, at the request of Mr. Phillips, another proposed stockholder.

Three of the proposed stockholders of the company, Beverly, Henderson, and Phillips, without the knowledge or consent of the appellants, went upon the lots with a force of employes and began excavating for the foundation to be laid for the machinery and had a pile driver at work driving piles. The appellants notified the people at work that Ruge Bros. had not authorized the work, and that the workmen would have to look to the compress people for payment for the same. Henderson was notified by one of the appellants, verbally and in writing, to discontinue the work on the property and vacate the same, because the appellants had given Henderson and his associates no authority to undertake any permanent work or exercise right of possession as trustee in behalf of the compress company "until the lease and agreements were perfected." To this notice the representatives of the proposed stockholders of the company replied that "they would perfect matters at once." But they did not do so, and no other action was taken by Ruge Bros. to dispossess these men, who continued their preparations for the foundations for the press machinery and began erecting the same about the latter part of August.

In the meantime the organization of the corporation was progressing, and on December 4, 1911, the Apalachicola Cotton Compress Company, having been duly incorporated, executed and delivered to the Webb Press Company four notes for \$1,250 each, and to secure the payment of the same executed and delivered to the Webb Press Company a mortgage upon the following property:

"All of the right, title and interest of the party of the first part in and to wharf lot four

(4), wharf lot five (5) and wharf lot six (6) of said city and Water street adjacent thereto. Said interest in wharf lots being more specifically described as the north half of wharf lot four (4), all of wharf lot five (5) and the south half of wharf lot six (6), together with all improvements thereon consisting chiefly of one double hydraulic compress, boilers, pumps, and engines, compress sheds, platforms, tools and all fittings and fixtures thereto belonging. The same being the entire compress plant of the Apalachicola Cotton Compress Company in Apalachicola, Franklin county, Florida, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

The mortgage appears to have been duly acknowledged and was recorded in the public records of Franklin county on December 18, 1911.

On March 11, 1912, the negotiations between the compress company and the appellants for the rental of the wharf lots upon which the compress machinery had been erected were renewed, and on that date a written contract of lease was executed and delivered between the parties, under the terms of which the lessors let the premises for the term of 10 years from the 22d day of August, 1911, and the lessee agreed to pay to the lessors "an annual rental of \$500 for the full term of this lease, to be paid in semiannual payments of \$250 on the 22d day of February and the 22d day of August in each and every year." It was also provided in that instrument that the lessee "its successors and assigns" should have the right to remove from the "said lots hereby leased" within 90 days after the expiration of the lease any buildings, structures, machinery, trade fixtures, equipment, and personal property placed thereon by the lessee, its successors and assigns.

The reason given by one of the appellants for making the term of the lease to begin August 22, 1911, was to make it coincident "with the date of a lease obtained from the city of Apalachicola to the Apalachicola Cotton Compress Company which was to be assigned in part to the Ruge Bros. Canning Company." During the taking of testimony one of the appellants upon cross-examination in answer to the following question: "Q. Is any rent due to you from the Apalachicola Cotton Compress Company for the premises mentioned in your lease accruing prior to the 18th day of December, 1911?" replied as follows: "A. All rent which matured prior to the installment falling due August 22, 1912, has been paid." The rent accruing for the three periods from February 22, 1912, to August 22, 1913, not having been paid, the appellant obtained a judgment against the compress company therefor, which has not been paid. The rent accruing for the three periods from August 22, 1913, to February 22, 1915, is also unpaid.

The Cotton Compress Company having failed to pay to the Webb Press Company

two of the notes secured by the mortgage, the latter company on the 8th day of December, 1913, filed its bill in the circuit court for Franklin county to foreclose and made the appellants here parties defendant. An order pro confesso was taken against the compress company for failure to plead, answer, or demur. The appellants answered setting up their claim for rent due under the lease and insisting that the lien therefor was superior to that of the complainant under its mortgage.

The court upon final hearing decreed the amount due under the mortgages, and that the lien of the mortgage was superior to the lien of the firm of Ruge & Sons for rent upon the machinery and improvements brought upon the property prior to the execution of the lease; that the lien of Ruge & Sons upon the leasehold interest of the compress company in the lots was superior to the mortgage lien; that the complainants were entitled to a foreclosure of the mortgage, and the compress company was ordered to pay the amount found to be due within a time certain, in default whereof the machinery, consisting of boilers, pumps, engines, also the compress sheds, platforms, tools, and all fittings and fixtures "except the bale hoist," to be sold at public outcry; that at the same time the leasehold interest of the compress company be sold, but separately and apart from the machinery, and subject to the condition that the purchaser take the same subject to the covenants of the lease and to the lien thereon for rent. The proceeds of the sale were required to be applied to the payment of taxes, costs, and the amount adjudged to be due complainants for principal, interest and attorneys' fees upon the mortgage indebtedness. From this decree, the appellants appealed, and assigned as error the making and entering the decree.

[1, 2] The statute provides that every person to whom rent may be due shall have a lien for such rent upon the property found upon or off the premises leased or rented and in the possession of any person, as follows:

"1. Upon agricultural products raised on the land leased or rented for the current year. This lien shall be superior to all other liens, though of older date.

"2. Upon all other property of the lessee or his sublessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of such property on the premises leased.

"3. Upon all other property of the defendant. This lien shall date from the levy of the distress warrant hereinafter provided for." Section 2237, Gen. Stats. of 1906; Compiled Laws of 1914.

The claim of the appellants that their lien was superior to that of the mortgage is based upon the second subdivision of the above-quoted statute, and upon the further contention that the leases provided that the "buildings, structures, machinery, trade fix-

tures or property" should not be removed from the premises until all rents, taxes, and other demands agreed to be paid under the terms of the lease shall have been fully paid and discharged. The lien given by the statute is a charge only upon the property of the tenant; but as the machinery described was not the property of the tenant at the time it was placed upon the lots, it follows that no lien attached to it until the relation of landlord and tenant existed between the owners of the lots and the owners of the machinery or their assigns.

The Webb Press Company retained the title to the machinery until the execution of the mortgage by the Compress Company on December 4, 1911. At that time the relation of landlord and tenant did not exist between the appellants and the compress company under such a contract as would support an action for rent. Archibald's Nisi Prius, 58. If the appellants had any claim against that company for its occupancy of the lots, it was a claim not for rent, because there was no contract between the parties for the payment of money or other things for the use of the lots, nor for any definite term of occupation; but the claim was for such sum as the use of the lots was really worth upon the implied contract to pay such sum. The appellants' action would have been for use and occupation. *Brolasky v. Ferguson*, 48 Pa. 434; *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490; *Porter v. Hooper*, 11 Me. 170; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015; *Stewart v. Fitch*, 31 N. J. Law, 17; *Ward v. Bull*, 1 Fla. 271.

The most favorable view that may be taken of the evidence from the appellants' standpoint is, that the occupation of the lots by the compress company during the year 1911 and to the date of the lease was with the consent of the appellants and under an implied contract to pay such sum as such use was reasonably worth. Section 2237 distinguishes between the words "leased" and "rented." Subdivision 1 provides for a lien upon the products raised upon the land leased or rented, while subdivision 2 provides that upon all other property usually kept upon the premises the lien shall be superior to other liens only when such other liens are acquired "subsequent" to the bringing of such property on the premises leased. The premises in this case were not leased until after the machinery was brought on the premises, and the mortgage lien of the Webb Press Company had attached. The lease made and executed by the appellants on March 11, 1912, to the Cotton Compress Company was for a term of 10 years, and was required by the statute to be in writing, signed, sealed, and delivered in the presence of at least two subscribing witnesses by the party creating, making, or granting the estate. Section 2448, Gen. Stats. of 1906,

Compiled Laws 1914; *King v. State*, 43 Fla. 211, 31 South. 254; *Graves v. J. M. Harris & Bro.*, 63 Fla. 169, 58 South. 236. To give it a retroactive effect as against the mortgagee would be to defeat the purpose of section 2237, General Statutes, and enable the landlord with the aid of his tenant to acquire an inequitable advantage over the vendor of the machinery who had diligently and lawfully taken all the necessary precautions to secure the payment of the balance due for the purchase money of the machinery sold by it. The case of *Webb v. Sharp*, 13 Wall. (U. S.) 14, 20 L. Ed. 478, cited by counsel for appellants, does not apply because in that case the mortgage was made by the lessees to Webb upon the press after the lease of the premises had been made to Snow and his associates and they had entered upon the leased premises and placed the press thereon. In the case of *Beall v. White*, 94 U. S. 382, 24 L. Ed. 173, the same act of Congress prescribing liens in favor of landlords upon the personal chattels of their tenants was considered, but in that case also as in *Webb v. Sharp*, the lessees entered into possession of the premises, and after the commencement of the lease, executed a deed of trust upon their furniture to secure a debt evidenced by notes to one other than the landlord. The court held that the lien for rent was superior. Said the court:

"Liens of the kind, arising under the act of Congress, attach at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought on to the premises."

Under our statute, however, the landlord's lien is not superior to a lien acquired by another prior to the bringing of the property upon the leased premises, or prior to the commencement of the tenancy under the lease.

It is contended that the court erred in ordering the machinery, tools, press, boilers, engines, press sheds, platforms, etc., to be sold separately from the leasehold interest of the cotton compress company in and to the lots. On the date the mortgage was executed the compress company had no right, title, or interest in and to the wharf lots, under any lease from the owners. If any such interest was acquired afterwards and became subject to the mortgage, the mortgagee's rights would be secondary to that of the landlord, and he cannot complain that his superior right in regard thereto was preserved by the decree. The contract between vendor and vendee, the mortgage and the indenture of lease, all show a clear intention of the parties interested to deal with the machinery and sheds as personal property. The decree so interprets the intention of the parties, and, as we think, correctly.

The decree is therefore affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

BLAND v. FIDELITY TRUST CO.

(Supreme Court of Florida. April 12, 1916.)

*(Syllabus by the Court.)***1. ALTERATION OF INSTRUMENTS § 8 — INDORSEMENT OF PAYMENT—MATERIALITY.**

An indorsement of payment on an instrument promising to pay money has no more validity or effect than a receipt, and the addition of such an indorsement does not have the effect of vitiating the instrument.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 40-46; Dec. Dig. § 8.]

2. BILLS AND NOTES § 342—INDORSEMENT—BONA FIDE PURCHASER.

The knowledge afforded by mere indorsements of partial payments on a negotiable note as of the date of its issue do not make the purchase of the note "amount to bad faith."

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 830-841; Dec. Dig. § 342.]

3. BILLS AND NOTES § 497(1) — ACTIONS — PRESUMPTIONS.

Where there is no evidence of a defect in the title of a payee to a negotiable note, a presumption exists in favor of an indorsee as a holder in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675, 1677, 1678, 1686, 1687; Dec. Dig. § 497(1).]

4. APPEAL AND ERROR § 1058(1)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

If error be committed in excluding evidence affecting the title of the payees of a negotiable note, which evidence would put upon the plaintiff holders the burden of proving that they "acquired the title as a holder in due course," such error, if any, may not be harmful where proof is made that the plaintiff is a holder in due course.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058(1).]

5. BILLS AND NOTES § 356 — TRANSFER — BONA FIDE PURCHASERS—CONSIDERATION.

If a mere credit upon the books of a bank does not of itself amount to the payment of a valuable consideration, the withdrawal by check of a substantial part of the amount so credited is such payment.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 908; Dec. Dig. § 356.]

6. TRIAL § 141—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE.

Where there is no opposing evidence, it is not necessary to submit the case to the jury when the evidence clearly shows the right of the plaintiff to recover.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 836; Dec. Dig. § 141.]

7. TRIAL § 139(1)—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

When the evidence would not have supported a verdict for the defendant, and no material or harmful error was committed in admitting or excluding evidence, a directed verdict for the plaintiff is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139(1).]

Error to Circuit Court, Duval County;
Daniel A. Simmons, Judge.

Action by the Fidelity Trust Company

against John H. Bland. Judgment for plaintiff, and defendant brings error. **Affirmed.**

Cockrell & Cockrell, B. B. Macdonell, J. S. Maxwell, and G. J. Patterson, all of Jacksonville, for plaintiff in error. Kay & Daggett, of Jacksonville, for defendant in error.

WHITFIELD, J. The declaration herein alleges that Bland, on May 4, 1908, by his negotiable promissory note of that date, promised to pay McLaughlin Bros. or order the sum of \$1,666 three years after date, with interest at 6 per cent. per annum, said interest payable annually; that said McLaughlin Bros. thereafterwards for value and before maturity indorsed the said note to plaintiff, Fidelity Trust Company, who was a bona fide purchaser of the same, whereby defendant became liable and promised to pay plaintiff the contents of said note according to the tenor thereof, which said contents of said note, with the exception of the sum of \$264 which latter sum has been paid on said note, as shown by the receipts indorsed on the back of said note; that no part of the said amount so remaining due has been paid. The note and the indorsements thereon are as follows:

\$1,666.00	Jacksonville, Fla., May 4th, 1908.
264.00	Three years after date, for value received, we jointly and severally promise to pay
1,402.00	McLaughlin Bros., or order, sixteen hundred and sixty-six ⁹⁹ / ₁₀₀ dollars, at the
252.36	Florida Nat. Bank of Jacksonville, with interest at six per cent. per annum interest payable annually.
\$1,654.36	

W. B. Talley.	D. A. Campbell.
F. K. Gardner.	W. L. Diggins.
John H. Bland.	G. W. Sanders.
A. McNulty.	C. F. Flynn.
Chas. Burnette.	George Francis.
Chas. H. Howard.	A. Drysdale.
W. R. Sebring.	J. F. Broward.
C. M. Lowe.	J. R. Wilson.
Frank M. Canepa.	T. J. Smith.
I. L. Farris.	Dick Oldham.
Thos. C. Thompson, M. D.	

Florida National Bank 32383. Jacksonville, Fla.

Received on the within note

From I. G. & J. A. Melson..	\$66.00
" A. R. Muller.....	66.00
May 4, 1908, paid.....	66.00
" " "	66.00

Demand, notice of nonpayment and protest waived.
McLaughlin Bros.

The following pleas were filed and issue joined thereon:

"That the note set up and sued upon is not his note, and that he never executed the note attached to and made a part of said declaration.

"(2) And for a second plea to the plaintiff's declaration, defendant says that the said note sued on was given solely in consideration of a horse sold by said payees solely for breeding purposes, and said payees represented said horse to be a sound stallion good for breeding purposes, and this defendant says that said horse then and there was not a sound stallion good for breeding purposes, and that the consideration of said note wholly failed; and that the said plaintiff is not a holder of said note in due course.

"(3) And for a third plea to said declaration defendant says that McLaughlin Bros. obtained

the signature of this defendant to said note by fraud in this, that McLaughlin Bros. represented to this defendant that this defendant would only be responsible for $\frac{1}{32}$ of the amount of said note, and that said note would be signed by 24 persons other than this defendant, said 24 other persons including C. O. Bettes, I. G. & J. A. Melson, A. R. Muller and D. H. McMillan; said C. O. Bettes, I. G. & J. A. Melson, A. R. Muller and D. H. McMillan so named were then and there solvent and the promise that they would sign the note was a material inducement to this defendant in signing said note; and the defendant says that the plaintiff is not a holder of said note in due course.

"(4) And for a fourth plea to the declaration defendant says that the consideration for which the said note mentioned in the declaration was given was the promise of McLaughlin Bros. to organize a corporation under the laws of Florida, to transfer to such corporation the title to one French coach stallion then owned by the said McLaughlin Bros., to issue and to deliver to this defendant fully paid stock in such proposed corporation of the face value of \$200; said proposed corporation has never been organized; no stock has ever been issued or delivered to this defendant in consideration for his signing said promissory note and the consideration of said note totally failed; and the defendant says that the plaintiff is not a holder of said note in due course."

There was judgment for the plaintiff on a directed verdict, and the defendant took writ of error.

The following provisions of the General Statutes have application in this case:

"2958. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

"2962. Absence or failure of consideration is a matter of defense as against any person not a holder in due course."

"2966. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue."

"2965. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

"2989. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of * * * such facts that his action in taking the instrument amounted to bad faith."

"2990. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"2992. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has ne-

gotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

"3046. Where a negotiable instrument is materially altered without the assent of all parties liable thereto, it is voided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers."

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

"Any alteration which changes:

"(1) The date;

"(2) The sum payable, either for principal or interest;

"(3) The time or place of payment;

"(4) The number or the relations of the parties;

"(5) The medium or currency in which payment is to be made;

"Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." Sections 2958, 2962, 2966, 2985, 2989, 2990, 2992, 3046, Gen. Stats. of 1906; ditto Compiled Laws of 1914.

Objections to the introduction of the note in evidence were overruled.

[1] It is contended that the payments indorsed on the back of the note constitute "a material alteration in the amount of the note and a change or alteration on the face of the note."

The indorsements of payments on the back of the note do not change the "sum payable" or "alter the effect of the instrument in any respect" within the meaning of section 3046, Gen. Stats., above quoted, though the indorsement bears the date of the note.

"To constitute a mutilation of a note or other contract which will void it, there must be some change or alteration in the writing constituting the evidence of the contract so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground upon which the doctrine rests is that such an alteration avoids the instrument; that it destroys the identity of the contract. A memorandum of a payment indorsed by the holder on the back of a promissory note is no part of the contract of the parties. The original note, which constituted the evidence of their contract, remains intact. The memorandum of payment is merely evidence against the holder of the fact of the payment, and is of no more effect than if made on a separate piece of paper. *Cambridge v. Hyde*, 131 Mass. 77 [41 Am. Rep. 198]. Writing on the back of an instrument may be such as to form a part of the contract itself, and in such a case an alteration of the indorsement would constitute an alteration of the written evidence of the contract of the parties; but a memorandum of a partial payment indorsed by the holder on the back of a promissory note is not of this character. It is neither a contract nor any part of a contract, but a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol. *Sears v. Wempner*, 27 Minn. 351, 7 N. W. 362." *Theopold v. Deike*, 76 Minn. 121, 78 N. W. 977, 77 Am. St. Rep. 607.

"An indorsement of payment on an instrument promising to pay money has no more validity

or effect than a receipt, and the addition of such an indorsement does not have the effect of vitiating the instrument." 3 Ency. L. & P. 399.

See, also, *State Solicitors Co. v. Savage*, 39 Fla. 703, 23 South. 413, where it was held that where a note for \$1,500 is given, and an indorsement thereon is "pay to the order of S. * * * the said principal sum being reduced to one thousand dollars," such an indorsement is not an alteration of the note itself, but is in legal effect a credit of \$500 on the note.

In the case of *Johnston v. May*, 76 Ind. 293, cited by plaintiff in error, the indorsement on a note given for \$1,100 for a definite purpose was:

"Two hundred fifty-three dollars and ⁵²/₁₀₀, paid on this note April 1, 1875, a sum in excess of indebtedness for which this note is given."

The court held the indorsement and the use of the note as shown was such a "perversion or misapplication of the note" as released the surety from liability. The indorsements of part payments on the back of the note in this case did not invalidate the note or affect its negotiability. See *Smith v. Shippey*, 182 Pa. 24, 37 Atl. 844, 38 L. R. A. 823.

[2] It is argued that because of the indorsements of partial payments the note is not "regular on its face," so as to make the plaintiff indorsee "a holder in due course," under section 2985 of the General Statutes, and that the indorsements were of such a nature as to put the holder upon inquiry before taking it, which inquiry would have shown the defenses claimed by the makers. While indorsements on a note of partial payments made on the date of the note by persons not parties to the note may be somewhat unusual, such indorsements on this note do not make the note other than "complete and regular on its face." The purchaser of the note may reasonably have supposed the payments were made and indorsed on the back of the note after it was executed, though done on the day the note bears date; and the mere fact that two of the payments were made by persons not parties to the note did not require the purchaser to ascertain the reason for such indorsements in order to become "a holder in due course." The indorsements did not ipso facto cause "any infirmity in the instrument or defect in the title of the person negotiating it." The knowledge afforded by the indorsements of payment did not make the purchase of the note "amount to bad faith" under section 2989. See *J. L. Smathers & Co. v. Toxaway Hotel Co.*, 162 N. C. 346, 78 S. E. 224; *Vaughn v. Johnson*, 20 Idaho, 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99; *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907; *Little v. Arkansas Nat. Bank*, 113 Ark. 72, 167 S. W. 75.

A number of actions against makers of the note were consolidated for the purposes

of trial. It was admitted, or otherwise proven, that each of the makers signed the note sued upon. Presumably they became parties "thereto for value." See section 2958, Gen. Stats.

A witness who purchased the note for the plaintiff testified that the note was purchased for value before its maturity and without any notice of infirmities in the payee's title. The witness specifically denied the averments of the pleas affecting the status of the plaintiff as a holder in due course of the note.

The court sustained objections to questions put on cross-examination to the plaintiff's witness for the purpose of showing:

"That the plaintiff had had a great many transactions with the payees of the note, of like nature to this note, wherein like infirmities existed between the payees and the makers as are pleaded in this case, known to the plaintiff prior to the alleged purchase of this particular note, and that plaintiff was aware prior to this transaction between the plaintiff and said payees of the fraudulent methods resorted to by the payees in securing such notes."

The ruling was not erroneous, since the matters referred to were not testified to on direct examination, and no abuse of judicial discretion appears. The supposed prior transactions were not shown to have any direct connection with the subject-matter of this action, and the excluded questions were not merely to test the credibility of the witness.

The witness for the plaintiff testified that he purchased the note sued on with other notes in one transaction, crediting the payees \$61,150.40, and that, before plaintiff had any information or notice of any alleged infirmity or defect in the note, the total amount to the credit of the payees with the plaintiff "had been withdrawn several times."

"Q. Please state whether or not McLaughlin Bros. drew upon their account to your bank between the time when your bank purchased this aggregation of notes which included the note sued on here and the 1st of January, 1911, to such an extent as to bring the total amount they had on deposit in your bank to a sum less than \$30,000. A. They drew on it so it was less than \$30,000 between those dates. Q. Please state whether or not McLaughlin Bros. drew upon their account in your bank between the time when your bank purchased this aggregation of notes and the 1st of January, 1911, to such an extent as to withdraw from your bank an amount at least equal to the total amount on deposit in your bank at the close of the day on which their account was credited with the proceeds of the discount of the aggregation of notes just inquired about. A. They did."

A sheet taken from a ledger made "under the loose-leaf system" was put in evidence in support of the testimony of the witness and used by him to refresh his memory.

[3, 4] It is urged that the evidence as to payment being of credits and withdrawals, by draft, etc., was both incompetent and insufficient to show payment, and that such evidence should at least have been submitted to the jury; whereas, the court directed a verdict for the plaintiff. The defendant did

not show that the title of the payees was defective, or that the plaintiff was not a holder in due course; therefore the presumption in favor of the holder of the note remained. As the plaintiff's testimony tended to support and did not rebut the presumption existing in its favor, errors, if any, in admitting evidence, could not reasonably have been harmful to the defendant. There was nothing put in evidence to destroy the presumption in favor of the plaintiff as holder in due course.

One of the makers of the note who was a witness for the defendant was asked "to state what signatures were on this note when you signed it." This question was objected to, and—

"the defendants jointly and severally by their counsel announced their purpose to prove by this question, and by further questions to this witness, and by questions to other witnesses in the courtroom ready to testify, the several infirmities in this note as set out in the several pleas, to wit, that this note was given solely in consideration of a horse sold by the payees, McLaughlin Bros., solely for breeding purposes, the said payees representing said horse to be a sound stallion good for breeding purposes, that said horse was not then and there a sound stallion good for breeding purposes, and the consideration of said note wholly failed; that the payees obtained the signature of the defendants to this note by fraud, in this, that the payees represented to the defendants that each of them would only be responsible for $\frac{1}{25}$ of the amount of this note and that this note would be signed by 25 persons in all, including these defendants, and also C. C. Bettes, I. G. & J. A. Melson, A. R. Muller, and D. H. McMillan, and that the four parties last named were then and there solvent and the promise that they would sign this note was a material inducement to these defendants in signing this note; that the consideration for which this note was given was the promise of the payees to organize a corporation under the laws of Florida, to transfer to such corporation the title to one French coach stallion then owned by the payees, to issue and deliver to each of these defendants fully paid stock in that corporation of the face value of \$200, that such corporation was never organized, no stock has been issued or demand to any of the defendants in consideration for his signing this note, and the consideration of this note has totally failed; that, when each of these defendants signed this note, he signed two others all printed alike aggregating \$5,000, payable one, two, and three years respectively after date, and as a part of the same transaction there was signed by all said 25 parties (including those whose names appear next underneath this note and 2 above mentioned whose names appear on the back of this note, and the 2 others above named C. C. Bettes and D. H. McMillan whose names do not appear anywhere on the note) a printed document furnished by the payees referring to said company to own said horse and the \$200 stock to be issued to the signers aggregating \$5,000, and that said payees when so securing the signatures of these defendants represented that the signatures to these notes of the other members (25 in all) of the proposed company would be secured before the delivery of the note, that the signing was conditional upon securing the other signatures, that when the defendants signed this note and the other two notes there was no writing or printing on the note other than what is printed and written on the date line and on the body of the note and the signatures at the bottom thereof preceding those of the defendants re-

spectively, that the writings on the note in these words,

Received on the within note
From I. G. & J. A. Melson.. \$66.00
" A. R. Muller..... 66.00
May 9, 1908, paid..... 66.00
" " " " 66.00

—were all placed on said note after the same was signed by the defendants and before the completion of said transaction and was placed without the knowledge of the defendants, who none of them knew thereof until after the first of said three notes had matured and after the annual interest installment was past due on each of said notes, and that said writings purported to represent the facts that four of said members of said proposed company had paid their twenty-fifth aliquot part of said \$5,000, one-third each being thus noted on each of said three notes.

"The same being argued and submitted, the court ruled, on the objection of the plaintiff, that said several matters so proposed to be proven do not tend to show the plaintiff was not a holder in due course and that none of said proposed testimony is admissible."

These matters sought to be put in evidence if covered by the pleas would not have shown the plaintiff to be not a holder of the note in due course.

If error was committed in excluding this proffered testimony upon the theory that it was designed to affect the title of the payees of the note, and thus to put upon the plaintiff the burden of proving that it "acquired the title as a holder in due course," such error was not harmful, since under section 2958 it is deemed prima facie that the makers of the note became parties thereto for value, and the plaintiff adduced evidence to prove good faith and the payment of value for the note, and there was no evidence offered that tended to show no payment of value or actual knowledge of infirmity in the note or other facts to show bad faith of the plaintiff in securing the note.

There was no contest as to other matters affecting the rights of the plaintiff as a holder in due course. The note was complete and regular on its face, and it was acquired by the plaintiff before its maturity.

In *Union National Bank of Columbus v. Winsor*, 101 Minn. 470, 112 N. W. 999, 118 Am. St. Rep. 641, 11 Ann. Cas. 204, "it was conceded, for the purpose of a motion to direct a verdict in favor of the plaintiff on the ground that it was a bona fide purchaser of the note for value, that the note was obtained by fraud, and that as between McLaughlin Bros. and defendants a defense existed, or at least that the evidence was such as required the issue to be submitted to the jury." There was no such concession in this case, and no allegation or evidence of fraud.

[5] It appears from the testimony of the plaintiff's witnesses that the plaintiff in good faith and without notice of an infirmity in the note discounted this note with many others in one transaction, and gave the payees credit for \$61,150.40, and that, before the plaintiff knew of the asserted de-

fect in the payees' title, the credit was reduced to less than \$30,000, showing that at least half of the entire credit of \$61,150 was withdrawn by the payees, which constituted value for the note, it being one of a number of notes embraced in one discount transaction resulting in the \$61,150.40 credit, the withdrawals covering a large portion of the aggregated credit resulting from the one transaction.

If a mere credit upon the books of a bank does not of itself amount to the payment of a valuable consideration, the withdrawal by check of a substantial part of the amount so credited is such payment. *First National Bank of West Minneapolis v. Persall*, 110 Minn. 333, 125 N. W. 506, 675, 136 Am. St. Rep. 499; *First National Bank of Minneapolis v. McNairy*, 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977; *Bank v. McNair*, 114 N. C. 335, 19 S. E. 361.

The testimony of the plaintiff's witness as to his knowledge that payment of value for the note had been made to the payees who indorsed the note to the plaintiff was positive and uncontroverted, and the sheet from the "loose-leaf" ledger was not irrelevant, and, being merely cumulative evidence of payment, its use in evidence was not harmful under the circumstances. Nor was the truth of such evidence inherently or apparently improbable; and nothing in the record discredits such evidence of payment.

[8] There being no conflicting testimony, it was not necessary to submit the case to the jury when the evidence clearly showed the right of the plaintiff to a judgment in its favor. See *First Nat. Bank of Wellington v. Person*, 101 Minn. 30, 111 N. W. 730.

[7] As the evidence adduced would not have supported a verdict for the defendant, and as no material or harmful error was committed in admitting or excluding evidence, a directed verdict for the plaintiff was proper. See *Berryhill-Cromartie Co. v. Manitowoc Shipbuilding & Dry Dock Co.*, 66 Fla. 170, 63 South. 720; *Tedder v. Fraleigh-Lanes-Smith Co.*, 55 Fla. 496, 46 South. 419.

Affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

COCKRELL, J., takes no part.

STONE v. STATE.

(Supreme Court of Florida. April 12, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §26 — CONSTRUCTION OF CONSTITUTIONAL PROVISIONS — GRANT OR LIMITATION OF POWERS.

The state Constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. §26.]

2. DISTRICT AND PROSECUTING ATTORNEYS §8—POWERS—STATUTORY PROVISION.

The duties of a state attorney are statutory; and while under the Constitution (article 5, § 15) there must be "a state attorney in each judicial circuit," the Constitution does not expressly or impliedly require the duties "prescribed by law" for such officer to be confined to the judicial circuit in which he is appointed.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. §8.]

3. CRIMINAL LAW §419, 420(2)—EVIDENCE—HEARSAY.

Testimony of a witness that she was present when a statement was made is not hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 974, 980-983; Dec. Dig. §419, 420(2).]

4. CRIMINAL LAW §421(3) — EVIDENCE — HEARSAY—AGE OF CHILD.

The age of a child may be testified to as a matter of family history.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 978; Dec. Dig. §421(3).]

5. CRIMINAL LAW §829(1) — TRIAL — INSTRUCTIONS—REQUESTS.

It is not error to refuse a requested charge that is in substance sufficiently covered by a charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829(1).]

6. CRIMINAL LAW §755½—TRIAL—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

A charge on the law applicable to facts of a case is not a charge on the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1765; Dec. Dig. §755½.]

7. CRIMINAL LAW §858(4)—TRIAL—CONDUCT AND DELIBERATIONS OF JURY—TAKING INSTRUCTIONS TO JURY ROOM.

Where charges are indorsed by the judge as refused because covered by other charges given, it is not error to permit them to be taken by the jury to the jury room with the charges given, where no harm reasonably could have resulted therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2059; Dec. Dig. §858(4).]

8. CRIMINAL LAW §1182—WRIT OF ERROR—DISPOSITION OF CAUSE—AFFIRMANCE.

Where there is ample evidence to sustain the verdict, and there is nothing to indicate that the jury were not governed by the evidence, and no material or harmful errors of law or procedure appear, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. §1182.]

Error to Circuit Court, Polk County; O. K. Reaves, Judge.

Hubert G. Stone was convicted of assault with intent to rape, and brings error. Affirmed.

Thomas Palmer, of Tampa, and J. J. Swearingen, H. K. Olliphant, and L. C. Johnson, all of Bartow, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

WHITFIELD, J. The plaintiff in error was charged by indictment with the statutory offense of unlawfully or carnally knowing and abusing a female child under the age of ten years. He was convicted of an assault

with intent to commit rape, which is included in the offense charged, and took writ of error.

At the trial in Polk county in the Tenth judicial circuit, the defendant—

“in open court objected to the said cause against him being prosecuted by M. A. McMullen, state attorney for the Sixth judicial circuit, the said M. A. McMullen never having been appointed by this court or sworn in as acting state attorney, or as assistant state attorney, for the Tenth judicial circuit court of the state of Florida, in and for Polk county, and not having been appointed or sworn, either as acting state attorney or assistant state attorney in the case against this defendant, and thereupon moved the court to exclude from the prosecution of this defendant, the said M. A. McMullen, state attorney of the Sixth judicial circuit of the state of Florida.

“To the granting of which said motion, the plaintiff, the state of Florida, did then and there object, because the Governor of the state of Florida, by an executive order filed in said court, had transferred said M. A. McMullen, the state attorney of the Sixth judicial circuit to attend the court of the Tenth judicial circuit for Polk county, and by said order had sent Hon. M. A. McMullen, state attorney of the Sixth judicial circuit, to attend and represent the state in all causes pending in the Tenth judicial circuit of the state of Florida, in and for Polk county, and the said judge did then and there deliver his opinion and decide that said objection should not be sustained, and said motion of the defendant should not be granted, and overruled the same, to which said decision and ruling of said judge the defendant by his attorney did then and there except.”

It is argued that the state attorney for the Sixth judicial circuit could not lawfully prosecute the defendant in the Tenth judicial circuit because the statute authorizing the transfer of such officer is unconstitutional, and because no oath was taken in the case by such prosecuting officer.

The Constitution ordains that:

“The Governor, by and with the consent of the Senate, shall appoint a state attorney in each judicial circuit, whose duties shall be prescribed by law, and who shall hold office for four years.” Section 15, art. 5.

[1, 2] Section 1, article 3, of the Constitution provides that:

“The legislative authority of this state shall be vested in a Senate and House of Representatives, which shall be designated, ‘the Legislature of the state of Florida.’”

Under this provision the Legislature may exercise any lawmaking power that is not forbidden by the organic law of the land. The Constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature. See *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 South. 769, Ann. Cas. 1915D, 99; *Chapman v. Reddick*, 41 Fla. 120, 25 South. 673. The Constitution requires the appointment of “a state attorney in each judicial circuit, whose duties shall be prescribed by law.” Thus the duties of a state attorney are statutory; and while under the Constitution there must be “a state attorney in each judicial circuit,” the Constitution does not expressly or impliedly require the duties “prescribed by law” for such officer to

be confined to the judicial circuit in which he is appointed. Consequently the Legislature had authority to enact the following provision, being section 2 of chapter 5399, Acts of 1905; section 1781b, Compiled Laws of 1914:

“That if any state attorney shall be disqualified to represent the state in any case pending in the circuit court of his circuit, or if for any reason the Governor of the state thinks that the ends of justice would be best subserved by an exchange of state attorneys, the Governor may require an exchange of circuits or of courts, in any of the counties of this state between such state attorney and any other state attorney of the state, or may assign any state attorney of the state to the discharge of the duties of state attorney in any circuit of the state, at any regular or special term of the circuit court.”

The contention that as the Constitution expressly provides for assigning circuit judges to act in any circuit, and makes no such provision as to state attorneys, the Legislature is thereby impliedly forbidden to authorize the assignment of a state attorney to temporary service in another circuit. It is argued that the maxim, “*expressio unius est exclusio alterius*,” is applicable, and that the Constitution impliedly excludes such legislation as to state attorneys because an exchange of circuits is expressly authorized only as to circuit judges. This view is untenable because the provisions relating to circuit judges and to state attorneys are in different sections of the organic law; and because the jurisdiction of circuit judges is defined in the Constitution, while the duties of the state attorneys are expressly required to be “prescribed by law.” It may be as important to the public welfare that state attorneys be temporarily assigned to other circuits as it is for circuit judges to be so assigned. State attorneys have only “duties” to perform, while circuit judges exercise “jurisdiction.” The Constitution makers may have considered it appropriate to provide in the organic law for an exchange of circuit judges since their jurisdiction is defined by the Constitution, while the state attorneys having only duties to perform, which duties must be “prescribed by law,” the nature and extent of those duties and the territorial limits within which they are to be performed could appropriately be left to the Legislature. The statute is not in conflict with organic law. As the state attorney for the Sixth judicial circuit was required to take the constitutional oath of office when he was commissioned, it is not necessary for him to take another oath of office to perform his official duties as state attorney when assigned to duty in another circuit under the quoted statute.

The above discussion may not be necessary since the state attorney holding an office named in the Constitution was acting under color of authority, and the rule is that when it appears that a person exercising the powers or duties of an office named in the Constitution does so by virtue of a recognized color of right, his acts, as to third persons,

are valid, and his right to exercise the duties of the office can be authoritatively inquired into only in some direct proceeding for that purpose. See *State ex rel. Attorney General v. Gleason*, 12 Fla. 190, text 232.

[3] A witness testified that the prosecuting witness "made a statement to me regarding that affair," and afterwards the witness "went to her [prosecutrix's] home and her father wasn't there and she made the same statement that she made to me." Defendant moved to strike this as being "hearsay testimony." The motion was denied and an exception noted. This testimony was merely that the prosecutrix made at home the same statement that she had previously made to witness. The witness testified of her own knowledge that the subsequent statement was made.

[4] A witness for the state testified as follows:

"My name is Bessie Brassell. I am the sister of Mrs. W. W. Mann. I am aunt to little Allene [the prosecutrix]; she is my niece. I do know the age of Allene. She was born September the 5th, 1904. I do know where she was born; she was born at York, Florida. I did have a brother name Allen. He is dead. I know whether he died before Allene was born or afterwards; he died the 10th of October, 1903; it was before Allene was born.

"Cross-Examination.

"I was living at Lakeland the time that Allene was born. I know that she was born September the 5th, 1904, because her father wrote us of her birth.

"Whereupon counsel for defendant moves to strike said question and answer.

"By the Court: Motion overruled because ages are matters of common knowledge in families. To which ruling and decision of the court the defendant by counsel then and there duly excepted."

This testimony as to a letter from the father was admissible to show why the witness knew as a matter of family history the age of the prosecutrix.

The following was given among the general charges:

"In order to convict the defendant, you must be satisfied from the evidence beyond a reasonable doubt that the defendant in Polk county, Florida, unlawfully and carnally knew and abused the said Allene Mann, and that at the time of the commission of the offense the said Allene Mann was a female child under the age of ten years."

A somewhat similar charge was given with reference to the crime of assault with intent to commit rape, which offense is included in the indictment.

[5] The court refused to give a requested instruction more elaborately covering the question of the age of the prosecutrix. While this refused charge might properly have been given, the court will not be held in error for refusing it since it is in substance covered by the charge previously given. The importance of the controverted question as to the age of the prosecutrix was sufficiently stated in the charges given. The defendant

could not reasonably have been injured by the refusal.

There was no error in refusing to give the following requested charge:

"Defendant requests the court to charge the jury that under the law of the state, the character of a defendant for crime is presumed to be good, unless put in issue and sworn by the evidence to be otherwise."

See *McDuffee v. State*, 55 Fla. 125, 46 South. 721.

[6] The following is a portion of the general charge that is complained of:

"Neither is it necessary to show that the act was committed against the will of the child. Whether she yielded or resisted is immaterial, because the law presumes that female persons under the age of ten years are incapable of consenting to or protesting against the act."

This portion of the general charge was given in exposition of the law applicable to the offense charged in the indictment, and is not a charge on the disputed fact as to the age of the prosecutrix.

[7] Two requested charges that were refused by the court were delivered to the jury and taken to the jury room along with the charges that were given, but as one of these refused charges was indorsed by the judge "refused because covered by general charge," and as the other refused charge is apparently similarly indorsed by the judge and was patently covered by charges given, there was no harm if error in allowing the jury to have the refused charges, particularly when the charges relate to the crime of rape and the conviction is only for an assault with intent to rape.

[8] There is conflict in the evidence as to the age of the prosecutrix at the time of the alleged offense, and it appears that seven or eight months elapsed before the prosecutrix made complaint of the defendant's conduct towards her; but on the whole evidence it does not appear that the jury were not justified in the verdict found, or that they were not governed by the evidence in their finding.

This being so and no material or harmful errors of law or procedure having been made to appear, the judgment is affirmed.

TAYLOR, O. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

VENTRESS et al. v. WALLACE. (No. 17245.)

(Supreme Court of Mississippi. Feb. 21, 1916.
On Suggestion of Error, May 15, 1916.)

1. EQUITY \Leftrightarrow 275—AMENDED PLEADING—OPERATION.

An amended bill, asking that it be taken as part of the original bill, relief to be granted upon hearing both bills together, is not an abandonment of the original bill, but both bills together constitute the bill in the case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 567; Dec. Dig. \Leftrightarrow 275.]

2. BANKS AND BANKING ⇨82(5)—DIRECTOR'S LIABILITY—ACTIONS.

A receiver of an insolvent bank is the proper plaintiff in a suit against directors for their gross negligence, causing the insolvency, although the caption of the bill describes him as suing "for benefit of all creditors of said bank."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 206; Dec. Dig. ⇨82(5).]

3. BANKS AND BANKING ⇨82(3)—DIRECTOR'S LIABILITY—ACTION IN EQUITY.

A suit by a receiver of an insolvent bank against directors whose negligence has caused the insolvency may be brought in equity to avoid multiplicity of actions and because of the fiduciary relation and the probable necessity of an accounting.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 205; Dec. Dig. ⇨82(3).]

4. DESCENT AND DISTRIBUTION ⇨119(1) — ACTIONS AGAINST HEIRS.

Suit by a receiver of an insolvent bank cannot be maintained against heirs of a deceased director for the latter's gross negligence as director; his remedy, if any, being to have an administrator of the estate appointed.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 224, 433, 434, 438, 439; Dec. Dig. ⇨119(1).]

On Suggestion of Error.

5. BANKS AND BANKING ⇨82(4) — ACTION AGAINST BANK DIRECTORS — LIMITATIONS — NEGLIGENCE.

Where all the directors of a bank were grossly negligent during a number of years, resulting in the bank's insolvency, the principles of concealed fraud and trust relationship applied to prevent running of limitations against an action by the receiver of the bank to recover from the directors for losses caused by such negligence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 207; Dec. Dig. ⇨82(4).]

In Banc. Appeal from Chancery Court, Wilkinson County; R. W. Cutrer, Chancellor.

Suit by D. H. Wallace, receiver, against L. T. Ventress and others. From a decree overruling their demurrers, defendants appeal. Affirmed in part, and reversed in part.

Bramlette & Bramlette and A. H. Jones, all of Woodville, and Green & Green, of Jackson, for appellants. J. McC. Martin, of Port Gibson, and Watkins & Watkins, of Jackson, for appellee.

STEVENS, J. Appellants appeal from a decree overruling their separate demurrers to the amended and supplemental bill of complaint exhibited against them by D. H. Wallace, duly qualified receiver of the Citizens' Bank of Wilkinson county. There was an original bill, to which was interposed a demurrer. Thereafter the amended and supplemental bill was filed, and separate demurrers were exhibited thereto, considered by the court, and overruled. The original bill avers in detail the appointment of receiver, the insolvency of the bank, and the administration of the bank's assets under the supervision of the court. The bill further

charges that the directors and officers of the bank were guilty of willful, wanton, and gross negligence in the management and supervision of the affairs and business of the bank; that they employed a cashier, and intrusted to him the work and responsibility, not only of cashier, but of bookkeeper, correspondent, and general manager of the bank, with full control and possession of the funds, securities, and property of the bank; that the cashier kept all the accounts, handled all moneys, and from time to time juggled the accounts, misused and appropriated the funds of the bank, and became a pronounced defaulter; that after the discovery by mere accident that the cashier had misused and mismanaged the assets of the institution, a liquidator was selected, and an audit company was employed to examine into the affairs and true condition of the bank, and that this company made its report to the directors, submitting, among other things, the following:

"While pointing out, however, that had any examination of the books ever been made previous to the date of January, 1913, the defalcations and irregularities would most certainly have been disclosed, and probably would not have amounted to such a large figure as is now the case."

The bill further charges that during all of the nine years in which the cashier served, no examination or audit of the books and affairs was ever had or made by any one whatever; that the directors accepted the cashier's reports and statements in reference to what the books showed, or as to the condition of the bank; that the charter and by-laws of the bank required an examination or inspection from month to month, but none was ever made or ordered by the directors; that they failed to appoint a finance or other committee to audit or examine the affairs of the bank, and accordingly no examination or audit was ever made; that the directors failed to use ordinary care in the management, failed to keep informed, and violated every duty imposed upon them by and as an incident to their office of director; that the law required the board to hold regular meetings and keep an accurate and complete record of all proceedings had at their said meetings, to make personal inspection of the bank's affairs and books in January, April, July, and October of every year, and to certify their finding to the auditor of public accounts under oath, and that none of these duties required by law was performed or regarded, but that all statements of the condition of the institution were prepared by the said faithless cashier and accepted by the directors as true and correct without verification. The bill sets out in further detail the obligations and duties of the directors and the alleged gross violation of these duties; the appropriation of the funds and securities of the bank by the cashier, false en-

tries entered by the cashier on the books, the taking from the bank of valuable notes, which the cashier had not accounted for, and the appropriation thereof by the cashier. It is charged that A. G. Shannon, J. H. Jones, and W. P. S. Ventress were directors of the bank, along with the other living directors who are named as defendants to the bill, but that Mr. Ventress departed this life November 23, 1911, Mr. Jones, December 10, 1911, and Mr. Shannon, December 31, 1912. The executrix of Mr. Jones and the administrator of Mr. Shannon and the heirs at law of Mr. Ventress are named as defendants to the bill, no administration having been taken out on the estate of W. P. S. Ventress, deceased. Claim was made against the estates of the said decedents, along with the living directors, for losses of the bank occurring during their lives and while they were members of the board of directors, and against the surviving directors alone for losses occurring after the death of the directors mentioned and up to the final suspension of the bank.

The bill attempts to hold the heirs at law of Mr. Ventress liable for all losses of the bank occurring while he was a director to the extent of the value of the real and personal property left by Mr. Ventress and received by his said heirs. The bill prays for an accounting and full adjustment and prorating of the obligations of the several defendants and their estates. The amended and supplemental bill reiterates many of the averments of the original bill, and further sets out in detail the assets and liabilities of the bank and full list of the creditors. The amended bill charges that a bond in the sum of \$10,000 was given by the cashier as security for the faithful performance of his duty; that under the provisions of this bond it could be renewed and continued in force from year to year; that this bond had been lost or misplaced, and could not be found among the papers and securities of the bank; that the directors did not examine or pay any attention to the bond, and failed to see that the same was properly renewed and kept in force. It is charged, further, that the cashier was a defaulter from year to year from the time of his appointment, April, 1904 to 1913, and the annual shortage is tabulated, aggregating the total sum of \$73,302.05. The amended and supplemental bill abounds in charges of bad faith and bad management on the part of the cashier and the grossest kind of negligence on the part of the directors. The prayer is for an accounting, for personal decree against the living directors, and the personal representatives of the two deceased directors whose estates are being administered upon, and a charge against the property received by the heirs at law of Mr. Ventress from his estate. The demurrers, both general and special, submit every conceivable objection to the bill. Without setting out in detail the 20 grounds of the general demurrer

and the many grounds of the special demurrer to many paragraphs of the bill, we discuss the main points of the case stressed by counsel for appellant in oral argument.

[1] It is contended that after the filing of the amended and supplemental bill the original bill is no part of the pleadings in this cause. The amended and supplemental bill, however, is asked by the pleader "to be taken as and for an amended and supplemental bill of complaint, and as part of his original bill herein," and that relief be granted "upon the final hearing of this bill of complaint, along with complainant's original bill herein." Under the facts of this case, therefore, we do not take the amended bill as an abandonment of any of the averments of the original bill, but, as indicated by the language of the amended bill itself, as supplemental thereto. Both documents together constitute the bill of complaint in this case.

[2] The right of the receiver to maintain this suit is earnestly challenged. Counsel for appellants construe and term this an action of the creditors of the bank, attempted to be prosecuted by and through the receiver. This, however, is not a creditors' suit. It is true that the caption of the bill describes the complainant as "suing herein by order of court, for benefit of all creditors of said bank." The bill as a whole shows that this is really and truly a suit in equity by the receiver for and on behalf of the defunct corporation, the affairs of which he is administering under the supervision of the court. In a sense the suit, if successful, will inure to the benefit of creditors. But the right of complainant to sue must not be limited or measured by the expression referred to. The question is not so much what the complainant calls himself as what action he in truth and in fact states. In *Morse on Banks and Banking* (4th Ed.) § 129, it is stated that:

"If the liability of a director accrues for dishonesty, negligence, or incompetency, the claim of the bank against him becomes a part of the assets of the institution. An assignee, receiver, commissioner, or other party whomsoever, who may come into possession of the property for the purpose of collecting it and distributing it among the creditors and shareholders, is obliged to regard the rights of action against such delinquent directors as a part of the available assets."

Mr. Thompson, in his excellent work on *Corporations*, paragraph 1316, says:

"It is now practically everywhere conceded, that the receiver succeeds to the title of the corporation, and whatever rights it may have asserted against its unfaithful directors such receiver may also enforce against them. The jurisdiction of the courts of equity to compel unfaithful directors to account to the corporation for losses sustained by their negligence, fraud, and breaches of trust has long been sustained both in England and in this country. An order of court, appointing a receiver of the bank and authorizing him to take charge of and reduce to his possession all the property, rights, credit, demands, and choses in action of every description, however arising, and belonging to the bank, empowers him to bring and prosecute, in his own name, as such receiver, all actions nec-

essary in the discharge of his duties, was held sufficient to authorize the receiver to maintain an action against the directors for damages for losses occasioned by their negligence in the management of the affairs of the bank."

In the case of *Ellis v. Mercantile Company*, 103 Miss. 560, 60 South. 649, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915B, 526, which was a suit in equity, brought by a number of depositors and stockholders against the directors of the Magee Bank, one of the grounds of the demurrer to the bill submitted was that:

"The right of action, if any there is, is in the bank, or its receiver, and not in complainants"—and the court, in its opinion through Reed, J., observes that:

"The suit might have been brought by the bank, to which the directors, as officers or trustees, were first liable. The bank, not being a going concern, and its business being under the control and management of the receiver appointed by a court of equity for the purpose of collecting the assets and winding up its affairs, could not bring the suit; but it would be proper for the receiver, standing in the place of the bank and administering its affairs, to bring the suit."

It was shown in the *Ellis* Case that the receiver declined to bring the suit in question. The instant case is similar to the case of *Ellis v. Mercantile Company*, and the liability of the directors under circumstances detailed by the bill now before us is settled and fixed beyond question by the *Ellis* Case. The right of the receiver to maintain this suit is supported by authority, by reason, and by every sense of justice. The bank, as a going corporation, was managed by its officers and directors, the very parties here sued. Its affairs are now in liquidation, and the receiver is the party primarily privileged and charged with the duty of maintaining this action.

[3] It is earnestly contended that this is an action in tort, and that the equity court is not the proper forum. The status of directors has been well defined by text-writers and the adjudications of our own court. Mr. Thompson, paragraph 1215, observes that:

"The rule is thoroughly embodied in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. They are regarded as agents intrusted with the management of the corporation, for the benefit of the stockholders collectively, and as occupying a fiduciary relation in the sense that the relation is one of trust, and are held to the utmost good faith in their dealings with the corporation."

The case of *Emerson v. Galtner, Receiver*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, is interesting and in point. The note to this case collates many authorities, sustaining the jurisdiction of equity over suits by a corporation, or its representative, against the directors for the very kind of losses here complained of. The opinion, in discussing the case of *Cockrill v. Cooper*, 86 Fed. 7, 29 O. C. A. 529, says:

"If the receiver is compelled to sue at law, numerous actions must be brought; and very likely several separate actions would have to be brought against some of the directors, to comply strictly with the rules of procedure at law governing the joinder of parties. It is also fair to infer from what is stated in the bill that the excessive loans therein complained of were inaugurated by one set of directors, and either continued, renewed, or enlarged by another, so that a suit brought against any one of the directors would probably involve an inquiry into the proceedings of the board of directors, and into many of the financial transactions of the bank for the entire period during which its affairs are alleged to have been mismanaged."

The opinion in that case further says:

"Not only can a multiplicity of actions be prevented by a proceeding in equity to redress the wrongs complained of, which is a matter proper to be considered, but it would seem that complete justice to all parties can be thereby better assured than by suits at law. It would be practically impossible for a jury to properly dispose of all questions raised by this bill, and when the fiduciary relations, which the directors occupy to the corporation, is remembered, there would seem to be no reason why courts of equity should not have power to determine such controversies, especially in this state, where the tendency is to extend, rather than limit the jurisdiction of courts of equity."

In the case of *Bosworth, Receiver, v. Allen et al.*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667, an action by the receiver against directors, the court observes:

"Equitable jurisdiction extends to all culpable acts or omissions of directors by which the pecuniary interests of the corporation are or may be injured."

The holding of our own court in the case of *Brent v. Brister Sawmill Co.*, 103 Miss. 876, 60 South. 1018, 43 L. R. A. (N. S.) 720, Ann. Cas. 1915B, 576, and *Ellis et al. v. Mercantile Co.*, supra, is in perfect accord with this view. Other authorities are collated by counsel for appellees in their exhaustive brief in this case. The rights and liabilities of the parties hereto can best be inquired into and adjusted in equity. The personal representatives of Mr. Jones and Mr. Shannon are sued, and their portion of the liability, if any, must be ascertained with due regard to the beneficiaries of those estates. Losses occurring subsequent to the death of either of these directors could not, of course, be claimed against the estates. The ascertainment of all losses must be determined as of a certain time, and this involves an accounting and the searching out facilities afforded by the chancery court.

[4] The separate demurrer of Mrs. W. G. Ventress, Harriett Ventress, Charles G. Ventress, and Margaret Ventress should have been sustained. The bill shows that no administration has been had upon the estate of W. P. S. Ventress, deceased, and this action should be prosecuted, if at all, against the administrator. Whatever may be the rule in any particular state, and aside from a possible state of facts justifying a suit in equity by a creditor against the heirs at law without administration, the statute laws

of our state afford every creditor a full, complete, and adequate remedy at law. The provisions of our Code place any creditor in position to force administration, and in case the relatives do not apply for administration, entitle any interested creditor to apply for letters of administration, or to petition the court to appoint the county administrator, or the sheriff, in case there is no county administrator. For all this court may know, other creditors of Mr. Ventress might be interested in his estate and the proper administration thereof. Our court, in dealing with a similar question in the case of *Partee v. Kortrecht*, 54 Miss. 66, held:

"It cannot be affirmed that the complainants are remediless except in this suit, because the ordinary, regular method of dealing with the assets of a decedent is open to them. When a creditor has the statutory right to take the office of administrator, or to suggest that it be conferred on the county administrator, and neither the one nor the other has been done, it is plain that the ordinary and statutory method of reaching and applying the assets is open to the party."

The right of action in this case is based on the alleged negligence of Mr. Ventress in failing to discharge the duties imposed upon him as a director in his lifetime. It is not only necessary, but proper, that his personal representative should be made a party defendant, to contest with the complainant the essential question of liability. There cannot be said to be any fixed obligation until the merits of this litigation are inquired into by the court, and not only the liability, but the amount thereof, fixed and determined.

It will profit little to discuss the other questions raised by the demurrer. The case has been well briefed and well argued, and has had our careful consideration. We are clearly of the opinion that the bill states a cause of action, that the receiver has the right to sue, and that equity is the proper forum. This presents a case where equity has proper and original jurisdiction. The action of the chancellor in overruling the demurrer of all the parties except the heirs at law of W. P. S. Ventress, deceased, was correct, and to that extent the decree of the court below is affirmed. The decree, in so far as it overrules the demurrer of the Ventress heirs, should be set aside and reversed. The demurrer as to them should be sustained, and the bill dismissed. The cause will be remanded for further proceedings in accordance with the views herein expressed.

Affirmed in part and reversed in part.

On Suggestion of Error.

[5] The suggestion of error, so-called is really an application for the court to amend its opinion, either by deciding the question of the statute of limitations or by expressly reserving judgment on this ground of the demurrer. Special demurrers were interposed to that part of the bill seeking to recover for

losses occurring more than three years prior to the filing of this suit. The bill avers that:

"The following table shows his (the cashier's) stealings, pilferings, and defalcations year by year from October 16, 1904, down to January 18, 1913"

—and undertakes to give, in a general way, the amount of losses for each year. The chancellor granted an appeal to settle the principles of the case, and this appeal brings in review the correctness of his decree overruling these special demurrers. To determine and adjudicate whether either of the statutes of limitations can be availed of by the directors in this case will enable the chancellor confidently to apply the law of the case to the facts, and may save a great deal of expense or costs, as well as labor, in taking proof as to the items which counsel for appellants contend are barred by the statute of limitations. This point was not covered by the oral argument in the case, and for this reason, as also because this feature of the case is presented by special, instead of general, demurrers, our attention was not directed to it in the preparation of the opinion heretofore delivered. The point, however, is covered by the splendid briefs on file, and we accordingly proceed with this addition to our former opinion.

Counsel for appellant submit that the breach of duty complained of is based upon an implied promise, and that therefore section 3099, Code of 1906, would apply. They contend, further, that if this section does not apply, then that the six-year statute of limitations could certainly be pleaded. While the particular point now before us has occasioned much conflict in the authorities, we are persuaded that the application of certain well-recognized principles of equity will render the problem easy of solution. As stated in the opinion already delivered, the amended bill of complaint in this cause charges the directors with the grossest kind of negligence and continuing sins of omission. The gist of the action is for losses sustained by the bank as a result of many years of mismanagement, the "willful, wanton, and gross negligence in the management of the affairs of said bank." It is laid to the charge of these directors that they willfully failed to investigate the books of the institution or to have the affairs of the bank audited, but on the contrary held the institution out to the trusting public as a safe and solvent banking establishment, and "quietly, negligently, and willfully closed their eyes" to the true condition of the bank and the obligations resting upon them as managing agents of the corporation. This is a case where the entire board of directors is sued. During the period complained of they had exclusive possession and control. It was their business to make and execute all necessary corporate contracts, and to direct the policy of the institution. As a part of their duties, they alone could determine the propriety of any suit at law or equity, and were

alone charged with the authority to institute such suits. The demurrer admits, as true, facts which convict the directors, not so much with being guilty of a single act that is wrong or actionable, such as the declaration and payment of an unlawful dividend or the misappropriation of a certain fund, but of a continuing policy of negligence that is shocking to every sense of justice and that has wrecked the institution. While the directors have had complete and exclusive control, the stockholders left in their charge and trust their several investments, and depositors and creditors have dealt with them in perfect good faith and confidence, and so it is that stockholders, depositors, and creditors generally, in the very nature of things did not know, and could not know, the true condition of the bank at any day during the long period of time complained of, and did not know, and could not know, that any one of the officers and directors was failing to discharge the usual and ordinary duties imposed upon him by his position of director.

It is true that the stockholders have their annual or periodic meeting for the purpose of electing directors and attending to any other necessary business incident to a regular shareholder's meeting, but at these meetings they looked to the directors, their agents, for a true and correct account of their stewardship and naturally accepted the financial statements submitted by the directors. If, therefore, the directors have continued from month to month and from year to year to neglect the duties imposed by their office and the statutory law of our state and this continuing negligence silently but surely operates over a long period of time and is only brought to the attention of the creditors and shareholders when and not until the institution is hopelessly insolvent and a receiver inquires into the true status of affairs, how can the guilty directors be heard now to say that time has barred this action against them? If any one had notice of the negligence complained of, it is these directors themselves, and they are charged with the responsibility of correcting the evil. If any suit is to be brought against any one or more of the directors, it is this very managing board of directors, who must authorize suit in the name of the corporation and see that same is successfully prosecuted. By their reliance, therefore, upon the statute of limitations they place themselves in the attitude of profiting by their own wrongdoing; and such plea, if sustained by the court, would simply "add insult to injury." They now say to the receiver in this case:

"You cannot maintain this suit because the same should have been filed within three years, and certainly not exceeding six years from the time the losses complained of occurred. It is true that we should have seen to it that this suit was filed, yet the corporation, as a going concern, did not, as a matter of fact, sue us in the time allowed, and we are now discharged from all liability."

71 SO.—41

It occurs to us that a mere statement of this contention is a sufficient answer. It is a familiar principle of equity that no one should be allowed to profit by his own wrongdoing.

There is another well-recognized principle of law that should apply, and that is the doctrine of concealed fraud. How could the corporation have sued in this case except at the initiative of its directorate? The very board here complained of has either willfully or negligently kept from the beneficiaries of this estate all knowledge of the wrongs complained of, and in the very nature of things this suit could not have been filed any earlier. Under the circumstances it could not be earlier known that losses had in fact occurred. It is only after the receiver is appointed and inquires into its condition and has a correct audit of the bank's affairs made that the corporation as such finds that any losses have occurred, and that the interests of the directors are adverse. The conflict in the authorities on the question as to what, if any, statute of limitations is available to directors arises from the varying views as to whether directors are trustees of an express trust. In the determination of the question as applied to the particular case now before us, it is really unnecessary for us to determine whether the directors of this bank were trustees of an express or an implied trust. Our own court in an early case (*Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74), very strongly inclined to the holding that directors are trustees, expressly holding that the unpaid subscription of stock "is a continuing, subsisting trust and confidence, to which the statute of limitations has no application." The court uses this further language which, while it may be dicta, is yet suggestive and persuasive:

"Test the principle by the converse state of facts. Suppose the stock to be all paid; the bank to go on prosperously; that no dividends are declared, but the whole is permitted to accumulate until the charter is about to expire. Then that the stockholders claim their respective amounts of stock with the accrued profits; but the directors refuse to pay, and interpose the statute of limitations, to that part which is of more than six years' standing. No one can believe that the statute would bar in such a state of the case because of the trust reposed. There is no adverse holding; the stockholders compose the corporation. The same principle must govern this case."

We approve the reasoning in the case of *National Bank of Commerce v. Wade* (O. C.) 84 Fed. 15, and the decision of the Supreme Court of Appeals, holding in that case that the statute of limitations did not run so long as the trust was active, and did not begin until the directors surrendered control over the bank. Judge Handford in that case says:

"The statute of limitations of this state provides that the right to commence an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of mak-

ing the loans which caused the losses complained of the defendants were the managing officers of the bank. I hold that in cases of this nature the statute of limitations will not begin to run so long as the cestui que trust is under the control or influence of the trustee (2 Perry, Trusts [3d Ed.] par. 864, p. 512; 2 Pom. Eq. Jur. par. 1089), and, as this suit was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations."

We think the ruling that the statute of limitations does not begin to run in favor of a director in a case of this kind until he surrenders his office is the more reasonable and supported by better authority. This view of the question was early outlined by Mr. Justice Sharswood in *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684, a decision, on the whole, favorable to directors. The court in that case said that the view announced by them rendered it unnecessary to discuss the statute of limitations, "except in the case of the defendants Churchman and Smith," and, further:

"Upon the point as made in their case, each of them having entirely ceased to be a director, more than six years before the bill was originally filed, we entirely concur in the opinion of the Chief Justice in *Churchman's Case*."

The question is fully discussed in the case of *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530, the court emphasizing the proposition that the assets of a corporation are in equity a trust fund, and that the directors of a corporation are trustees. A part of the opinion is in the following language:

"Ordinarily, an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist and to which the same legal principles are applicable, and such appears to be the relation established by law between directors and the corporation, citing *Highower v. Thornton*, 8 Ga. 486 [52 Am. Dec. 412]; *Payne v. Bullard*, 23 Miss. 88 [55 Am. Dec. 74]; *Curry v. Woodward*, 53 Ala. 371. The statute of limitations, therefore, presented no bar to a recovery by the receiver."

It is interesting to observe that the court cited with approval the early case of *Payne v. Bullard*, supra, decided by our own court, and evidently construed the opinion as committing our court to this holding. The two more recent cases of *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 97 N. E. 897 [39 L. R. A. (N. S.) 173, Ann. Cas. 1913B, 420], and *Brinckerhoff v. Roosevelt*, 143 Fed. 478 [74 C. C. A. 498], held with much confidence that the statute of limitations does not begin to run until after the cessation of the trust imposed upon directors, the Circuit Court of Appeals making the following pertinent observation:

"The action is not barred by the statute of limitations or for laches, for the reason that the complainant did not discover the wrongful conduct, which is the foundation of the action, until a few months prior to its commencement. Directors are assumed to act for the interest of

their stockholders, and the latter have a right to rely upon the assumption that they are acting honestly until the contrary appears."

Mr. Thompson, at paragraph 1318, discusses the defense here pleaded by the directors, and announces the general rule as follows:

"As to the defense of the statute of limitations, the rule applicable, in cases of fraud applies in this class of cases, that is, the statute begins to run only from the time when the corporation or its representative acquired knowledge of the fraud or collusion. Such cases proceed upon the theory that the action does not accrue until the discovery of the facts constituting the fraud by the aggrieved party. * * * A better class of cases, it seems, regard the directors as trustees, and that no lapse of time is a bar to a direct or express trust, as between the trustee and a cestui que trust, and that the statute of limitations does not run against the claim of a corporation in actions against directors for breaches of trust."

It is not the purpose of this opinion to declare directors of a corporation trustees of an express trust. The application of the statute must be governed by the facts of any particular case. The case of *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402, relied on by counsel for appellants, was controlled by the facts of that particular case, and the court recognized the principle which should control the instant case in the following language:

"If the acts of the appellants upon which this suit is founded had been parts of a continuous and persistent course of action which had wrecked this bank and robbed its creditors and stockholders; if they had been accompanied with intentional misrepresentations; if they had been purposely or negligently concealed from the other officers and employees of the bank or from the stockholders and creditors—these facts might well induce a court of equity to permit this suit to be maintained notwithstanding the statute."

It will be observed that the court in that case says if the facts are "negligently concealed" from the stockholders and creditors, the statute should not apply. The same salutary principle is applied in the case of *Rankin v. Cooper* (C. C.) 149 Fed. 1010, the court referring to the exceptional circumstances recognized by the opinion in *Cooper v. Hill*, supra. We wish to cite with approval this language of the opinion that applies with equal force to the present case:

"As to the statute of limitations, I have come to the conclusion that it does not apply, because the case, in my opinion, falls under the exceptional circumstances referred to by Sanborn, J., in *Cooper v. Hill*, 94 Fed. 582 [36 C. C. A. 402], circumstances under which a court of equity will permit a suit to be maintained, notwithstanding the statute, * * * and also because at the time of the commission of the wrongful acts in question and afterwards until the appointment of a receiver, the defendants who were concerned therein constituted the majority, if not the whole, of the board of directors, and that in consequence of their having full control of the corporation no suit could be brought to redress the real grievances until a receiver was appointed."

One of the strongest opinions relied upon by appellant is that of *Boyd v. Mutual Fire*

Ina. Co., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. Rep. 948. The reasoning of the court in that case is persuasive that directors are not trustees of an "express trust" in the sense that we generally understand that term, but the real question involved in that case was whether or not the statute of limitations would run from the time of the appointment of a receiver to the institution of the suit in question. The six-year statute was pleaded, and the court first held that no statute applied. On a rehearing, however, the court held that the six-year statute commenced to run from the time of the commission of the wrongs complained of. It yet remains that more than six years had run between the cessation of the trust and the time of the filing of the suit, and it was altogether unnecessary, therefore, for the court to go further than holding that under the fact of that case the six-year statute applied. It will be observed furthermore that the Chief Justice filed a dissenting opinion. We reiterate our statement that whether or not directors are express trustees does not so much concern the court in the instant case, and much of the learning of the opinions along this line have no application to the particular case now confronting us. It is not the purpose of this opinion to hold that the statute of limitations may not be pleaded in courts of equity. It is generally held that the statute does not apply to trusts for which there is no remedy at law, trusts cognizable alone in a court of equity and in a suit directly between trustee and cestui que trust. Concede that an action at law might have been brought by the bank in this case against the directors for any portion of the losses complained of, yet no such action could have been instituted unless the officers and directors themselves had taken the initiative, and this, as a matter of fact, would have placed them in an attitude of suing themselves. When it is remembered that the losses complained of were accruing from time to time over a period of nine years, that the personnel of the board changed, two of the directors being deceased, and that an accounting is necessary, it is difficult to perceive how a jury could well dispose of all questions raised by the bill, and how the remedy at law was full, adequate, and complete. At any rate the receiver has acted promptly after his appointment, and under the circumstances this action could not have been instituted earlier. All parties in interest are now before the court. Even applying the three-year statute of limitations from the time of the death of Mr. Ventress and Mr. Jones, the action has been instituted in seasonable time.

The application for this additional opinion being now disposed of, let the case be affirmed and remanded, to be proceeded with in accordance with the opinion heretofore delivered and the additional views herein expressed.

J. J. WHITE LUMBER CO. v. McCOMB CITY TURPENTINE CO. (No. 17556.)

(Supreme Court of Mississippi. April 24, 1916.)

CLERKS OF COURTS —23—FEES—COPIES AND DUPLICATES.

Laws 1914, c. 209, amending Laws 1912, c. 144, requiring clerks of circuit and chancery courts to make and retain copies, which may be carbon copies, of the transcripts of records certified by them to the Supreme Court, does not contemplate an allowance of fees to such clerks for such copies but fees will be allowed to the clerks of courts below only for such copies of papers and proceedings as are actually filed in the Supreme Court.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 33, 34, 54; Dec. Dig. —23.]

Holden and Sykes, JJ., dissenting.

In Banc. Motion to retax costs. For former opinion, see 71 South. 5. Motion sustained.

PER CURIAM. This cause was disposed of on a former day, and we are now asked to retax the costs by disallowing one-half of the fees claimed by the clerk of the court below. The record contains 180,000 words, which, at 10 cents per hundred, amounts to \$180. The clerk of the court below has included in his fee bill a charge, not only for the 180,000 words contained in the transcript, but also for the 180,000 contained in the copy thereof, which he made and retained in his office under the provisions of chapter 209, Laws 1914, amending chapter 144, Laws 1912, making a total of 360,000 words, which at 10 cents per hundred, amount to \$360. We do not think that this statute contemplates an allowance of fees to the clerks of the circuit and chancery courts for making and retaining the copies, which may be carbon copies, of the transcripts of records certified by them to this court, thereby doubling the cost of a transcript of the record on appeal; but, conceding for the sake of the argument that they are entitled thereto, such fees cannot be allowed here, for the reason that fees are allowed in this court to the clerks of the courts below only for the copies of the papers and proceedings actually filed in this court.

Motion sustained.

HOLDEN and SYKES, JJ., dissenting.

BRAMLETTE et al. v. JOSEPH. (No. 17821.)

(Supreme Court of Mississippi, Division B.

April 3, 1916. Suggestion of Error

Overruled May 15, 1916.)

1. BANKS AND BANKING —54(3)—DIRECTORS —STATUTORY LIABILITY.

Although under the express terms of Code 1892, § 851, it was unlawful for a bank of deposit to lend more than one-fifth of its capital stock to any one person or firm, the directors assenting to such loan were not individually liable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 94; Dec. Dig. —54(3).]

2. BANKS AND BANKING ¶55(3)—DIRECTORS —STATUTORY LIABILITY.

A creditor or party suing to recover upon the statutory liability of a bank director must bring himself within the express terms of the statutes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 101; Dec. Dig. ¶55(3).]

3. BANKS AND BANKING ¶55(4)—DIRECTORS —STATUTORY LIABILITY—PLEADING.

A complaint against bank directors charging upon information and belief that notes representing loans in excess of one-fifth the bank's capital, made to a director after his resignation, were either signed or delivered while he was a director, or that the loan had been agreed on while he was a director, and the notes subsequently executed, is not sufficient to show liability under Code 1906, § 922, imposing individual liability upon bank directors authorizing a loan of more than one-fifth its capital stock to an officer or director; the bill affirmatively showing that no loan was made during his directorship while the statute was in force.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 102; Dec. Dig. ¶55(4).]

Appeal from Chancery Court, Wilkinson County; R. W. Cutrer, Chancellor.

Suit by I. S. Joseph, receiver, against D. C. Bramlette and others. From a decree overruling demurrers to the bill, defendants appeal. Reversed and set aside, and decree entered sustaining the demurrers and dismissing the bill.

Green & Green, of Jackson, and Ackland H. Jones, of Woodville, for appellants. Longino & Ricketts, of Jackson, for appellee.

STEVENS, J. I. S. Joseph, as receiver of the bank of Woodville, an insolvent banking establishment, the estate of which is being administered by the chancery court of Wilkinson county, exhibited his bill of complaint in this cause against the directors of the bank, seeking to recover losses alleged to have been sustained by reason of certain loans made by the directors to Chas. Cohen, a fellow director, in excess of one-fifth of the capital stock of said bank. The bill avers that the suit is brought by authority of the chancery court, appointing and having jurisdiction of the receiver, names and sets out the directors serving each year from February 12, 1903, until January 16, 1907, and details various loans made to Mr. Cohen while he was a director, and charges that the bank suffered losses aggregating \$15,132.76. It is averred in the bill that Mr. Cohen was indebted to the bank in the sum of \$5,000 when he became a director for money loaned to him; that the capital stock of the bank was \$20,000; that other loans, statement of which is filed as an exhibit to the bill, were made to Mr. Cohen from the time he was elected a director until January 16, 1907, when he resigned from the board of directors; and that at the time of his resignation he was indebted to the bank in the sum of \$20,865.64 for money so loaned. It appears from the statement, filed as Exhibit

A, that certain loans were made Mr. Cohen after he resigned as director, and that total payments or credits aggregate \$7,819.44. The bill charges that on or about January 20, 1909, the officers and directors of the bank abandoned all efforts to collect the balance of \$15,132.76 then remaining due and unpaid, and caused to be entered on the books of the bank, in the bills receivable account, under the name of "Jonas Cain and others," a charge of the amount then due; that thereafter Mr. Cohen offered a composition to his creditors in settlement of all claims; that this composition was agreed to by the officers of the bank, and reported to and ratified by the board of directors; and that after making the said composition the said Cohen was fully insolvent. It is charged that Mr. Cohen was so completely insolvent that, had not said composition been accepted, he would have filed a voluntary petition in bankruptcy. The complainant, by leave of court, filed an amended bill, which goes more into detail in listing various loans made to Mr. Cohen, and giving the names and tenure of the various directors, including the statement of the time served by Mr. Cohen himself, and in a general restatement of material charges contained in the original bill. In addition to the detailed account of all the Cohen transactions with the bank, the amended bill avers that the directors and officers of the bank also loaned to one Ben Rothschild \$10,900 when the capital stock of the bank was only \$20,000, and when the largest loan that could lawfully be made any person out of the funds of the bank was \$4,000; that by reason of the making of said excessive loan to Rothschild the bank suffered a loss, the exact amount of which is unknown to complainant, but which is in excess of \$3,990.67. The bill seeks to hold the officers and directors personally liable for losses sustained by reason of the various loans to Mr. Cohen, as also the loss sustained on account of the alleged excessive loan to Mr. Rothschild. The Bank of Woodville, according to the averments of the bill, is totally insolvent, and its receiver, acting under order of the court, claims the right to recover from the directors for the benefit of creditors loans made in violation of section 851 of the Code of 1892. From the detailed statement of the loans made to Mr. Cohen, it appears affirmatively that no loan was made to him between October, 1906, when the Code of 1906 became effective, and the time he resigned as director, January 16, 1907. It appears that several loans were made Mr. Cohen on January 21, 1907, after he had resigned as a director; and the bill, in a way, charges upon information and belief that the notes representing these loans were either signed and delivered while Cohen was a director, or that the loan had been agreed upon while he was a director, and the notes subsequently executed

after he had severed his relationship with the bank as director.

Separate and special demurrers were filed to the amended bill. The demurrers were overruled, and from the decree overruling the several demurrers to the whole bill the chancellor granted an appeal to settle the principles of the cause. For the purposes of this opinion it is unnecessary to detail the various grounds of the demurrers, some of which are directed to the whole bill, and others separately to the Cohen transactions and the Rothschild transactions.

[1-3] The theory of the complainants' bill seems to be that under section 851 of the Code of 1892, it is unlawful for a bank of deposit to lend more than one-fifth of its capital stock to any one person or firm, and that the directors assenting to such loan are individually liable to creditors whose debts were contracted before the repayment of the money borrowed. It is certainly true that this section expressly provides that "a bank of deposit shall not loan a sum greater than one-fifth of its capital to any one person or firm," but the section does not expressly impose personal liability upon the directors assenting to or making the loan. There is a manifest difference between section 851 of the Code of 1892 and the same section reenacted as section 922, Code 1906. The provision in the Code of 1892 makes it unlawful for a bank of deposit to lend more than one-fifth of its capital stock to any one person or firm, but imposes no penalty for a violation of the law. The Code of 1906, on the contrary, does not forbid a loan of more than one-fifth of its capital to any person generally, but does forbid such excessive loan being made to an officer or director, and imposes personal liability upon the directors authorizing the loan. Our court has held that these statutes are innovations on the common law, and should be strictly construed. In other words, the creditor or party complaining must bring himself within the express terms of the statutes. In the instant case the receiver is asking the court to read into section 851 a provision that the directors violating the statute are personally liable to creditors whose debts were contracted before the repayment of the money borrowed. The effort here is to recover a statutory liability. This is not a suit to charge the directors with gross negligence in the performance of their official duties; but the prayer of the bill is bottomed upon the statute mentioned. To grant the relief prayed for would be to give to section 851, Code 1892, a liberal, instead of a strict, construction; in fact, it would approximate, if, indeed, it would not be, outright judicial legislation. We are not in this case called upon to say what the rights of the complainant would be under section 922, Code 1906, which expressly imposes personal liability upon the directors for making an

excessive loan to one of their fellow directors. The facts do not bring this case under the terms of section 922, Code 1906. It is true there is a stagger at a showing that the directors are liable under the provisions of the present Code for the loans made to Mr. Cohen January 21, 1907; but the allegations of the bill in this regard are not sufficient. Even though Mr. Cohen, after the adoption of the Code of 1906, might have resigned as a director, with the express purpose of being in position to borrow large sums of money from the bank, and did contract the loans mentioned by the bill of date January 21, 1907, we cannot say this would constitute fraud. During the time from October 1, 1906, to January 16, 1907, when the directors might have rendered themselves individually liable for excessive loans to Mr. Cohen, the bill affirmatively shows that no loan was made; and, this being true, the bill as a whole, so far as the Cohen transactions are concerned, states no cause of action whatever against appellants.

What we have said with reference to the loans to Mr. Cohen disposes also of the complaint based upon the excessive loan to Mr. Rothschild. This loan was negotiated while the Code of 1892 was effective; and, while it was made against the plain provisions of the statute, no statutory liability was incurred by the directors. The liability did not exist at common law; but, on the contrary, the statute invoked "is new and unknown to the common law," as stated by our court in *Avery v. McClure*, 94 Miss. 184, 47 South. 901, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134. We are not called upon to speculate as to what remedy would be afforded any interested party for the violation of section 851 of the Code of 1892. It is certain that the state could by proper proceeding complain at the corporation as such. The evident defect in the older statute has been cured by the additional provisions of the present Code as well as the state banking act of 1914. Laws 1914, c. 124.

The decree of the court below is contrary to the views here expressed, and accordingly should be reversed and set aside, and a decree entered here in favor of appellants sustaining the demurrers and dismissing the bill.

METZGER et al. v. JOSEPH. (No. 17823.)
(Supreme Court of Mississippi, Division B.
April 3, 1916.)

1. APPEAL AND ERROR ⇐1167—REVERSAL—JURISDICTIONAL DEFECTS.

Under Const. § 147, forbidding reversal because of error in choice between equity and common-law jurisdiction, where in a doubtful case a demurrer to a bill because not within equitable jurisdiction is overruled, and the court has jurisdiction of the parties, the Supreme Court

will not reverse because the complainant misjudged his forum.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶1167.]

2. BANKS AND BANKING ¶82(3)—DIRECTORS—LIABILITY FOR WRONGFUL DIVIDENDS—ACTIONS—JURISDICTION.

A court of equity, because of its jurisdiction over fraud and accountings, has jurisdiction of an action by the receiver of an insolvent bank to recover from directors a dividend disbursed in violation of the express terms of Code 1906, § 923, forbidding payment of dividends by an insolvent corporation, and rendering assenting directors liable therefor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 206; Dec. Dig. ¶82(3).]

3. BANKS AND BANKING ¶82(5)—DIRECTORS—LIABILITY FOR WRONGFUL DIVIDENDS—ACTIONS—PARTIES.

The receiver of an insolvent bank may maintain a suit as representative of all the creditors to recover an illegal dividend from assenting directors under Code 1906, § 923, making them liable therefor, although the right of action is by the terms of the statute given to creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 206; Dec. Dig. ¶82(5).]

4. BANKS AND BANKING ¶82(6)—DIRECTORS—LIABILITY FOR WRONGFUL DIVIDENDS—ACTIONS—BILL.

In a suit by the receiver of an insolvent bank to recover from assenting directors a dividend illegally paid under Code 1906, § 923, making assenting directors liable therefor, the bill sufficiently alleges the interests of creditors if it charges that, when the dividend was declared, the bank's stock was entirely worthless, and its assets entirely insufficient to pay creditors or any reasonable proportion of such indebtedness.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 206½; Dec. Dig. ¶82(6).]

5. BANKS AND BANKING ¶50—DIRECTORS—LIABILITY FOR WRONGFUL DIVIDENDS—NATURE—"PENAL."

Code 1906, § 923, imposing personal liability on directors for paying dividends when the corporation is insolvent, is not penal, but remedial.

[Ed. Note.—For other cases, see Banks and Banking; Dec. Dig. ¶50.

For other definitions, see Words and Phrases, First and Second Series, Penal.]

6. BANKS AND BANKING ¶50—DIRECTORS' LIABILITY—STATUTES.

Code 1906, § 923, imposing personal liability on directors for paying dividends when the corporation is insolvent, is not repealed as to banks by the state banking law (Laws 1914, c. 124), since section 45 of the latter limits implied repeal by that act to such as is necessary to give it effectiveness, and section 923 can exist without conflict therewith.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. ¶50.]

7. LIMITATION OF ACTIONS ¶35(3)—"PENALTY"—DIRECTORS' LIABILITY FOR WRONGFUL DIVIDENDS.

Personal liability of directors under Code 1906, § 923, for illegal payments of dividends is not barred by the one-year statute of limitations of Code 1906, § 3101, as to penalties; for such liability is not a penal one.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 162; Dec. Dig. ¶35(3).]

For other definitions, see Words and Phrases, First and Second Series, Penalty.]

Appeal from Chancery Court, Wilkinson County; R. W. Cutrer, Chancellor.

Suit by I. S. Joseph, receiver, against August Metzger and others. From a decree overruling demurrers to the bill, defendants appeal. Affirmed and remanded.

Green & Green, of Jackson, and A. H. Jones and Bramlette & Bramlette, all of Woodville, for appellants. Longino & Ricketts, of Jackson, for appellee.

STEVENS, J. This action was instituted by I. S. Joseph, receiver of the Bank of Woodville, by a bill in chancery seeking to recover from appellants, as defendants in the court below, a 5 per cent. dividend declared by appellants as directors of said bank at a time when the bank was insolvent. The suit is brought by authority of the chancery court appointing and having jurisdiction of the receiver and the administration of the affairs of the defunct bank. The bill avers that appellants on the 17th day of February, 1912, were the directors of the Bank of Woodville; that the bank was at that time, and had been for a long time, totally insolvent; that the directors knew that the bank was insolvent, but, notwithstanding this knowledge, that they proceeded to declare and disburse on said date a dividend of 5 per cent. upon the par value of \$20,000 of the capital stock of said bank, less the sum of \$45 which was not claimed by or paid to any person; that each of the directors assented to and participated in the declaration of said dividend, and received and accepted their individual share as a stockholder, all in violation of section 923, Code 1906. It is averred that by force of the statute the defendants are jointly and severally liable to all creditors of the bank whose debts existed on February 17, 1912, for the said sum of \$955, and that the complainant, as representative of all the creditors, has the right, in his capacity or office of receiver, to sue for and recover the said sum for the benefit of the creditors entitled thereto and as a fund to be paid and distributed to them in the administration of the estate, under proper supervision of the chancery court. Separate demurrers were filed to the bill by the defendants. The demurrers were overruled, and from the decree overruling the demurrers, the chancellor granted an appeal to settle the principles of the case. The demurrers challenge the jurisdiction in equity, and submit that the remedy at law is complete; that the bill does not state any cause of action; that the receiver has not the right to maintain this suit; that the cause of action is barred by the statute of limitation of one year (section 3101, Code 1906); and that the allegations of the bill are too vague and indefinite, and do not show in detail what creditors are interested nor for what amount the alleged liability of the several defendants exists.

[1] The first point argued by counsel is the contention that the bill seeks to recover purely a statutory penalty, and that a court of equity will not assume jurisdiction of a suit to recover penalties. The chancellor overruled the several demurrers to the bill, and thereby assumed jurisdiction of this cause; and, aside from the question whether equity has original jurisdiction of this particular cause, under section 147 of our Constitution, we could not reverse the decree of the chancellor. This constitutional provision has a manifest beneficent and remedial purpose to accomplish. There are many causes of action appearing in the twilight separating common-law and equity jurisdictions; and, when the chancery court has jurisdiction of the parties and has assumed jurisdiction of the subject-matter, this constitutional provision must be construed to mean exactly what it says, and absolutely to forbid a reversal simply because the complainant has misjudged his forum. Much valuable time of litigants and courts is wasted in a preliminary contest over jurisdiction before the real merits of the litigation are reached.

[2, 3] Aside from the constitutional provision, however, we cannot say that equity has no jurisdiction of this cause. Our court, in the recent case of *Ventress et al. v. D. H. Wallace, Receiver*, 71 South. 636, is committed to the holding that equity has original jurisdiction of a suit on the part of a receiver against directors of a bank for gross negligence in the discharge of their official duties. We fail to appreciate why equity should not be a proper forum for this action, instituted by the receiver of an insolvent banking establishment to recover a dividend disbursed in violation of the express provisions of the statute, and when the fund to be recovered should equitably be prorated amongst that class of creditors whose debts existed at the time the dividend was declared, and whose interests are in a large measure now represented by the receiver. This court is committed to the holding that the receiver, to a large extent, represents creditors as well as the defunct corporation, whose estate is being administered upon by him under the direction of the court. *Payne Hardware Co. v. International Harvester Co.*, 70 South. 892. The liability sought to be recovered is expressly imposed by section 923 of the present Code. It provides that the directors who declared and paid such dividend "shall be jointly and severally liable to creditors whose debts then existed, to the extent of such withdrawal or dividend and interest." It is true that the right of action is given to creditors, but the liability is limited to the amount of the dividend declared and paid, and this constitutes a single fund in which many of the creditors have an equity, and should in equity be prorated amongst the several creditors beneficially interested. This can best be accomplished in a court of equity. One payment of this dividend by the directors would dis-

charge once and for all time the liability. The declaration of a dividend when a corporation is totally insolvent impairs the capital stock, and "such a distribution of the assets of a corporation is in the nature of a fraud upon its creditors, and is remediable in equity. * * *" 10 Cyc. 883. Many of the courts hold that the personal liability of directors for declaring dividends in excess of the net profits or surplus cannot be enforced in a court of law, but that equity is the proper and exclusive forum.

"Equity has jurisdiction where the effect of the statute is to create a common fund for the security of creditors, although there may be a concurrent remedy at law." *Thompson on Corporations* (2d Ed.) vol. 4, par. 5078.

Our court had this statute in review in the case of *Kretschmar, Receiver, v. Stone*, 90 Miss. 375, 43 South. 177, and in that case expressly upheld the right of the receiver to recover from stockholders dividends paid them by the corporation when it was insolvent. It will be remembered that the statute imposes liability upon the stockholders who receive the dividend as well as the directors who declare and pay it.

[4] In answer to the criticism that the bill does not give a list of the creditors, or show what the exact amount of their several claims is, it is sufficient to say that the bill does charge that the capital stock of the bank was entirely worthless, and its assets dissipated and so depreciated in value as to be entirely insufficient on the day the dividend was declared to pay and discharge the claims of creditors, "or any reasonable proportion of such indebtedness." The equities of the various parties can really in this case best be determined and adjudged in the chancery court authorized to appoint a master, if necessary, to take and state an account, and to require proper probate of the claims of the various creditors interested.

[5] Counsel argue with confidence the contention that equity will not entertain this suit to enforce penalties. The chief criticism of this argument is well answered by *Woods, J.*, in the case of *Lafayette County v. Hall*, 70 Miss. 678, 13 South. 39:

"Equally untenable is the position assumed by counsel for appellees that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter courts of equity refuse to enforce, but the former, the expression of the will of the lawmaking power, the courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases."

An additional criticism is the assumption that the recovery here sought is strictly a penalty. While this contention of counsel is supported by respectable authority, including some general statements by our own court, we have no hesitancy in saying that the trend of modern authority, and, indeed, the announcements of Mr. Thompson in his work on corporations, and that of well-re-

soned cases, is toward the conclusion that a statute of the character here in review is not penal in the proper meaning of such term.

"Whatever may be said of the penal nature of these statutes, the cases are coming more and more to the proposition that they are not penal in the strict and proper sense applied to statutes imposing punishment for offenses against the state. This term has evidently arisen from the supposition that a penalty is imposed. With reference to their nature and construction, the better, and undoubtedly the correct, rule is that they are penal as to their construction, and remedial as respects the creditors." Thompson on Corporations (2d Ed.) vol. 2, par. 1326.

In the sense that the liability here declared "is new and unknown to the common law," as said by our court in *Avery v. McClure*, 94 Miss. 184, 47 South. 901, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134, and that the party complaining must therefore bring himself clearly within the terms of the statute, this might possibly be termed a penal statute. This is the thought expressed by our court in *Manns Mercantile Co. v. Smith*, 107 Miss. 16, 64 South. 929. Mr. Thompson, in paragraph 1330, vol. 2 (2d Ed.), quotes with approval the language of Mr. Morawetz showing clearly that these statutes are not, after all, really penal. Among other things quoted in this paragraph is the following language:

"Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the state for the infraction of a public law. The liability of the directors is both in form and in substance a private obligation, similar in many respects to that of sureties. It is imposed by the Legislature partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by the acts of those who have control over the company's fortunes. The statutes imposing this liability establish a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company."

The United States Supreme Court, in the well-reasoned case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, takes up this subject in an exhaustive fashion, and demonstrates to what extent the courts have broken away from early expressions indicating that the liability here imposed is a penalty. Mr. Justice Gray, speaking for the court, uses, in addition to other expressions equally as strong, the following language:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither

the liability imposed nor the remedy given is strictly penal."

So far as the interests of the bank in this case are concerned, the statute is remedial; its object is to authorize a recovery of the money actually disbursed in violation of the statute. It is compensation that the creditors seek; and, when once compensated, no matter from what source, the liability imposed is discharged. The public, as such, has no direct interest in the result.

[6] It is contended that section 923, Code 1906, is repealed by chapter 124, Laws 1914, known as the "State Banking Act"; the contention being that this is a penal statute, and that the various provisions of the state banking law guaranteeing deposits and providing for liquidation of insolvent banks supersede section 923 of the Code, and by necessary implication repeal it. The state banking law does not, however, expressly repeal section 923; and section 45 of the new banking law declares that:

"No provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed except in so far as necessary to permit the unrestricted operation of this act. * * *

In our judgment, section 923 can well exist and be effective independently of and in addition to all the provisions of chapter 124, Laws 1914. There is no direct or necessary conflict.

[7] What we have said in reference to the penal nature of this statute disposes of the contention that the one-year statute of limitations applies. The dividend here sought to be recovered is not such a penalty as is embraced within the terms of section 3101 of the present Code. The object of section 923 is to compel restitution of the very money unlawfully paid out under the guise of a dividend, and, so far as the interests of creditors is affected, is remedial and compensatory.

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. * * *" *Huntington v. Attrill*, supra.

Under our views of this case the demurrers were properly overruled, and the decree of the court below is accordingly affirmed, and the cause remanded, with leave to appellants to answer within 30 days after receipt of mandate by the clerk of the court below.

Affirmed and remanded.

SMITH v. WILLIAMS-BROOKE CO. (No. 17287.)

(Supreme Court of Mississippi. May 15, 1916.)

1. MORTGAGES \S 300—TENDER OF PAYMENT.
A tender of the amount secured by a mortgage or deed of trust does not discharge the lien evidenced by the instrument.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 876-888; Dec. Dig. \S 300.]

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. MORTGAGES **↔544(5)**—**FORECLOSURE—RECOVERY OF POSSESSION BY PURCHASER.**

In an action of unlawful entry and detainer by the purchaser at foreclosure sale under a trust deed, evidence by the defendant of tender before sale of the amount due under the trust deed is inadmissible, since equitable defenses cannot be interposed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1574, 1576, 1577; Dec. Dig. **↔544(5)**.]

3. MORTGAGES **↔544(5)**—**FORECLOSURE—RECOVERY OF POSSESSION—PRIMA FACIE PROOF.**

In an action of unlawful entry and detainer by the purchaser under sale by virtue of a trust deed, the plaintiff makes a prima facie case by the introduction of the trustee's deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1574, 1576, 1577; Dec. Dig. **↔544(5)**.]

4. MORTGAGES **↔335** — **FORECLOSURE AND SALE—TENDER.**

The trustee under a trust deed has a right to foreclose and sell the property notwithstanding tender of the amount due.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1019-1023; Dec. Dig. **↔335**.]

5. TENDER **↔18**—**KEEPING GOOD.**

A tender once made is ineffectual for any purpose if not kept good.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. §§ 55-58; Dec. Dig. **↔18**.]

6. TENDER **↔24**—**PAYMENT INTO COURT.**

When the benefit of tender is claimed, the money must be produced and placed in the custody of the court so that it may be awarded to the proper party.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. §§ 79-81, 94; Dec. Dig. **↔24**.]

7. MORTGAGES **↔300** — **TENDER — TRUSTEE—CESTUI QUE TRUST.**

Where plaintiff permitted his land to be sold under a trust deed without tendering to the trustee the amount due, he cannot defeat an action by the purchaser to recover possession merely by showing that prior to the sale he tendered to the cestui que trust the amount due.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 876-888; Dec. Dig. **↔300**.]

Cook and Potter, JJ., dissenting.

In Banc. Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action by the Williams-Brooke Company against W. H. Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Munn, of Newton, for appellant. G. H. Banks, of Newton, and W. C. Longmire, of Itta Bena, for appellee.

STEVENS, J. Williams-Brooke Company, appellee herein, instituted this action of unlawful entry and detainer against appellant in accordance with procedure outlined by chapter 147 of the present Code. From an adverse judgment entered against him by the unlawful entry and detainer court appellant, as the defendant in the proceedings, appealed to the circuit court, and upon the trial of the cause on its merits in the circuit court a peremptory instruction was granted in favor of appellee, as plaintiff. From the judgment entered in pursuance of said instruction, appellee brings the case to this court for re-

view. Appellee is a firm doing a mercantile business in Newton county, and in the usual course of its business accepted from appellant a deed of trust to secure a certain promissory note in the sum of \$165 due and owing by W. H. Smith, appellant, and his wife, Rosa Smith, and also to secure subsequent advances. The promissory note was payable on or before November 1, 1911. The deed of trust in question was given upon a mule and 40 acres of land, as well as the entire crop to be grown during the year 1911. Default having been made in the payment of the indebtedness secured by the deed of trust, W. C. Longmire, the trustee named in the trust deed, in pursuance of the provisions of the instrument, duly published in January, 1912, notice of foreclosure sale, and on February 13, 1912, sold the real estate at public auction in accordance with law and the provisions of the deed of trust. Appellee, the beneficiary, bid in the property and received from the trustee the usual trustee's deed. Appellant having refused to surrender possession of the premises conveyed by the trustee's deed, appellee resorted to this possessory action for relief. On the trial of the case in the circuit court the appellant, as a witness in his own behalf, testified that he had paid a part of the indebtedness secured by the deed of trust, and "offered to pay the balance." The substantial portion of his testimony on this point is disclosed by the record as having been introduced in the absence of the jury, and is as follows:

"Q. You say that left a balance of \$84.52? A. Yes, sir. Q. When did you offer to pay it? (Objection. Objection sustained. Exception.) A. In December, 1911."

After all the testimony had been introduced the court peremptorily charged the jury to find for the plaintiff and refused the several instructions requested by the defendant. One of the refused instructions was, in effect, a statement that, if the jury believed from the evidence that the defendant in December, 1911, "offered to pay, and did make a legal tender, the balance due on the said deed of trust," and that said company refused to accept said payment, and thereafter instructed the trustee, W. C. Longmire, to advertise and sell the land mentioned in the deed of trust, said sale was void. The evidence fails to disclose any irregularity in the notice of the trustee's sale, in the manner of conducting the sale, or in making the sale. The only question that merits consideration is the contention of counsel for appellant that, a tender of the balance due on the deed of trust having been made to the beneficiary before the deed of trust was foreclosed, and this tender having been refused, any sale by the trustee is void and conveyed no title.

[1] Whatever the holding may be in other states as to the effect of a legal tender upon the lien of a mortgage or deed of trust, our court has long since repudiated the doctrine

that a tender of the amount secured by deed of trust discharges the lien given and evidenced by the instrument. *Campbell, C. J.*, in the case of *Tishimingo Savings Institution v. Buchanan et al.*, 60 Miss. 496, announces the views of the court as follows:

"We repudiate the doctrine that a tender of the sum due discharges the lien of a mortgage or deed of trust. There was a reason for such doctrine when a mortgage was an absolute conveyance of the estate, if the debt was not paid according to its terms; but it is without any sensible foundation in the present view of mortgages as mere securities for debts."

The right of the purchaser of land at a trustee's sale to maintain this action of unlawful entry and detainer was expressly approved in the case of *Marks v. Howard et al.*, 70 Miss. 445, 12 South. 145. Appellant's offer to pay, according to his testimony, was in December, after there was a default in the payment of the indebtedness secured by the deed of trust, and therefore after breach of the conditions contained in the instrument itself.

[2, 3] The court heard the testimony of Mr. Smith in reference to payment of a part of the indebtedness and tender of the balance, this evidence being fully inquired into in the absence of the jury; and, after all the witness had to say on this subject was incorporated into the record, the court held the evidence incompetent on the issue raised by the possessory action here prosecuted. The action of the court in excluding this testimony and in refusing the instruction based thereon was, in our judgment, correct. It has been expressly held by our court that purely equitable defenses cannot be interposed in this action of unlawful entry and detainer. There was no showing by Mr. Smith that the terms of the deed of trust in reference to foreclosure were not complied with. The trustee, in making the sale, satisfied the terms of the instrument and the law of the land. That a trustee's deed is prima facie evidence of the correctness of its recitals was expressly recognized by our court in *Tyler v. Herring*, 67 Miss. 169, 6 South. 840, 19 Am. St. Rep. 263, and other adjudications of this court. In the case mentioned Judge Campbell well says:

"The true view is that the plaintiff begins and ends with the burden of proof. Introducing the trustee's deed, he makes a prima facie case. It then devolves upon the defendant to meet the case thus made, failing in which the plaintiff is entitled to recover."

The only way the defendant attempted to meet the case made by the plaintiff was to show one single solitary offer to pay the balance of the secured debt a long while prior to the first publication of the notice of sale. The tender testified about was not even kept good. In *Home Association v. Leonard*, 77 Miss. 39, 25 South. 351, our court, through Whitfield, J., said of the defenses therein attempted to be interposed that:

"The defenses which would be available, if any, are equitable, and cannot be interposed

in this action. * * * The trust deeds are not void for illegality; and, if it be true that the equitable defenses can be sustained by proof—as to the sufficiency of which proof we say nothing now—the appellees may have their day in the appropriate forum."

[4] If a tender after the day fixed for payment were a discharge of the lien, as appears to be the holding in New York and Michigan, then the evidence in this case would perhaps have been relevant. Even then the tender should be kept good, *Tut-hill v. Morris*, 81 N. Y. 94. But, if this tender does not discharge the lien, as expressly held by our own court, then certainly the trustee had the right upon request to foreclose. It would be inconsistent to hold that the beneficiary still has his lien, but does not enjoy the right to have his lien foreclosed. There cannot be a right without a remedy. If the beneficiary still owns a lien, he still has the right to have the lien foreclosed in accordance with the contract of the parties. Our court is not alone in the holding announced by it in *Tishimingo Savings Institution v. Buchanan et al.*, *supra*. Mr. Jones, in his work on *Mortgages* (6th Ed.) par. 892, lays down this rule:

"A tender of the amount due on a mortgage after breach of the condition does not operate at common law as a discharge of the debtor's liability. If a debtor wishes to extinguish his liability for subsequently accruing interest, or is seeking some affirmative relief, the tender must be kept good, to avail anything. The appropriate office of a tender, then, is to relieve the debtor from subsequently accruing interest, to preserve the right of redemption, or to protect him from the costs of a suit to redeem."

In some of the states the lien of the mortgage is discharged by a tender, but, as stated, this rule does not obtain in Mississippi, and in its application to the facts of any particular case the courts of those states giving such effect to a tender are not in accord. Mr. Jones in paragraph 1894 further says:

"Upon the delivery of the deed the purchaser is entitled to the possession of the property, and he may maintain a writ of entry or an action of ejectment to recover it."

And in paragraph 1798:

"A sale under the power after a tender made, and not accepted, transfers the legal title and possession; but the mortgagor may preserve his right to redeem against a purchaser by giving him notice before or at the sale of the tender. Until he is restored to the legal right of possession by a decree of court in equity he can neither maintain nor defend a writ of entry against one claiming under the mortgage. The foreclosure is complete by the sale notwithstanding the tender. And, unless the mortgagor proceeds in equity to redeem, the purchaser is entitled to possession, and may recover it by a writ of entry, although he purchased with full knowledge that after breach and before the sale the mortgagor tendered the whole amount due under the mortgage."

In the case of *Crain et al. v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37, the court makes this observation:

"When it is reflected that no serious hardship is imposed on a party making a tender by requiring him to keep it good, it would seem clearly unjust, under circumstances like those alluded

to, to require a party to whom a tender is made, after the day of payment has passed, to elect at once to accept or reject it, at the peril of losing his security if he misjudges as to his rights. An exceptional instance of injustice that would result from such a rule is found in facts disclosed by this record."

The holding of the Illinois court in this case was expressly approved by the Supreme Court of Florida in *Matthews et al. v. Lindsay et al.*, 20 Fla. 962, the court, among other things, saying:

"The rule prevailing in New York and in Michigan that a tender after a debt became due operates to discharge the mortgage and to leave the mortgagee only a personal remedy for his debt has not been adopted in other states."

[5, 6] The universal weight of authority is to the effect that a tender once made must be kept good. On this point Brickell, C. J., in *Frank v. Pickens*, 69 Ala. 869, makes the following sensible statement:

"The tender having been made, there is a duty resting upon the party making it to keep the money safely, ready to pay it over whenever the other party may manifest his willingness to accept it. A neglect of the duty or disabling himself from performing it is an abandonment of the tender. And, when the benefit of the tender is claimed in court, the money must be produced and placed in the custody of the court, so that, if the tender is adjudged good, the money may be awarded to the party to whom it is then ascertained to belong rightfully. *Smith v. Phillips*, 47 Wis. 202 [2 N. W. 285]."

If the defense of appellant is made to square with this announcement of the law, then he has certainly failed to measure up to the requirements; he did not keep his tender good; he did not bring the money into court; and for all this court now knows he may not be able to pay the balance admitted to be due.

We are not called upon in this action to say what the rights of appellant may be. He might well have gone into equity and enjoined the sale, tendering into court at the time the amount due, and thereby prevented the very sale here complained of. He may yet have his right of redemption in the proper forum. As to this we express no opinion.

[7] It might also be observed that appellant made no tender to the trustee before or on the day of sale. The trustee is a disinterested party, selected by the parties themselves. He has a duty to perform. If a tender of the correct amount had been fairly made to the trustee, he could and should have accepted the money. Instead of keeping good the tender, appellant sits idly by while the trustee advertises his home for sale and suffers a sale to be concluded and a conveyance made. The deed of trust, the solemn contract of the parties, should not and cannot be so easily abrogated. So long as the lien existed the trustee had the right to foreclose. Having the right to foreclose, he had the right to sell in accord with the terms of the instrument. This he did. There is no showing of oppression or fraud. Appellee was not required to explain why the tender

was refused, because the court excluded the testimony of appellant, rendering it unnecessary for appellee to rebut or explain. The only particle of evidence upon which to predicate fraud is the testimony of appellant that appellee refused his one, single offer to pay in December, after the debt was due, and at least a month before the trustee began action.

Affirmed.

COOK and POTTER, JJ. (dissenting). We are unable to agree with the majority in this case. This action was begun by the appellee under chapter 147, Code of 1906—"Unlawful Entry and Detainer." The case reached the circuit court, and the jury was directed to find for the plaintiff, appellee here, and from this judgment defendant prosecuted this appeal.

The plaintiff relied on a trustee's deed to support its claim to possession of the land. Plaintiff was engaged in the mercantile business, and to secure advances to be made by it to defendant, defendant executed a deed of trust on the land.

The record shows that the land was advertised for sale in accordance with the terms of the deed of trust, and that appellee became the purchaser at said sale. The record shows that appellant then conveyed the land to a third party, and this party, before the institution of this suit, reconveyed the land to appellee. At the trial the defendant proved that he had paid to plaintiff a part of the indebtedness secured by the deed of trust, and tendered the balance due to plaintiff before the land was advertised for sale; but the defendant refused to accept same. This was not denied. The court nevertheless, at the request of plaintiff, excluded all of this evidence as incompetent and irrelevant, and instructed the jury to find for plaintiff.

So we have here this question: Admitting that appellant tendered to his creditor all that was due the creditor upon the secured indebtedness, will the courts permit the cestui que trust to put him out of the possession of his land? The title of this land is not involved in this proceeding, but nevertheless plaintiff must rely on his title deed from the trustee to establish his right to possession of the land. Plaintiff is a cestui que trust, and also a vendee, and the charge here is that the plaintiff obtained a deed to this land by fraud or stratagem; that the deed of trust could not have been foreclosed unless the conditions were broken; that the defendant did all that the contract required him to do when he tendered to the plaintiff all that was due him. The plaintiff says that this question cannot be adjudicated in this purely statutory proceeding; that the defendant must invoke the aid of the chancery court; that the sale by the trustee and the conveyance of the land are all regular on their face, and for this reason this court cannot go behind the deed and inquire into the good

faith of the cestui que trust and vendee. In other words, no matter how gross may have been the fraud practiced on the defendant, this court is powerless to grant relief in this proceeding. This contention has the approval of our learned Associates.

Has the right of the owner of this land expired by the terms of his contract? If the defendant is to be believed—and for the purposes of this appeal we must take his version of the facts as the absolute truth—the plaintiff arbitrarily and unconditionally refused to accept payment of the debt secured by the deed of trust, procured the land to be advertised and sold by the trustee, and obtained a deed for same. If a plaintiff may, under the statute, recover possession of land from one who has deprived him of possession “by force, stratagem, stealth,” why is it that the party in possession may not defend his right to remain in possession against a person who is seeking to oust him by the same means?

The merchant was not authorized by the deed of trust to procure a sale of the land if the defendant had paid him the secured debt; but it is stated by this court that, although he refused to accept the tender of payment of the indebtedness, he may procure a sale of the land, buy it in, take a deed, and oust the defendant in a court of justice, because he has elected to invoke a statutory remedy whereby all inquiries concerning the validity of his title are shut off. Our Associates say: You have a remedy—the chancery court. In this court, your right to hold this land will not be heard. Your right to hold this land has not expired, but you will have to go into another court for relief. In *Williams v. Simpson*, 70 Miss. 113, 11 South. 689, this court held, in a proceeding like this, that the defendant could show that the plaintiff, a merchant, had defrauded the state in its revenues, by failing to pay his privilege tax, and that the deed of the trustee was for this reason invalid.

In the present case defendant has proven that plaintiff resorted to a flank movement—a stratagem—refused to take the pound of flesh, preferring the real estate. This is the proof, because it is not denied, but admitted, for the purposes of this appeal.

We find ourselves unable to approve plaintiff's ideas of justice by law. The remedy employed in this case was not designed to settle the title of real estate, but the lack of right to possession may be shown by destroying the title deed which is the basis of the claim to the right of possession. The right of defendant to the possession of the land did not expire by the terms of the contract until he had defaulted in the payment of the debt secured by the contract. A default was a condition precedent to the trustee's power to foreclose. The merchant is demanding that he be put in possession of the land upon the theory that there has been a default in the payment of the debt,

which default came about by his refusal to accept payment.

We are of opinion that evidence of defendant should not have been excluded; that his evidence established a complete defense to the action; that plaintiff, when it asked that defendant's testimony be excluded, admitted its truthfulness; that plaintiff cannot recover the possession of the land by the artifice of refusing to accept payment of his claim, and by thus obtaining a trustee's deed to the land, which deed forms the basis of his claim to the possession of the land.

Much is said in the opinion of the majority about the tender of payment not being a discharge of the lien. No one has suggested that the lien of the trust deed was discharged by the tender, and this part of the opinion of the court merely amounts to the utterance of an undisputed principle of law in a very solemn way, and, like “the flowers that bloom in the spring,” has nothing to do with the case. The learned judge speaking for the court says: “Appellant's offer to pay, according to his testimony, was in December, after there was a default in payment.” The fact nevertheless remains that he tendered payment before the sale, and was not then in default. Again, it is said that the defendant did not continue to make a tender. We take it that it was not incumbent upon the defendant to tender and continue to tender payment, when it appears that plaintiff arbitrarily and unconditionally refused to accept payment. The law never requires the doing of a vain thing. This is not an equitable defense; it goes to the very heart of the contract. The plaintiff's trustee was without power to sell unless there was a breach of the covenant—a default in payment of the debt secured by the contract.

We believe that every principle of law and common justice was violated when defendant was not permitted to tell the jury that he tendered performance and plaintiff refused to accept performance; that he did everything in his power to perform. There is nothing peculiar about this action which requires the courts to favor creditors who are seeking an unfair advantage. True, the doors of chancery are wide open to all, provided always that he who enters there must be able to pay the price, if he expects to obtain a restraining order. We can see no reason why this defense of tender should be barred in this summary proceeding. Let us suppose that defendant may now go into the chancery court; what will he prove to support his bill for cancellation of appellee's deed? Why, of course, fraud, artifice, and stratagem—an unconscionable refusal to accept payment to the uttermost farthing of the debt secured by the foreclosed trust deed. That is exactly what he offered to prove in this action, and exactly the proof plaintiff must make to maintain his claim to posses-

sion. Appellee, by the decision of this court, takes shelter behind his fraudulent trustee's deed, and by the aid of this court uses same to enter into possession, and we are told that the defendant must go into some other court and there receive a fair deal, but in this court, selected by his adversary, the doors of justice may not be unlocked. Again we beg leave to dissent.

This holding of our Associates is merely the relic of an archaic procedure when judicial hairsplitting was in fashion; and we respectfully submit that modern courts should render justice, and especially so when the statute applicable here was not, in our opinion, designed to give to plaintiff a weapon of offense and deny to the defendant the use of the same weapon for purposes of defense.

STANDARD ACC. INS. CO. v. BROOM. (No. 17984.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. INSURANCE ⇐665(5)—ACTIONS ON POLICY—EVIDENCE.

In an action to recover on an accident policy, evidence examined, and held sufficient to warrant a finding that death of insured was the result of accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1719, 1721, 1722; Dec. Dig. ⇐665(5).]

2. INSURANCE ⇐530—ACTIONS ON POLICY—NOTICE PRECEDENT.

The provision in an accident policy requiring written notice to the insurer, within 15 days after the accident for which claim is made, is void under Code 1906, § 8127, providing that any contract changing "the limitations prescribed in this chapter" shall be null and void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. ⇐530.]

Appeal from Circuit Court, Lowndes County; Thomas B. Carroll, Judge.

Action by Mrs. Ida Broom against the Standard Accident Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sturdivant, Owen & Garnett, of Columbus, for appellant. James T. Harrison, of Columbus, for appellee.

POTTER, J. Mrs. Ida Broom brought suit in the circuit court of Lowndes county against the Standard Accident Insurance Company, a corporation chartered under the laws of Michigan and doing business in the state of Mississippi, for the recovery on a certain accident insurance policy held by her as beneficiary, insuring John W. Broom against accidental death in the sum of \$2,000.

The declaration sets out that the deceased, in attempting to reverse a locomotive engine, of which he was in charge as engineer, had his left hand thrown violently against the corner of the cab and badly bruised, and that the injury to the hand

caused an embolus on the base of his brain near the medulla oblongata on the right side, which caused his death. The plaintiff alleged in her declaration that the insured had complied with all the requirements of the defendant company, and was neither derelict in duty nor dues, and that the defendant company was therefore indebted to her under the terms of the policy in the sum of \$2,000. The policy was made an exhibit to the declaration. The case was submitted to the jury, and a verdict and judgment rendered for the plaintiff for \$2,000, the amount sued for, and from this judgment the defendant insurance company appeals.

[1] The insurance company argues at great length that the facts in this case will not sustain a verdict for the plaintiff mainly because the physicians testifying for the plaintiff testified that the embolus in passing from the bruised portion of the hand to its place of lodgment at the base of the brain would necessarily pass through the minute capillaries in the lungs, and that the physicians described the embolus as being much larger than the minute capillaries through which they said it passed; therefore, it is argued their conclusions were incorrect and physically impossible. We understand from the testimony of the physicians that this embolus was a pus formation and not a solid, and therefore we are unable to say that it was beyond physical possibility or probability for this small semiliquid substance, loose in the blood vessels, to be driven through the minute capillaries of the lungs to its place of lodgment. The physicians for the plaintiff testified that this happened, the jury so found, and we cannot say that they were wrong about it.

The main contention of the defendant, however, is that the assured, the said John W. Broom, or the beneficiary named in the policy, under the terms of the policy, was duty bound to give the defendant written notice of any accident or injury to him for which claim against the defendant could be made under said policy, with full particulars thereof, within 15 days after the date of the accident causing the loss for which claim was made against the defendant, and that neither the said John W. Broom, nor the beneficiary named in said policy, gave the defendant written notice within 15 days of his alleged injury for which claim is made against the defendant under the terms of the policy. This was set up by way of affirmative matter under the general issue and by special pleas to about the same effect. The plaintiff relied in her replication and in the development of her case upon a waiver of this condition in the policy, and the brief of the appellant is largely devoted to this feature of the case, and it is perhaps thoroughly demonstrated by argument

and citation of authority that this provision in the policy, if valid, was not waived. Under the decisions of our court, however, the clause thus under consideration providing for notice of the accident within 15 days from the time of the accident is invalid.

In the case of *General Accident, Fire & Life Assurance Co. v. Walker*, 99 Miss. 404, 55 South. 51, this court held that under the provisions of section 2575 of the Code of 1906 that a similar clause in a contract of insurance was void. Section 2575 of the Code of 1906 is as follows:

"No company shall make any condition or stipulation in its insurance contract concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the loss or injury, and any such condition or stipulation shall be void."

This section was repealed by charter 223 of the Acts of the Legislature of 1912. Before its repeal this section made it possible for an insurance company to so contract that its policies of insurance would not be subject to the general statutes of limitation, but by terms in its policies it could provide for any period of limitation of not less than one year. Upon the repeal of section 2575 of the Code of 1906, section 3127, a statute general in its terms, applied to insurance contracts as it does to all other contracts. This section is as follows:

"The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

There is no essential difference between the effect of the general statute above set out and the special statute (section 2575) now repealed. The interpretation applicable to section 2575 is just as applicable to section 3127. The only difference between the two statutes is that section 2575 was applicable to insurance contracts alone, while section 3127 is a general statute applicable to all contracts, including insurance contracts, since the repeal of section 2575 of the Code of 1906. Following, therefore, the decisions of this court in the cases of *Dodson v. Western Union Telegraph Co.*, 97 Miss. 104, 52 South. 693, *Illinois Central R. R. Co. v. Jordan*, 66 South. 406, and *Assurance Co. v. Walker*, 99 Miss. 404, 55 South. 51, we conclude that the 15-day notice clause in the policy under consideration is void.

Affirmed.

**BOYD & BRADSHAW v. BOARD OF
SUP'RS OF CHICKASAW COUN-
TY. (No. 18160.)**

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Chickasaw County; H. K. Mahon, Judge.

Action between Boyd & Bradshaw and the Board of Supervisors of Chickasaw County.

From the judgment, Boyd & Bradshaw appeal. Affirmed.

W. D. & J. R. Anderson, of Tupelo, for appellants. R. J. West, of Okolona, and J. E. Harrington, of Houston, for appellee.

PER CURIAM. Affirmed.

**BANK OF DECATUR v. ROBINSON et al.
(No. 17716.)**

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Bank of Decatur and W. B. Robinson and others. From the judgment, the Bank appeals. Affirmed.

V. W. Gilbert and W. W. Venable, both of Meridian, for appellant. Baskin & Wilbourn, of Meridian, for appellees.

PER CURIAM. Affirmed.

FLYNT v. ROYALS. (No. 17584.)
(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between Dr. S. B. Flynt and Dr. T. E. Royals. From the judgment, plaintiff appeals. Affirmed.

W. W. Venable and F. K. Ethridge, both of Meridian, for appellant. R. F. Cochran and A. S. Bozeman, both of Meridian, for appellee.

PER CURIAM. Affirmed.

MOODY v. MOODY et al. (No. 17919.)
(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Pontotoc County; T. L. Lamb, Chancellor.

Action between Mrs. P. E. Moody, administrator, and W. R. Moody and another. From the judgment, the administrator appeals. Affirmed.

Fontaine & Fontaine, of Pontotoc, for appellant. Mitchell & Roberson, of Pontotoc, for appellees.

PER CURIAM. Affirmed.

**GEORGETOWN MERCANTILE CO. v. J. B.
& E. O. SMITH. (No. 17923.)**

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.

Action between the Georgetown Mercantile Company and J. B. & E. O. Smith. From the judgment, the Company appeals. Affirmed.

H. J. Wilson, of Hazlehurst, for appellant. R. N. & H. B. Miller, of Hazlehurst, for appellees.

PER CURIAM. Affirmed.

**MERIDIAN & M. R. CO. v. HARRIS.
(No. 17684.)**

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Meridian & Memphis Railroad Company and R. B. Harris. From the

judgment, the Railroad Company appeals. Affirmed.

Neville, Stone & Currie, of Meridian, for appellant. V. W. Gilbert, of Meridian, for appellee.

PER CURIAM. Affirmed.

STRICKLAND v. PLANTERS' LUMBER CO. (No. 17908.)

(Supreme Court of Mississippi. May 10, 1916.)

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Action between J. L. Strickland and the Planters' Lumber Company. From the judgment, Strickland appeals. Appeal dismissed.

Boddie & Farish, of Greenville, for appellant. Percy Bell, of Greenville, for appellee.

PER CURIAM. Appeal dismissed.

WEBSTER v. STATE. (No. 18616.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lauderdale County; W. W. Venable, Judge.

Amelia Webster was convicted of unlawful retailing, and appeals. Affirmed.

F. K. Ethridge, of Meridian, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

BOYD et al. v. ALABAMA & V. R. CO. (No. 17286.)

(Supreme Court of Mississippi, Division B. May 15, 1916.)

On suggestion of error. Suggestion of error overruled.

For former opinion, see 71 South. 164.

COOK, P. J. Appellants in their brief insist that we have necessarily overruled *Dyche v. Railroad Co.*, 79 Miss. 367, 30 South. 711, and *Railroad Co. v. Byrd*, 89 Miss. 308, 42 South. 286, in the opinion affirming this case. There are some expressions in the opinion of the court in the last-named case that might lead to this conclusion, but, we think, the opinion, applied to the facts of the case there under review, does not conflict with the opinion in the present case. In the *Byrd* Case there was evidence showing that the train was overcrowded and the passenger, for this reason, was forced to ride on the platform; that the train was running around a curve not in perfect condition, and the court held that, if there was negligence in the operation of the train, it was the duty of the railroad company to carry Byrd to a place where he could receive proper treatment. In the present case the evidence excludes any theory of negligence on the part of the railroad company. It is evident that the demented passenger fell from the train, or jumped from the train, at a moment when his caretaker's attention was withdrawn from his charge. In the *Dyche* Case the railroad company assumed the charge of the passenger, and, having done so, this court held, "it was charged with the duty of common humanity." The principle announced in the *Dyche* Case has no application to the present case—there is a marked difference in the facts of the two cases. In the present case no negligence is shown, or suggested by the record; and the railroad company was under no duty to take charge of the passenger, and it did not take charge of him. In the *Dyche*

Case there was no negligence which contributed to the injury, but the railroad company did take charge of the injured man.

Suggestion of error overruled.

INZER v. McDANIEL (No. 17935.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Pontotoc County; T. L. Lamb, Chancellor.

Action between J. W. Inzer and J. R. McDaniel. From the judgment, Inzer appeals. Affirmed.

Fontaine & Fontaine, of Pontotoc, for appellant. Mitchell & Roberson, of Pontotoc, for appellee.

PER CURIAM. Affirmed.

INZER v. CONLEE (No. 17936.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Pontotoc County; T. L. Lamb, Chancellor.

Action between J. W. Inzer and R. L. Conlee. From the judgment, Inzer appeals. Affirmed.

Fontaine & Fontaine, of Pontotoc, for appellant. Mitchell & Roberson, of Pontotoc, for appellee.

PER CURIAM. Affirmed.

MOSES v. STATE. (No. 18577.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lincoln County; J. B. Holden, Judge.

Bell Moses was convicted of unlawful retailing, and appeals. Affirmed.

Brennan & Boothe, of Brookhaven, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

MOSES v. CITY OF BROOKHAVEN. (No. 18578.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Lincoln County; J. B. Holden, Judge.

Charley Moses was convicted of selling intoxicating liquor in violation of an ordinance of the City of Brookhaven, and appeals. Affirmed.

Brennan & Boothe, of Brookhaven, for appellant. A. A. Cohn, of Brookhaven, for appellee.

PER CURIAM. Affirmed.

ALABAMA & V. R. CO. v. HILL* (No. 17736.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Newton County; A. J. McLaurin, Judge.

Action between the Alabama & Vicksburg Railroad Company and Minnie Hill. From the judgment, the Railroad Company appeals. Affirmed.

R. H. & J. H. Thompson, of Jackson, for appellant. Byrd & Byrd, of Newton, for appellee.

PER CURIAM. Affirmed.

*Suggestion of error overruled June 12, 1916.

WILMOT v. BOARD OF SUP'RS OF BOLIVAR COUNTY. (No. 17487.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Bolivar County; M. E. Denton, Chancellor.

Action between Mrs. S. G. Wilmot and the Board of Supervisors of Bolivar County. From the judgment, Mrs. Wilmot appeals. Affirmed.

G. G. Lyell, of Jackson, Cutrer & Johnston, of Clarksdale, Mayes & Mayes, of Jackson, and Somerville & Somerville, of Cleveland, for appellant. W. G. Hardee, Charles Clark, and D. J. Allen, Jr., all of Cleveland, for appellee.

PER CURIAM. Affirmed.**ASHBY et al. v. PARK et al.** (No. 17844.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Chancery Court, Chickasaw County; J. Q. Robins, Chancellor.

Action between R. L. Ashby and another and Elbert Park and others. From the judgment, parties first mentioned appeal. Affirmed.

Joe H. Ford, of Houston, for appellants. N. W. Bradford, of Houston, for appellees.

PER CURIAM. Affirmed.**VILLAGE OF SCOBIEY v. BAILEY.** (No. 17857.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Yalobusha County; N. A. Taylor, Judge.

Action between the Village of Scobey and T. J. Bailey. From the judgment, the village appeals. Affirmed.

Creekmore & Stone, of Water Valley, for appellant. J. G. McGowen, of Water Valley, for appellee.

PER CURIAM. Affirmed.**ILLINOIS CENTRAL R. CO. v. BURKHALTER.** (No. 17848.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Tallahatchie County; J. B. Echols, Judge.

Action between the Illinois Central Railroad Company and C. P. Burkhalter. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. J. H. Caldwell, of Charleston, for appellee.

PER CURIAM. Affirmed.**MISSISSIPPI BENEFICIAL INS. CO. v. MILLER.** (No. 17715.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action between the Mississippi Beneficial Insurance Company and J. M. Miller. From the

judgment, the Insurance Company appeals. Affirmed.

Anderson, Vollar & Kelly, of Vicksburg, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

PER CURIAM. Affirmed.**BARTON-PARKER MANUFACTURING CO. v. WALKER & NORMAN.** (No. 18161.)

(Supreme Court of Mississippi. May 18, 1916.)

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action between the Barton-Parker Manufacturing Company and Walker & Norman. From the judgment, the company appeals. Appeal dismissed.

Mitchell & Clayton, of Tupelo, for appellant. W. D. & J. B. Anderson, of Tupelo, for appellees.

PER CURIAM. Appeal dismissed.**POPLARVILLE SAWMILL CO. et al. v. LOTT.** (No. 17917.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Pearl River County; A. E. Weathersby, Judge.

Action between the Poplarville Sawmill Company and others and W. H. Lott. From the judgment, the parties first mentioned appeal. Affirmed.

J. M. Shivers, of Poplarville, for appellants. Tally & Mayson, of Hattiesburg, and Hall & Hall, of Columbia, for appellee.

PER CURIAM. Affirmed.**STATE ex rel. KING et al. v. PEARCE,** Judge. (4 Div. 443.)

(Court of Appeals of Alabama. Feb. 10, 1916. Rehearing Denied April 4, 1916.)

1. ABATEMENT AND REVIVAL §48, 71 — DEATH OF PARTY—COMMON LAW—STATUTE.

At common law and in either a real or personal action the death of either party put an end to the action, and, if the cause of action survived, a new suit might be brought, in the case of the death of the plaintiff, by his personal representative; the right to revive and continue an original suit is statutory.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 245, 358-376; Dec. Dig. §48, 71.]

2. ABATEMENT AND REVIVAL §50 — CONSTRUCTION OF STATUTE—PROVISIONS IN PARI MATERIA.

Code 1907, § 2496, providing that all personal actions survive in favor of the personal representative, section 2497, providing that real actions survive in favor of the heirs, devisees, or personal representatives, and section 2498, providing that no action shall abate by the death or other disability of the plaintiff or defendant, if the cause of action survives, and that it must be revived in the name of the legal representative of the deceased, his successor or party in interest, being in pari materia, must be considered together.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 245-357; Dec. Dig. §50.]

3. ABATEMENT AND REVIVAL ¶53, 72(6) — **ACTIONS ON CONTRACT** — "LEGAL REPRESENTATIVE" — HIS "SUCCESSOR" — "PARTY IN INTEREST."

Under such provisions, an action on contract or a personal action, upon the death of the plaintiff, survives in favor of the personal representative; the terms "legal representative," "his successor," and "party in interest," having reference to the personal representative of the deceased, who is the only proper or necessary party.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 251, 252, 385; Dec. Dig. ¶53, 72(6).]

For other definitions, see Words and Phrases, First and Second Series, Interest; Legal Representative; Successor.]

4. ABATEMENT AND REVIVAL ¶72(3) — **EJECTMENT** ¶80 — **RIGHT OF HEIRS.**

Under such provisions, an action to try title or to recover the possession of lands, on the death of the plaintiff, survives in favor of the heirs, as well as the personal representative, and may be revived in the name of either the heirs at law or the personal representative.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 380, 381, 398; Dec. Dig. ¶72(3); Ejectment, Cent. Dig. § 118; Dec. Dig. ¶80.]

5. MANDAMUS ¶169 — **PROCEEDINGS** — **PETITION** — **DISMISSAL.**

A petition for mandamus for permission to revive an action on contract as heirs at law of the original plaintiff, not making a case entitling petitioners to the relief prayed, would be dismissed without the issue of the rule nisi.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 375; Dec. Dig. ¶169.]

Petition by the State of Alabama, on the relation of H. B. King and others, for mandamus to require revival of a suit in the names of relators as heirs at law of W. C. King, deceased, who was the original plaintiff. Petition denied.

W. C. King began his suit in the circuit court against J. M. Deas and C. T. Harris, to recover of them the sum of \$900, the basis of the suit being that they were agents of the Lahaska Insurance Company, of Pennsylvania, and as such agent made a contract with W. C. King, for and on behalf of the Lahaska Insurance Company, to insure a framed dwelling, and that, at the time said contract was made, said insurance company was a foreign corporation, and not qualified to do business in Alabama, and that the loss of \$900 was sustained on said contract. Pending the suit, W. C. King died, and, as no debts were owing, no administration was had on his estate, and the relators here, each being over the age of 21 years, sought to have the suit revived in their name. The court denied the order, and they applied for mandamus.

Farmer & Farmer, of Dothan, for appellants. W. L. Lee, of Columbia, for appellee.

BROWN, J. Section 2496 of the Code provides:

"All actions on contracts, express or implied; all personal actions, except for injuries to the

reputation, survive in favor of and against the personal representative."

Section 2497 provides:

"Real actions to try the title, or for the recovery of the possession of lands, and actions for injuries to lands, survive in favor of the heirs, devisees, or personal representatives, and against heirs, devisees, tenants, or personal representatives, according to their respective rights," etc.

Section 2499:

"No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of * * * the legal representative of the deceased, his successor, or party in interest," etc.

[1] At common law, whether the action was real or personal, the death of either party put an end to the suit; and, if the cause of action survived, a new suit might be brought, in the case of the death of the plaintiff, by his personal representative. 1 Cyc. 47, A. To avoid the necessity of allowing a suit to abate under such conditions, these statutes were enacted, providing a course of procedure for continuing the original suit to final judgment on the merits. *Evans v. Welch*, 63 Ala. 250. Otherwise stated, the right to revive and continue the original suit is statutory. 1 Cyc. 48; *Gould v. Carr*, 33 Fla. 523, 15 South. 259, 24 L. R. A. 130; *Neal v. Haygood*, 1 Ga. 514; *In re Palmer*, 115 N. Y. 493, 22 N. E. 221; *Green v. Watkins*, 6 Wheat. 260, 5 L. Ed. 256.

[2-4] These statutes, being in pari materia, must be construed together; and, when so construed, it is clear that in actions on contract and all personal actions, if the plaintiff dies and the cause of action survives, the action survives in favor of the personal representative. *Wynn, as Adm'r, v. Tallapoosa County Bank*, 168 Ala. 492, 53 South. 228. In such actions the terms "legal representative," "his successor," and "party in interest," have reference only to the personal representative of the deceased, and such personal representative is the only proper or necessary party. *Thompson v. Lee*, 31 Ala. 292. In actions to try the title to or recover the possession of lands, on the death of the plaintiff the action survives in favor of the heirs as well as the personal representative, and the action may be revived in the name of either the heirs at law or the personal representative. *Rowland & Helfner v. Ladiga's Heirs*, 21 Ala. 9; *Jordan v. Abercrombie*, 15 Ala. 580; *Leatherwood et al. v. Sullivan et al.*, Ex'rs, 81 Ala. 458, 1 South. 718; *Espalla v. Gottschalk*, 95 Ala. 258, 10 South. 755; 1 Cyc. 89(11).

The order of the circuit court overruling the petitioners' motion to revive in the names of petitioners as the only heirs at law of the deceased plaintiff was correct.

[5] The petition, on its face, not making a case entitling the petitioners to the relief

prayed, the petition will be dismissed without the issue of the rule nisi. 26 Cyc. 471; *Moore v. Waco Building Ass'n*, 92 Tex. 265, 47 S. W. 716.

Petition dismissed.

HARTSELL v. TURNER. (8 Div. 916.)

(Supreme Court of Alabama. April 6, 1916.)

1. CONTRACTS ⇨171(3) — FAILURE TO PERFORM—RIGHT OF RECOVERY.

Where plaintiff's contract to drive a well was entire, and he failed to fully and substantially perform, he could not, without more, recover on the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 757; Dec. Dig. ⇨171(3).]

2. WORK AND LABOR ⇨14(3)—PARTIAL PERFORMANCE OF CONTRACT—QUANTUM MERUIT.

Where plaintiff's contract to drive a well was entire and he failed to fully and substantially perform, he could not, without more, recover the value of the labor expended in its partial performance.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 30, 33; Dec. Dig. ⇨14(3); Damages, Cent. Dig. § 330.]

3. WORK AND LABOR ⇨14(3)—PARTIAL PERFORMANCE OF CONTRACT—QUANTUM MERUIT.

A party having the right to insist on the full performance of an entire contract, who voluntarily accepts the benefit of part performance, is liable for the advantage thus voluntarily accepted; such liability resting not upon the original contract, but upon an implied agreement deducible from the acceptance of a valuable service or thing; but the mere fact that the performance has been beneficial is not sufficient to charge the party benefited upon a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 30, 33; Dec. Dig. ⇨14(3); Damages, Cent. Dig. § 330.]

4. WORK AND LABOR ⇨14(3)—NONPERFORMANCE OF CONTRACT—ACCEPTANCE OF BENEFITS—QUANTUM MERUIT.

Where plaintiff contracted to drive a well on defendant's premises, and defendant unequivocally rejected it because the water then produced was not a performance of the contract, and plaintiff drilled the well deeper, without success, and then left it, the defendant who, after having another well bored without success, through his tenants used the limited supply of water from the plaintiff's well for more than four years, and aided his tenants in having the well cleaned out, in view of the fact that the well presented no obstacle to the use of his premises, was liable to plaintiff for the value of the labor spent in boring the well in no event to exceed what would have been the contract price of boring the well to that depth driven had it then furnished the contemplated supply of water, less the value of the pipe contributed by defendant.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 30, 33; Dec. Dig. ⇨14(3); Damages, Cent. Dig. § 330.]

5. WORK AND LABOR ⇨30(2) — ACTION ON QUANTUM MERUIT—QUESTION FOR JURY.

In such case, the amount of recovery was for the jury.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-62; Dec. Dig. ⇨30(2).]

Appeal from Law and Equity Court, Madison County; James H. Ballentine, Judge.

Action by Ed Hartsell against Curry Turner. Judgment for defendant, and plaintiff appeals. Transferred from the Court of Appeals under Acts 1911, p. 449, § 6. Reversed and remanded.

R. E. Smith, of Huntsville, for appellant. Douglass Taylor and Clarence L. Watts, both of Huntsville, for appellee.

SAYRE, J. On the first trial of this cause in the court below the plaintiff (appellant here) contended that he was entitled to recover the agreed price of his work as for a full and substantial performance of his part of the contract. The Court of Appeals, very properly holding that plaintiff had not fully and substantially performed, reversed the judgment in favor of the plaintiff. *Turner v. Hartsell*, 4 Ala. App. 607, 58 South. 950, where a statement of the case in its then aspect will be found. On the second trial plaintiff, abandoning his contention as to full and substantial performance, sought to recover on the quantum meruit as for the reasonable value of the well he bored, his theory of the facts being that the well he bored, though it did not furnish the quantity of water contemplated in the contract, yet was of some value, and that defendant had accepted and used it for what it was worth. The trial court gave the general charge for defendant, and plaintiff has appealed.

[1-4] The contract was entire, and plaintiff, having failed to perform fully and substantially, could not, without more, recover on the contract, nor the value of the labor he expended in its partial performance. Any other rule would tend to encourage bad faith and lessen the obligation of contracts into which the parties must be presumed to enter with a full understanding of their necessary implications. But while no claim can be founded upon an express contract which has not been fully performed, nor will the mere fact that part performance has been beneficial be considered as sufficient to charge the party benefited on a quantum meruit, still, if the party who has a right to insist on the full performance of such a contract has voluntarily accepted the benefit of partial performance, the modern doctrine, based upon principles of equity and right, holds him liable to pay for the advantage he has thus voluntarily accepted. Liability in such case is rested, not upon the original contract, but upon an implied agreement deducible from the delivery and acceptance of a valuable service or thing. The difficulty in cases of this character has been to determine how and by what circumstances a voluntary acceptance may be shown. Where the defendant can reject what has been performed without detriment to himself, he will be required to do so; but it would be requiring too much to compel him to abandon his own property because the plaintiff

has incorporated his labor with it in a manner incompatible with the agreement. These statements of the law, drawn for the most part from 6 Ruling Case Law, §§ 345-356, where we find a very acceptable statement of it, are in substantial accord with the principles to be deduced from a comparison of our reported cases, though it must be confessed that on the surface at least they do not appear to be entirely reconcilable among themselves. *Thomas v. Ellis*, 4 Ala. 108; *Davis v. Badders*, 95 Ala. 348, 10 South. 422; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Maxwell v. Delehomme*, 163 Ala. 490, 50 South. 882; *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823. Numerous other cases in the same line may be found cited in the cases above.

[5] Whether there has been such acceptance as to charge the defendant in the general run of cases of this character, must frequently be a question for jury decision, and this appeal asserts in substance that the question here should have been submitted to the jury. Defendant unequivocally rejected the well when it reached the depth of 97 feet because the quantity of water it then produced did not constitute a performance of the contract. In view of all the known and undisputed purposes the well was intended to serve, we agree with the Court of Appeals in its ruling that at this point the defendant was right. Plaintiff made his concurrence in this construction of the contract very manifest by proceeding to bore the well some 50 or 60 feet further through the rock. But his further efforts were utterly barren, and there he left the well. Defendant then had another well bored, but that too furnished an inadequate supply of water, so that afterwards his tenants equipped the well in dispute with a rope and bucket and made use of the very limited supply of water thus obtained for drinking purposes, and continued so to do during the four years that passed before the last trial of this case. Defendant knew this and aided his tenants in the use of the well by having it cleaned out. Upon these facts is predicated defendant's voluntary acceptance of what advantage there was in the use of the well—unquestionably some advantage, or it would not have been so constantly used. Defendant was not required to abandon any use of his property, but, on the other hand, the presence of this well on his farm, a six-inch hole in the ground, presented no sort of obstacle to the use of his property without the use of the well as free and full as if the well had not been bored. On these facts, equitable principle would seem to require that defendant should pay plaintiff for the value of the labor expended in boring the well to the depth at which it furnished the water used by the former—in no event, however, to ex-

ceed what would have been the contract price of boring the well to that depth had it then furnished the contemplated supply of water—less the value of the pipe contributed by defendant and used in piping the well. These facts, which we have stated according to the tendencies of the evidence favorable to plaintiff, and the result, should have been left with the jury.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

RICE v. J. H. BEAVERS & CO. (6 Div. 316.) (Supreme Court of Alabama. April 20, 1916.)

1. TIME §9(1)—COMPUTATION—EXCLUDING FIRST DAY.

Under Code 1907, § 11, as to computing time, where a statute fixes the time within which an act may be done, the first day must be excluded, and the last day included.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-16, 24½, 32; Dec. Dig. §9(1); Appeal and Error, Cent. Dig. § 1914.]

2. TIME §3 — WORDS AND PHRASES — "WITHIN."

The use of the word "within" as a limit of time, or degree, or space, embraces the last day, or degree, or entire distance, covered by the limit fixed.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 3; Dec. Dig. §3.]

3. TIME §8 — BILL OF EXCEPTIONS — TIME FOR PRESENTATION.

Under Code 1907, § 3019, providing that bills of exception may be presented "within 90 days from the date on which judgment is entered and not afterwards," where judgment was entered May 19th, and bill of exceptions was presented on August 19th, 92 days thereafter, a motion in the Supreme Court to strike the bill of exceptions will be granted.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 10, 33; Dec. Dig. §8.]

For other definitions, see Words and Phrases, First and Second Series, Within.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action between Elver L. Rice and J. H. Beavers & Co. From a judgment Rice appeals. Transferred from the Court of Appeals, under section 6, Act April 18, 1911 (Acts 1911, p. 44). Affirmed.

W. G. Peebles, of Jasper, for appellant. J. B. Powell, of Jasper, for appellee.

THOMAS, J. [1, 2] The cause is submitted on motion to strike bill of exceptions, because not presented to the trial judge within the time required by law. When a statute fixes a time within which an act may be done, the first day must be excluded and the last day included, to compute it. Code 1907, § 11; *Oberhaus v. State ex rel. McNamara*, 173 Ala. 483, 55 South. 898. Bills of exceptions may be presented at any time "within ninety days from the date on which judgment is entered and not afterwards."

Code 1907, § 3019. The use of the word "within," as a limit of time, or degree, or space, embraces the last day, or degree, or entire distance, covered by the limit fixed. *Hamilton v. State*, 101 Tenn. 417, 47 S. W. 695.

[3] The judgment in this case was entered on May 19, 1915, and the bill of exceptions was presented on the 19th day of August, 1915, 92 days after the entry of the judgment. The motion to strike the bill of exceptions is granted, and the bill of exceptions is stricken. There being nothing before the court for review, the cause is affirmed.

Affirmed.

ANDERSON, O. J., and MAYFIELD and SOMERVILLE, JJ., concur.

MITCHELL et al. v. CUDD. (8 Div. 872.)
(Supreme Court of Alabama. April 13, 1916.)

1. EQUITY §150(3) — PLEADING — "MULTIFARIOUSNESS."

A bill to foreclose two mortgages on real estate, one executed by J. and others and the other executed later by M., and to reform certain features of the descriptions in the mortgages, and which, as amended, sought the cancellation of a conveyance by J. and M. to the son and heir of M. as a condition to the enforcement of the mortgages, was not "multifariousness," as the purpose of the bill was single—that is, the enforcement of the complainant's liens—and as it is not essential in such cases that every defendant have an interest in or concern for all matters or phases of the controversy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 374; Dec. Dig. §150(3).]

For other definitions, see Words and Phrases, First and Second Series, Multifariousness.]

2. CANCELLATION OF INSTRUMENTS §35(3)—PARTIES—DEFENDANTS.

Upon such bill the grantee in the conveyance sought to be canceled was a necessary party respondent, as the complainant's rights could not be satisfactorily and completely determined without such party.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 57-64; Dec. Dig. §35(3).]

Appeal from Chancery Court, Morgan County; James E. Horton, Jr., Chancellor.

Bill by J. J. Cudd against Harry Mitchell and others, to foreclose mortgages on real estate and to reform the descriptions in such mortgages, with amendment seeking the cancellation of a conveyance. Demurrers overruled, and defendants appeal. Decree affirmed.

P. M. Brindley, of Hartselle, and E. M. Russell, of Decatur, for appellants. E. W. Godbey, of Decatur, for appellee.

McCLELLAN, J. In the amended bill the appellee is the complainant, and Frank O. Mitchell and others are the respondents. The dominant purpose of the bill is to foreclose two mortgages on real estate, one ex-

ecuted to complainant, on September 4, 1907, by M. A., John, Harry, Mollie, and G. A. Mitchell, and the other, executed to complainant, on June 26, 1911, by M. A. Mitchell, and to reform specified features of the descriptions of lands in the mortgages. Frank O. Mitchell is the son and heir at law of M. A. and John Mitchell, now deceased. An exhibit to the bill is a copy of a conveyance executed on August 15, 1905, by M. A. and John Mitchell to Frank O. Mitchell. The amended bill seeks, among other things, the cancellation of this conveyance, which, if unavowed, would render ineffectual the complainant's mortgages on the land described in the conveyance to Frank O. Mitchell. That the amended bill, in its general theory, possesses equity is manifest.

Three questions are discussed in brief for appellants who invoke review of the decree overruling the demurrers. The consideration of the appeal is, of course, confined to these questions:

1. The averments of paragraph 6 of the amended bill fully refute the first contention, viz., that complainant, when he accepted the first or the second mortgage, had actual knowledge of the existence of the deed of August 15, 1905, to Frank O. Mitchell. The allegations of this paragraph affirmatively exclude the notion that complainant had, until after he had accepted the second mortgage (June 26, 1911), knowledge or notice of the existence of the conveyance to Frank O. Mitchell.

[1] 2. The effect of the contention that the bill is multifarious, because it seeks the cancellation of the conveyance of August 15, 1905, to Frank O. Mitchell, is to say that the mortgagee (complainant) must, in a separate cause, invoke the courts to cancel that conveyance. The purpose of the bill is single, viz., enforcement of the complainant's liens; and the removal of obstacles in the way of that relief is but incidental to the major objective. It is not essential, in causes of this character, that every defendant have an interest in, or concern for, all matters or phases of the controversy. The amended bill is not multifarious. *Ellis v. Vandergrift*, 173 Ala. 142, 154, 155, 55 South. 781; *Truss v. Miller*, 116 Ala. 494, 505, 22 South. 863; *Bolman v. Lohman*, 74 Ala. 507.

[2] 3. It is obvious that Frank O. Mitchell is a necessary party respondent to the cause. Under the averments of the amended bill, the rights complainant asserts and would have vindicated could not be satisfactorily, completely determined without making Frank O. Mitchell a party respondent. The three objections urged against the amended bill on this appeal are without merit.

The decree is affirmed.

Affirmed.

ANDERSON, O. J., and SAYRE and GARDNER, JJ., concur.

FARRELL v. FARRELL. (8 Div. 881.)

(Supreme Court of Alabama. April 6, 1916.)

DIVORCE — 240(5) — PERMANENT ALIMONY — AMOUNT — FACTS AFFECTING.

Where a wife, although not entirely free from fault, secured a divorce from her husband because of cruelty, and the husband was a strong, healthy man, 48 years old, successful in business, with a personal estate of \$5,000 or more, an award of \$1,200 permanent alimony and \$100 attorney's fees was not excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 678, 680; Dec. Dig. — 240(5).]

Appeal from Chancery Court, Madison County; James E. Horton, Jr., Chancellor.

Suit for divorce by Jesse R. Farrell against Lucy Farrell. From a decree for defendant on her cross-bill, plaintiff appeals. Affirmed.

Douglass Taylor and Clarence L. Watts, both of Huntsville, for appellant. Betts & Betts, of Huntsville, for appellee.

GARDNER, J. Appellant filed the original bill in this cause, seeking a decree of divorce from bed and board because of cruelty on the part of his wife, as authorized by Code, § 3809. Appellee made her answer a cross-bill and sought an absolute divorce from the bonds of matrimony on the ground of cruelty. Upon submission of the cause for final decree, the chancellor dismissed the complainant's bill and granted the relief prayed in the cross-bill, thus divorcing the parties absolutely, and awarded to the wife the sum of \$1,200 as permanent alimony and \$100 as her attorney's fee, the amount agreed upon by counsel. In his opinion, which accompanies the decree, the chancellor discusses the evidence in the case, and concludes that:

"While the wife may not be entirely free from fault, a consideration of the situation of the parties, the delicate condition of the wife, the health and strength of the husband, and of the acts and conduct of the husband and his children toward his wife, inclines the court to the opinion that the charges of cruelty against the husband by the wife have been made out and that she should be granted relief, notwithstanding her own derelictions."

Appellant was a widower 48 years of age at the time of this marriage, the father of six children, five of whom resided with him; and appellee was a widow 31 years of age, the mother of two small children. The record is convincing that it was an ill-starred match. The parties were married in June, 1914, and the original bill in this cause was filed in August, 1915. It would serve no useful purpose to discuss this rather voluminous record, and thus place in permanent form the details of this unfortunate family relation. Suffice it to say the evidence has been given careful consideration, and we are persuaded that the chancellor reached the correct conclusion as summarized in the above-quoted statement from his opinion.

The question of alimony has also been

carefully considered, and due consideration given to the fact that from the evidence we find the wife not entirely free from fault. Jones v. Jones, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95. The chancellor in his opinion states as his conclusion that the value of the complainant's personal estate equals or exceeds \$5,000. We are led to the conclusion that this is a rather conservative estimate, and that doubtless its value exceeds that amount. His real estate does not exceed \$500 in value, but he does not appear to be indebted. It further appears from the record as well established that the appellant is a strong and healthy man, industrious, and more or less successful in his business affairs. His earning capacity is to be taken into consideration. Johnson v. Johnson, 71 South. 415. The exhibit to his testimony, showing his bank account, gives some idea of the volume of business transacted by him, disclosing deposits of \$19,000 in a period of less than one year.

Upon mature consideration, we see no sufficient reason for a modification of the decree of the chancellor with respect to the amount of alimony and the amount of attorney's fee. Jeter v. Jeter, 86 Ala. 401; Turner v. Turner, 44 Ala. 438; King v. King, 28 Ala. 315; Sharit v. Sharit, 112 Ala. 617, 20 South. 954; 1 Rul. Cas. Law, §§ 77, 78. We are therefore of the opinion that the decree of the court below should not be disturbed, and it is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

TODD et al. v. INTERSTATE MORTGAGE & BOND CO. (7 Div. 759.)

(Supreme Court of Alabama. April 6, 1916.)

1. DOWER — 49(1) — ESTOPPEL TO ASSERT — JOINING IN MORTGAGE.

By joining with the heirs of her deceased husband in the execution of a mortgage of decedent's lands after his death, the widow estopped herself, as against the mortgagee, to assert dower or quarantine rights.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-156, 167, 173; Dec. Dig. — 49(1).]

2. HOMESTEAD — 145 — ESTOPPEL OF WIDOW — JOINING IN MORTGAGE.

By joining with the heirs of her deceased husband in the execution of a mortgage on his lands after his death, the widow estopped herself, as against the mortgagee to assert her homestead rights, under Code 1907, § 4197, in the property.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 268, 277, 280, 285; Dec. Dig. — 145.]

3. EQUITY — 153 — PLEADINGS — CONSTRUCTION.

In suit by a mortgagee against mortgagors, a widow and her husband's heirs, of two tracts, owned one by the widow, the other by the heirs, the widow having joined in the mortgage only as surety, where the original bill alleged foreclosure by the mortgagee, and its purchase of the two

mortgaged parcels of land en masse, praying that the mortgagors be required to elect whether they would affirm or disaffirm the sale under power, and, in the event of disaffirmance, that the mortgage be foreclosed by appropriate decree, thus conceding the option of the mortgagors to disaffirm, the widow's right, to the benefit of a proper foreclosure of the two tracts separately under decree of the court, by her cross-bill became fixed, and she could not be deprived thereof by dismissal of the original bill, or its amendment to withdraw the averments of sale en masse, the prayer that the mortgagors be required to elect, and the introduction of a prayer that the sale be confirmed by decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386-389; Dec. Dig. §153.]

4. MORTGAGES §518—SALE—ORDER OF SALE—SURETY.

Where a widow joins as surety in the mortgage of her husband's heirs, covering two pieces of property, theirs and her own, she has the right to have the heirs' property first sold on foreclosure of the mortgage for the relief pro tanto of her own.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1518; Dec. Dig. §518.]

5. EQUITY §427(3)—PLEADING—PRAYER FOR RELIEF—SUPPORT OF DECREE.

In a mortgagee's suit against the mortgagors, a widow and her husband's heirs, to require them to elect whether they would affirm or disaffirm a sale under power, where the widow, who was surety for the heirs, did not specifically pray for relief by sale of the heirs' property first for the relief of her own, but her cross-bill contained a prayer for general relief, upon suggestion made at bar, or ex mero, it was proper for the court to decree a sale of the parcels in the order suggested by the fact that the widow was a surety.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1009-1014; Dec. Dig. §427(3).]

6. EQUITY §138 — PLEADING — PRAYER FOR RELIEF.

The fact that a bill in equity contains a prayer for specific relief, not authorized by the facts averred, will not destroy its equity where there is a prayer under which relief may be granted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 819-821; Dec. Dig. §138.]

7. ESTOPPEL §57 — POSITION IN JUDICIAL PROCEEDINGS — CLAIM INCONSISTENT WITH PREVIOUS POSITION.

To come within the rule, that a party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded upon the same subject-matter, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 143; Dec. Dig. §57.]

8. ELECTION OF REMEDIES §1—APPLICATION OF PRINCIPLE.

To make a case for the application of the principle by which a party concludes himself by an election between remedies, the party must have actually at command two inconsistent remedies.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 1; Dec. Dig. §1.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Bill by the Interstate Mortgage & Bond Company against Mary Annie Todd and others. From a decree for plaintiff, the named defendant appeals. Reversed and remanded.

Oulli & Martin, of Gadsden, for appellant. O. R. Hood, of Gadsden, and E. D. Smith, of Birmingham, for appellee.

SAYRE, J. R. T. Todd died, intestate, seised in fee of a vacant lot on Turrentine avenue in the city of Gadsden, and this was all the real property he owned. His wife, appellant, owned a lot on Fourth street which had been improved by the erection thereon of three apartments. The family occupied a rented house in another part of the city. Intestate left surviving him appellant and six children, his heirs, one of them a minor. There has never been any administration of his estate, nor any assignment of homestead or dower. Shortly after his death, the widow and children, to secure a loan of money to the children, joined in the execution of a mortgage to J. B. Martin. This mortgage covered both the above-mentioned lots. The children erected two houses on the Turrentine avenue lot, and upon their completion the widow occupied, and continues to occupy, one of them as a dwelling, receiving and using the rents from the other for the support and maintenance of herself and family. Four or five years later the widow and her children, all now certainly of age, executed and delivered the mortgage under which appellee claims. This mortgage also covered both pieces of property. The agreement as to facts states that appellant received no part of the proceeds of the mortgage, into which she entered for the sole purpose of securing the loan to her children by pledging her Fourth street property. However, she executed the mortgage and the notes thereby secured, assuming on the face of the transaction, and in fact so far as the mortgagee knew, equality of obligation with the heirs, and out of the proceeds the Martin mortgage was paid and discharged. This mortgage of latest execution contained apt words of conveyance and both special and general warranties applicable alike to both properties. Upon default there was a foreclosure under the power contained in the mortgage, and the mortgagee became the purchaser as it had a right to do under the terms of the security. The two properties were exposed for sale and purchased by appellee en masse at and for the sum of the mortgage debt and the expenses of foreclosure, a sum very materially less than the reasonable value of the property at the time. Afterwards appellant surrendered possession of the Fourth street property to appellee, as she had to do in order to retain her statutory right of redemption, but refused to surrender the Turrentine avenue lot, claiming to hold the latter by her right of quarantine and homestead. Thereupon appellee filed its bill, alleging the foreclosure and its purchase en masse, and praying that the mortgagors be required to elect whether they would affirm or disaffirm the sale, and, in the event of a

disaffirmance, that its mortgage be foreclosed by appropriate decree. The heirs suffered a decree pro confesso. Appellant answered, making her answer a cross-bill under the statute, praying that the foreclosure be set aside, that the Fourth street property be sold in separate parcels, that the Turrentine avenue property be set apart to her and her minor child—meaning, of course, the child who was a minor at the time of the father's death—as a homestead, that the last-named property be not sold or partitioned during her life, and for general relief. To this answer, as a cross-bill, a demurrer was sustained. Appellee then amended its bill by withdrawing the averment of a sale en masse and the prayer that defendants be required to elect, and introducing a prayer that the sale under the power be confirmed by decree and appellee let into possession of the Turrentine avenue property. The heirs allowed this amended bill to be taken as confessed; but appellant again answered by cross-bill, to which, as before, the heirs were made parties defendant, renewing substantially the prayer of her former answer. After demurrer sustained to this cross-bill, appellee again amended by averring that appellant had elected to affirm the sale under the power by joining the heirs in an action at law in which the plaintiffs there sought to recover an amount alleged to be due to them by reason that appellee had bid in the whole property for an amount considerably in excess of the indebtedness secured by the mortgage, which action had been determined in favor of appellee. This, we believe, is a fair summary of the proceedings prior to the submission for final decree. The cause being submitted for decree on the bill and its amendments, the answer, the decrees pro confesso against the heirs, and the agreed statement of facts—which, we may remark, does not seem to have been intended to cover facts shown by the pleadings not to be in dispute—the chancellor confirmed in all respects appellee's right under the foreclosure sale. The widow appeals.

[1, 2] By joining the heirs in the execution of the mortgage to appellee after the death of her husband, appellant estopped herself, as against the mortgagee, to assert either dower or homestead rights in the property. This, under our decisions, is clearly the case so far as the claim of dower or quarantine right is concerned. *Jones v. Reese*, 65 Ala. 134; *Reeves v. Brooks*, 80 Ala. 26; *Lytle v. Sandefur*, 93 Ala. 396, 9 South. 260. We can perceive no valid reason why the same rule should not be applied to appellant's claim of homestead. One certain conclusive consideration affects the two cases alike. Whatever may have been the case at the time of the execution of the Martin mortgage, when appellee took the mortgage now in question the heirs were all of full age, and they and the widow owned among them the whole fee and were entirely competent to convey it by

deed or mortgage. The statute (Code, § 4197) does provide that, where a decedent, at the time of his death, has no homestead exempt to him from levy and sale under process, the widow and minor child, or children, or either, shall be entitled to homestead exemption, or \$2,000 in lieu thereof, out of any real estate owned by him, and that "in no case, and under no circumstances, shall the widow and minor children, or either of them, be deprived of homestead or \$2,000 in lieu thereof if they or either of them apply therefor in manner as herein provided, before final distribution of the decedent's estate." But, as we indicated in *Chamboredon v. Fayet*, 176 Ala. 211, 57 South. 845, the language of this section in its present shape is broader than the true legislative purpose as it is to be learned from other parts of this court, the true purpose of that part of the section which we have quoted being to deny that the widow or minor children may be charged with laches in moving for an assignment of homestead, provided only they move before final distribution of the decedent's estate. It was never intended to lay down the rule that the widow and heirs, all having reached full age and being sui juris, may not, by conveyance and appropriate covenants in which they all freely join for valuable consideration, estop themselves at law as in equity thereafter to claim homestead in the property so conveyed.

[3-5] The whole equity, then, of the original bill in this cause, the only reason why the remedy by ejectment would have been inadequate, lay in the averment that the separate parcels covered by the mortgage had been sold at foreclosure en masse, the concession by the complainant that this manner of sale left in the mortgagors an option to disaffirm, the prayer that the mortgagors be required to elect whether they would affirm or disaffirm, and, in the event of a disaffirmance, that the mortgage be foreclosed by appropriate decree. By her election to disaffirm, appellant's right to the benefit of a proper foreclosure under a decree of the court became fixed; and, having so elected, she became entitled further, not only to a sale of the property in separate parcels, but to a sale of them in a certain order. By the pleadings and proof it was made to appear that, while appellant was bound to appellee as a principal debtor, as between herself and the heirs she was a surety. On this ground it was due to her that the Turrentine avenue property be first sold for the relief pro tanto of her Fourth street property. These rights having been asserted by way of cross-bill, she could not be deprived of them by a specious amendment nor even by a dismissal of the original bill, and to this extent the cross-bill contained equity. Appellant did not specifically pray for a part of this relief, but her cross-bill contained a prayer for general relief, and upon suggestion made at the bar, or ex mero, it would have been prop-

er for the court to decree a sale of the parcels in order suggested by the fact that appellant was a surety. *Rosenau v. Powell*, 173 Ala. 123, 55 South. 789.

[6] To a certain extent appellant proceeded upon a different theory, it seems, though she was careful to aver and prove the fact of her suretyship. This appears from the prayer of her cross-bill, which has been stated. But the fact that a bill contains a prayer for specific relief not authorized by the facts averred will not destroy its equity, provided there is a prayer under which relief may be granted. *Rosenau v. Powell*, supra.

[7, 8] The amendments, whereby appellee first withdrew the prayer of its original bill for an election and then sought to foreclose the election appellant had made in her answer and cross-bill by averring the action at law, should not have been allowed to avail it anything. These amendments, apart from the status of right and equity brought under consideration by appellant's answer and cross-bill, would have left the cause in the attitude of presenting to the court a question of purely legal cognizance. The equity of the bill in its last shape was refuted by the fact that appellant and her coplaintiffs had taken nothing by their action at law. In *Herman on Estoppel* it is said that:

"A party who obtains or defeats a judgment, by pleading or representing a thing or judgment in one aspect, is estopped from giving it another in a suit founded upon the same subject-matter." Section 165.

To come within this statement of the rule of conclusiveness, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded. He must have received some benefit under his election. *Register v. Carmichael*, 169 Ala. 588, 53 South. 799, 34 L. R. A. (N. S.) 309, and cases there cited. Appellant and her coplaintiffs in the action at law, which rested necessarily and alone upon the allegation that appellee's bid was in excess of the amount secured by the mortgage, took nothing for the reason, we must assume upon the record, there was no such excess. Plaintiffs in that action were pursuing a will-o'-the-wisp; there was no substance to the right under which they claimed. To make a case for the application of the principle by which a party concludes himself by an election between remedies, the party must have actually at command two inconsistent remedies. *Calhoun County v. Art Metal Construction Co.*, 152 Ala. 607, 44 South. 876; *Southern Railway Co. v. City of Attalla*, 147 Ala. 653, 41 South. 664. In *American Freehold Land Mortgage Co. v. Pollard*, 120 Ala. 1, 24 South. 736, cited to this point by appellee, the mortgagee had bid in the property at its foreclosure sale at a price several thousand dollars in excess of the debt secured, and the ruling was that the mortgagor could not be heard to claim the excess while seek-

ing to defeat the security. And in the same case, reported in 127 Ala. 227, 29 South. 593, where it appeared that the mortgagor, in answer to the mortgagee's original bill, had elected to affirm under the terms then proposed, and afterwards the bill was amended to change the terms, it was held that the amendment set the mortgagor's election at large. In the same case it was held that the filing of the bill revived the right of election which otherwise would have been lost to the mortgagor; this upon the principle that the mortgagee, though in possession for a length of time that would have barred a bill by the mortgagor to avoid the sale, treated the mortgage as merely a subsisting security by filing its bill, such an act being entirely inconsistent with any pretension on its part that its possession had ripened into title. The principles brought into view by the cases to which we have referred lead to the conclusion that, whatever effect might otherwise have been attributed to appellant's unsuccessful lawsuit, the filing of the original bill in this cause gave appellant a right of election to affirm or disaffirm the voidable foreclosure, a right of which she could not be deprived after she had elected by answer and cross-bill to disaffirm and prayed for relief that became appropriate in that event.

The decree was affected with error. To the end that appellant may have her election to disaffirm the foreclosure sale made effectual and that the mortgage may be properly foreclosed by decree under pleadings to be recast to develop the true equities of the cause, the court making such order, if any, in respect to the sale by subdivisions of the two parcels as may seem best in the circumstances, the decree will be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

SEAROY et al. v. CULLMAN COUNTY. (6 Div. 210.)

(Supreme Court of Alabama. April 13, 1916.)

1. COUNTIES ~~§~~96 — TREASURER'S BOND—OBLIGEE—STATUTE.

The fact that the county treasurer's bond was made payable to the state of Alabama, instead of to the county of Cullman, was of no importance or bearing in the county's action on bond.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 137-139; Dec. Dig. ~~§~~96.]

2. COUNTIES ~~§~~99—TREASURER'S BOND—OBLIGATION—CONSTRUCTION OF STATUTE—SPECIAL FUND—"ADDITIONAL."

Code 1907, § 210, provides that the treasurer shall give a bond with sureties payable to the county and conditioned as prescribed by law, and that an additional bond shall be required whenever any special fund shall be received by him; section 211 makes it his duty to receive and keep the county's money and dis-

burse it according to law; and section 1500 makes every official bond obligatory as to the breach of their condition during the officer's continuance in office and as to the faithful discharge of any duties subsequently required by law, for the benefit of every person injured by his neglect in performing his official duties. The treasurer subsequently received and misappropriated money from a special fund derived from the sale of county bonds for the construction and maintenance of public roads. *Held*, in the county's action against the treasurer and his sureties on his general official bond, that sections 210 and 1500 were in *pari materia* and must be considered in view of that relation, that the sureties' obligation included the assurance of his fidelity with respect to the special fund, and that the term "additional" meant supplemental, though an additional bond would not supersede the original bond or minimize the sureties' obligation thereon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 144-146, 148; Dec. Dig. § 99.

For other definitions, see Words and Phrases, First and Second Series, Additional.]

Appeal from Circuit Court, Cullman County; Robert C. Brickell, Judge.

Suit by the County of Cullman against J. J. Searcy and others. Judgment for plaintiff, and defendants appeal. Affirmed.

George H. Parker, of Cullman, and Eyster & Eyster, of New Decatur, for appellants. A. A. Griffith and F. E. St. John, both of Cullman, and Callahan & Harris, of Decatur, for appellee.

MCCLELLAN, J. [1, 2] The county of Cullman instituted this action against the county treasurer and the sureties on his general official bond to recover a sum of money—received and afterwards misappropriated by the county treasurer—derived from the sale of county bonds authoritatively issued and sold for the purpose of affording funds wherewith to construct and maintain public roads. Code, § 158 et seq. The bond of the treasurer was incorrectly made payable to the state of Alabama, instead of to the county of Cullman; but, in view of the statutes, this error is of no importance or bearing. U. S. F. & G. Co. v. Union Trust Co., 142 Ala. 532, 38 South. 177; Barnes v. Hudman, 57 Ala. 504. The single question presented is whether the obligation assumed by the sureties on the general official bond of the county treasurer included the assurance of that official's fidelity with respect to the special fund belonging to the county and received by him subsequent to the execution of the general official bond on which this action is founded.

Section 210 of the Code provides:

"Before entering on the duties of his office he must give bond, with at least two good and sufficient sureties, in double the estimated amount of the annual revenue of the county, to be determined by the court of county commissioners, payable to the county and conditioned as prescribed by law, which bond is to be approved by the judge of probate and filed and recorded in his office; and the court of county commissioners shall require an additional bond whenever any special fund is to be received by the treasurer, and pay the premium therefor."

So far as presently important, Code, § 1500, provides:

"Every official bond is obligatory on the principal and sureties thereon—(1) For every breach of the condition during the time the officer continues in office, or discharges any of the duties thereof. (2) For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein. (3) For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

Section 211 of the Code provides:

"It is the duty of the county treasurer—(1) To receive and keep the money of the county, and disburse the same according to law."

The receipt by the treasurer of the special fund here involved had the effect to impose upon that official the obligations of fidelity which the law manifestly exacted of him in respect of funds belonging to the county. *Jackson County v. Derriek*, 117 Ala. 348, 23 South. 193.

Sections 210 and 1500 are in *pari materia*, and must be construed in view of that relation. The bond, for the breach of which this action was instituted, was intended by the obligors to be and it was an official bond; and the official acted and was, when the default occurred, acting as county treasurer. The statutory condition that the official would faithfully discharge the duties of his office was of the essence of the obligation assumed by the obligors on his bond. Code, §§ 1483, 1500; U. S. F. & G. Co. v. Union Trust Co., 142 Ala. 538, 38 South. 177. That the faithful safe-keeping of and accounting for the special fund in question was of his official duties is manifest. His lawful, official reception of the special fund was not conditioned upon the requirement, or the execution, of an additional bond—a statutory status vitally different from that found to exist in the case of *Morrow v. Wood*, 56 Ala. 1, where the lawful official reception of the fund there in question was expressly conditioned upon the antecedent execution of the bond prescribed by the act, and the assurance that bond was held to afford was restricted by the duties prescribed by the act approved April 19, 1873. The decision in *Morrow v. Wood*, supra, is not a governing authority on the inquiry presented by this appeal.

Section 210, in its last provision, prescribed the exaction of an additional bond under defined circumstances, viz., when a special fund was to be received by the official. The term "additional," as there employed, means supplemental. Such an additional bond does not, when given, supersede the original bond or minimize its obligations so far as the sureties on the original bond are concerned. The defined (section 210) circumstances under which the court of county commissioners is commanded by the statute to exact the additional bond but served to fix the occasion

when the additional bond should be required, and not to make the requirement, or execution, of the additional bond a condition to the lawful reception of any special fund belonging to the county, for the disposition of which the law did not make other provision. Being an official bond, so intended by the obligors and the tenure of office taken under its sanction, the provisions of section 1500 effected to impose on the obligors on the general bond the obligations to answer for the full penalty of the bond (section 1504) for "every breach of the condition during the time the official continues in office, or discharges any of the duties thereof"; provided, of course, the default or dereliction occurs while such bond is a binding, unreleased obligation.

The trial court correctly so ruled. Its judgment holding the obligors on the general bond liable must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

WALLACE v. CROSTHWAIT. (8 Div. 910.) (Supreme Court of Alabama. April 20, 1916.)

1. APPEAL AND ERROR ¶268(4), 1175(7)—EXCEPTIONS — NECESSITY — EVIDENCE — TRIAL BY COURT—DETERMINATION.

On the trial of a cause without a jury either party may by bill of exceptions present for review the judgment of the trial court on the evidence without an exception thereto, and, if error is discovered, the Supreme Court may render such judgment as the trial court should have rendered, or reverse and remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1597, 1603, 4581; Dec. Dig. ¶268(4), 1175(7).]

2. FRAUD ¶50—PRESUMPTIONS AND BURDEN OF PROOF.

The law does not presume fraud, and, when a charge of fraud is made, it must be established by the evidence before relief can be had.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ¶50.]

3. SALES ¶181(12) — REMEDIES OF BUYER — ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by the purchaser of cotton to recover the prices paid under Code 1907, § 3734, declaring that, when cotton in bales is sent by a planter or other owner to a factory for sale, a warranty is implied that the cotton is not fraudulently packed, evidence held insufficient to show that the bale was water-packed or plated, but that it was sold as damaged cotton without fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 488, 489; Dec. Dig. ¶181(12).]

4. WORDS AND PHRASES—"WATER-PACKED."

A "water-packed" bale of cotton is one to the lint of which water is added in such a manner that the weight is increased, or in which water-damaged cotton is placed, or the sampling sides of which are packed with lint cotton not so wet or water-damaged. If the water is added to the lint cotton before or at the time it is pressed into a bale, or wet or water-damaged cotton is concealed therein, such a bale is "water-packed." If, however, the seed cotton enter-

ing into the bale was merely green or damp when ginned and pressed, and no water or moisture or other extraneous matter was added by human agency, such a bale is not fraudulent or "water-packed."

Appeal from Circuit Court, Lawrence County; A. H. Alston, Judge.

Action by A. J. Crosthwait against W. C. Wallace. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, Act April 18, 1911, p. 449. Reversed and rendered.

W. T. Lowe, of New Decatur, for appellant. J. M. Irwin, of Moulton, for appellee.

THOMAS, J. The suit was by plaintiff, appellee here, for the recovery of the purchase price of a bale of cotton sold to him by defendant. The gravamen of count 3 was that said bale of cotton was "water-packed," that this fact was unknown to plaintiff buyer at the time of the purchase, and that on account of such condition plaintiff suffered the damages. The cause was tried by the court without the intervention of a jury. The special finding of fact was "that the bale of cotton in controversy was water-packed," and judgment was entered for plaintiff.

[1] In the trial of a cause without a jury either party may by bill of exceptions present for review by this court the judgment of the trial court on the evidence, without an exception thereto; and this court will review such finding. If there is error, such judgment will be here rendered as the court below should have rendered, or the cause may be reversed and remanded for further proceedings in the lower court.

[2, 3] The warranty on sale of a bale of cotton by the planter is thus declared by statute (Code 1907, § 3734):

"When cotton in bales is sent by a planter or other owner to a factor for sale, a warranty is implied on the part of such planter or owner to the factor, and the purchaser from such factor, respectively, that such cotton is not fraudulently packed; and when cotton is sold by sample by the owner or his factor, that the sample has been fairly drawn, and that the cotton is not fraudulently packed, and no other warranty is thereby implied; and for any breach of such implied warranty, the purchaser may recover damages, either from the owner or factor selling the same; but no action can be brought for any breach of such last mentioned implied warranty, unless the suit is commenced within one year after such sale; but planters shall not be liable, in any way, for losses sustained by factors or commission merchants for having sold cotton by fraudulent or unfair samples, unless such loss was occasioned by plating of fraudulent packing of the cotton by such planter."

The law does not presume fraud, and, when a charge of fraud is made as a fact, and it is denied, it must be established by the evidence before relief can be had. If the facts and circumstances from which the alleged fraud is supposed to arise may be reasonably consistent with honest intentions, fraud will not be imputed. *Thames v. Rembert*, 63 Ala.

561; *Harrell v. Mitchell*, 61 Ala. 270, 281; *Allen v. Riddle*, 141 Ala. 621, 37 South. 680; *Morris & Co. v. Barton & Allen*, 180 Ala. 98, 60 South. 172; *Henderson v. Gilliland*, 187 Ala. 268, 65 South. 793.

[4] Cotton is one of the chief products of agriculture in this state, and from its preparation for market and sale have come the expressions "plated," "sand-packed," and "water-packed," each with well-understood meaning. *Daniel v. State*, 61 Ala. 4. A civil and a criminal statute have been enacted to prevent the fraudulent packing of bales of cotton by "plating or otherwise." Code 1907, §§ 3734, 6683. When cotton is "ginned and packed" into a merchantable bale, the warranty is implied that the lint coming from the gin has not been so dealt with or manipulated as to fraudulently increase its weight, that wet or damaged staple has not been placed therein, and that the sides of the bale from whence the sample is to be taken have not been plated with a better staple.

A "water-packed" bale of cotton is one to the lint of which water was added in such manner that the weight was increased, or in which water-damaged cotton was placed, or the sampling sides of which were plated with lint cotton not so wet or water-damaged. In other words, if water was added to the lint cotton before or at the time it was pressed into a bale, or wet or water-damaged cotton was concealed therein, such a bale is water-packed. If, however, the seed cotton entering into the bale was merely "green" or damp when ginned and pressed, and no water or moisture or other extraneous matter was added by human agency, such a bale could not be said to be a fraudulent or a water-packed bale of cotton.

We have carefully followed the evidence on which the special finding of the trial court was rendered. With frankness of statement the plaintiff, the ginner of the bale of cotton in question, and the defendant, have detailed the facts. There is little if any, conflict in the testimony. The cotton was ginned at Moulton, placed on defendant's wagon, and immediately sold to plaintiff, who was an experienced buyer. Plaintiff states that he bought the cotton on his own judgment, from the samples that he took from the bale; that he knew it was bad when he bought it; that the defendant did not bring him a sample, and made no representations concerning the cotton; and that after its purchase he allowed it to lie on the platform, without shelter, for 35 or 40 days, when he sold it to Mr. Jones, who "some time after" resold it to a factor in Decatur, who "later" discovered its damaged condition. The record does not disclose the length of time that elapsed from its purchase by plaintiff to the discovery of its condition at the compress in Decatur.

The seed cotton was "bad and damp" when offered to Mr. Prince to be ginned. The de-

fendant then carried it to Moulton, where it was ginned by Mr. Long, who testified that the cotton was ginned from defendant's wagon, and just as other cotton was ginned; that it was conveyed by suction pipes to the gin, and that the lint was conveyed by machinery to the press; that it was not handled other than by machinery in this process; that the bale could not have been "water-packed" without stopping the gin and subjecting it to water while the machinery was standing; that he did not water-pack the bale of cotton; and that defendant "did not handle or have anything to do with the bale of cotton from the time it left the wagon until it was rolled out from the press, when he put it on the wagon and drove away."

The counts for deceit were unsupported by the evidence, and judgment thereon must be for the defendant. *Scott v. Holland*, 132 Ala. 389, 31 South. 514.

After a careful consideration of the evidence we are of opinion that the great weight of the evidence shows there was no deceit or breach of warranty or bad faith on the part of the seller towards purchaser, and that the bale of cotton was not, in fact, water-packed. The reasonable view of the transaction, and the view consistent with honest intention, is that the cotton was carried to the gin by the seller, where, without change in its condition, it was ginned and packed, and was afterwards purchased by plaintiff; that it was of the last of defendant's crop, and for this reason was of inferior grade, and perhaps "frost-bitten," and that it was purchased as such inferior or damaged grade of cotton; that after its purchase the buyer allowed it to remain exposed to the weather for a month or more, and that its deterioration occurred while in the possession of a subsequent purchaser.

The court committed error in finding from the evidence that the bale was water-packed, and in rendering judgment for the plaintiff.

Judgment is here rendered for the defendant, and the appellee is taxed with the costs in this court and in the lower court.

Reversed and rendered.

ANDERSON, O. J., and MAYFIELD and SOMERVILLE, JJ., concur.

MARTIN v. WALKER et al. (7 Div. 792.)
(Supreme Court of Alabama. April 6, 1916.)

1. APPEAL AND ERROR ⇐1042(4)—REVIEW—HARMLESS ERROR.

The erroneous refusal of trial court to strike a plea on demurrer was harmless, where under a plea good as against demurrer the same evidence admissible under the plea wrongfully retained was admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4113; Dec. Dig. ⇐1042(4); Pleading, Cent. Dig. §§ 1144, 1172.]

2. MORTGAGES \Leftrightarrow 312(1) — SATISFACTION — FAILURE TO ENTER.

Mere inadvertence or indifference of a mortgagee after payment and notice will not excuse his failure to enter satisfaction of record.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 930, 931, 933, 935, 941; Dec. Dig. \Leftrightarrow 312(1).]

3. MORTGAGES \Leftrightarrow 312(1)—SATISFACTION—EXCUSE.

A mortgagor delivered to the mortgagees, who resided in a different county, a notice to promptly enter satisfaction of a mortgage which had been paid. The mortgagees noted satisfaction on the notice, delivered it to the mortgagor's agent, and requested the mortgagor to have the probate judge of the county of his residence enter satisfaction. The mortgagor, though he visited the probate court before the expiration of the 60-day period, did not enter satisfaction, or deliver the power of attorney prepared by the mortgagees to the probate judge. *Held* that, as the mortgagees were warranted in assuming that the mortgagor actually desired satisfaction of the mortgage to be entered, the mortgagor by accepting the power of attorney and failing to object acquiesced therein, and could not complain that the mortgagees failed to enter satisfaction themselves and so recover the penalty for failure to enter satisfaction.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 930, 931, 933, 935, 941; Dec. Dig. \Leftrightarrow 312(1).]

Appeal from Clay County Court; E. J. Garrison, Judge.

Action by H. E. Martin against W. R. Walker and George Gosdin, as partners, for the penalty for the failure to satisfy the record of a mortgage. Judgment for defendants, and plaintiff appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 450. Affirmed.

The notice is as follows:

"Goodwater, Ala., 2-18-15. Dear Sirs: I see your mortgage on me hasn't been taken off record yet, please give the matter prompt attention and take it off at once. The mortgage was due Nov. 1, 1914, recorded in Mortgage Record 42, page 202, at Ashland, Ala. Yours very truly, H. E. Martin."

Upon this paper was also indorsed the following:

"Judge Ingram: Please mark H. E. Martin's notice satisfied in favor of Walker & Gosdin, all of them. Walker & Gosdin."

It appears from the evidence that the original notice was delivered to Gosdin by one Percy Peppers and Estes Peppers, plaintiff's agents, and that, when the indorsement was made upon the notice, it and the notice were redelivered to the said Peppers with the request to deliver to plaintiff. The other facts sufficiently appear.

C. W. Allen and Merrill & Cornelius, all of Ashland, for appellant. Riddle, Burt & Riddle, of Talladega, for appellee.

SAYRE, J. It may be doubted that the notice in this case was the full equivalent of the request in writing which the statute, sec-

tion 4896 of the Code, makes a condition precedent to the mortgagee's liability for failing to enter the fact of payment or satisfaction on the margin of the record. *Clark v. Wright*, 123 Ala. 594, 26 South. 501. But defendants knew what it meant, and accepted it as the request prescribed by law. We shall therefore, for the purposes of this case, consider it as sufficient. So considering the request, we think there was no reversible error.

[1] The ethical correctness of the decision below is plain, and our judgment is that it should be sustained on legal considerations as well. The facts to which plaintiff objected were admissible in proof of the allegations of pleas 6 and 7 alike. Plea 7 repeats the allegations of plea 6, and adds, to state the legal effect of the addition, that plaintiff, well knowing that defendants relied on him to deliver their request and power of attorney to the probate judge, and fraudulently contriving to lull defendants into a sense of security, to the end that the mortgage might not be marked satisfied, as plaintiff pretended to desire, but that it might not be so marked in order that he might have the penalty for failure, withheld the said request and power of attorney from the probate judge. This was a good plea, as for any specific objection taken to it by the demurrer, and the judge below, trying the case without a jury, could not have reasonably found otherwise than that it was sustained by the proof. Such being the case, the survival in the record of plea 6, though it should have been stricken on demurrer, will not be allowed to work a reversal of the judgment.

[2, 3] The only point of apparent difficulty is raised by plaintiff's proposition that he owed defendants no duty to take their request and power of attorney to the probate judge, and hence they had no right to rely upon him to do so. In the peculiar circumstances of this case our opinion is that defendants had both a moral and legal right to rely upon plaintiff as alleged.

Without dispute the evidence showed that defendants, upon receiving from plaintiff's agent the request in writing that the mortgage be marked satisfied upon the record, indorsed upon it a written request and authority to the probate judge to mark the note satisfied—meaning upon fair construction the note and mortgage in the body of which it was incorporated; that they delivered this request and power of attorney to plaintiff's agent, who thereupon became their agent, with the request, in effect, that he or plaintiff would take it to the probate judge upon some occasion when they would be going to the county seat, where the mortgage was recorded; that this agent did not indicate that he would take the paper to the probate judge, but he did undertake to carry it to plaintiff; that he delivered the paper to plaintiff and

told him of defendants' request; that plaintiff said nothing; did nothing. The mortgage in question, a mortgage securing a loan of \$265 on household furniture, farming stock and implements, and crops to be grown by the mortgagor, was executed at Goodwater, in Coosa county, and defendants' request and power of attorney was dated from Goodwater. But the mortgage was recorded in Clay county, and this suit was brought in Clay. The fair inference is that plaintiff lived in Clay, and that defendants did business at Goodwater. These facts, to which we have last referred, are significant to this extent; they go to prove, there being nothing to the contrary, that defendants were not making an extraordinary or unreasonable draft on the good feeling upon which, as the whole record of the facts goes to show, they relied in assuming that plaintiff in good faith desired that the cloud upon his title should be removed, within two months at most, and in sending their request to him. The true motive that characterized plaintiff's conduct in the premises is further shown by the fact that within the time in which the record might have been satisfied according to the statute he went to the county seat, and on the sixtieth day, which was the first day after two months had expired, he went into the probate office with the power of attorney in his pocket, but withheld it from the probate judge. The mortgage was satisfied of record, but it does not appear just when this was done; we know only that it was more than 60 days after notice. These facts authorized and required a judgment for defendants under their seventh plea.

The mere inadvertence or indifference of the mortgagee after payment and notice will not excuse his failure to enter payment or satisfaction of record. *Dittman Boot & Shoe Co. v. Mixon*, 120 Ala. 206, 24 South. 847. In ordinary transactions concerning property, where the parties have adverse interests and deal at arm's length, it is the duty of every one to exercise reasonable care and prudence for his self-protection, and, if he negligently trusts himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has placed himself by his own imprudent confidence. Many cases illustrate this doctrine. *Terry v. Mutual Life Ins. Co.*, 116 Ala. 242, 22 South. 532; *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; 2 *Cooley on Torts* (3d Ed.) 931, note. Hence mere silence, or inaction, in the absence of some duty to speak, or act, is no fraud. On the other hand, the statute on which plaintiff predicated his action was not made to be an instrument of fraud. *Chatanooga Co. v. Echols*, 125 Ala. 548, 27 South. 975. It is highly penal, and must be strictly construed. *Mayhall v. Woodall*, 68 South. 322. Fraud may consist in producing a false impression upon the mind of another, and, if this result is accomplished, the method

adopted by the artful mind is not a matter of importance.

"So one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the mind of another, though nothing is directly asserted which is calculated to keep it up." *Cooley*, 910, 911.

In the law of estoppel quiescence under such circumstances as that assent may be reasonably inferred from it is the equivalent of acquiescence. *Herman on Estoppel*, § 776. Quiescence may amount to misrepresentation. It has been said, however, that fraud or bad faith is a necessary ingredient of misrepresentation by passivity (16 Cyc. 730), and, so far as this case is concerned, we think that is the correct rule.

Passing on the law and the facts, as did the court below, we affirm two things:

(1) That defendants were not guilty of culpable negligence in relying on plaintiff to take their power of attorney to the judge of probate. Negligence is determined by reference to the standard of care ordinarily exercised by prudent men in like circumstances. Plaintiff's request that the record of the mortgage be marked satisfied was notice to defendants that the penalty might follow upon their failure to comply within the time limited by the statute; but they may very well have been, and doubtless were, under the impression—delusion it may be termed—that what plaintiff really desired was that the record should be satisfied. Plaintiff made no express promise; but defendants promptly and without demur conceded by their action that the mortgage debt had been paid, and that plaintiff was entitled to have what he asked. No reason appears why they should have understood that plaintiff was dealing with the subject in hand as a matter of difference or antagonism between them. They had no interest in keeping the record of the mortgage unsatisfied. Their interest, like that they supposed the plaintiff had, was that the record should show satisfaction. Their request that plaintiff take the power of attorney to the probate judge, proceeding, as evidently it did, upon their assumption of a state of good will between themselves and plaintiff and upon the further assumption that plaintiff really desired that for which he asked in his notice, which took the guise of an informal and not unfriendly request, in connection with plaintiff's receipt and retention of it in silence, when dissent would have been so easy, natural, and reasonable according to the common standard of good neighborhood and good faith prevailing in ordinary intercourse between men dealing with a matter in which they have a common interest, raised the implication of a promise on his part.

(2) We do not mean to assert that by anything he did plaintiff forfeited his right to have the record of the mortgage marked satisfied. The bad faith of which defendants

complained could in no event suffice to deprive him of that right. But plaintiff's conduct was urged by way of defense and in support of an existing status of property which had its origin in undisputed right, and in that aspect it was of controlling legal importance and consequence. The outcome of the case depended, not upon any inquiry as to previously existing property rights, but upon the question whether defendants' liability under the statute had been nurtured to maturity by any fraudulent means. Defendants had no legal right to impose any duty upon plaintiff; but from the circumstances in evidence the court must have been reasonably satisfied that defendants did, not unreasonably as such things go among men acting in good faith, rely upon plaintiff to take their request and power of attorney to the probate judge, and that he knew they were relying upon him. From this situation arose the duty, not indeed to take the paper to the probate judge, but, if plaintiff would not, to disabuse the mind of defendants of the delusion under which they labored, as he might so easily have done. Ordinarily the fact that a promise is never performed is not of itself either fraud or evidence of fraud. Nevertheless a promise is sometimes the very device resorted to for the purpose of accomplishing fraud, and the most apt and effectual means to that end. Cooley, p. 929. The fraud in such case is not the failure to keep the promise, but it is that a promise, purporting to be made for ordinary business reasons, or from good will, is in fact made as a device to lure the promisee into a liability which he would otherwise have avoided. *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406. The most rational conclusion in this case was that plaintiff, allowing defendants to rest in the belief that he desired to have the record satisfied, when in fact he desired that it be not satisfied in order that he might have the penalty, allowing them to rely upon the false security of a confidence to the misplacement of which he had contributed by his silence when in good faith he should have spoken, took advantage of the situation, and evidently that was his purpose all along—to lay the trap into which they fell. The right to the penalty prescribed by statute should not be allowed to rest upon such ground, and so the seventh plea was established.

Plaintiff cannot be heard to say that the probate judge might not have been willing to execute the power of attorney. That was not a matter for plaintiff's consideration. If the power of attorney, being delivered, had not been executed, or if plaintiff had not allowed defendants to rest on the belief that he would deliver, defendants would have been responsible for the consequences.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

HOLMES v. BLOCH. (3 Div. 237.)

(Supreme Court of Alabama. April 20, 1916.)

1. SALES — 22(3) — CONTRACTS — COUNTERMANDING OF ORDERS.

An order signed by defendant was conditional, where reserving the right to plaintiff to accept or reject the sale made by its representative and defendant could countermand at any time before acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 41; Dec. Dig. — 22(3).]

2. EVIDENCE — 71 — PRESUMPTIONS.

There is a presumption that a letter, mailed with postage prepaid, is duly received by the addressee, though that presumption may be rebutted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. — 71.]

3. SALES — 53(1) — ACTIONS — COUNTERMAND — EVIDENCE.

In an action on a contract of sale, the question whether the buyer had countermanded the order before acceptance, the countermand being posted only a short time after the order was mailed and it appearing that the two would be carried in the same mail, *held* for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-147, 149; Dec. Dig. — 53(1).]

Appeal from City Court of Montgomery; C. P. McIntyre, Judge.

Action by B. K. Bloch, doing business as the Empire Distillery Company, against Lee Holmes. From a judgment for plaintiff, defendant appeals. Transferred from Court of Appeals under section 6, p. 449, Acts 1911. Reversed and remanded.

Rushton, Williams & Crenshaw, of Montgomery, for appellant. Ball & Samford, of Montgomery, for appellee.

MAYFIELD, J. This is an action to recover the purchase price of five barrels of whisky. Four counts declare each on promissory notes made by defendant, payable to plaintiff, for the aggregate price of the whisky. There is no dispute that the notes were given as for the purchase price of the whisky, nor that they were delivered to plaintiff's agent and salesman. The defense set up is that there was only an agreement to sell, made by and between the defendant and the plaintiff's agent or salesman, which agreement was by its very terms subject to the ratification or rejection of the plaintiff, the contemplated seller; and that the defendant revoked the order for the whisky and declined to purchase, before the agreement was ever ratified or rejected by the plaintiff, and that consequently, in fact and in law, there was no sale—that the contract to sell was not consummated.

It appears without dispute that there was never any delivery in fact of the whisky, but only an offer to deliver, and a declination by the defendant to accept, or receive.

The contention of plaintiff is that the order of purchase, and to ship, was not countermanded until after the agreement by its agent to sell had been ratified, and until it

had offered to ship, and that the sale was therefore consummated, and that the defendant was therefore liable as if he had accepted and received the goods.

The evidence of defendant tended to show that he did make an agreement with plaintiff's agent to purchase, and did order the whisky to be shipped him, and did execute the notes sued on, as for the purchase price; but that on the same day, and within less than an hour, he wrote a letter properly addressed to the plaintiff, with the proper postage affixed, and mailed it promptly; that by this letter he countermanded the order and directed plaintiff not to ship the goods. There was also evidence tending to show that the order for the whisky, and contract to purchase, was mailed at the same time—that is, on the same day—at the same place, viz., Montgomery, Ala.; and that the order and defendant's letter containing the countermand were each addressed to the plaintiff at 200 Fifth avenue, New York City, state of New York.

It was certainly open for the jury to infer, from all the evidence offered, that both the order for the whisky which was subject to the approval or rejection of the plaintiff, and the alleged letter countermanding the order, left Montgomery, Ala., or were mailed in Montgomery, addressed to the same party at the same destination, on the same day, and within a half hour of the same time.

The question of law involved is whether or not the jury could infer that the plaintiff received the countermanding order, before the acceptance of the order. There is no direct and specific proof of this fact; and, in fact, the plaintiff denies so receiving the countermanding order, before acceptance.

The trial court evidently ruled that the evidence was conclusive of this question, or that there was no just inference for the jury to draw that the countermanding order was received by plaintiff before the acceptance of the order. We conclude this, from the fact that the trial court gave the affirmative charge for the plaintiff.

The order or contract of purchase was unquestionably conditional. It was as follows:

"Montgomery, Ala., Oct. 17th, 1912.

"Empire Distillery Co., B. K. Bloch, Prop., 200 Fifth Avenue, New York—Gentlemen: I have this day bought of you through Mr. H. Kramer, 5 barrels whisky in bond, and have received warehouse contract certificate covering said whisky as follows:

W. C. C. No.	BRAND	Age	Proof Gallons	Pr. Per Gal.	Total
28400	Old Empire	7	235.35	90	\$211.81

"Cash \$ No and notes for \$211.81. Said whisky or its equivalent is to be sent, upon my order on compliance with terms of contract and after payment of notes as they mature. This order ship together with said certificate constitute the complete contract, no other agreement being recognized, said contract being subject to the approval of your home office and to be binding up-

on you only upon receipt by your home office of all moneys and notes paid hereon.

"Lee Holmes,
"(Signature of purchaser)
"144 Mobile St.,
"(Address)."

Kramer testifies that he sent this order and these notes to plaintiff at New York by mail, and must have sent them after they were signed. The defendant, after testifying to having signed the order and notes, and to the agent's leaving his office, further testified in part as follows:

"About half an hour after Mr. Kramer left my office, I wrote a letter to the Empire Distillery Company addressing it to 200 Fifth avenue, New York City, countermanding the order which I had just given their agent, Mr. Kramer. This letter was deposited by me in the United States mail postage prepaid. A few days after this I received through the mail a circular letter from B. K. Bloch on a letter head of the Empire Distillery Company sending me a certificate substantially the same as that attached as Exhibit D to the deposition of Mr. Kramer in this case. I immediately returned this certificate to the Empire Distillery Company, and told them that I had nothing to do with it, as I had previously countermanded the order. They sent the certificate back to me, and I promptly returned it to them again. They sent it back, and I sent it to them once more, and my recollection is that they returned it still another time. I immediately mailed it back to the distillery company and have not seen it since. The Empire Distillery Company has never offered to deliver the whisky to me, nor have they ever told me that they had put aside any whisky for me, except as shown in the circular letter dated October 19, 1912, a copy of which is attached as Exhibit C to Mr. Kramer's deposition."

[1] If the plaintiff received the countermanding order before acceptance of the order of purchase, then the plaintiff cannot recover in this action, because the sale was never consummated, the two minds contracting never met at the same time. The defendant had the right to countermand at any time before acceptance.

What was said by this court in the case of Gould v. Cates Chair Co., 147 Ala. 634, 41 South. 675, is applicable and conclusive of this question of law—that is, the right of defendant to countermand:

"The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiff could have refused to accept the order. Neither party had become bound by anything then done. The order of defendant was a mere proposal, to be accepted or not as the plaintiff might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*. Benj. on Sales, §§ 40, 70."

[2, 3] Did the defendant in this case in fact countermand the order before acceptance, and before shipment? The goods were never shipped, but plaintiff says the order was accepted, and there is no positive proof that the countermand was received before acceptance.

The evidence of the defendant in this case was sufficient to carry the case to the jury, as to whether or not there was a revocation of the order before an acceptance by the plaintiff.

In this country the mail service is regulated and carried on by law; and by common experience and common consent it is established, from the regularity of the service, that it may be inferred that letters mailed or posted at the same time and place, and addressed to the same party at the same place, will be transported by the mails with the same regularity. When certain necessary conditions (shown in this case) are complied with, the mailing of the letter or other posted matter gives rise to or authorizes the inference that it arrived at its destination in due course of mail. The rule has been thus stated by this court:

"The presumption of law is that a letter, postage prepaid, mailed to one at the place of his residence, or at the place he usually receives his letters, was received by him. This presumption, however, is rebuttable by proof. *Steiner v. Ellis*, 7 South. 803; *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 304, 20 South. 413; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 South. 570; 1 Green. Ev. § 40." *Pioneer Co. v. Thompson*, 115 Ala. 552-557, 22 South. 511.

The same rule is stated by Mr. Chamberlayne, in his recent work on Evidence (volume 2, § 1057); and in note he quotes the following:

"The depositing in the post office of a letter properly addressed, with the postage prepaid, is prima facie evidence that the person to whom it was addressed received it. The fact that the defendants had no additional proof that the letters were actually received by the plaintiff is immaterial. The evidence that letters were so deposited was competent, and should have been submitted to the jury to be weighed by them in connection with the other evidence in the case. They alone have the right to decide whether the inference that the letters were received, founded upon the probability that the officers of the government will do their duty, and that letters will be duly delivered, is overcome by the other evidence." *Briggs v. Hervey*, 130 Mass. 186 (1881).

"It is well settled that the fact of depositing, in the post office, a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reaches its destination by due course of mail. In other words, it is prima facie evidence that it was received by the person to whom it was addressed; but that prima facie proof may be rebutted by evidence showing that it was not received. The question is necessarily one of fact, solely for the determination of the jury, under all the evidence." *Whitmore v. Dwelling House Ins. Co.*, 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838 (1892).

The judgment of the court below is reversed, and the cause is remanded.

ANDERSON, C. J., and SOMERVILLE
and THOMAS, JJ., concur.

BROWN v. CITY OF TUSCALOOSA. (6 Div. 271.)

(Supreme Court of Alabama. April 20, 1916.)

1. CRIMINAL LAW §195(1)—"FORMER JEOPARDY."

To have been in former jeopardy a defendant must have been put upon trial for the same offense, or one of the same species, supportable by the same evidence, or else the one crime must

be an essential ingredient of the other, and the mere improper introduction on former trial of evidence, now used to support the present charge, does not constitute a former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 382; Dec. Dig. §195(1).]

For other definitions, see Words and Phrases, First and Second Series, Jeopardy.]

2. INDICTMENT AND INFORMATION §176—VARIANCE—TIME OF CRIME.

A crime charged as of one date may be established by proof of its occurrence on another date, but the crime proved must antedate the charge on which defendant is being tried; otherwise there is a fatal variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. §176.]

3. INDICTMENT AND INFORMATION §176—EVIDENCE—TIME OF OFFENSE.

In a prosecution for crime, evidence of an offense committed later than the charge upon which defendant is being tried was brought in inadmissible and will not support a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. §176.]

4. CRIMINAL LAW §196—"FORMER JEOPARDY."

A former acquittal is no bar to a subsequent prosecution unless defendant could have been convicted upon the first indictment upon proof of the facts averred in the second.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 384; Dec. Dig. §196.]

5. CRIMINAL LAW §292(1)—FORMER JEOPARDY—PLEAS.

In a prosecution for crime, where each of defendant's special pleas of former jeopardy averred that he had been formerly put in jeopardy and tried for the same offense now charged, he was not entitled to discharge on the ground that, though the pleas were insufficient in their averments of facts, yet the evidence sustained them as framed, so that the defendant was entitled to judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668, 671; Dec. Dig. §292(1).]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Will Brown was convicted of violating a city ordinance, and he appeals. Affirmed.

Defendant was convicted of violating a prohibition ordinance of the city of Tuscaloosa on a warrant issued by the recorder on May 21, 1914. He appealed to the county court, and was there tried on December 4, 1914, and convicted on the charge of doing prohibited acts "on or about May 21, 1914." On that trial he filed several special pleas setting up a former trial and acquittal on the same charges now presented. This issue was tried on an agreed statement of facts by the court without a jury, and found against the defendant. Thereupon, the general affirmative charge on the general issue being refused to the defendant, he was found guilty by the jury, and there was judgment accordingly. The facts offered in support of these special pleas so far as they are pertinent, are as follows: On March 24, 1914, defendant was arrested on a warrant by the recorder, charging violation of the prohibition ordinances of the city of Tuscaloosa prior

to that date. He was convicted, and appealed to the county court. He was there tried on that charge on October 21, 1914, and was acquitted. On that trial the only evidence placed before the court, and which was not objected to, related to the offense committed by defendant on May 21, 1914, he having in his possession 51 half pints of whisky, and the court charged the jury that they must discharge the defendant, since the only offense proved occurred after March 21, 1914, the date of the issuance of the warrant. The errors assigned are to the finding of the court on the special pleas and the refusal of the affirmative charge.

Wright & Fite, of Tuscaloosa, for appellant.
Brown & Ward, of Tuscaloosa, for appellee.

SOMERVILLE, J. It is in effect conceded by counsel for defendant, and the record itself is conclusive of the fact, that the offense for which defendant was previously tried, and of which he was acquitted, was not the offense with which he is presently charged. It is, however, the conception of counsel that the mere introduction on the former trial of the evidence now used to support the present charge placed defendant in some danger of a conviction of this offense, however irrelevant the evidence, and however unauthorized and wrongful such a conviction would have been, and that such a danger was a legal jeopardy.

[1] This theory of former jeopardy is not only not tenable, but it scarcely merits serious discussion. To have been in former jeopardy a defendant must have been put upon trial for the same offense, or one of the same species, supportable by the same evidence; or else the one crime must be an essential ingredient of the other.

"If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar." 12 Cyc. 280, b.

[2, 3] It is, of course, true that time is not ordinarily material, and that a crime charged as of one date may be established by proof of its occurrence on another date. But in every case the crime proved must antedate the charge upon which the defendant is being tried; otherwise, not only is there a fatal variance, but also a complete absence of jurisdiction of the particular offense. In such a case evidence of the later offense is not admissible, and there can be no lawful conviction thereof.

[4] Jeopardy implies an exposure to a lawful conviction of the same offense on a former trial, and not the mere danger, humanly speaking, that a jury may unlawfully try and

convict the defendant of a distinct offense with which he is not charged before them, and which, as matter of law, cannot be embraced in nor covered by the charge actually presented. This principle is embodied in the rule long ago established in this state, as in many others, that:

"A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment upon proof of the facts averred in the second." *Hall v. State*, 134 Ala. 90, 115, 32 South. 750; *Dominick v. State*, 40 Ala. 680, 91 Am. Dec. 496; *People v. McDaniels*, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81, note page 105.

As stated by Mr. Freeman in the note referred to (92 Am. St. Rep. 107, c):

"Under this test it is the facts which are alleged in the two indictments, and not the testimony given in either, by which the identity of the offenses is to be determined. Accordingly it is held immaterial that the evidence relied upon to support the second charge was, in fact, introduced on the trial of the first. The criterion is not what testimony was introduced, but what might have been, and the determinative feature is whether the facts alleged in one charge would support a conviction under the other."

In the case of *Martha v. State*, 26 Ala. 72, the defendant was tried for the arson of a dwelling house belonging to one Todd, and pleaded that she had been formerly put upon trial for the arson of a dwelling house belonging to one Coleman, and that both indictments, and the proof offered under each, related to the same act of burning. The conclusion of this court on appeal was that:

"As the offenses charged in the two indictments are distinct and different, the record showing the discontinuance of, or acquittal upon, the prosecution of the one, would be no bar to a prosecution of the other."

And it was further said that:

"As the record showed the two indictments to be for different offenses, and as a record cannot be gainsaid by parol evidence, it was entirely proper for the court to charge the jury that the plea of autrefois acquit and discontinuance were not sustained by the proof."

[5] It is, however, insisted that, even though the pleas were insufficient in their averments of facts, yet the evidence sustained the pleas as framed, and hence defendant was entitled to a judgment thereon, and so to a discharge. This contention is not well founded; for each one of the special pleas distinctly avers that defendant has been formerly put in jeopardy, and has been tried for the same offense now charged.

These averments were not supported by any proof, and hence the technical rule invoked by defendant is not here available.

Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

CENTRAL OF GEORGIA RY. CO. v. MATHIS. (4 Div. 633.)

(Supreme Court of Alabama. April 20, 1916.)

1. CARRIERS ⇨314(2)—PLEADING—CARRIAGE OF PASSENGERS.

Counts of a complaint, averring the relationship of passenger and carrier, between plaintiff and defendant, which charged that after plaintiff had reached her destination defendant's train on which she was being carried did not stop a reasonably sufficient length of time for her to alight, and that while she was near the steps of the coach one of defendant's servants recklessly, wantonly, and intentionally injured plaintiff by taking hold of her and pulling her off the train while it was in motion, charged wanton negligence, and are not objectionable as charging both wanton and simple negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½; Dec. Dig. ⇨314(2); Negligence, Cent. Dig. § 182.]

2. APPEAL AND ERROR ⇨1040(15) — HARMLESS ERROR—REPLICATION—DEMURRER.

In such case, defendant pleaded contributory negligence, in that the train stopped a sufficient length of time at plaintiff's station to allow passengers to embark or debark; that plaintiff failed to get off of the train at her destination, though she knew it had been reached, but after the train was put in motion she ran out of the train and jumped from the steps, falling and receiving injuries. A second plea averred the same facts, and that, though warned, plaintiff jumped from the train. A special replication to the two pleas alleged that plaintiff's acts were done as a result of the invitation, direction, or request of defendant's servants. *Held*, that it was not reversible error to overrule the replication, which merely denied the special averments in the second plea, although plaintiff might have had the benefit of such matters under a general replication, the replication being good as to the first plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4103, 4105; Dec. Dig. ⇨1040(15).]

3. APPEAL AND ERROR ⇨1058(2)—HARMLESS ERROR.

Error cannot be predicated on the court's refusal to allow a question to a witness, where it appeared that the witness subsequently answered the question and the answer was received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4196, 4201; Dec. Dig. ⇨1058(2).]

4. APPEAL AND ERROR ⇨1033(3)—REVIEW—HARMLESS ERROR.

In an action by a passenger who was hurt in alighting, it being her claim that the porter pulled her from the train while it was in motion, the carrier cannot complain of the receipt of testimony that the passenger did not, at the time of injury, know what she was talking about, for such testimony tended to support its contention that the passenger was drunk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4054, 4055; Dec. Dig. ⇨1033(3).]

5. CARRIERS ⇨347(11) — CARRIAGE OF PASSENGERS—NEGLECT IN ALIGHTING.

Where plaintiff contended that when she alighted from a moving train she did so at the request and with the assistance of the porter, it is improper for the court to declare, as a matter of law, that such act was contributory negligence; for the question whether one is guilty of negligence in voluntarily alighting from a

moving train depends on the circumstances, the speed of the train, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1356, 1391-1393, 1402; Dec. Dig. ⇨347(11).]

6. TRIAL ⇨253(9) — INSTRUCTION—APPLICABILITY TO ISSUES.

In an action by a passenger injured in alighting from a train, who claimed that she was not notified that the train had reached her destination, and so had to alight while it was in motion, a charge that a railroad company is not required to stop beyond a reasonable length of time to allow passengers to alight is improper, omitting the question whether plaintiff knew that the train had reached her destination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 620; Dec. Dig. ⇨253(9).]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by Ella Mathis against the Central of Georgia Railway Company, for damages suffered while a passenger. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals under Acts 1911, p. 449, § 6. Affirmed.

Count A alleges the relationship of passenger and carrier between plaintiff and defendant, and that while such passenger the defendant then and there so negligently conducted itself in its said business that by reason of said negligence, plaintiff received certain injuries, which are set out. Count B alleges the negligence and carelessness of defendant's agents, servants, or employees in charge of the train on which plaintiff was a passenger, and, as a proximate result, injuries to plaintiff. Count C, after alleging the relationship of passenger and carrier between plaintiff and defendant, sets up that:

After plaintiff had reached her destination, defendant's train on which she was being carried did not stop a reasonably sufficient length of time for her to alight from said train, and that while she was on the platform on or near the steps of the porch on which she was being carried, one of defendant's servants, agents, or employees on said train, to wit, the porter, recklessly, wantonly, or intentionally injured plaintiff by taking hold of her and pulling her off of said train while same was in motion, and thus bruised and injured plaintiff. [Here follows catalogue of injuries.]

Count D alleges that plaintiff was injured internally and externally, and bruised, etc., as a direct result of the reckless and wanton or intentional injury inflicted on plaintiff by defendant's porter, who was, at the time, one of defendant's servants, agents, or employees in charge of defendant's train. Special pleas to counts A and B are as follows:

Contributory negligence, in that said train on which plaintiff was a passenger made the usual and customary stop at said station of sufficient duration to allow passengers destined for that station to alight from said train in safety, and to allow all passengers to get aboard said train at said station who desired to do so; that plaintiff failed to get out of said train at Malvern, her destination, when the same stopped at said station, and while the same was standing for that purpose, although she knew that said station of Malvern had been reached, but after said train was put in motion and was moving away

from said station, plaintiff ran out of said train and jumped from the steps thereof to the ground and fell, thus causing the injuries complained of.

Plea 3 alleges the same state of facts, with the additional averment that:

Before plaintiff attempted to and did jump from said train, she was warned not to do so, but to wait, and said train would be brought to a stop, and plaintiff given an opportunity to get off in safety, but plaintiff declined to heed such warning, and jumped from said train while it was in motion.

The special replication 2 to pleas 2 and 3 is as follows:

Plaintiff's acts and movements as alleged in each of said pleas occurred and were done as a result of the invitation, direction, or request of one of defendant's servants, agents, or employees in charge of said train on the occasion in question.

The following charges were refused to defendant:

(2) The court charges the jury that when plaintiff's destination was reached, and the train stopped, it was her duty in law to retire from said train with reasonable diligence and dispatch, and if she failed to do so, and remained on said train until the same was put in motion, and was moving away from said station, and, while it was in motion, jumped off, by such act plaintiff took the risk of the peril involved in the venture, and she cannot recover in this suit.

(8) The court charges the jury that in no case can a recovery be had if the injury complained of is the result of the mutual negligence of both parties. In this case, if plaintiff remained on the train at Malvern and did not attempt to get off while the same was standing for that purpose, but waited until the train was put in motion, and then jumped off of her own notion, and received the injuries complained of, she cannot recover in this suit, however greatly she may be injured, although the defendant may have been negligent in not allowing the train to remain at the station until it was known that all passengers from said station had retired from the train.

(7) The law does not require defendant company to stop at a station for the discharge of passengers beyond what would be a reasonable length of time to enable passengers for said station to alight, by the exercise of ordinary diligence on their part, and the law does not impose on the conductor in charge the duty of seeing and knowing that all the passengers intending to do so have alighted. Unless he knows or has good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed and gotten off the train.

Benj. F. Reid, of Dothan, for appellant. C. D. Carmichael, of Geneva, for appellee.

ANDERSON, C. J. [1] While we do not commend counts C and D of the complaint as models of good pleading, or hold that they would not be subject to appropriate grounds of demurrer, if interposed, argued, and insisted upon on appeal, we do not think that either of said counts was subject to the ground of the demurrer argued and insisted upon in brief of appellant's counsel, that is, "They count upon simple negligence and wanton negligence." We think that each of said counts charges willful or wanton misconduct as the proximate cause of the plaintiff's injury.

[2] The trial court did not commit reversi-

ble error in overruling the demurrer to plaintiff's second replication to special pleas 2 and 3 to counts A and B of the complaint. The replication 2 was but a denial of a material part of plea 3, which charged that the plaintiff did the things charged, after being warned not to do so, but this would not prevent her from setting up the fact specially, though the trial court would not have committed reversible error in sustaining the demurrer to the replication to said plea 3, as the plaintiff could have gotten the benefit of same under the general replication. The said replication 2 set up good matter in confession and avoidance of special plea 2.

[3] Whether the trial court did or did not err in not letting the defendant ask the witness Ella Shivers, whom the plaintiff was standing there talking with when she (witness) got up and jumped off the train, matters not, as the witness seems to have subsequently answered the question, and which was not excluded. She said:

"As I started out of the train I heard plaintiff speak a word or two to somebody, but I don't know who it was. I never did look back to see."

[4] The defendant cannot complain because the witness Ella Shivers testified, in response to the plaintiff's question as to the mental condition of plaintiff, that at the time she (the plaintiff) did not know what she was talking about. This tended to establish the defendant's contention that the plaintiff was drunk or drinking. Moreover, the fact that she did not know what she was talking about at the time had a tendency to weaken the accuracy of the plaintiff's evidence, which had been unfavorable to the defendant.

[5] Charges 2 and 8, refused the defendant, in effect instruct as matter of law that the plaintiff was guilty of contributory negligence for voluntarily stepping or jumping off the moving train. While there are circumstances under which the court could say, as matter of law that a person would be negligent in stepping or jumping from a moving train, depending largely upon the rate of speed the train was going, whether day or night, the surrounding conditions, and whether or not incumbered with bundles, etc. (Hunter v. L. & N. R. R. Co., 150 Ala. 594, 43 South. 802, 9 L. R. A. [N. S.] 848), yet it was for the jury to determine, in the case at bar, whether or not the plaintiff was guilty of negligence in getting off of the train, which was not moving rapidly and it being broad daylight. Moreover, the porter was standing near—some of the evidence shows that he had hold of her—and the jury could infer that the act of getting off was not necessarily dangerous and negligent. Birmingham R., L. & P. Co. v. Girod, 164 Ala. 20, 51 South. 242, 137 Am. St. Rep. 17; Sou. Ry. Co. v. Morgan, 178 Ala. 590, 59 South. 432.

[6] Charge 7, refused the defendant, was refused without error, for the reason that, if not otherwise faulty, it pretermits a knowl-

edge on the part of the passenger of the arrival of the train at the destination station, or a proper warning as to the approach of same. It was for the jury to determine whether or not the plaintiff had been properly warned or notified of the approach or arrival of the train at the particular station in question. While we have only discussed those charges specifically designated and argued in brief of counsel, the others have not been overlooked, and we do not think that the trial court committed reversible error in refusing any of them.

The judgment of the circuit court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

ALABAMA GREAT SOUTHERN R. CO. v. TAYLOR. (6 Div. 182.)

(Supreme Court of Alabama. April 6, 1916.)

1. MASTER AND SERVANT ⇨286(3)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—QUESTION FOR JURY.

In an employé's action for injuries against a railroad company under Employers' Liability Act (Code 1907, § 3910, subd. 1), whether there was negligence attributable to the defendant either in the existence of a defect in the condition of its ways, works, etc., or in failure to remedy the defect, *held* for the jury under evidence tending to show that the defect had existed for sufficient time to warrant the inference either that it was known, or would have been discovered by due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. ⇨286(3).]

2. MASTER AND SERVANT ⇨286(27)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—QUESTION FOR JURY.

In such action whether the method adopted by defendant's roundhouse superintendent for bringing a car down an incline, which resulted in injuries to plaintiff, was such a method as due care and precaution approved, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1032; Dec. Dig. ⇨286(27).]

3. MASTER AND SERVANT ⇨279(5)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—SUFFICIENCY OF EVIDENCE.

Evidence *held* to warrant conclusion that the railroad employé who directed that a car be brought down an incline in a certain manner was a superintendent within such act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. ⇨279(5).]

4. APPEAL AND ERROR ⇨1050(1)—HARMLESS ERROR—REPETITION OF TESTIMONY.

In an employé's action against a railroad for personal injuries, where a witness testified without objection that he never brought a car down an incline with less than four or five men to let it down, the subsequent allowance of plaintiff's question to the same witness, eliciting a repetition of such testimony, was harmless to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⇨1050(1).]

5. DAMAGES ⇨208(3)—PERSONAL INJURIES—QUESTION FOR JURY—"PERMANENT INJURIES."

Whether the plaintiff was permanently injured—i. e., had suffered an injury that, according to every reasonable probability, would continue throughout the remainder of his life—was for the jury under evidence tending to show that plaintiff was less perfect nine months after the injury; that he complained of pain; that two of his ribs had been broken, etc.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. ⇨208(3).]

For other definitions, see Words and Phrases, First and Second Series, Permanent Injury.]

6. DAMAGES ⇨30—PERSONAL INJURIES—PERMANENT INJURIES.

Where a railroad is liable for its servant's permanent injuries, the damnifying consequences resulting from such injuries are of the elements of recoverable damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. ⇨30.]

7. DAMAGES ⇨12—PERSONAL INJURIES—PERMANENT INJURIES—NOMINAL DAMAGES.

In the entire absence of data from which to determine the amount of damage to a railroad employé from permanent injuries in service, such employé is entitled to recover nominal damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 31; Dec. Dig. ⇨12.]

8. DAMAGES ⇨216(6)—PERSONAL INJURIES—INSTRUCTION.

Where plaintiff was before the jury as a witness, and there was evidence tending to show a decrease in his capacity to work and in his earning capacity, indicated in the reduction of wages received by him after his injuries, though the mortality tables were not offered in evidence, the instruction that, if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured, as alleged, as a proximate consequence of the negligence complained of, they might award him such sum as would reasonably compensate him for such permanent injuries, so advising the jury on the hypothesis that there was evidence warranting compensatory damages for permanent injuries, was proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 551; Dec. Dig. ⇨216(6).]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by W. T. Taylor against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The ninth count, after setting out the business of defendant and the relationship between plaintiff and defendant, alleges that plaintiff was in the service or employment of defendant as an engine repairer, and while engaged in the discharge of his duties as such employé the plaintiff received the wounds and injuries heretofore alleged; and plaintiff avers that his said wounds and injuries were the proximate consequence of and caused by reason of the negligence of a certain person, namely, Mr. Sims, who was in the service or employment of the defendant, and who had superintendence intrusted to him while in the exercise of such superintendence. Said negligence consisted in this, viz.: The said Mr. Sims negligently caused

or permitted a railway car to be propelled down the track and against the tank under which plaintiff was working with such violence as to injure plaintiff as aforesaid. The other facts sufficiently appear.

A. G. & E. D. Smith, of Birmingham, for appellant. Erle Pettus, of Birmingham, for appellee.

McCLELLAN, J. Action by servant against the master for injuries received while engaged in the master's service. The case went to the jury under the issues made by count 1 and amended count 9. There is no insistence upon error in overruling the demurrer to count 1. There is argument for error in overruling the demurrer to amended count 9. The legal sufficiency of the count is affirmed by *A. G. S. Ry. Co. v. Choate*, 184 Ala. 636, 64 South. 78; *L. & N. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Reiter Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 South. 280.

[1] Count 1 was drawn to state a cause of action under the first subdivision of the Employers' Liability Act (Code, § 3910); and the defect in the condition of the ways, works, etc., to which plaintiff's injury was ascribed was alleged to be in the "brakes on one of defendant's said cars." The sufficiency of the count is conceded. That there was such a defect in the condition of the car was proven. Whether there was negligence attributable to the defendant either in the defect's existence or in the failure to remedy or repair the defect was made a jury issue by phrases of the testimony tending to show that the alleged defect in the condition of the brakes had existed for a sufficient length of time to warrant the inference either that the existence of the defect was known, or, had due care and prosecution been observed, the defect would have been discovered, or would have been remedied. *L. & N. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *A. G. S. R. Co. v. Yount*, 165 Ala. 537, 544, 51 South. 737; *Birmingham R. Mill Co. v. Rockhold*, 143 Ala. 115, 42 South. 96. The defendant was not entitled to the general affirmative charge forbidding a recovery under count 1.

Count 9 as amended was drawn to state a cause of action under the second subdivision of the Employers' Liability Act (section 3910), and attributed the plaintiff's injury to the negligence of one Sims, who, it was alleged, was then exercising the authority conferred on him as a superintendent for the defendant.

[2, 3] When injured plaintiff was engaged in repairing the brake rigging under the tank of a locomotive located for the purpose on track No. 1 about defendant's roundhouse. The track at that point was so constructed as to make a pit about four feet deep and of a width the distance between the rails; this to allow workmen to conveniently get at

their work underneath locomotives. An inclined track leading from the surface level (at a turntable) to a coal chute elevated approximately ten feet was used to move cars, conveying coal up to the coal chute, where they were unloaded. Between track No. 1, on which the locomotive stood, and the end of the track leading up the incline to the coal chute, was a turntable, which was capable of being so adjusted as to connect track No. 1 with the track to the coal chute by joining therewith a track on the turntable. There was evidence tending, at least, to show that by W. D. Sims' direction the tracks were so connected over the turntable as to make a continuous railway from the top of the incline to the point at which the locomotive undergoing repair was located. An empty coal car rested at the coal chute. W. D. Sims directed a single subordinate, John Wheeler, to move the car down the incline. The method contemplated was to "pinch" the car to a point where gravity would apply, and then with the hand brake to restrain the flight of the car down the incline. The brakes on this car were defective; but no inspection at the time to determine their efficiency was made by Sims or by his direction. The car was put in motion by Wheeler, and gained speed as it went down the incline. Wheeler undertook to hold the car with the hand brake, but that was ineffectual. The car, passing down the incline, followed the track across the turntable and collided with the locomotive under which plaintiff was at work, inflicting the injury of which he complains. There was evidence tending to show that proper prudence was not observed by committing the control of the car, on the incline, to only one servant whose reliance to control the car was to be the hand brake; this by testimony suggesting to the judgment of a reasonably prudent man these methods: The letting down of the car with an engine to control its movement; the "chucking" of the car on the incline, thus allowing its gradual descent, four or five men being assigned and used to control the car in its movement down the incline. In view of the circumstances disclosed by the evidence, it is quite clear that the evidence, and reasonable inferences therefrom, required the court to submit to the jury's decision the question whether the method adopted by Sims for bringing this car down the incline was such a method as due care and precaution approved. According to phases of the evidence, the power and authority conferred on Sims with respect to the removal of emptied coal cars from the coal chute down the incline and their disposition thereafter justified the conclusion that Sims was a superintendent within the second subdivision of the Employers' Liability Act (section 3910). *A. G. S. R. Co. v. Ellis*, 137 Ala. 560, 34 South. 829; *Dantzler v. C. & I. Co.*, 101 Ala. 309, 14 South. 10. 22 L. R. A. 361.

[4] The witness Lipscomb having theretofore, without objection, testified that he never brought a car down that incline with less than four or five men to let it down, no prejudice to defendant could have resulted from the subsequent allowance of a question (by plaintiff) to the same witness that elicited a repetition of the testimony just stated.

[6-7] Approximately nine months after the plaintiff was injured there was testimony tending to show: That plaintiff was physically less perfect than he was before the injury; that he complained of and suffered pains in his back and sides; that two of his ribs, healed by then, had been broken; that there was a depression over the liver—a depression the jury might have concluded was due to the breaking, or nature-wrought repair, of the ribs. Under the evidence, and reasonable inference deducible from the evidence, it was for the jury to decide whether, as alleged, the plaintiff was permanently injured; had suffered an injury that, according to every reasonable probability, would continue throughout the remainder of his life. *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103, 105. If the defendant was found to be liable for plaintiff's injury, and if the jury concluded from the evidence that plaintiff was permanently injured, the damnifying consequences resulting from his permanent injury were of the elements of recoverable damages, and, in the entire absence of data from which to determine the amount of damage resulting from such permanent injury, the plaintiff was entitled to recover nominal damages. *B. R., L. & P. Co. v. Wright*, 153 Ala. 107, 44 South. 1037; *B. R., L. & P. Co. v. Friedman*, 187 Ala. 562, 571-572, 65 South. 939. The court in the oral charge thus instructed the jury:

"If you are reasonably satisfied from the evidence that the plaintiff is permanently injured as alleged in the complaint as a proximate consequence of the negligence complained of, you may award him such sum as would reasonably compensate him for such permanent injury."

[8] This instruction advised the jury upon the hypothesis that there was evidence warranting a finding of compensatory damages for permanent injury. The plaintiff was before the jury as a witness. There was evidence tending to show a decrease in plaintiff's capacity to work, as he did formerly, and of a decrease in his earning capacity, as that was indicated by the reduction of the wages he received for work after he was injured. The mortality tables were not offered in evidence for the jury's consideration on the issue of the pecuniary loss entailed by his permanent injury (if so)—the probable duration of the existence of the result of his permanent injury. *B. R., L. & P. Co. v. Wright*, *supra*. The failure to offer the mortality tables in evidence does not authorize the conclusion that there was no evidence before the jury from which the jury could form a judgment as to the probable duration of the per-

manent injury suffered by the plaintiff, if such injury was sustained by him. As is indicated by the reference heretofore made to the presence of the plaintiff before the jury and to the tendencies of the evidence touching the damnifying effect of his injury upon his capacities to work and to earn wages, it cannot be held that there was an entire absence of evidence bearing upon the damnifying effect of his injury, if his injury was found by the jury to be permanent. *Mary Lee Coal Co. v. Chambliss*, 97 Ala. 171, 175, 11 South. 897.

This disposes of all the assignments of error insisted upon in brief for appellant.

No prejudicial error appearing, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

STATE ex rel. SHOEMAKER v. DAVISON,
County Registrar. (3 Div. 234.)

(Supreme Court of Alabama. March 25, 1916.
Rehearing Denied April 21, 1916.)

ELECTIONS — 105 — REGISTRATION — TIME OF REGISTRATION.

Under the Registration Law (Acts 1915, p. 244, § 15), a qualified citizen must be registered as a voter between November 15th and January 5th, and registration after January 5th is forbidden.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 94; Dec. Dig. — 105.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Mandamus by the State, on the relation of S. P. Shoemaker, against R. P. Davison, as registrar. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

Douglas & Ray, of Birmingham, for appellant. Beckwith & Davison, of Montgomery, for appellee.

SOMERVILLE, J. The appellant petitioner seeks by the writ of mandamus to compel the respondent, as registrar of Montgomery county, to register petitioner as a voter of said county. It appears that petitioner applied for registration on January 15, 1916, and was able to show that he was qualified for registration. The trial court sustained a demurrer to the petition, and the only question on this appeal is whether or not a qualified citizen may be lawfully registered under the new registration law (Acts 1915, p. 239) after January 5th.

Section 15 of this act is as follows:

"The registrar in each county shall visit each precinct except the precinct in which is located the county site, at least once, and oftener if necessary, between November 15, 1915, and January 1, 1916, and each two years thereafter, and shall remain there at least one day from eight a. m. until sunset, and shall sit at the court house at the county site from January 1, 1916, to January 5, 1916, to make a complete registration of

all persons entitled to register. They shall give at least twenty days' notice of the time when and the place and the precinct where they will attend to register applicants for registration by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, file new appointments therein; but the time consumed by the board in completing such registration shall not exceed forty working days in any county except that in counties having more than 50,000 population, as shown by the last preceding census, the time shall not exceed sixty days."

In prescribing the calendar time within which registration must be made, viz., between November 15th and January 5th, the language of the act is free from the slightest ambiguity. It is contended, however, that the limitation referred to is in effect qualified by the last clause of section 15, viz.:

"But the time consumed by the board in completing such registration shall not exceed forty working days in any county, except that in counties having more than 50,000 population, as shown by the last preceding census, the time shall not exceed sixty days."

The question, therefore, is whether a clear and specific limitation within a calendar period which could include, for the recent registration session, only 43 or 44 working days, is to be extended by implication beyond the calendar limitation in counties having more than 50,000 population, which includes Montgomery county, by reason of a further limitation in such counties to 60 days for the work of registration. In short, does the declaration that the work of registration shall not consume more than 60 days authorize or require the registrar to make registrations beyond the calendar date expressly fixed for the termination of his labors?

We think not. Indeed, the 40 and 60 days' limitations were evidently incorporated into the act by an adoption verbatim of the language of section 805 of the Code of 1907, under the provisions of which, without these limitations, the board of registration could have consumed three months between July 1st and October 1st. Under the provisions of the new law, the 60 days' limitation was inapt and unnecessary, and its presence is clearly the result of carelessness or inadvertence. In the reconstruction of new systems of law out of existing statutes, such instances of verbal inaptitude are of frequent occurrence, and in the new registration act no effort seems to have been made to adjust or adapt the language of the many sections of the old law which are therein incorporated verbatim. A flagrant example of this will be found in section 24 (identical with § 314 of Code of 1907), which provides that "the action of a majority of the registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business," although the

new act substitutes a single registrar for the former board of three. Similar inaccuracies are numerous.

We cannot doubt that the intention of the Legislature was accurately expressed in the provision that all registration shall be performed between November 15th and January 5th; and this language, of its own force, forbids registration after the latter date.

It results that petitioner was not entitled to registration, and the demurrer to the petition was properly sustained.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

STATE ex rel. NEWTON v. HERRING, Judge of Probate. (7 Div. 808.)

(Supreme Court of Alabama. April 21, 1916.)

ELECTIONS \Leftrightarrow 105—REGISTRATION—TIME OF REGISTRATION.

Under the Registration Law (Acts 1915, p. 239), a qualified citizen may only be lawfully registered as a voter between November 15th and January 5th in the following year.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 94; Dec. Dig. \Leftrightarrow 105.]

Appeal from Circuit Court, St. Clair County; James E. Blackwood, Judge.

Prohibition by the State, on the relation of J. H. Newton, against James L. Herring, Judge of Probate. From a judgment for defendant, plaintiff appeals. Reversed, and relief granted.

John W. Inzer, of Ashville, for appellant. James A. Embry, of Ashville, for appellee.

THOMAS, J. The appellant seeks by writ of prohibition to prevent the respondent, James L. Herring, as judge of probate of St. Clair county, Ala., from placing the names of Burrell Bowlin and others, so registered, on the official list of voters for said county. The averments of the petition are admitted to be true by said judge of probate. They are, in substance, that there was no qualified registrar for said county from November 1, 1915, to February 6, 1916; that prior to November 5, 1915, the Governor appointed one Hardee Cornett as registrar for said county, for the purpose of registering the qualified voters under the act of 1915 (Gen. Acts 1915, pp. 239-248); that Cornett did not qualify, nor enter upon the discharge of the duties of the office of registrar; that there was no registrar for said county, who had the right, and on whom rested the duty, to register the voters of said county, until after January 6, 1916. The petition further alleges that after January 6, 1916, the Governor appointed R. F. Ashley as registrar of said county, who qualified as such and entered upon the discharge of the duties of the office; that he gave the prescribed notice that he would

visit certain precincts of said county during the month of March, 1916, for the purpose of registering persons entitled to be registered; that he did register, at Ashville, at the courthouse, on March 1, 1916, the said Burrell Bowlin, and others, who had not theretofore been registered but who were entitled to be registered as voters of said county.

Thus is raised by the petition the right of the said R. F. Ashley to register the said Burrell Bowlin and others, after January 5, 1916, in, to wit, the month of March, 1916; and the right of Burrell Bowlin and others, so registered or sought to be registered, by the said R. F. Ashley, in 1916, after January 5th, contrary to the express provisions of the act, to be registered and listed among the legal voters of said county.

The act of 1915, in question, made it the duty of the Governor, the state auditor, and the commissioner of agriculture and industries, or of a majority of them, acting as a board of appointment, to appoint a "reputable and suitable person" who should be a qualified elector and resident of the county and who should not hold an elective office during the time, to conduct in each county the registration of the qualified voters therein, the term of such registrars to be for four years and until their successors are appointed.

By sections 3 and 31½ of the act it is provided as follows:

"Sec. 3. *Vacancies of Registrars; How Filled.*—If one or more of the persons appointed on such board of registration shall refuse, neglect, or be unable to qualify or serve, or if a vacancy or vacancies occur in the membership of the registrar from any cause, the Governor, state auditor and commissioner of agriculture and industries, or a majority of them acting as a board of appointment, shall make other appointments to fill such board."

"Sec. 31½. That in case of sickness or other disability of the registrar, the registrar on the approval of the probate judge may appoint a deputy registrar to act in the place of the registrar pending his sickness or disability, provided, however, that in no case shall more than one salary be paid."

Thus there was made in the statute ample provision for timely appointment, to meet any failure in the office of registrar because of the refusal, neglect, or inability, of the registrar "to qualify or serve"; and thus it was provided for the registration, within the time prescribed, of those qualified under the act to be registered.

Section 31 of the act reads as follows:

"Sec. 31. The registrar shall, each year, within two weeks after January 15, make a copy of the list of names registered, stating the residence of the persons registered by precincts, and where precincts have been subdivided into districts by districts or precincts, which copy, along with the registration lists must be returned to the office of the probate judge of the county. The judge of probate shall certify an alphabetical list to the secretary of state. The probate judge shall keep both the original list filed by the registrars and the alphabetical list made therefrom as records in the office of the probate judge of the county, and same shall be open to public inspection."

Section 14 of the act prescribed, among others, the following duties of the judge of probate:

"Sec. 14. The judge of probate shall from the registration list heretofore and hereafter returned to his office, including those registered prior to January 1, 1903, and excluding those names stricken therefrom, as shown by the lists returned to him under section 12 above, make correct alphabetical lists of all the electors registered by precincts and by districts of precincts where precincts have been divided or subdivided, which list shall be certified by him officially to be a full and correct copy of the list of registered electors for each precinct, and where a precinct has been divided or subdivided, for each district of each precinct respectively, as the same appears from the returns of the registrar on file in his office. Said judge of probate shall after the first day of February 1916, and of each year thereafter, compare such official list of registered electors with the poll tax lists which have been furnished him by the tax-collector, and shall ascertain from such comparison the names of such persons on the official lists of registered electors who have failed to pay any poll tax for which they are legally due, and by such comparison and other available information, said judge of probate shall make correct alphabetical lists of all of the qualified electors registered by precincts and of districts of precincts where precincts have been divided or subdivided, and who have paid all poll tax due. Said lists so made up shall be published by him in some newspaper with a general circulation in said county on or before the 15th day of April 1916, and of each year thereafter, and together with said lists there shall also be published a certificate that said list constitutes the correct list of all qualified electors who will be entitled to vote in any elections held in said county from the time of said publication until the first day of May of the next succeeding year, and also a notice that any voter duly registered whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his name entered upon said list of qualified voters. If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that his name should be added to such list, his name shall be added thereto. An alphabetical list by districts and precincts of those so added within said ten days shall be prepared and published by said judge of probate in some newspaper with a general circulation in said county on or before the first day of May, 1916, and of each year hereafter. The alphabetical list of voters published by said judge of probate on or before the fifteenth day of April, together with the names added and published on or before the first day of May, shall be the official list of qualified voters in said county and for the districts and precincts therein for the next ensuing year, until a new list is published, and no person whose name does not thereon appear shall be allowed to vote nor shall he be allowed to vote except in the precinct, or if the precinct has been divided into districts in the district in which his name on said list appears unless such person complies with the qualifications prescribed by law for challenged voters."

Section 15 of the act has been construed in *State ex rel. Shoemaker v. R. P. Davison, as Registrar, etc.*, 71 South. 678. There this court said:

"We cannot doubt that the intention of the Legislature was accurately expressed in the provision that all registration shall be performed between November 15th and January 5th; and this language of its own force, forbids registration after the latter date."

We adhere to the construction given section 15 of the act in the Shoemaker Case.

If therefore ample opportunity for those who were qualified to register in St. Clair county during the period from November 15, 1915, to January 5, 1916, was not afforded, it was through no fault of the statutes made and provided for such registration.

The judgment is reversed, and one is here rendered granting the relief prayed.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

MOORE et al. v. ALTOM. (8 Div. 891.)
(Supreme Court of Alabama. April 6, 1918.)

1. FRAUDULENT CONVEYANCES \Leftrightarrow 255(1) — PARTIES—DEFENDANTS.

In a suit to set aside a fraudulent conveyance, one who has joined with defendant in the execution of the note on which complainant is a creditor, and whose liability is joint and several, is not a necessary party.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 741; Dec. Dig. \Leftrightarrow 255(1).]

2. FRAUDULENT CONVEYANCES \Leftrightarrow 172(2)—VALIDITY AS BETWEEN ORIGINAL PARTIES.

A conveyance, claimed to be fraudulent by a creditor of grantor, cannot for that cause be annulled as between the parties to it.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 527-529; Dec. Dig. \Leftrightarrow 172(2).]

3. FRAUDULENT CONVEYANCES \Leftrightarrow 324—REMEDIES—DISPOSITION OF PROCEEDS—SURPLUS.

If land conveyed in fraud of creditors is sold to satisfy their claims, the remainder of the fund produced thereby goes to the fraudulent grantee, or those claiming under him.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 542, 992; Dec. Dig. \Leftrightarrow 324.]

4. FRAUDULENT CONVEYANCES \Leftrightarrow 255(1) — PARTIES—DEFENDANTS—WIFE OF GRANTOR.

In a suit to set aside a fraudulent conveyance, it is not necessary to join as defendant the grantor's wife, who though joining in the conveyance, is charged with no fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 741; Dec. Dig. \Leftrightarrow 255(1).]

5. FRAUDULENT CONVEYANCES \Leftrightarrow 260 — PLEADING — COMPLAINT — PRESENTMENT OF NOTE.

In a suit to set aside a fraudulent conveyance in order to enforce a note, the complaint need not state that the note was presented for payment at the time and place where payable, nor deny that funds awaited it there, as this is defensive matter.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 765, 766, 775; Dec. Dig. \Leftrightarrow 260.]

6. BILLS AND NOTES \Leftrightarrow 394—PRODUCTION OF MONEY AT PLACE OF PAYMENT.

Under Code 1907, § 5025, as to presentment of a note, if money for its payment awaits the holder at the time and place for payment, this is the equivalent of a tender.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996-1050; Dec. Dig. \Leftrightarrow 394.]

7. BILLS AND NOTES \Leftrightarrow 398—PRESENTMENT—NECESSITY.

Where the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his money, but only the cost of collecting it elsewhere.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1045-1050; Dec. Dig. \Leftrightarrow 398.]

8. FRAUDULENT CONVEYANCES \Leftrightarrow 313(2) — REMEDIES—DECREE—ORDER OF SALE.

In a suit to set aside a fraudulent conveyance, if complainant is entitled to a decree on the merits, and it appears the land may be sold in parcels, without jeopardizing the full satisfaction of complainant's demand, and that such course may avoid an unnecessary sacrifice of the land to defendant, the court in its discretion may order selling in parcels.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 969, 970; Dec. Dig. \Leftrightarrow 313(2).]

Appeal from Chancery Court, Jackson County; James E. Horton, Jr., Chancellor.

Bill by J. B. Altom against D. D. Moore and others, to declare a deed fraudulent and void as to creditors. From the decree, defendants appeal. Affirmed.

Lawrence E. Brown, of Scottsboro, for appellants. Bouldin & Wimberly, of Scottsboro, for appellee.

SAYRE, J. After the decree overruling the general demurrer had been affirmed in this court (Moore v. Altom, 68 South. 326) complainant (appellee) eliminated from his bill that alternative aspect of it which sought to enforce a vendor's lien, and further amended by adding to the bill in its other aspect, seeking to set aside a conveyance as fraudulent, an averment to the effect that the grantee defendant Sherwood was a party to the fraud.

[1] Smith had no interest in the lands in question; he took nothing by the conveyance complained of. He joined Moore in the execution of the note that made complainant a creditor; but his liability was several as well as joint. We conceive no reason why he should be made a party to complainant's bill to collect his debt from Moore by having the court decree Sherwood a trustee in invitum of the land conveyed to him in fraud of complainant's right as a creditor.

[2-4] As between the parties to it the conveyance in controversy cannot be annulled. After the complainant shall have been satisfied, the remainder of any fund to be produced by the decree, if the decree results in a sale, will go to the fraudulent grantee or those claiming under him. Davis v. Stovall, 185 Ala. 173, 64 South. 586. It was not necessary to make Mrs. Moore, who joined her husband in the conveyance, but who is charged with no fraud, a party defendant to the bill. Williams v. Spragins, 102 Ala. 424, 15 South. 247.

[5-7] Appellant insists that no default in the payment of the note is shown, for the reason that it was payable at the Tennessee

Valley Bank, and the bill contains no averment that the note was presented for payment at the time and place when and where it was made payable, nor any denial that funds awaited the note at the bank. This is defensive matter. If money for its payment awaited the complainant at the time and place appointed for the payment of the note, that was the equivalent of a tender, but does not deprive complainant of his right to proceed in this bill. If complainant was at fault in presenting his note for payment, he did not thereby forfeit his money, but only the cost of collecting it elsewhere. Code, § 5025. If an indorser were involved, the rule as to him would be different.

[8] Complainant was under no duty to point out how the land conveyed could best be sold to the advantage of defendant. If the averments of the bill shall be established, defendant has no rights in the land as against complainant. The court, in the event of a decree for complainant on the merits, if it shall appear that the land may be sold in parcels without jeopardizing the full satisfaction of complainant's demand, and that such course may avoid an unnecessary sacrifice of the land to defendant, may, in its discretion, order a sale in parcels. That matter will be left with the chancellor.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

LOUISVILLE & N. R. CO. v. DAVIS. (6 Div. 292.)

(Supreme Court of Alabama. April 20, 1916.)

1. RAILROADS — 441(1) — INJURIES TO HORSE — BURDEN OF PROOF — STATUTE.

In an action against a railroad for injuries to plaintiff's horse, where the only negligence charged was "in running an engine into a horse," there being no count relying on negligence as for frightening the animal, thereby causing the injury, so that Code 1907, § 5476, touching the burden of proof in an action against a railroad for damage to stock, was applicable, the burden was not on plaintiff to show negligence on the part of the road's agents, which would have been true had the injury been caused by merely frightening the animal.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1577, 1582, 1593-1595; Dec. Dig. § 441(1).]

2. TRIAL — 296(3) — INSTRUCTION — CURED BY OTHER CHARGES.

In an action against a railroad for injuries to plaintiff's horse, an instruction putting the burden on plaintiff to reasonably satisfy the jury that defendant was operating the road, that it damaged the horse, and that, after plaintiff established his ownership and that the horse was damaged by train, the burden was on defendant to show, and all the evidence would have to establish, that defendant was not guilty of negligence in killing the horse, though possessing misleading tendencies, when standing alone, was cured by charges that the jury must believe, before plaintiff was entitled to recover, that defendant was responsible for the injury;

that is, that its train ran into the horse and injured it on account of negligence of the defendant, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296(3).]

3. TRIAL — 256(9) — MISLEADING INSTRUCTIONS — REQUEST — NECESSITY.

Where part of the oral charge possessed misleading tendencies, they should have been removed by requested explanatory charges.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628, 633; Dec. Dig. § 256(9).]

4. TRIAL — 252(1) — INSTRUCTIONS — INAPPROPRIATE.

Requested charges inapt to the evidence are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. § 252(1).]

5. TRIAL — 260(1) — INSTRUCTIONS — REPETITION.

Requested charges fully covered by others given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260(1).]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by George Davis against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, Act of April 18, 1911, p. 449. Affirmed.

Tillman, Bradley & Morrow, of Birmingham, for appellant. Goodwyn & Ross, of Bessemer, for appellee.

MAYFIELD, J. [1] The action is to recover damages for injuries to plaintiff's horse. The only negligence alleged was in "running an engine into a horse." There was no count relying on negligence as for frightening the animal, and thereby causing the injury; hence the statute (section 5476 of the Code) was applicable to the case. And hence there was no error in the court's declining to charge the jury that the burden of proof was on the plaintiff to establish negligence on the part of defendant's agents—which would have been true if the injury had been caused from or in consequence of negligence in merely frightening the animal. Garth v. N. C. & St. L. Ry., 186 Ala. 145, 65 South. 166.

The trial court affirmatively instructed the jury that the plaintiff could not recover, unless they were reasonably satisfied from the evidence that the engine collided with the plaintiff's horse.

[2] The defendant excepted to the part of the oral charge which was as follows:

"That puts the burden of proof upon the plaintiff to reasonably satisfy this jury that the defendant was operating this railroad as alleged, and that they damaged the horse of the plaintiff; if the plaintiff establishes the ownership of the horse, and this horse was damaged by the defendant's train, the burden would rest upon the defendant to show by the evidence, and all the evidence in the case would have to establish, after that, that the defendant was not guilty of any negligence in and about the killing of the horse."

This statement, standing alone, unquestionably possessed misleading tendencies, if it was not wholly erroneous; but taken in connection with other parts of the oral charge, and with the written requested charges given at the defendant's request, the excerpt is cured of its misleading tendencies, and of error, if such there be, inherent when it is considered alone. For example, the court in its oral charge instructed the jury that:

"You must believe before the plaintiff is entitled to recover that the defendant is responsible for the injury; that is, its train ran into this horse, and injured it, on account of the negligence of the defendant."

The court also instructed the jury, at the request of the defendant, as follows:

"(3) The court charges you that, unless you are reasonably satisfied from the evidence that plaintiff's horse was injured by being struck by defendant's engine, you must find for the defendant."

"(4) The court charges you that, if the defendant's engine did not strike plaintiff's horse, the burden of proof does not rest upon the defendant to acquit itself of negligence in and about the injuring of plaintiff's horse."

"(5) The court charges the jury that, unless you are reasonably satisfied by the evidence that defendant's train did come in actual physical contact with the plaintiff's horse, there would be no duty on defendant to exonerate itself of negligence."

[3] If the excerpt possessed other misleading tendencies, they should and could have been removed by requested explanatory charges.

It will be noticed that the statute says that the defendant must show that there was no negligence on the part of the company or of its agents. The phrase "all the evidence," standing alone, of course possessed misleading tendencies; but it could have been explained by requested charges—and in some respects it was so cured.

[4, 5] There was no error in refusing any of the defendant's requested charges. Each was either bad, inapt, or misleading, or was fully covered by other given charges. There was likewise no error in any of the rulings on the evidence.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

TEMPLE v. DOOLEY. (8 Div. 921.)

(Supreme Court of Alabama. April 20, 1916.)

1. APPEAL AND ERROR — 792 — DISMISSAL — WANT OF JUDGMENT.

Where there is no valid judgment from which an appeal may be taken, the court will of its own motion dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3137-3141; Dec. Dig. — 792.]

2. APPEAL AND ERROR — 21 — INTERLOCUTORY JUDGMENTS — CONSENT TO REVIEW — STATUTE.

Under Code 1907, § 2841, allowing appeals from certain interlocutory judgments, the giving

of an affirmative charge on the trial of a plea in abatement to a landlord's attachment, can be reviewed on appeal, provided the appeal be taken with the consent of the opposite party, which consent is a condition precedent and jurisdictional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 88-97; Dec. Dig. — 21.]

3. APPEAL AND ERROR — 22 — SUFFICIENCY OF JUDGMENT BELOW — JURISDICTION — WAIVER.

The question of the sufficiency of the judgment or decree in the lower court to support an appeal is jurisdictional, and cannot be waived.

* [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 98; Dec. Dig. — 22.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Attachment suit by L. P. Dooley, plaintiff-landlord, against T. T. Temple, defendant-tenant. Verdict and judgment for plaintiff on affirmative charge on the trial of defendant's plea in abatement, and defendant appeals. Transferred from the Court of Appeals under section 6, p. 450, Act of April 18, 1911. Dismissed.

McCORD & ORR, of Albertville, for appellant. STREET & BRADFORD, of Albertville, for appellee.

THOMAS, J. The questions presented in the assignment of errors arose in the trial of an attachment, sued out by a landlord against his tenant, to recover an amount due for rent and advances. The ground for the attachment was that the defendant-tenant had removed from the premises a part of the crop raised on the rented premises, without paying the rent and advances, or either, and without the consent of the landlord. Defendant interposed a plea in abatement, that the alleged ground for the attachment did not exist. At plaintiff's request, the court gave the affirmative charge on trial of defendant's said plea. There was verdict and judgment for the plaintiff on this issue, and from this finding the defendant appeals. There was no final judgment in the cause.

[1] There must be a valid judgment from which an appeal may be taken, to support the appeal. If there be none such, the court will of its own motion dismiss the appeal. *Gunter v. Mason*, 125 Ala. 644, 27 South. 843.

[2] Certain interlocutory judgments, rendered before the final determination of the cause, will support an appeal to the Supreme Court if the record affirmatively shows that the appeal is within the terms of the statute (section 2841 of the Code of 1907). Interlocutory judgments overruling a motion to dismiss or quash an attachment, or sustaining a demurrer to a plea in abatement to an attachment or sustaining an attachment against matters set up in abatement of it either in the way of an agreed case or by plea or otherwise, may be reviewed on appeal, provided the appeal be taken with "the consent of the opposite party or his attor-

ney." No such consent of the plaintiff or of his attorney is shown by the record. Such consent is a condition precedent, and is jurisdictional. *Stanton v. Heard*, 100 Ala. 515, 14 South. 359; *Crumley Bros. v. Bryan & Co.*, 69 Ala. 91. Appeals are of statutory creation. Authority for the appeal in each case must be found in the statute. *May v. Courtney*, 47 Ala. 185; *Stoutz, Adm'r, v. Huger*, 107 Ala. 248, 18 South. 126.

[3] The question of the sufficiency of a judgment or decree in the lower court to support an appeal is jurisdictional and cannot be waived. *Meyers et al. v. Martinez et al.*, 162 Ala. 562, 50 South. 351. The judgment from which this appeal is taken is not such as will support an appeal to the Supreme Court, without the consent of the plaintiff or his attorney. The record failing to show affirmatively such consent in this case, there is no statutory authority for the appeal, and this court is without jurisdiction. *Bennett et al. v. Hall*, 69 South. 136.

The appeal is dismissed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

COMMERCIAL FINANCE CO. v. COOPER BROS. (7 Div. 789.)

(Supreme Court of Alabama. April 13, 1916.)

1. EVIDENCE \Leftrightarrow 434(11) — PAROL EVIDENCE — CONTRACT OF SALE — FRAUD.

In an action for goods sold under a contract, where the testimony showed that the contract signed by the buyer was not the one made by him, and was signed upon the misrepresentation of the seller's salesman, testimony of the buyer as to what articles he contracted to purchase was relevant, in connection with the other evidence going to show that the contract signed did not speak the truth; and testimony of a witness who was present at the trade corroborative of the buyer was also admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014; Dec. Dig. \Leftrightarrow 434(11).]

2. CONTRACTS \Leftrightarrow 94(5) — FRAUD — RESCISSION.

A contract executed by one in reliance upon false representations as to its contents is not binding upon the party deceived, if he elects to avoid it, although he could read and had an opportunity to read it before signing it, as a party asserting facts cannot complain that the other took him at his word.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 424, 425, 1164; Dec. Dig. \Leftrightarrow 94(5).]

Appeal from City Court of Talladega; Marion H. Sims, Judge.

Assumpsit by the Commercial Finance Company against Cooper Bros., a partnership. Judgment for defendants, and plaintiff appeals. Transferred from the Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

The action was for goods, wares, and merchandise sold under a contract in writing for the sale of certain chinaware. The defend-

ants set up the failure of consideration, in that plaintiff's agent represented the assortment to contain certain articles which are set out in the plea, but that plaintiff did not and has not complied with the contract, but has shipped defendants other and wholly different articles of property from that purchased, and that defendants had refused said crockery, and notified plaintiff that same was held subject to its order. Other pleas set up the same statement of facts with the additional allegation that the crockery had been returned. Others set up false and fraudulent representation by plaintiff's agent Brown inducing the signing of the contract without reading it, on the belief that said representations are true, and that upon the discovery of the fraud the contract was promptly rescinded, and the property offered to be returned. Plaintiff set up by way of replication that defendants agreed in said contract that there was no other contract of any kind, verbal or written, except the one sued on, and that defendants agreed in said contract to accept the goods as their property when shipment was made.

Graves Embry, of Talladega, for appellant. Carl C. Smith, of Talladega, for appellees.

ANDERSON, C. J. [1, 2] It is, no doubt, true that W. E. Cooper had no right to testify as to what articles he bought if the contract contained the true articles and was such a contract as was binding upon Cooper Bros.; but the defendants' evidence shows that the contract signed was not the one made by the defendants, and was signed upon the misrepresentation of the salesman Brown; therefore the witness W. E. Cooper had the right to tell what articles he purchased, and Brown represented to him that the contract covered said articles instead of the ones shipped. A contract executed by one in reliance upon false representations as to its contents is not binding upon the party deceived if he elects to avoid it, although he could read and had an opportunity to read the said contract before signing same.

"A party asserting facts cannot complain that the other took him at his word." *Shahan v. Brown*, 167 Ala. 584, 52 South. 737; *Moline Jewelry Co. v. Crew*, 171 Ala. 415, 55 South. 144.

The trial court did not err in permitting W. E. Cooper to testify what articles he contracted to purchase, which was relevant in connection with the other evidence going to show that the contract signed did not speak the truth and was not binding upon the defendants. For the same reason there was no error in admitting the showing of the witness Mitchell, who heard the trade between Cooper and the salesman Brown, and who corroborated W. E. Cooper.

The trial court did not err in the conclusion upon the facts, as the defendants' evi-

dence, which was practically uncontradicted, showed that the contract was not the one they made, and was not therefore binding, and they did nothing to estop themselves from setting up its invalidity by retaining the goods or otherwise.

The judgment of the city court is affirmed. Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

HOUSE et al. v. DAVIS et al. (7 Div. 769.)
(Supreme Court of Alabama. April 13, 1916.)

1. VENDOR AND PURCHASER ⇨279—VENDOR'S LIEN—BILL TO PERFECT.

Where a bill sought to perfect and enforce a vendor's lien subject to a prior mortgage, the mortgagee is not a necessary party; for the proceedings would not affect his title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 778-782; Dec. Dig. ⇨279.]

2. VENDOR AND PURCHASER ⇨226(2)—BONA FIDE PURCHASER—RIGHTS OF.

A bona fide purchaser for value and without notice will be protected to the extent pro tanto that he pays before notice of a latent equity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 476; Dec. Dig. ⇨226(2).]

3. VENDOR AND PURCHASER ⇨280(1)—VENDOR'S LIEN—BILL—SUFFICIENCY.

A bill seeking the perfection of a vendor's lien, though showing that complainant's vendee had sold the land to another, is not demurrable, where it did not show or admit that the last grantee was a bona fide purchaser for value and without notice, or that he had paid any of the consideration or had assumed irrevocable obligations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 784, 785, 789; Dec. Dig. ⇨280(1).]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Bill by C. M. Davis and others against F. M. House and others. From a decree overruling a demurrer, defendants appeal. Affirmed.

Samuel W. Tate, of Anniston, for appellants. Blackwell, Agee & Bibb, of Anniston, for appellees.

MCCLELLAN, J. [1] The appellees filed the bill against the appellants to have declared and enforced a vendor's lien, subject to prior mortgage to Annie G. Luttrell on the land. Obviously, the mortgagee is not a necessary party to the cause set forth in, and the relief sought by, this bill. If the court should grant the relief sought, and a sale of the land should be appropriately ordered and effected, the purchaser at the sale would acquire no right or title superior, but subordinate, to the lien of the mortgagee.

[2, 3] It is established in this state that an innocent, bona fide purchaser of land will be protected to the extent pro tanto he pays be-

fore notice of a latent equity. *Florence Mach. Co. v. Zeigler*, 58 Ala. 221, 224, 225; *Craft v. Russell*, 67 Ala. 9, 12. Appellees' vendee, House, sold and conveyed the land to Peters "at and for the sum of \$1,000.00, payable as follows: \$400.00 at one year after date (about January 1, 1916); \$400.00 at two years after date; and \$200.00 at three years after date." The bill does not show or admit that Peters was bona fide purchaser for value and without notice. According to the dealing between House and Peters, disclosed by the averments of the bill, Peters had paid or parted with nothing of value at the time the bill was filed, viz., July 5, 1915. Whether Peters executed or assumed irrevocable obligations in or about his purchase from House before notice of the equity asserted by appellees is a question not capable of being raised or decided at this stage without assuming the existence of allegations not present in this bill.

The court correctly overruled the demurrer.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

GARRETT v. LOUISVILLE & N. R. CO.
(3 Div. 200.)

(Supreme Court of Alabama. April 20, 1916.)

1. NEGLIGENCE ⇨56(1)—PROXIMATE CAUSE.

The law will consider only the proximate cause, and not a remote cause, where there are two or more causes of an injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. ⇨56(1).]

2. NEGLIGENCE ⇨62(1)—"PROXIMATE CAUSE"—INTERVENING CAUSE.

Where one cause merely created the condition, and after the condition had been created an intervening agency produced the injury, the first cause is not the "proximate cause."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76, 78; Dec. Dig. ⇨62(1).]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

3. MASTER AND SERVANT ⇨96(2)—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

Defendant wrongfully employed plaintiff's minor son, without her knowledge or consent, to work on a barge in a river. The work was not essentially dangerous, and the boy appeared to be an adult. One of the other employés, as a joke, pushed the boy into the river, and he was drowned. Held, that defendant's wrong was not the proximate cause of the death, and so there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 158; Dec. Dig. ⇨96(2).]

4. COMMON LAW ⇨14 — APPLICABILITY — STATUTORY REMEDIES.

Where an action for the death of plaintiff's minor son was brought under the Homicide Act (Code, § 2485), but was founded on defendant's common-law wrong in employing a minor at a

dangerous work without the consent of the parent, the common-law principles govern.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. §=14.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by Mattie Garrett against the Louisville & Nashville Railroad Company, for damages for death of a minor child by drowning. Judgment for plaintiff, and defendant appeals. Affirmed.

The action is based upon the wrongful death of plaintiff's minor son, for that defendant wrongfully employed him, without plaintiff's consent, at a dangerous work, and that death resulted therefrom. The evidence shows without dispute that defendant employed deceased without plaintiff's knowledge or consent, the father of deceased being dead, and put him to work on a barge in the Alabama river, by weaving boughs together and dropping them and staves over the edge of the barge around the base of the piers of the railroad bridge. The current was swift at that point, and the water about 30 feet deep. While the deceased was thus engaged, another employé of defendant, a man named Irving, winked at the other men, and then pushed deceased over the edge of the barge into the deep water, where, in spite of all efforts to rescue him, he was speedily drowned. Deceased was 19 years of age, and appeared to be a grown man, and had worked for defendant several months. The barge was 15x20 feet, and on it at this time were 8 or 10 white men and about 15 negroes. At the conclusion of the evidence, the court, at the request of defendant, gave the general charge for defendant, and this ruling is assigned for error.

Hill, Hill, Whiting & Stern and R. T. Rives, all of Montgomery, for appellant. Goodwin & McIntyre, of Montgomery, for appellee.

SOMERVILLE, J. [1, 2] Although judicial decisions are not always harmonious in their application of the principles which determine whether any wrongful act is the proximate and juridical cause of a particular injury, the principles themselves are settled beyond further controversy and a simple statement thereof from the leading authorities will suffice for the purposes of the present case.

"The law, in its practical administration in cases of this kind, regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause." *Atchison, etc., Ry. Co. v. Calhoun*, 213 U. S. 1, 29 Sup. Ct. 321, 53 L. Ed. 671; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 489, 24 L. Ed. 256.

"Where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled that where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition, or give rise to the occasion, by which the injury was made possible. It seems to be sound in principle and well settled by authority that where it is admitted or found that two distinct, successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate, and the other the remote, cause of the injury, and the court, in passing on the facts as found or admitted to exist, must regard the proximate as the efficient and consequent cause, and disregard the remote cause." *Mo. Pac. Ry. Co. v. Columbia*, 35 Kan. 390, 69 Pac. 338, 58 L. R. A. 399.

"Suppose that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable. * * * For the spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow beings, their acts cannot be said to have been caused by me, unless they are imbeciles or act under compulsion, or under circumstances produced by me which gave them no opportunity for volition." *Wharton on Neg.* 138.

After a full discussion of this subject, Mr. Freeman, in noting some differences in the cases where the subsequent act of the third person is merely negligent, concludes:

"But the courts, at least in this country, refuse to hold a tort-feasor liable for the results of a subsequent act which is willfully wrong, unless that act was actually intended by him." *Gilson v. Delaware, etc., Canal Co.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, note, 807, 842, 843, citing the authorities.

Our own decisions, so far as they have spoken, are in harmony with these principles, and in the case of *Tobler v. Pioneers, etc., Co.*, 166 Ala. 482, 509, 52 South. 88, 98, it was said:

"A wrongful act of independent third persons (it conclusively appears that this was such, though they may have been the servants of the master), not actually intended or reasonably to be expected by the master, is not the consequence of the master's wrong, and he is not bound to anticipate the general probability of such acts."

In that case the intervening act was negligent merely, and not a willful wrong. See, also, *W. Ry. of Ala. v. Milligan*, 135 Ala. 205, 33 South. 438, 93 Am. St. Rep. 31, and *Kirby v. L. & N. R. R. Co.*, 187 Ala. 443, 65 South. 358.

[3] We hold on the evidence, as shown without dispute by the bill of exceptions, that the work in which the deceased was engaged was not dangerous in itself, nor with respect to either its incidents or its environ-

ments, to this deceased, who was 19 years of age, and mature in body and mind, and, further, that, even if the work or place were dangerous, nevertheless the act of the man Irving in pushing plaintiff's son over the edge of the barge into the river was willful, independent, not connected with, nor in any way related to, the defendant's business, and neither intended nor anticipated by the defendant, and hence was in a legal sense the sole proximate and responsible cause of the injury, of which the deceased's employment by defendant and his presence on the barge furnished merely the chance condition and opportunity. A contrary conclusion could not be supported, either by reason or judicial precedent. Two striking and pertinent illustrations of proximate and remote causes of injury will be found in the cases of *King v. Henkle*, 80 Ala. 505, 510, 60 Am. Rep. 119, and *A. G. S. R. R. Co. v. Chapman*, 80 Ala. 615, 620, 2 South. 738, to which we merely refer.

We do not overlook those cases decided under statutes which forbid the employment of children in certain places and pursuits which common experience has shown are peculiarly dangerous to them. Such prohibitions, extending usually to children under 14 years of age, are, no doubt, intended to protect immature children, not only against the perils of their own immediate tasks, but also against their propensity to playful diversions, and the general perils of their environment. In some such cases the doctrines of proximate cause seem to have been applied somewhat liberally in favor of the master's liability for the original wrongful employment of the child. *Rollin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, note, 8 Ann. Cas. 638; *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S. E. 836, 48 L. R. A. (N. S.) 656, note; *Perry v. Tozer*, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416. But, even in such cases, the injury must result naturally from the work itself, or from the operation of the business by others, or from contact with some dangerous condition or agency belonging to or permitted about the place. So this court has recently said:

"Nor is it necessary that injury must result as the proximate cause of some act or omission of the minor in the discharge of the duty assigned him, but the right of action arises if the injury resulted from the employment and was incident to any of the risks or dangers in and about the business. Of course, there would be no causal connection if the boy got sick or was injured in some way foreign to the master's work or business, although in or near the mine; but if the injuries are produced while the boy is at the forbidden place—that is, in or about a mine by some cause not foreign to the master's mine or business—there is such a causal connection with the forbidden employment as would render the master liable." *De Soto, etc., Co. v. Hill*, 179 Ala. 186, 60 South. 583.

[4] While the present action is brought under the Homicide Act (Code, § 2485), it

is founded on a common-law wrong, the employment of a minor at a dangerous work without the consent of the parent; and the scope and policy of the prohibitive statutes above referred to are without application here.

The trial court properly gave the general affirmative charge for the defendant, and the judgment will be affirmed.

Affirmed.

ANDERSON, O. J., and MAYFIELD and THOMAS, JJ., concur.

PORTER et al. v. WATKINS. (5 Div. 609.) (Supreme Court of Alabama. April 20, 1916.)

1. DISMISSAL AND NONSUIT § 43(2)—SETTING ASIDE—CONTROL OF COURT.

Where through inadvertence plaintiff's counsel asked that an action be discontinued against a defendant who had been served and who had defended on a previous trial, and, before any judgment or minute order was entered, discovered his mistake, the court on motion properly set aside the order of discontinuance and allowed plaintiff to proceed against defendant, for the order had not passed beyond the court's control.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 86; Dec. Dig. § 43(2).]

2. DISMISSAL AND NONSUIT § 43(7)—"DISCONTINUANCE"—WHAT CONSTITUTES.

A "discontinuance" is an abandonment or the chasm or interruption in proceedings occasioned by the failure of plaintiff to continue suit regularly from time to time as he ought; therefore no discontinuance was worked where the court through inadvertence of counsel ordered an action discontinued as to a defendant but before the order was entered set it aside, counsel having discovered his mistake.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 91; Dec. Dig. § 43(7).]

For other definitions, see Words and Phrases, First and Second Series, Discontinuance.]

3. EVIDENCE § 181—SECONDARY EVIDENCE—LOST DOCUMENTS.

Every reasonable effort which might have resulted in the production of a missing paper must be shown to have been made without avail, before secondary evidence can be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600; Dec. Dig. § 181.]

4. APPEAL AND ERROR § 1058(2)—REVIEW—HARMLESS ERROR.

In an action on a note, where the court excluded secondary evidence of the contents of a lost receipt, the exclusion was not error, where one receipt was received and defendant was allowed to testify that, some time after the payment, another payment was made which discharged the note; the testimony received showing all of the essentials of receipt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. § 1058(2).]

5. PAYMENT § 39(1), 45, 46(1)—APPLICATION—RIGHT TO DIRECT.

While a debtor has the right to direct the application of a payment and the creditor if he fails may then make application as he desires, the law in the absence of specific application by either will apply the credit most beneficially to the creditor, that is, to the most precarious debt, or the one least secured, and payment cannot

without consent be applied to an immature debt when there is an unsatisfied mature one.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104, 108, 109, 124, 125; Dec. Dig. §39(1), 45, 46(1).]

6. TRIAL §252(19) — INSTRUCTION — APPLICABILITY TO EVIDENCE.

In an action on a note, where there was no evidence that the debtor ever directed payment to be applied on the note, a charge that the debtor had the right to direct what note the payment by him should be applied to, and credit must be given as directed, was abstract and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 609; Dec. Dig. §252(19).]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by T. H. Watkins against C. L. Porter and others. From a judgment for plaintiff, defendants appeal. Transferred from Court of Appeals under section 6, p. 449, Acts 1911. Affirmed.

James W. Strother, of Dadeville, for appellants. Bulger & Rylance, of Dadeville, for appellee.

MAYFIELD, J. This was an action on a promissory note, against several defendants, among whom was one Porter, appellant. There was dismissal or abatement as to several defendants, on account of death, bankruptcy, etc.

[1, 2] Counsel for plaintiff, who appeared for the first time (the plaintiff, at previous hearings and trials, having been represented by other counsel), after asking orders for dismissal as to some of the defendants on account of death, bankruptcy, etc., asked that the case be discontinued as to the defendant Porter, and the court announced that the order was granted; but, before any judgment or minute order to that effect was entered, counsel discovered that Porter had been served, and had defended on former hearings. The court, on motion of counsel, set aside the order of discontinuance and allowed plaintiff to proceed to trial against Porter.

There was no error in this action of the court. The first order had not passed beyond the control of the court, and, being taken on a mere oversight or mistake of counsel, the court properly allowed the case to proceed against Porter. No judgment or order to that effect was ever entered, and no error occurred on account of which Porter or any of the other defendants should be allowed to profit. There was therefore neither in fact nor in law a discontinuance as to Porter. There was no sufficient gap or chasm in the proceedings to amount to a discontinuance in law. The record proper shows no discontinuance. All that appears is in the bill of exceptions, and it shows that the final action of the court was to decline to allow or sanction a discontinuance, and

to merely reverse a former ruling which was invoked by a mistake of counsel.

In Bouvier's Law Dictionary, a "discontinuance" in practice is to be "the chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time as he ought." It is, in substance and effect, an abandonment of the moving party of his pending cause. *Ex parte State*, 71 Ala. 367. It has been many times decided by this court that official neglect or refusal of the clerk to perform the duties required of him will not operate a discontinuance. *Wiswall v. Glidden*, 4 Ala. 357; *Drinkard v. State*, 20 Ala. 9; *Harrall v. State*, 28 Ala. 52; *Brown v. Clements*, 24 Ala. 354; *Ex parte Remson*, 31 Ala. 270; *Glenn's Adm'r v. Billingslea*, 64 Ala. 345.

While it is true that a discontinuance puts an end to the cause, yet, where a mere order or announcement has been made to that end, such order or suggestion may be changed or corrected during the term of the court at which it was originally made; and certainly so, where, as in this case, the two orders were practically simultaneous. *Curtis v. Gaines*, 46 Ala. 459.

[3] The defendant testified to having made two payments, one of \$125 and one of \$5. He introduced a receipt for the first, and offered to prove the contents of the receipt for the latter; but the court declined to allow the proof, on the ground that the absence of the original was not sufficiently accounted for.

If the loss of a paper is relied on, to account for its nonproduction, the fact of its loss is not established without proof of diligent search where the paper is most likely to be found and the particular character of the search should be shown. Every reasonable effort which might have resulted in the production of the missing paper should be shown to have been made without avail, before secondary evidence can be received. *McEntyre v. Hairston*, 152 Ala. 251, 44 South. 417; *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Boulden v. State*, 102 Ala. 78, 15 South. 341; 6 Mayf. Dig. 336.

[4] We are not prepared to say that the trial court was in error, but, if error there was, it was without possible injury. It was only a receipt offered to be proven; and the witness did in fact testify, without objection, as to everything proper for a receipt to contain. The receipt introduced was as follows: "Received of O. M. Porter, \$125.00 on the amount due on his father's note.—Thad H. Watkins."

We quote from the same witness as follows:

"The Court: 'That \$125.00 was in 1907? Defendant's counsel replied: 'Yes, sir, in 1907.' Said witness further testified as follows: 'Five dollars and something, my son paid after that. That was paid in about ten or fifteen days after the receipt. That paid the balance on that note.

I have not the receipt for that five dollars; my son has it, and it in here last summer was a year ago. My son is in Texas; it is not in my possession, my son has it; it is just like that."

He certainly could not have testified any more fully as to a mere receipt for five dollars.

[5, 6] The defendant Porter requested the giving of the following charges, "A" and "B," which were refused:

"A. The court instructs the jury that C. L. Porter had a right to direct what note the \$125 payment by him should be applied to, and credit must be given as directed by him."

"B. The court instructs the jury that if you believe the evidence the \$125 payment was made on the note sued on."

These charges were properly refused. Charge A, under the evidence in this case, was calculated to mislead, although, abstractly considered, it states a correct proposition of law.

The following, among other rules as to the application of payments to different debts, are propositions that have been frequently reaffirmed by this court:

The debtor, at the time of making payment, has the right to direct the application of the amount to any particular debt; if he fail so to do, before or at the time of payment, the creditor may then direct it; if he do not so do, then the law directs the application. *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Kent v. Marks*, 101 Ala. 350, 14 South. 472; 4 Mayf. Dig. 430.

If a paying debtor fails to give directions as to the application, then the creditor may elect on which of two or more debts, past due, he will allow the credit; and, if neither expresses any election, then, as between such debts, the presumption of the law is that the credit is applied most beneficially to the creditor—that is, to the most precarious debt, or the one least secured. It cannot, without consent, be applied to an immature debt when there is an unsatisfied mature one. *Callahan v. Boazman*, 21 Ala. 246; *Bohe v. Stickney*, 36 Ala. 482; *Robinson v. Allison*, 36 Ala. 525; *Johnson v. Thomas*, 77 Ala. 367; *Taylor v. Cockrell*, 80 Ala. 236; *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; 4 Mayf. Dig. 430.

We fail to find evidence in this record which conclusively shows that the debtor ever directed the payment of the \$125 to the note sued on. In fact, the receipt offered in evidence by the defendant, taken in connection with the other evidence, tends to show that no request was made by the debtor, before or at the time of payment, that the amount should be applied to the note sued on. Such was certainly not shown without dispute; and hence charge A was calculated to mislead the jury to infer that such a demand was made, or that the right of the debtor to so apply the payment was invoked before, or at the time, the payment was made.

Charge B was properly refused, because, at best that could be said in its favor, the appli-

cation of the payment was a question for the jury, and this charge took the question from the jury.

There was evidence, also, sufficient to carry the question of attorney's fees, and the amount thereof, to the jury; and hence the defendant was not entitled to the affirmative charge on this phase of the case.

We find no error in the trial court's overruling defendant's motion for a new trial. We find no sufficient reason for disturbing the verdict of the jury or the judgment of the court entered thereon.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO.
v. GRAY. (6 Div. 312.)

(Supreme Court of Alabama. April 20, 1916.)

1. CARRIERS \S 314(1)—INJURIES TO PASSENGER—PLEADING—SUFFICIENCY.

Counts charging simple negligence of a carrier to the injury of a passenger, which allege that the defendant was a common carrier of passengers, that plaintiff was a passenger, and that defendant so negligently conducted itself in and about her carriage thereon that at a certain time and place plaintiff was thrown or caused to fall from car, are sufficient.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 1270, 1273, 1274, 1276, 1277; Dec. Dig. \S 314(1); *Negligence*, Cent. Dig. \S 182.]

2. EVIDENCE \S 268 — PERSONAL INJURIES — EVIDENCE—STATEMENTS OF INJURED.

Expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible in an action for personal injuries; but the rule does not include declarations as to the cause of the pain or narrations of past conditions, and can be proved by any one who heard the declarations.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. $\S\S$ 1061, 1062; Dec. Dig. \S 268.]

3. EVIDENCE \S 268 — PERSONAL INJURIES — STATEMENTS OF INJURED.

While it might be error to permit a passenger to testify as to what he said or did indicative of pain, it would be proper for him to testify whether he suffered pain.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. $\S\S$ 1061, 1062; Dec. Dig. \S 268.]

4. CARRIERS \S 321(14) — INJURIES TO PASSENGER—ACTIONS—INSTRUCTIONS.

In a passenger's action for personal injuries, an instruction, hypothesizing the allegations of the complaint, that if the plaintiff was injured as alleged, as proximate consequence of defendant's negligence as alleged, and if the defendant negligently closed its gates on plaintiff as alleged, while plaintiff was alighting from its car, the plaintiff could recover, is properly given.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1332; Dec. Dig. \S 321(14).]

5. CARRIERS \S 280(3)—CARE REQUIRED AS TO PASSENGERS.

The law requires the highest degree of care and diligence and skill by those engaged as common carriers of passengers by street cars, known to careful, diligent, and skillful persons,

engaged in such business, consistent with the practical operation of the road.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1089-1091; Dec. Dig. ¶280(3).]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Mrs. Ethel Gray against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under Act of April 18, 1911 (Laws 1911, p. 449) § 6. Affirmed.

Tillman, Bradley & Morrow, of Birmingham, for appellant. Prosch & Prosch, of Birmingham, for appellee.

MAYFIELD, J. Action, by passenger against common carrier, to recover damages on account of personal injuries. The negligence alleged, which went to the jury, was the closing of the gate of the street car upon plaintiff while she was in the act of alighting from the car at the end of her journey; and the sudden jerking or lurching of the car, at that moment, which caused plaintiff to fall and injure herself. There were no pleas of contributory negligence, and the wanton counts were charged out by the court. The jury found for the plaintiff and assessed her damages at \$375.

Each of the counts was sufficient in an action by a passenger against a carrier for negligence in causing personal injuries, and they were therefore not subject to the demurrers thereto interposed.

[1] Counts charging simple negligence of a common carrier to the injury of a passenger on one of its cars, which allege that the defendant was a common carrier of passengers, that plaintiff was a passenger, and that it so negligently conducted itself in and about her carriage thereon that at a certain time and place plaintiff was thrown or caused to fall from said car, are sufficient. *Birmingham Co. v. Fisher*, 173 Ala. 623, 55 South. 995, 7 Mayf. Dig., 101.

[2] There was no error in allowing witnesses to testify that plaintiff complained of her injuries. These expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible evidence. True, the rule allows an opportunity for simulation and the perpetration of fraud; but necessity and justice require it. The reality or simulation of pain as the cause of such expressions is a question for the jury. The rule, however, has limitations. The declarations must be limited to the existence of pain and suffering at the time they are made, and do not extend to rehearsals or narrations of past conditions or sufferings; nor does the rule extend to declarations as to the cause of the pain or suffering. *Western Steel Co. v. Bean*, 163 Ala. 260, 50 South. 1012; Mayf. Dig., 314. The declarations, if admissible, can be proven by any one who heard them. Id.

[3] It might be error to allow the plaintiff to testify as to what he said or did, on these occasions, indicative of pain. It would be better and more appropriate for him to testify whether or not he suffered pain, than to what he said about it. Id., 163 Ala. 260, 50 South. 1012.

In an action against a common carrier for injury to a passenger, complaints of pain and suffering, and symptoms indicative of injury, made by the person injured, are admissible.

[4, 5] There was no error in the giving of any of the plaintiff's written requested charges. They were as follows:

"(1) If the jury is reasonably satisfied from all the evidence in this case that the plaintiff was injured in the manner and form alleged in the complaint, as the proximate consequence of the defendant's negligence as alleged therein, then you must find a verdict for the plaintiff.

"(2) If the jury is reasonably satisfied from all the evidence in this case the defendant, its agents or servants, negligently closed the gates on the plaintiff as alleged in the said complaint, while plaintiff was in the act of alighting from said car, and that she received her said injuries proximately from said gates being closed upon her, you must find a verdict for the plaintiff.

"(3) The court charges you, gentlemen of the jury, that the law requires the highest degree of care and diligence and skill, by those engaged as a common carrier of passengers by street cars known to careful, diligent, and skillful persons, engaged in such business, consistent with the practical operation of the road."

Charges 1 and 2 practically hypothesized the material averments of the complaint, and as there were no special pleas of contributory negligence, etc., there was no error in the giving of the charges.

The evidence was sufficient to support a verdict under either of the counts allowed to go to the jury; hence there was no error in refusing defendant's requested charges which were in effect the general affirmative charge to find for the defendant as to these counts.

We find nothing in this record which would justify us in holding that the trial court erred in refusing the motion for a new trial. As we have said above, there was evidence sufficient to support the verdict; and we are not prepared to say that the verdict was excessive.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

RYAN, County Treasurer, v. COLLINS.
(8 Div. 906.)

(Supreme Court of Alabama. April 13, 1916.)

1. FINES ¶20—DISPOSITION—PAYMENT OF WITNESS FEES.

Under Code 1907, § 6664, declaring that the foreman of the grand jury shall issue certificates to all witnesses examined, to become claims against the fine and forfeiture fund in the same manner as certificates issued to state witnesses by the clerk of the court, a certificate

for a witness fee, signed by the foreman of the grand jury and indorsed by the clerk of the court, showing that the state failed to convict, shows that the owner is entitled to payment by the treasurer; the clerk's indorsement being a compliance with section 6666, requiring him to issue witness certificates.

[Ed. Note.—For other cases, see *Fines, Cent. Dig.* §§ 23, 24; *Dec. Dig.* § 20.]

2. FINES § 20 — DISPOSITION — PAYMENT OF WITNESS FEES.

Code 1907, § 6888, provides that all fines shall go to the county. Persons convicted of misdemeanors and sentenced to work out fines on the public roads paid such fines. By a local improvement act, approved March 11, 1911 (*Acts* 1911, p. 91), all county convicts of Morgan county were required to be worked on public roads of the county, and the commissioners' court was required to see that it was done. The treasurer of the county contended that fines paid by the misdemeanor convicts should be devoted to the public roads. *Held*, that such money became part of the fine and forfeiture fund, and could be devoted to paying fees of state witnesses.

[Ed. Note.—For other cases, see *Fines, Cent. Dig.* §§ 23, 24; *Dec. Dig.* § 20.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Application by F. M. Collins for mandamus to T. R. Ryan, as treasurer of Morgan county, to compel him to pay the amount due on a witness certificate. From a decree granting the writ, the treasurer appeals. Affirmed.

The following is the certificate directed to be set out:

Grand Jury Certificate.

The State of Alabama, Morgan County.

Jim Garth

The State v. Grand Jury. No. 777.

Law and Equity Court, Spring Term, 1912.

Having proved attendance as a witness before the grand jury at said term, one day and for miles traveling to and from court, is entitled therefor to ——— dollars.

2 days at \$1.00 per day, \$2.00

miles, at 5cts., per mile, \$ none.

W. A. Boger, Foreman.

The above and foregoing certificate was certified as a claim or charge against the fine and forfeiture fund by the clerk of the Morgan county law and equity court, and was duly filed by T. R. Ryan, as county treasurer of Morgan county, Ala., as shown by the following indorsements appearing on the back thereof, to wit:

The State of Alabama, Morgan County, Circuit Court.

The state failed to convict in this case.

A. S. Blackwell, Clerk. 1—18—13.

File No. 2964. Filed in my office Feb. 24, 1913.

T. R. Ryan, County Treasurer.

Paid No. ——— F. M. Collins.

Sample & Kilpatrick, of Cullman, for appellant. W. H. Long, Jr., of Decatur, for appellee.

GARDNER, J. By this proceeding petitioner (appellee here) seeks by mandamus to compel appellant, as treasurer of Morgan county, to pay the amount due on a witness certificate issued to one Garth by the foreman of the grand jury of the law and equity court of Morgan county, and which certificate is owned by the petitioner. The certificate, with the indorsement of the clerk of the court thereon, is made an exhibit to the petition and will be set out in the report of the case.

[1] One of the assignments of demurrer takes the point that the petitioner shows no right for an order commanding respondent to pay the amount due, in that no facts are averred to show that it had been properly certified as required by law, so as to require its payment out of the fine and forfeiture fund of the county. The demurrer was overruled.

Section 6664 of the Code of 1907, which is but a codification of the act of December 7, 1896 (*Acts* 1896-97, p. 81), reads as follows:

"The foreman of the grand jury shall issue certificates to all witnesses examined before the grand jury, and such certificates may become claims against the fine and forfeiture fund in the same manner as witness certificates issued to state witnesses by the clerk of the court."

The authorities relied upon by counsel for appellant (*Herr v. Seymour*, 76 Ala. 270); *Alston v. Yerby*, 108 Ala. 480, 18 South. 559; *Scruggs v. State*, 111 Ala. 60, 20 South. 642), were cases arising before the enactment of the above-cited statute. This statute was doubtless enacted to meet these decisions, and we think it quite clear that the certificate of the foreman of the grand jury was in full compliance with said section 6664 of the Code, and the indorsement thereon, as shown by the clerk, was a substantial compliance with section 6666, Code 1907, and that the demurrer was properly overruled.

[2] The next insistence to be considered is one involving the meritorious question on this appeal. The appellant contends that he had, as treasurer of Morgan county, the sum of \$2,000 paid to him by the clerk of the circuit court, which sum was the aggregate of numerous fines imposed against defendants convicted of misdemeanors; that these defendants were sentenced to work out the fines on the public roads of the county; and that after such fines were imposed the defendants, instead of performing said labor and in lieu thereof, paid the fines in money to the clerk. It further appears that by a local act approved March 11, 1911, all the county convicts of Morgan county are required to be worked on the public roads of that county, and the commissioners' court is required to see that this is done. It is therefore the insistence of counsel for appellant that once the hard labor sentence is imposed the convict becomes subject to hard labor for

the county on its public roads, and that, should he discharge this sentence of labor, no payment would be made or passed to the fine and forfeiture fund of the county. It is argued, therefore, that after he has once become subject to work the road, and then pays his fine, the money should go to the benefit of the public roads just as would his labor had the fine not been paid.

We cannot concur in this contention. All fines go to the county. Code 1907, § 6888. It is conceded that, while the fine and forfeiture fund is a county fund, yet the manner of its disposition resides in the Legislature, and the commissioners' court has no control over it. *Sanders v. Court County Com'rs*, 117 Ala. 543, 23 South. 788. The provisions of the Code above cited disclose that the Legislature has prescribed how this fund shall be disbursed. There is nothing in the local act above referred to which in any manner conflicts with any of the general provisions as to this fund.

It results that the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

REED v. HAMMOND. (6 Div. 802.)

(Supreme Court of Alabama. April 20, 1916.)

1. JUDGMENT \Leftrightarrow 151—DEFAULT JUDGMENT—MOTION FOR REHEARING.

A petition for a rehearing, after suffering default judgment on the ground that the finding was contrary to the evidence, and that defendant, having a meritorious defense, was prevented by surprise, accident, or mistake from making it before the court's final findings, but failing to state any facts in support of the prayer for relief, was demurrable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 296-298, 727, 730; Dec. Dig. \Leftrightarrow 151.]

2. JUDGMENT \Leftrightarrow 163—DEFAULT JUDGMENTS—MOTION FOR NEW TRIAL—DISMISSAL.

On such motion, where it did not appear that the petitioner ever offered to amend his petition, it was properly dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. \Leftrightarrow 163.]

3. JUDGMENT \Leftrightarrow 173—DEFAULT—MOTION FOR REHEARING—SETTING ASIDE DENIAL.

A motion to set aside an order denying a rehearing after a default judgment, not accompanied by an offer to amend the petition by sworn statements of the facts showing a good and meritorious defense to the action, was properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 340; Dec. Dig. \Leftrightarrow 173.]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Assumpsit by Bell Hammond against John B. Reed. Default judgment for plaintiff, and

from rulings of the circuit court sustaining a demurrer to the defendant's petition for a rehearing, dismissing the petition, and overruling a motion to set aside the former order and allow an amendment to the petition, defendant appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

The original motion for new trial is based on the following grounds:

(1) The finding of the court contrary to the evidence in the case. (2) That defendant, without fault on his part, and having a meritorious defense to the case, through surprise, accident, or mistake, was prevented from making said defense before the final findings of the court.

Demurrers were interposed to this motion, and were sustained. The motion was filed February 2, 1915, and demurrers sustained and motion dismissed February 13, 1915. On February 25, 1915, the movant appeared, and moved the court to set aside the order made on February 13th, and permit defendant to amend his motion for new trial so as to show, among other things, that before the judgment was entered, the attorney for defendant had died, and that defendant did not become aware of the death of his attorney of record until about the middle of January, 1915, some time after the judgment had been entered against defendant, and, in support of said motion, to permit defendant to file affidavit. This motion was also denied.

Douglas & Ray, of Birmingham, for appellant. A. Leo Oberdorfer, of Birmingham, for appellee.

SOMERVILLE, J. This appeal is from rulings of the circuit court sustaining a demurrer to appellant's petition for a rehearing under section 5372 of the Code, and dismissing the petition, and overruling his motion, made 12 days later, to set aside the former order and allow an amendment to the petition.

[1, 2] The original petition was fatally defective in its failure to state any facts in support of its prayer for relief, and was subject to the demurrer. *Chastain v. Armstrong*, 85 Ala. 215, 3 South. 788. It does not appear that petitioner then offered to amend the petition, and it was properly dismissed.

[3] Conceding, without deciding, that the entertainment of his subsequent motion to set aside that order was not within the discretion of the court, nevertheless it was without merit, because it was not accompanied by an offer to amend the petition in such manner as to correct one of its substantial and fatal defects, viz., by a sworn statement of the facts showing that petitioner had a good and meritorious defense to the action, and that the judgment was therefore inequitable. *Dunklin v. Wilson*, 64 Ala. 162; *Chastain v. Armstrong*, 85 Ala. 215, 3 South. 788; Code, § 5373.

As to the rulings complained of, the trial court does not appear to have been in error, and the judgment appealed from will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

MARTIN v. STATE. (6 Div. 227.)

(Supreme Court of Alabama. Jan. 18, 1916.
Rehearing Denied Feb. 10, 1916.)

1. HOMICIDE — 204 — DYING DECLARATIONS — CONDITION OF DECLARANT.

Statements of the deceased, who survived the shooting about 18 hours, made when he was conscious that he could not recover, to the effect that defendant had shot him, and his statement when he realized that he was near death made in response to a question when defendant was in his presence, that defendant had shot him, were admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 438; Dec. Dig. — 204.]

2. HOMICIDE — 203(1) — DYING DECLARATIONS — SUBJECT-MATTER.

In such case, the substance of the decedent's accusing statement designating defendant as his assailant was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 430; Dec. Dig. — 203(1).]

3. CRIMINAL LAW — 798(1) — INSTRUCTIONS — REASONABLE DOUBT.

In a prosecution for homicide, a requested instruction that if any one of the jury had a reasonable doubt of the guilt of the defendant from the evidence, the jury should give the benefit of the doubt to defendant and not convict was properly refused, as it would impose upon the remainder of the jury the reasonable doubt entertained by only one juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. — 798(1).]

4. CRIMINAL LAW — 789(4) — INSTRUCTIONS — PROPOSITION OF LAW.

In a prosecution for homicide, defendant's requested instruction that the jury must construe every reasonable doubt in his favor was properly refused, as it stated no proposition of law; it not being possible to "construe" a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1847; Dec. Dig. — 789(4).]

5. CRIMINAL LAW — 778(4) — INSTRUCTIONS — PRESUMPTION OF INNOCENCE.

In a prosecution for homicide, defendant's requested charge that the burden of proof was not shifted from the state to him, and that the presumption of innocence continued with defendant until the evidence convinced the jury that he could not be guilty, and that unless that was done they should acquit was faulty in that it was capable of misleading the jury to conclude that defendant could not be convicted, unless the jury was absolutely convinced of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1843, 1960, 1967; Dec. Dig. — 788(4).]

Mayfield and Sayre, JJ., dissenting in part.

Appeal from Criminal Court, Jefferson County; Wm. El. Fort, Judge.

Sam Martin was convicted of murder in the first degree, and he appeals. Affirmed.

The facts sufficiently appear. The following charges were refused to defendant:

(4) The jury must construe every reasonable doubt in favor of defendant.

(8) If any member of the jury have a reasonable doubt of the guilt of defendant from the evidence, the jury will give the benefit of the doubt to defendant, and not return a verdict of guilty.

(11) In this cause the burden of proof is not shifted from the state to defendant, and the presumption of innocence abides with defendant until the evidence in the cause convinces the jury that the defendant cannot be guilty, and unless that is done, you should acquit him.

Frank S. Andress, of Birmingham, for appellant. Hugo L. Black, of Birmingham, for the State.

McCLELLAN, J. The appellant was adjudged guilty of murder in the first degree, and was sentenced to suffer death. The victim was James Little. Little was assassinated when he opened a door in the house of one Garret. The only issue in the case was whether the defendant was the assassin.

[1, 2] Little survived the shot about 18 hours. After ample proof that Little was conscious of his impending dissolution, the prosecution was allowed to show several statements made by Little in which he said the defendant was his assailant. After Little had been taken to a hospital in Birmingham, and at a time when the evidence tended to show that he realized he was near death, the defendant was brought into his presence; and thereupon, in response to a question, designated the defendant as the one who shot him. There was also evidence tending to show that the defendant, in whose actual presence Little thus accused him, made no denial or other statement. The statements attributed to Little in this connection were patently admissible as dying declarations. That the substance of Little's accusing statement, designating the defendant as his assailant, was admissible, is too clear for doubt. *Yarbrough v. State*, 105 Ala. 43, 16 South. 758. There was no error in any of the rulings on the evidence.

[3] Charge numbered 8, requested for the defendant, was correctly refused, since it would have imposed upon the remainder of the jury the acceptance of the reasonable doubt entertained by only one member of the jury. It is a different instruction from those considered in *Hale's Case*, 122 Ala. 85, 26 South. 236, and other of our decisions in that line.

[4] Charge numbered 4 stated no proposition of law. It is not possible to "construe" a reasonable doubt.

[5] Charge numbered 11, requested for the defendant, was faulty, in that it was capable of misleading the jury to the conclusion that the defendant could not be convicted, unless the jury was absolutely convinced of his guilt, and thus inculcating the idea that a higher degree of certainty than that the law in fact requires was exacted to justify a conviction in a criminal case.

Justices MAYFIELD and SAYRE are of the opinion that the charge was faulty in its statement that the burden of proof did not shift from the state to the defendant; it being their opinion that the state discharged its burden, *prima facie*, with respect to proof of malice, when it was shown that the deceased was killed by the use of a deadly weapon.

No error appearing, the judgment must be affirmed.

Affirmed. All the Justices concur.

J. C. WALDEN AUTO CO. v. MIXON. (4 Div. 631.)

(Supreme Court of Alabama. April 20, 1916.)

CHattel MORTGAGES \Leftrightarrow 138(1) — PRIORITY — VEHICLE REPAIRER'S LIEN.

A recorded prior chattel mortgage is superior to a lien for automobile repairs given by the express terms of Code 1907, § 4785, although the repairs were authorized by the owner then and at time of suit in lawful possession of the car, where it does not appear that the mortgagee has expressly or impliedly authorized the repairs.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 223, 229, 231-236; Dec. Dig. \Leftrightarrow 138(1).]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by J. C. Walden, doing business as the J. C. Walden Auto Company, to enforce a lien for repairs upon the automobile of John P. Harrell, with claim interposed by Travis Mixon. Judgment for claimant, and plaintiff appeals. Transferred from the Court of Appeals under section 6, p. 450, Acts 1911. Affirmed.

Martin & Crawford and E. S. Thigpen, all of Dothan, for appellant. Espy & Farmer, of Dothan, for appellee.

THOMAS, J. The suit was to enforce a lien for material used and labor done in the repair of a certain automobile. The claimant, Mixon, appellee on this appeal, rested his right and title on a mortgage given on the car by the owner, and duly recorded, before the repairs were made by plaintiff. The mortgage was due and unpaid at the time of the institution of the suit and the trial. The repairs were authorized by one Harrell, who was then in the lawful possession of the car,

and was in such possession at the time the suit was instituted.

Appellant asserted his lien for such material and labor on the car, and sought its enforcement under sections 4785 et seq. of the Code of 1907. Appellant further cites, as authority for the superiority of his lien for necessary repairs to that of the mortgage on the property. *Broom et al. v. Dale et al.* (Miss.) 67 South. 659, L. R. A. 1915D, 1146; *Reeves & Co. v. Russell et al.*, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

At common law persons had the right to retain goods on which they had bestowed labor, until the reasonable charges therefor were paid. 2 Kent's Comm. 635.

It has been held that at common law a mechanic's lien for repairs under special circumstances may be superior to prior existing liens on the property. In *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. Rep. 719, a case where a physician had executed a chattel mortgage on a buggy used by him in his practice, and thereafter had made repairs on the vehicle, such use by the mortgagor and the fact that the buggy was left in the shops of the carriage company for repairs being known to the mortgagee, the holding was as follows:

"We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so."

Thus are the facts in the *Drummond Carriage Company Case* distinguished from the facts in the case for decision. Here, the mortgagee-claimant did not know that the automobile had been left for repairs, with the appellant, J. C. Walden Auto Company.

In *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615, the improvements were made on an engine belonging to the mortgagor and used in operating a railroad, by the terms of the mortgage left in the possession of the mortgagor, and after the debt became due it was still permitted by the mortgagee to remain in the possession of the mortgagor to be so used. The court held that under such circumstances the necessary implication was that the engine was to be kept in repair and by a machinist, and that such machinist would have a lien for the amount of the repairs. The repairs so made added to the value of the property and were for the benefit of the mortgagee as well as of the mortgagor.

So in the case of *Broom et al. v. Dale et al.*, supra, the automobile was in the possession of the mortgagor, and being used by him, with the knowledge and consent of the mortgagee; and such possession and use contin-

used for a long time. In that case the mortgagee "not only knew and consented to the general use of the automobile, * * * but also had knowledge that in the course of his (mortgagor's) use of the property he was having it repaired and * * * with this knowledge made no objection to the repairs being made; * * * the repairs were such as were necessary to preserve the automobile and keep it in proper condition for its use." From these statements it will be observed that the facts on which the decisions in the Broom and Watts Cases were rested were different from the facts in the case at bar.

The statute, section 4785 of the Code, does not invest such a lien with priority over other liens. It is generally held that such a statutory lien will not take precedence of prior chattel mortgages of which the lien claimant had either actual or constructive notice at the time he performed the services, or contributed the material used, in the production, manufacture, or repair of any vehicle, implement, machine, or article, unless the mortgagee expressly or impliedly authorized the mortgagor to engage the services or material for which the lien is claimed. *Wilson v. Donaldson*, 121 Cal. 8, 53 Pac. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17; *Rourke v. Bergevin*, 4 Idaho, 742, 44 Pac. 645; *Easter v. Goynes*, 51 Ark. 222, 11 S. W. 212; *Sims v. Bradford*, 12 Lea (Tenn.) 434; *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115; *Owen v. Burlington, C. R. & N. R. Co.*, 11 S. D. 153, 76 N. W. 302, 74 Am. St. Rep. 786; *Allen v. Becket* (Sup.) 84 N. Y. Supp. 1007; *Baumann v. Jefferson*, 4 Misc. Rep. 147, 23 N. Y. Supp. 685; *Jones, Chat. Mortg.* § 472.

It has been declared by our court that, under section 4810 of the Code, a statutory lien on a mare for the services of a stallion is not superior to a prior chattel mortgage on the mare, duly recorded so as to charge third parties with notice thereof, where the mortgagee has in no way authorized the mortgagor to place the animal, under a superior lien. *Mayfield v. Spiva*, 100 Ala. 223, 14 South. 47. So, of section 4806 of the Code, which declares the lien of the livery stable keeper or other person feeding and caring for live stock for pay. *Chapman v. First National Bank*, 98 Ala. 523, 13 South. 764, 22 L. R. A. 78.

Chapter 107 of the Code of 1907 provides a system of liens and for the enforcement thereof. Of this system are sections 4785, 4806, and 4810. No good reason exists why these respective statutes should not be construed to the consistent general result that no right of a superior lienholder shall be subordinated to another lien, except a tax lien, without the express or implied authority of such superior lienholder. This harmonious construction is more consonant with the reason and policy of our statutes for the creation, preservation, and enforcement of the

many different liens dealt with in chapter 107 of the Code.

The affirmative charge was properly given for the claimant in the court below, appellee here, and the cause is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

HEADLEY v. HARRIS. (2 Div. 593.)

(Supreme Court of Alabama. April 20, 1916.)

1. TRIAL §110—EXAMINATION OF WITNESSES—EXCLAMATION OF COUNSEL.

The exclamation of plaintiff's counsel while one of defendant's chief witnesses was being examined and immediately following his denial of a fact which seemed to have been overwhelmingly established by the other witness, "Look out now! Hold on! Watch how you testify! Somebody may be indicted for perjury!" was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. §110.]

2. APPEAL AND ERROR §1000(2)—HARMLESS ERROR—EXCLAMATION OF COUNSEL.

Such improper exclamation was not prejudicial, where the witness' testimony was in no wise affected thereby, but he retracted nothing and pointedly supported every fact relied upon by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. §1000(2).]

3. APPEAL AND ERROR §242(1) — ASSIGNMENTS OF ERROR—RULING OF COURT.

An objection to the remarks of opposing counsel, which invoked no ruling of the court, afforded no basis for an assignment of error with respect thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417, 1424, 1425; Dec. Dig. §242(1).]

Appeal from Law and Equity Court, Hale County; Charles E. Waller, Judge.

Statutory detinue by O. W. Harris against J. A. Headley. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 450. Affirmed.

J. T. Denson, of Eutaw, for appellant. Thomas E. Knight, of Greensboro, for appellee.

SOMERVILLE, J. A careful review of the evidence in this case leads to the conclusion that the findings and judgment of the trial court, sitting without a jury, are well founded, and ought to be affirmed.

[1, 2] While one of the defendant's chief witnesses was being examined by counsel, and immediately following his statement in denial of a fact which seems to have been overwhelmingly established by the other witnesses, counsel for plaintiff exclaimed:

"Look out now! Hold on! Watch how you testify! Somebody may be indicted for perjury!"

The bill of exceptions recites that:

"Defendant's counsel objected to the remarks of the attorney for plaintiff, and the court directed plaintiff's counsel to come to order, and then directed defendant's attorney to proceed with the examination of the witness."

The interjection of this remark by counsel was not proper, and it may be, as argued for appellant, that it might ordinarily be suspected of prejudicial results, especially in view of the fact that plaintiff's counsel is the prosecuting officer of the court, and would have peculiar facilities for securing the suggested indictment. However, an inspection of this witness' testimony shows that it was in no wise affected by the objectionable statement, since he retracted nothing, and pointedly supported every contention of fact relied upon by defendant, who was his brother.

[3] Moreover, the objection, as interposed, invoked no ruling of the court, and there is no basis for an assignment of error with respect thereto. *B. R., L. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543.

Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

DABBS v. DABBS. (6 Div. 175.)

(Supreme Court of Alabama. April 6, 1916.)

1. DIVORCE \S 37(16)—VOLUNTARY ABANDONMENT—STATUTE.

Under Code 1907, \S 8793, subd. 3, making voluntary abandonment a ground for divorce, a separation compelled by the husband, after which the wife reared several minor children, would not be a "voluntary" abandonment; and the fact that many years after he had compelled her departure complainant went to the house established by the wife, and there remained with her about a month, and then left without any reason given by her, such association with his wife did not exonerate him from the consequences of his previous conduct, and so re-establish their relations as to render her culpable in any degree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 123; Dec. Dig. \S 37(16).]

2. DIVORCE \S 37(16)—"ABANDONMENT."

A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him, as by going away from their former residence and leaving her there, and not permitting her to live with him.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 123; Dec. Dig. \S 37(16).]

For other definitions, see Words and Phrases, First and Second Series, Abandonment.]

3. DIVORCE \S 186 — DISPOSITION — CROSS-BILLS.

On a husband's bill for divorce on the ground of the wife's voluntary abandonment, where a decree for the husband was reversed for failure to prove the ground alleged, the dismissal of the original bill did not strike down the wife's cross-bill, seeking permanent alimony upon the contingency that the divorce should be granted, but the cause will be remanded, to enable the cross-complainant, who had been

granted, in view of the decree for husband, the prayer of her bill, with a reference to ascertain the amount to be allowed for alimony and a reasonable solicitor's fee, to amend and to proceed as she might be advised.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 574; Dec. Dig. \S 186.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Bill for divorce by W. H. Dabbs against Elizabeth Dabbs, with cross-bill by defendant, seeking permanent alimony if the divorce should be granted. Decree for complainant, and defendant appeals. Decree reversed, and a decree rendered, dismissing the bill, and cause remanded on the cross-bill.

Estes, Jones & Welch, of Bessemer, for appellant. Pinkney Scott, of Bessemer, for appellee.

MCCLELLAN, J. [1] Bill by the husband for divorce; the single ground assigned being the wife's "voluntary abandonment" of the husband's "bed and board." The overwhelming weight of the evidence disproves the ground upon which the complainant rests his prayer for a dissolution of the marriage bonds. The conclusion is unescapable that the complainant compelled the wife's departure from his domicile, a departure that included her taking with her the several minor children of the union, and resulted in her unaided rearing of them. Obviously a separation thus enforced by the husband could not be a "voluntary" abandonment within the purview of subdivision 3, \S 8793, of the Code.

[2] The complainant went to the place of residence established by the wife, many years after he had compelled her departure from his domicile, and there remained with her about 32 days, and upon the expiration of that period the complainant left the wife's dwelling. From the evidence there can be no doubt that complainant left her dwelling without any reason or excuse therefor, afforded by her conduct, and in the heat of a temper and ill will towards her that had characterized their association before he compelled her departure from his domicile. According to the evidence here presented, it cannot be soundly ruled that his reassociation with his wife, after many years of separation, alone attributable to his very reprehensible treatment of her and of the children of the union—years devoted by her to the unassisted rearing of several of their children—served to exonerate him from the consequences of his previous conduct that compelled her departure from his domicile, and to so re-establish their relation as to render her culpable in any degree, or to justify any suggestion that his leaving her dwelling was or could be the basis of a charge that she then voluntarily abandoned him.

"A husband may as effectually abandon his wife by putting her away from him and deny-

ing her the privilege of dwelling with him as by going off himself from their former residence, leaving her there, and not permitting her to live with him." *Jones v. Jones*, 95 Ala. 443, 451, 11 South. 11, 13 (18 L. R. A. 95).

The decree, in so far as it dissolves the bonds of matrimony, as prayed in complainant's bill, is reversed, and a decree will be here rendered dismissing his bill.

[3] The cross-bill of the respondent (appellant) sought permanent alimony upon the contingency that the bonds of matrimony should be dissolved as prayed in complainant's bill. The court, following the awarding of the relief sought by complainant's bill, granted the stated prayer of the cross-bill, and ordered a reference to the register to ascertain a reasonable sum to be allowed for permanent alimony, as well as to ascertain the amount of a reasonable solicitor's fee for obtaining such alimony as might be awarded. Since alimony may be awarded even though no dissolution of the marital bonds is effected (*Glover v. Glover*, 16 Ala. 440; *Downey v. Downey*, 98 Ala. 373, 13 South. 412, 21 L. R. A. 677), and since the evidence here presents a clear case for the exaction of a reasonable contribution by the complainant (respondent in the cross-bill) to the support of his wife, who, after bearing him 10 children and without his aid rearing several of them, is now well past middle age, we have determined to remand the cause, that the cross-complainant may amend her cross-bill and proceed in the premises as she may be advised; the dismissal of the original bill not operating to strike down the cross-bill, which possessed an independent basis for relief.

The decree is reversed and rendered in part, and the cause is remanded. The cost of the appeal will be taxed against the appellee.

Reversed, rendered, and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

WALKER, State Superintendent of Banks, v. MUTUAL ALLIANCE TRUST CO.

(4 Div. 614.)

(Supreme Court of Alabama. April 20, 1916.)

1. PLEADING \S 214(1) — DEMURRER — ADMIS-
SIONS.

Facts stated in a petition must be treated as true on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 525, 529; Dec. Dig. \S 214(1).]

2. BANKS AND BANKING \S 77(4)—ADMINIS-
TRATION BY SUPERINTENDENT OF BANKS —
RIGHT OF CREDITOR.

Where a bank, unable to meet its engagements promptly, if not actually insolvent, was taken charge of by the chancery court of the county, by and through the agency of the state superintendent of banks vested by statute with powers and duties to such end, and the superintendent, as agent or quasi trustee or receiver,

settled an indebtedness to the bank by accepting the debtor's conveyance of a lot of land, and such settlement was ratified by the court, the court, on petition of a creditor of the bank secured by notes and mortgages held by the bank against its debtor, might protect the interests of all the parties by enforcing the creditor's lien at least to the amount of the debt for which it held the collateral and which the bank owed it, or to its aliquot part thereof, among other creditors having a lien, as the law would imply a promise and a duty to so account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 173, 174; Dec. Dig. \S 77(4).]

3. BANKS AND BANKING \S 77(4)—ADMINIS-
TRATION BY SUPERINTENDENT OF BANKS —
COLLECTION OF ASSETS — RATIFICATION BY
CREDITOR.

Such proceeding on the part of the creditor was a ratification of the superintendent's settlement of the bank's debtor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 173, 174; Dec. Dig. \S 77(4).]

4. BANKS AND BANKING \S 77(6). — ADMINIS-
TRATION BY SUPERINTENDENT OF BANKS —
CLAIM OF CREDITOR—VENUE—STATUTE.

Under Acts 1911, p. 83, relating to the state banking department, such proceeding might be maintained against the superintendent in his representative capacity in the county where he was administering the trust, and in the same court in which he was acting as quasi receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 176; Dec. Dig. \S 77(6).]

5. BANKS AND BANKING \S 77(3) — ADMINIS-
TRATION BY STATE SUPERINTENDENT OF
BANKS—COMPROMISE OF DEBT—VALIDITY—
ESTOPPEL.

In such proceeding the receiver, having acted in the matter of compromising the debt to the bank, and his action having been approved by the court and the parties in interest, could not set up the invalidity of his acts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 171, 172; Dec. Dig. \S 77(3).]

Appeal from Chancery Court, Geneva County; W. R. Chapman, Chancellor.

Petition by the Mutual Alliance Trust Company to be made a party to proceedings by A. E. Walker, as superintendent of banks of Alabama in control of the business of the Bank of Geneva, and for the enforcement of a lien on property received in settlement of an indebtedness to the bank. Decree overruling the demurrer, and the superintendent appeals. Affirmed.

W. O. Mulkey, of Geneva, for appellant.
C. D. Carmichael, of Geneva, for appellee.

MAYFIELD, J. The Bank of Geneva is an Alabama corporation, engaged in the banking business at Geneva, Ala. In time it became heavily indebted, and not able to meet its engagements and duties promptly, if not actually insolvent. Its business was, on this account, taken charge and control of by the chancery court of Geneva county, by and through the agency of appellant, who is the superintendent of banks of Alabama, and upon whom is conferred powers and imposed duties to this end, by virtue of a statute. Appellee was among the large creditors of

this bank, the bank securing its indebtedness to appellee by depositing with it notes and mortgages which the bank held against its (the bank's) debtors, including those evidencing a debt owing it by K. M. Clark and McDuffie & Clark. Appellant, in his official capacity, and as agent or quasi trustee or receiver of the court, compromised or settled the indebtedness due the Bank of Geneva from K. M. Clark; and in consideration therefor, and in satisfaction of the indebtedness due the bank, accepted a conveyance of a lot of land from the debtors to the creditor, or to appellant in his representative capacity. This settlement, whether expressly authorized by the court or the law, was ratified by the court; and on the filing of this bill or petition it was ratified by all who had a right to complain. The appellee bank filed a petition in the chancery court of Geneva county, which was administering the trust, asking that the appellant, as superintendent of banks of Alabama and as quasi trustee or receiver of the funds or business of the Bank of Geneva, be made a party to the proceeding, and that the chancery court assume jurisdiction of the petition and declare and enforce a lien in favor of petitioner upon certain property received from McDuffie & Clark, or the Clarks, in settlement of debts due to the Bank of Geneva, upon the strength of the notes held as collateral to secure the debt which the Bank of Geneva owed petitioner. Appellant demurred to the petition or bill, assigning various grounds, including a want of equity in the proceedings. The chancellor overruled appellant's demurrer, and from the decree appellant prosecutes this appeal.

[1-3] The petition or bill, whatever it may be called, seems to us on its face to contain much equity, and asks that nothing be done which is not equitable. Moreover, we know of no law, statutory, common, or other, that stands in the way of a court of equity's assuming jurisdiction and affording relief, if the facts stated in the petition are true—and on demurrer, of course, they must be treated as true. The chancery court of Geneva county is shown to be administering the trust, and appellant and his agents are agencies of the court and the law, in the nature of trustees or receivers for the court; and the funds, including the lands in question acquired from the debtors of the bank, are for the benefit of the creditors of the bank; and if one of the debts so settled by the conveyance of lands was the debt which appellee held the collateral to secure, it is entitled to a lien, at least to the amount of the debt for which it held the collateral and which the Bank of Geneva owed it, or certainly to its allquot part thereof, among other creditors having a lien, if such there be.

There is no attempt, so far, to hold appellant liable personally or officially, except in so far as he is a quasi trustee or receiver of the funds of the Bank of Geneva, the affairs of which are being administered in the chan-

cery court of Geneva county. The court can surely protect the interests of all parties concerned, and no injustice or wrong will be done any person or corporation. 34 Cyc. 420, 507.

It is insisted by appellant that he, as bank superintendent, had no knowledge or notice of appellee's claim when he made the settlement with McDuffie & Clark, or the Clarks, and acquired the lands in settlement of the debts which they owed the Bank of Geneva. We are not prepared to say that notice to him of appellee's claim or right was necessary to the relief prayed; but, if so, the petition in terms alleges that he did have such notice, and this hearing is on demurrer.

It is also claimed by appellant that the settlement was not made for the benefit of appellee, and that no promise was made to account to appellee. If the facts alleged are true, it required no express promise; the law would imply a promise, and impose a duty, to so account.

It is also insisted that appellee did not authorize the settlement, and has not ratified it. The answer to this contention is that this proceeding on the part of the appellee is a ratification thereof.

If the land had been converted into money, our authorities hold that appellee might maintain assumpsit under the facts set forth in the petition. See *Potts & Potts v. Bank*, 102 Ala. 286, 288, 14 South. 663, which collects the authorities. As the lands are not yet converted into money, and the trust is yet being administered by the chancery court, that court, of course, has jurisdiction to give full and adequate relief. *Henry v. Henry*, 103 Ala. 595, 15 South. 916.

[4] There can be no doubt about the right to maintain this proceeding against appellant, in his representative capacity, in Geneva county, where he is administering the trust and in the same court in which he is acting as quasi receiver. *Acts 1911, p. 83; Henry v. Henry, supra.*

What was said in several recent cases by this court is applicable here. Appellant is only proceeded against as a quasi trustee or receiver of the court administering the trust estate, and there is no question that his activities can be controlled within proper bounds by the court, nor that with the court's consent he may be proceeded against. *Coffey v. Gay*, 67 South. 681, L. R. A. 1915D, 802; *Cobbs v. Vizard Co.*, 182 Ala. 372, 62 South. 730, Ann. Cas. 1915D, 801.

[5] The receiver having acted in the matter, and his action being approved by the court and the parties interested, he cannot now set up the invalidity of his acts. 34 Cyc. 411.

It follows that the decree appealed from will be affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

STATE ex rel. MIMS v. BUGG et al.
(1 Div. 934.)

(Supreme Court of Alabama. April 21, 1916.)

1. STATUTES \S 125(1) — VALIDITY — SUBJECT AND TITLE OF ACTS — COMPREHENSIVE TITLE. Gen. Acts 1915, p. 348, entitled "an act to abolish the office of county treasurer," is not invalid under Const. 1901, \S 45, which requires that each law shall contain but one subject, which shall clearly be expressed in its title; for, though the act does not abolish all county treasurers, its purpose of abolishing some of them is embraced within the comprehensive title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 189; Dec. Dig. \S 125(1).]

On Rehearing.

2. COUNTIES \S 61 — OFFICERS — CREATION OF OFFICES — STATUTE — CONSTRUCTION.

Gen. Acts 1915, p. 348, abolishes the office of county treasurer in all counties of a population of 50,000 or less, and does not merely suspend the existence of the office of such counties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 86; Dec. Dig. \S 61.]

3. STATUTES \S 93(3) — SPECIAL LEGISLATION — CLASSIFICATION OF COUNTIES.

Population is a valid basis for a classification made in good faith upon which to base a separation of counties in which there shall be a county treasurer from those in which the office is abolished.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 102; Dec. Dig. \S 93(3).]

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Mandamus by the State, on relation of D. D. Mims, against L. J. Bugg, as Chairman of the Democratic Executive Committee of Monroe County and others. From an order denying the writ, plaintiff appeals. Affirmed.

Gregory L. Smith & Son, of Mobile, for appellant. Barnett & Bugg, of Monroeville, for appellees.

MCCLELLAN, J. This is an application for a writ of mandamus to be addressed to the chairman of the Democratic executive committee of Monroe county and to the judge of probate of said county requiring them to receive and file relator's declaration that he is a candidate for nomination at the Democratic primary election to be held on May 9, 1916, to the office of county treasurer of Monroe county. The judge of the law and equity court of Monroe county, to whom the petition was addressed, denied the writs prayed for, and this appeal results. The single question presented for review is whether the title of the act approved September 15, 1915 (General Acts 1915, p. 348), is sufficient under section 45 of the Constitution, which, as here important, provides that:

"Each law shall contain but one subject, which shall be clearly expressed in its title."

The title of the act is as follows:

"To abolish the office of the county treasurer, and to require that the county funds to be deposited in such incorporated national or state bank in the several counties, as the board of

revenue or court of county commissioners may elect, and to provide for the custody of such funds, and to require all acts required of the treasurer to be performed by the president of the board of revenue or county commissioners."

The act's application is restricted to those counties of the state of Alabama having a population of 50,000 or less according to the last federal census or any subsequent federal census.

[1] Since the title of the act manifestly expresses the legislative purpose to abolish the office of county treasurer, the point of the appellant's criticism of this act is, in substance, this: That the title manifests a purpose to abolish the office of county treasurer throughout the state; whereas the body of the act effects that purpose in only a part of the counties of the state. The effect of this contention is to say that the title is broader than the act. In these circumstances the point taken is ruled against the appellant by the case of Griffin v. Drennen, 145 Ala. 128, 40 South. 1016, a decision that has been subsequently accepted as authority on this point in Sheffield Oil Co. v. Pool, 169 Ala. 420, 53 South. 1027. It was said in the first-cited case, quoting from an early decision:

"When the subject may be comprehended in the title, the act should be upheld."

The subject of this act is the abolition of the office of county treasurer; and the title is not misleading because of partial (upon classification) application to counties in the state. That the act in its body does not abolish that office in every county in Alabama does not subtract from the comprehensiveness of the title, which undoubtedly includes the subject with which the act undertakes to deal. The writs prayed for were correctly denied below; Monroe county not having the requisite population to exclude it from the operation of the act.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

On Rehearing.

MCCLELLAN, J. [2, 3] If the act under consideration did not affect the abolition in January, 1917, of the office of county treasurer in all counties of the state which now have, or hereafter may have, populations of 50,000 or less, there would be basis for the contention that the act only operates to suspend the existence of the office of county treasurer in a county or counties having a population of 50,000 or less. Since the act, as noted in the title, expressly abolishes the office in all counties within the population class therein defined, the premise for the contention indicated is not present. The first section of the act provides "that the office of county treasurer is hereby abolished." The last section of the act provides, after a gen-

eral repealing clause, that it shall not apply to counties having a population of 50,000 or more according to the present or the future Federal census. The two provisions of the act, when read in appropriate, necessary relation, establish this as the legislative intent: That the office is abolished (in January, 1917) in all counties having a population of 50,000 or less. The act cannot be read to any other effect. Population is a valid basis for a classification made in good faith. If, perchance, a county's population now below should hereafter increase above 50,000, according to the federal census, a question of what law should have application there-to may arise; but that question would not be of a constitutional nature.

The application for rehearing is denied.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

GILLILAND v. ARMSTRONG. (8 Div. 902.) (Supreme Court of Alabama. April 13, 1916.)

1. PROPERTY §9 — POSSESSION — PRESUMPTION OF OWNERSHIP.

The possession of real property raises a presumption of ownership.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. §9; Evidence, Cent. Dig. § 178.]

2. EVIDENCE §591 — CONCLUSIVENESS ON PARTY.

In a statutory action in the nature of ejectment, where it appeared that defendant held possession under a default judgment in a previous action against plaintiff, the plaintiff, by the introduction of a decree of the probate court authorizing a sale of the property by the tax collector drawn in Code form and reciting that notice of the proceeding had been duly given, for the purpose of showing that defendant claimed under a tax title and in anticipation of a defense thereunder, was not divested of the right to show that, with respect to the recited notice, the decree was without the court's jurisdiction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440-2443; Dec. Dig. §591.]

3. TAXATION §658(3) — SALE — NOTICE — STATUTE.

Under Code 1907, § 2272, providing that notice of the proceeding to sell land for delinquent taxes must be served by the collector by handing a copy thereof to the party to whom it is addressed, or by leaving a copy thereof at his residence or place of business, and must be indorsed to show service or the reason for failure to serve, and that, if the party assessed has died, the notice must be served on a personal representative, if a resident of the county, the record, directing a sale of the property of Georgia Armstrong, while importing notice to her, in view of her death before the decree was rendered, did not import notice to her personal representative.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1335; Dec. Dig. §658(3).]

4. TAXATION §639 — TAX SALE — JURISDICTION OF PROBATE COURT.

The power of the probate court in proceedings for the sale of property for delinquent taxes is limited and statutory, and to sustain its judgment the record, in the absence of other proof of the regularity of the proceedings that went

before, should show the facts essential to its jurisdiction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1302; Dec. Dig. §639.]

5. TAXATION §662 — SALE — LOST NOTICE — PROOF.

Where a notice of a tax sale to the person assessed or his personal representative has been lost or mislaid, it is competent to prove its contents.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1342; Dec. Dig. §662.]

6. TAXATION §788(5) — SALE — DEED AS EVIDENCE.

Under Code 1907, § 2297, the probate judge's deed in a tax sale is only "prima facie evidence of the regularity of all proceedings subsequent to the judgment recited therein," and does not cure defects in the record of the judgment and its necessary antecedent proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1561; Dec. Dig. §788(5).]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Statutory ejectment by William Armstrong against J. A. Gilliland. Judgment for plaintiff, and defendant appeals. Affirmed.

Sample & Kilpatrick, of Cullman, for appellant. H. V. Cashin, of Decatur, for appellee.

SAYRE, J. [1, 2] Statutory action in the nature of ejectment. The property in suit was assessed to Georgia Armstrong for taxation in the year 1910. She was then in possession, and there is no evidence to contradict the presumption of ownership thus raised. In November, 1910, she died leaving plaintiff (appellee), her husband, but no children. Plaintiff proved these facts and offered in evidence a decree of the probate court rendered at the May term, 1911, authorizing and directing a sale of the property by the tax collector, under the caption "Geo. C. Hardwick, Tax Collector, v. Armstrong, Georgia, colored." This decree was in Code form, and contained a recital that notice of the proceeding had been given as required by law. It seems that plaintiff offered the tax proceeding, as far as he went, for the purpose of showing that defendant claimed under a tax title and in anticipation of a defense under that title. In the further course of plaintiff's examination as a witness it appeared that defendant held possession under a default judgment that had been recovered by Gilliland March 23, 1914, in a previous action brought by him against plaintiff here and his tenants. By introducing this decree evidently plaintiff did not intend to conclude his own title, nor did he thereby divest himself of the right to show that, in respect of the recited notice, the decree was without the jurisdiction of the court, as in fact it was under plaintiff's uncontradicted testimony, unless its recital of notice was as matter of law conclusive against his testimony.

[3-6] Our opinion is that in the circumstances of the present case it was not evi-

dence of notice according to law, though doubtless it would have been had the decree been rendered in the lifetime of Georgia Armstrong, against whom it purported to be rendered. *Driggers v. Cassady*, 71 Ala. 529. Section 2272 of the Code provides that notice of a proceeding for the sale of land for delinquent taxes—

"must be served by the tax collector, or his deputy, by handing a copy thereof to the party to whom it is addressed, or his agent, or by leaving a copy thereof at the residence or place of business of such party, or his agent; and, with his endorsement thereon, showing how and when served, or if not served, showing his reasons for not serving the same; it must be by the collector, or his deputy, returned into court on or before the first day of the next term thereof. If the party against whom such assessment was made has since died, and letters testamentary or of administration have been granted upon his estate, such notice must, in like manner, be served on his personal representative, if a resident of the county."

Plaintiff resided in the county, and had taken out letters of administration on the estate of his wife. The tax collector's return on the notice was not offered in evidence. It will be observed that the presumption of notice arises, not by virtue of the statute, but from the recital of the decree. Underlying the entire proceeding was the fact that the power of the probate court in proceedings for the sale of property for taxes was limited and statutory, and on familiar principle, to sustain its judgment, the record, in the absence of other proof of the regularity of the proceedings that went before, should have shown the facts essential to the exercise of its jurisdiction. *Carlisle v. Watts*, 78 Ala. 486; *Johnson v. Harper*, 107 Ala. 706, 18 South. 198. The record had its beginning in the tax collector's book. Assuming that "Geo." in the advertisement of sale may be allowed to stand for "Georgia," the name of the owner to whom the property was assessed, though we are not at all satisfied with the propriety of the assumption, the record showed a proceeding from beginning to end against Georgia Armstrong. The decree must be read with reference to the rest of the record. So read, it imports notice to Georgia Armstrong. But it cannot be sustained as a decree against her, for the very good reason that she died months before the decree was rendered. When she died the liability for taxes shifted along with the descent of the property to her heir or personal representative. To meet this situation the statute provides that notice must be served on the owner's personal representative, if a resident of the county, as was the case here, and so it follows a new element might have been introduced and a new meaning given to the decree by proof of the original of a notice to plaintiff as the personal representative of deceased, or, if such notice had been lost or mislaid, it would have been competent to prove its contents. *McGee v. Fleming*, 82 Ala. 276, 3 South. 1.

[8] As for the probate judge's deed, introduced by defendant, it was only "prima facie evidence of the regularity of all proceedings subsequent to the judgment recited therein." Code, § 2297. It did not cure defects in the record of the judgment and its necessary antecedent proceedings. In the presence of the undisputed proof of Georgia Armstrong's death prior to the decree, and in the absence of record evidence showing service of notice on plaintiff as administrator of her estate or a recital of notice in that particular form, it did not appear that the court had jurisdiction to render a decree binding upon plaintiff, and he was entitled to judgment without regard to the ruling which excluded the deed.

Affirmed.

ANDERSON, C. J., and MCOLELLAN and GARDNER, JJ., concur.

SOUTHERN RY. CO. v. FRICKS. (8 Div. 846.)

(Supreme Court of Alabama. April 20, 1916.)

1. RAILROADS \S 394(6) — INJURIES TO PERSONS ON TRACKS—COMPLAINT — CONSTRUCTION.

In an action for the death of one run down by train on a side track, the complaint, alleging that the place where deceased was run over and killed was one where people traveling along the track were wont to pass in great numbers, which was known by the agents and servants of the defendant, who knew that plaintiff's intestate was going to be in such place, and that defendant's servants willfully, wantonly, and intentionally backed a car on the side track at a high and dangerous speed, without giving any warning, running over and killing plaintiff's intestate, charged wantonness, and defendant could not have been misled into believing that simple negligence was charged.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1338; Dec. Dig. \S 394(6).]

2. NEGLIGENCE \S 100 — TRIAL \S 251(8) — COMPARATIVE NEGLIGENCE—APPLICABILITY OF INSTRUCTIONS.

Where the complaint charged wantonness, contributory negligence is no defense, and charges on that issue should be refused.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 85; Dec. Dig. \S 100; Trial, Cent. Dig. § 593; Dec. Dig. \S 251(8).]

3. EVIDENCE \S 123(11)—WITNESSES \S 389—IMPEACHMENT—RIGHT TO IMPEACH.

In an action for the running down of plaintiff's intestate, the engineer in charge of the train cannot be impeached by proof that shortly after the accident he stated that deceased ought to have been killed, as he should not have been on the track, for the statement was not part of the *res gestæ*, and so was not admissible as against the railroad company, and, though the engineer denied making it, it could not be received.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 365; Dec. Dig. \S 123(11); Witnesses, Cent. Dig. §§ 1243-1245; Dec. Dig. \S 389.]

4. EVIDENCE \S 123(11) — ADMISSIONS BY AGENT—RES GESTÆ.

An agent cannot bind his principal by admission relating to bygone transactions, therefore statements made by those in charge of the train which ran down plaintiff's intestate, some time after the accident, are inadmissible as admissions not being part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 365; Dec. Dig. \S 123(11).]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Mrs. Mary Fricks, administratrix, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Lawrence E. Brown, of Scottsboro, for appellant. Milo Moody, of Scottsboro, and S. L. Sinnott, of Birmingham, for appellee.

MAYFIELD, J. This is an action under the homicide statute, to recover damages of the defendant for the wrongful death of appellee's intestate. The intestate was killed by one of the appellant's freight trains in the town of Scottsboro, Ala. The train which killed him was backing on a side track, for the purpose of leaving a tank of oil which was consigned to that station. Intestate was the agent of the oil company, the consignee of the tank of oil being delivered by the railroad, and was on the track for the purpose of designating the point on the side track at which the tank should be left, so that the oil could be stored in the tanks of the consignee. It was a disputed question, made so by both the pleading and the proof, whether he was thus on the side track with the knowledge, consent, or request of the railroad company. This fact, of course, is an element to be considered in determining the duty which the defendant owed the intestate, and whether the handling and movement of the train on the occasion in question was negligent or wanton. It was also made a disputed question by the pleading and the proof whether the side track of the railroad at the place of the injury was so used by the public, by such numbers and with such frequency, as to impose on the defendant the duty of keeping a lookout for trespassers on the track at the point of the collision with intestate. This fact of frequent use, by great numbers of pedestrians, of parts of railroad tracks in populous districts, is an element which may enter into the question whether the handling and movement of trains at such used points is negligent or wanton; and this, even though the persons so using the track may be trespassers.

[1] The case was tried on one count only, which was intended by the pleader, and treated by the trial court, to state a case of wantonness or willful injury. It was demurred to by the defendant, and a great number of grounds were assigned. Those chiefly

insisted upon are to the effect that the count was treated and intended as a count for wantonness or willful injury, yet the facts alleged showed at best only simple negligence. The count is not as certain in this respect as it could be made; but we deem it reasonably certain in stating a cause of action as for wanton or willful injury. It alleges the facts that the intestate was on the track with the knowledge and consent of the defendant's agents, and that with such knowledge of intestate's danger and peril they did the acts alleged, in a wanton or willful manner, which proximately resulted in the injuries complained of. It contains, among others, the following allegations of fact, and conclusions:

"The plaintiff alleges that at the time and place where her intestate was so run over and killed was a place of great frequency of travel by the public where people traveling along said track were wont to be passing in great numbers, known by the agents and servants of the defendant, and, knowing that plaintiff's intestate was going to be at such place to show said servants where to place said oil car, willfully, wantonly, or intentionally backed a car or train of cars back in on said side track at a high and dangerous rate of speed, without giving any warning by ringing the bell or blowing the whistle or other signal of intention to back in on said side track, and, without having any one at said point or on the rear of the train as it came back to give warning of its approach, ran against or over plaintiff's intestate and killed him, as a proximate consequence of said wantonness of said servants and agents of defendant."

[2] This we hold to be sufficient, under our liberal rules of pleading, to charge wantonness; and, there being no attempt to charge simple negligence, the defendant could not be, and was not, misled as to its defenses to such count. The pleas of contributory negligence were therefore not availing or appropriate to this count; and, as it was the sole count on which trial was had, the court properly refused to instruct the jury as to the doctrine of contributory negligence.

Other charges were properly refused to the defendant, because they were calculated to mislead the jury as to whether or not contributory negligence would be availing as a defense.

The propositions of law announced above in this opinion have been so frequently reaffirmed that it is both useless and a waste of time and space to cite the decisions.

[3] The case must be reversed, however, because of rulings adverse to the defendant in allowing the plaintiff, over the defendant's protest, to prove the declarations of the engineer, made some time after the injury, which declarations were not a part of the res gestæ, and were therefore not admissible against his principal, this defendant. One of the recitals of the bill of exceptions as to such rulings is as follows:

"Nute Bell, witness for the plaintiff, testified on rebuttal as follows: 'Just after the occurrence I detailed on the stand this morning, when this man was run over, I saw the engineer of

the train. He was going back down to the train, going back down to the engine. He was just passing me talking to the railroad men.' Plaintiff's counsel then asked the witness this question: 'Did he make this remark on the occasion that day: "Damn him! he ought to have been run over; he ought not to have been on the track."?' Defendant's counsel objected to the question, on the ground that it was immaterial, irrelevant, incompetent, and illegal and hearsay evidence, and not a part of the *res gestæ*, and not asked according to the predicate laid. The court overruled the objection, and defendant's counsel duly excepted. The witness answered: 'Yes, sir, I heard him say "Damn him! he ought to have been killed; he ought not to have been on the track."'

The predicate laid for this evidence was as follows:

"The plaintiff's attorney then asked the witness (engineer) this question: 'After that man was run down and after you got on your engine a few minutes afterwards, didn't you say to some brakeman on your train, and in the hearing of Nute Bell, make the remark that "Damn him! he ought to have been killed; he ought not to have been on the track"?' Defendant's counsel objected to the question for the reason that not sufficient predicate had been laid; that it called for immaterial testimony, and was an attempt to prove the remark of the engineer and not a part of the *res gestæ*. The court overruled the objection, and the defendant's counsel duly excepted to the ruling of the court. Witness answered, 'No, sir; I did not make that remark.' The defendant's counsel moved to exclude the answer on the same ground assigned to the question. The court overruled the motion, and permitted the answer in evidence, and the defendant's counsel duly excepted."

[4] The trial court probably allowed this evidence on the theory that it was competent to impeach or discredit the witness of the defendant, by showing contradictory statements. This theory fails, however, for the reason that if the witness had in fact declared on the time and occasion inquired about, what the plaintiff's witness says he did, it would not be admissible or competent against his principal, this defendant. If the witness had been on trial, and his animus or feeling toward the deceased, living or dead, had been the subject of inquiry, his declarations as to such matters might be admissible. The rule in such cases was stated by this court in the case of *Smith v. State*, 183 Ala. 10, 62 South. 864. The distinction is that the declarant is not here on trial, and that the defendant is not responsible for, and cannot control, his words or actions, except as and when he is in the discharge of his duties, and when they form a part of the *res gestæ*. The rule in cases like the one before us is probably best stated in *Hawk's Case*, 72 Ala. 112, 47 Am. Rep. 403. In that case it is said:

"The objection interposed to the testimony of the witness Allison should have been sustained. This witness was permitted to testify to the jury that, 'a few minutes after the plaintiff had been hurt, the conductor asked the engineer why he did not respond to the bell call; and the

engineer answered that he did respond to all the bell calls he heard.' To the admission of this evidence the defendant duly excepted. The rule is well established that it is not within the scope of an agent's authority to bind his principal by admissions having reference to bygone transactions. The only ground upon which the admissibility of an agent's declarations can be justified is that they must have been made while in the discharge of his duties as agent, and be so closely connected with the main transaction in issue as to constitute a part of the *res gestæ*. *Mobile & Mont. R. R. Co. v. Ashcraft*, 48 Ala. 15; *Tanner's Ex'r v. L. & N. R. R. Co.*, 60 Ala. 621; *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray (Mass.) 92; *Baldwin v. Ashby*, 54 Ala. 82; 1 Brick. Dig. p. 63, §§ 160-162. * * * In *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131, *supra*, the declarations of the driver of a street car, made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order, were ruled to be mere hearsay and inadmissible. In *Adams v. Hannibal, etc., R. R. Co.*, 74 Mo. 553, s. c. 41 Amer. Rep. 333, the court, for a like reason, excluded the declarations of the engineer and fireman of the train, made immediately after the deceased was struck and the train was stopped, showing that the accident was occasioned by the negligence of the engineer. The case is clearly analogous to the present one, and the views of the court, after a clear and instructive review of the cases, fully accord with the conclusion reached by us, and the reason upon which that conclusion is based. Our conclusion is that the declarations of the conductor and engineer cannot, under a proper application of these principles, be regarded as a part of the *res gestæ* of the accident resulting in the injury to plaintiff. The time—'a few minutes'—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justify authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete. *Thompson on Carriers of Passengers*, pp. 557-8."

Declaration of a fireman to the engineer, immediately after running the engine over a mule, "You knocked one off on this side," is not admissible against their principal, unless it was a part of the *res gestæ*. *Railroad Co. v. Sistrunk*, 85 Ala. 353, 5 South. 79.

Agents or officers of companies cannot bind such companies by admissions or declarations as to past transaction. *Railroad Co. v. Davis*, 91 Ala. 621, 8 South. 349; *Railroad Co. v. Cogsbill*, 85 Ala. 456, 5 South. 188; *Railroad Co. v. Carl*, 91 Ala. 272, 9 South. 334; *Danner v. Stonewall Co.*, 77 Ala. 184.

Declarations of a depot agent that plaintiff's goods were burned up in the car are not admissible against the agent's principal, when sued for the goods. *Railroad Co. v. Carl*, *supra*.

For the error indicated, the judgment must be reversed, and the cause remanded. Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

ENSLEY MOTOR CO. v. O'REAR, County Treasurer. (6 Div. 263.)

(Supreme Court of Alabama. April 20, 1916.)

1. COUNTIES §149—LIABILITY FOR CLAIMS.

No officer can charge a county with the payment of any claim due him, however meritorious, or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication authorized by law, the policy of the state being to remove liability on any account except as it is expressed or implied by statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214; Dec. Dig. §149.]

2. COUNTIES §149—LIABILITY FOR CLAIMS.

The power of the board of revenue or court of county commissioners to expend funds is not confined strictly to claims enumerated by statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214; Dec. Dig. §149.]

3. COUNTIES §113(1)—FUNCTIONS OF COMMISSIONERS AND BOARDS OF REVENUE—DISCRETION.

In performing their statutory duties in the location, erection, repair, removal, or furnishing of the county buildings, bridges, and roads, the county commissioners or boards of revenue exercise a function that is quasi legislative, and have a discretion that cannot be exercised for them by any other officer, or directed by any court, except when their acts are fraudulent.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 176; Dec. Dig. §113(1).]

4. COUNTIES §113(1) — COMMISSIONERS' COURT—POWER TO PURCHASE AUTOMOBILE—STATUTE.

Under Gen. Acts 1915, pp. 573-575, §§ 1, 5, 9, vesting courts of county commissions or boards of revenue with general superintendence over the roads and bridges of their respective counties, the commissioners' court of a county has authority to purchase and maintain an automobile for use in maintaining and inspecting the roads and bridges of the county, and, a proper warrant having issued therefor, such warrant should be duly registered and paid by the county treasurer, as required by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 176; Dec. Dig. §113(1).]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Mandamus by the Ensley Motor Company against Caine O'Rear, as Treasurer of Walker County. From a decree denying the writ, petitioner appeals. Reversed and remanded.

Burgin, Jenkins & Brown, of Birmingham, and Finch & Pennington, of Jasper, for appellant. Lacy & Lacy, of Jasper, for appellee.

THOMAS, J. [1] This court has held that counties are governmental agencies of the state; and the board of revenue or commissioners' court is invested with large powers in the conduct of the business affairs of the county. The county is liable for those claims only which the law imposes or authorizes to be contracted.

"No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may have

derived therefrom, unless expressly or by necessary implication authorized by law."

Without regard to any liability of the county at common law, the policy in this state is to remove liability on any account except as it is expressed or implied by statute. *Mobile v. Drago*, 172 Ala. 155, 50 South. 995; *Naftel v. Montgomery Co.*, 127 Ala. 563, 29 South. 29; *Jack v. Moore*, 68 Ala. 184; *Simpson v. Lauderdale Co.*, 56 Ala. 64; *Posey v. Mobile Co.*, 50 Ala. 6; *Mitchell v. Tallapoosa Co.*, 30 Ala. 130; *Van Eppes v. Comm. Court*, 25 Ala. 460; *Barbour Co. v. Horn*, 48 Ala. 649; *Barbour Co. v. Brunson*, 36 Ala. 362; 2 Kent, 274.

[2] It must not be understood that the power of the board of revenue or court of county commissioners to expend funds is confined only to claims enumerated in the statute; nor can it be reasonably insisted that no other claims than such as are "enumerated" can be charged upon the county. *Jack v. Moore*, supra; *Gunter et al. v. Hackworth et al.*, 182 Ala. 205, 62 South. 101; *Mobile v. Williams*, 180 Ala. 639, 61 South. 963; *B. E. L. & P. Co. v. City of Montgomery*, 114 Ala. 433, 21 South. 960; *Allen v. La Fayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497. In *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823, it is made clear that no contract can be implied against a county unless it is one which the county is empowered by law to make. In *Board of Revenue of Covington County v. Merrill*, 68 South. 971, the court said:

"Incidental to the power to build roads, bridges, jails, hospitals, and courthouses is the implied power in the board or court to properly inform themselves and to protect the county by the employment of engineers and architects accustomed to such construction, that the needed facility may be the better constructed and adapted and the general public thus the better served. *Smith v. McOutchen*, 146 Ala. 455 [41 South. 619]."

[3] In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commissioners or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by any court, except only when their acts are such as amount to fraud, corruption, or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi legislative. *Matkin v. Marengo Co.*, 137 Ala. 155, 34 South. 171; *Board of Revenue of Covington Co. v. Merrill*, supra; *Talley v. Jackson Co.*, 175 Ala. 644, 39 South. 167; *Eutaw v. Coleman*, 189 Ala. 164, 66 South. 464; *Comm's Court v. Hearne*, 59 Ala. 371; *Askew v. Hale Co.*, 54 Ala. 639, 25 Am. Rep. 730; *Parnell v. Comm's Court*, 34 Ala. 278; *Comm's Court v. Bowie*, 34 Ala. 461; *Moore v. Hancock*, 11 Ala. 245. In *Town of Eutaw v. Coleman*, supra, this court said:

"We are not dealing with any question of the advisability of what the commissioners have done. There is no charge of fraud, corruption, or unfair dealing, and, in the absence of some such charge, this court is committed to the doctrine that in no case involving the exercise of discretionary power by the court of county commissioners will their action be controlled by any judicial tribunal."

[4] The contention of appellant is that the authority to purchase an automobile and to maintain it is by implication given the commissioners' court by the act of 1915. Gen. Acts 1915, p. 573. Section 1 of said act is as follows:

"That the courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state are invested with a general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old, roads, bridges and ferries of their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they are given legislative, judicial and executive powers, except as limited herein. Courts of county commissioners, boards of revenue or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public road, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years. Provided, however, that nothing in this act shall be construed to authorize the courts of county commissioners, boards of revenue, or other like governing bodies of the several counties to establish, promulgate or enforce any rules, regulations or laws which may be in conflict with a local or special law providing for the working, maintenance, change, discontinuance or improvement of the public roads, bridges or ferries of such county, now in force or which may hereafter be enacted."

The power of eminent domain is given in section 5; and by section 9 the convicts of any county or municipality may be used in such work under the direction of the court of county commissioners or board of revenue, either in the actual construction of roads, or in quarries, gravel pits, or any plant used for the production of road material. And for the purpose of maintenance there is conferred on such boards or courts the right to impose tolls upon owners of vehicles, with permission to establish, construct, and maintain any road, street, or bridge within the corporate limits of any municipality. Sections 13, 13½.

It is thus apparent that the statute invested in courts of county commissioners or boards of revenue general superintendence over the roads and bridges of the respective counties, and that in the construction, maintenance and improvement of roads and

bridges unlimited jurisdiction and power is given, except only as it may be limited by the local or special statutes of force in the county. Such courts or boards may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be by such courts or boards be deemed necessary or advisable, to build, construct, work, improve and maintain a good system of public roads, bridges and ferries in their respective counties. Acts 1915, p. 573, § 1. This power is to be exercised by such courts or boards as deemed necessary or advisable for the public weal, and cannot be exercised for them, nor can their exercise thereof be restrained or reviewed, unless it has been in a fraudulent, corrupt, or unfair conduct of the business of the county.

With the more recent demands for better roads and more secure bridges and ferries in all sections of the country—in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities—greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. So also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor. And if the right exists to contract for this inspection and supervision, then the right to maintain, and to transport such inspectors from one portion of the county to another, in the discharge of this public service, cannot be doubted.

The demands for construction and maintenance, and for inspection, of necessity would vary in the different counties, depending upon the facilities for travel, the distances to be traversed, and the nature and extent of the improvement undertaken. And if any court of county commissioners or board of revenue, as the business agent of the county, should attempt to so contract for machinery, materials, skilled services, or labor, as to amount to a fraudulent, corrupt, or unfair dealing on its part, or as the custodian of such property of the county, should attempt to so misuse, or authorize the misuse of, such property of the county, as to constitute a diversion of the property or funds of the county to a personal, rather than to the county use, a forum is open to restrain such fraudulent conduct, and the member or members of the board so abusing their trust would be liable to the county therefor.

The authority having been exercised in the purchase for the county of an automobile, for the purpose of constructing, maintaining, and inspecting the roads and bridges of Walker county, and a proper warrant having issued therefor, such warrant should be duly registered and paid by the county treasurer in the manner required by law.

The judgment of the lower court is reversed; and judgment is here rendered, awarding the writ of mandamus as prayed in the petition.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

MADISON v. STATE. (8 Div. 874.)

(Supreme Court of Alabama. April 6, 1916.)

1. COURTS — 104 — OPINIONS — STATUTES.

Under Acts 1915, p. 595, § 3, amending Code 1907, § 5999, to provide that the justices of the Supreme Court need not write opinions in cases where the decision merely reaffirms previous decisions, questions presented by charges refused to defendant in his trial for homicide, involving no new principle of law, require no separate treatment in the opinion on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 355-358; Dec. Dig. —104.]

2. HOMICIDE — 300(15) — INSTRUCTION — SELF-DEFENSE.

Requested charges, based on the theory of self-defense premitting the duty to retreat, were faulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 630; Dec. Dig. —300(15).]

3. HOMICIDE — 118(1) — SELF-DEFENSE — PLACE.

The fact that the defendant at the time of the shooting was in a public road made no change in the rule as to his duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 168; Dec. Dig. —118(1).]

4. HOMICIDE — 118(2) — SELF-DEFENSE — FREEDOM FROM FAULT — DUTY TO RETREAT.

Where it is clearly shown that the party slain made a sudden and entirely unprovoked murderous attack upon the defendant with a deadly weapon, and was in the act of effecting upon the defendant such murderous purpose, no duty to retreat rests on the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 169; Dec. Dig. —118(2).]

5. HOMICIDE — 300(13) — INSTRUCTIONS — SELF-DEFENSE — FAULT — NEW TRIAL FOR HOMICIDE — REQUESTED CHARGES.

Charges failing to hypothesize defendant's freedom from fault in bringing on the difficulty were properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. —300(13).]

6. HOMICIDE — 300(7) — SELF-DEFENSE — ABANDONMENT OF DIFFICULTY.

Evidence that defendant and deceased had some dispute two hours previous to the fatal encounter, in which deceased threatened an assault upon defendant, who thereupon went to his home, and subsequently and voluntarily returned and called deceased out of the house, afford-

ed no ground for instructions on the theory of defendant's abandonment of the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. —300(7).]

7. CRIMINAL LAW — 807(1) — INSTRUCTIONS — ARGUMENTATIVENESS.

Argumentative charges were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. —807(1).]

8. CRIMINAL LAW — 811(2) — INSTRUCTIONS — UNDUE EMPHASIS.

Requested charges, giving undue prominence to portion of the evidence, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1971; Dec. Dig. —811(2).]

9. CRIMINAL LAW — 829(1) — REQUESTED INSTRUCTIONS — GIVEN INSTRUCTIONS.

Requested charges, substantially covered by special charges given, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. —829(1).]

Appeal from Circuit Court, Lawrence County; Robert C. Brickell, Judge.

Joe Madison was convicted of murder in the second degree, and he appeals. Affirmed.

R. L. Almon, of Moulton, and W. H. Long, Jr., of Decatur, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

GARDNER, J. Appellant was convicted of murder in the second degree, and sentenced to imprisonment for a period of 35 years. He sought to justify the killing upon the theory of self-defense. No questions are presented for review upon the evidence in the case. The record contains a large number of special charges, both given and refused, none of which are numbered. The oral charge of the court does not appear in the record. The bill of exceptions merely states that:

"The presiding judge thereupon charged the jury the law as to the various phases of the case."

[1, 2] The questions presented by the refused charges involve no new principle of law and need no separate treatment here. Acts 1915, p. 595. Some of them, based upon the theory of self-defense, are faulty in premitting the duty to retreat.

[3] From some of the argument and the language of some of the charges it would seem to be one of the contentions that the fact that the defendant at the time of the firing of the fatal shot was in the public road worked a change in the rule as to his duty to retreat. This, however, is not the case. *Brake v. State*, 8 Ala. App. 101, 63 South. 11, and cases there cited.

[4] Other charges of like character, premitting the duty to retreat, were evidently framed to come within the language used in *Storey's Case*, 71 Ala. 329, wherein reference was made to an assault that was "manifestly

felonious in its purpose and forcible in its nature," and to the doctrine of retreat. What was said in Storey's Case has received comment and explanation in the recent case of *Matthews v. State*, 88 South. 834. See also *Hutcheson v. State*, 170 Ala. 29, 54 South. 119, and *Beasley v. State*, 181 Ala. 28, 61 South. 259. Speaking of the exception to the general rule as to the duty to retreat, this court, in *Matthews v. State*, supra, said:

"The exception mentioned is where the party slain by the defendant made a sudden, entirely unprovoked, murderous attack upon the defendant; the assailant being then armed with a deadly weapon, and in the very act of effecting upon the defendant such murderous purpose. In such case, where the evidence is clear, and without conflict or adverse inference, the law concludes that no duty to retreat rests on the defendant; its theory being that, under such circumstances, retreat would not serve the humane purpose the law intends to subserve by its exaction of one, wholly without fault in the premises, unless immediately and suddenly menaced by an adversary."

We have carefully considered the testimony in this case, and think it too clear for argument that it lacks the essential elements of the case quoted from above, and that the doctrine of the Storey Case, as above qualified and explained, is therefore without application here.

[5] Some of the charges, while hypothesizing that defendant approached the deceased in an orderly and peaceful manner, yet otherwise fail to hypothesize freedom from fault in bringing on the difficulty. *Scoggins v. State*, 120 Ala. 369, 25 South. 180.

[8] Other charges seem to be based upon the theory of an abandonment of the difficulty by the defendant, although he might have been at fault in bringing it on. But there is nothing in the evidence to support that theory. There is testimony to show that the defendant and the deceased had some dispute, two hours previous to the fatal encounter, in which deceased threatened an assault upon defendant, and that thereupon the latter went to his home, and subsequently returned, of his own volition, and called deceased out of his house. There was clearly nothing in this state of the facts involving the doctrine of abandonment of the difficulty, as contended for by such charges.

[7-9] Many other charges were correctly refused, for being argumentative, or giving undue prominence to portions of the evidence; and some of them were substantially covered by special given charges. Each of the refused charges has been by us given most careful consideration, and in the action of the court thereon we find no reversible error.

An examination of this record fails to disclose any reversible error, and the judgment of conviction is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

TARRANCE v. CHAPMAN et al.
(8 Div. 103.)

(Supreme Court of Alabama. April 6, 1916.)

1. NEGLIGENCE — 110 — PLEADING — COMPLAINT — SUFFICIENCY.

In an action for damages for burning of plaintiff's residence, caused by a fire in defendant's house, alleged to have originated from a defective chimney, a count in the complaint, alleging damage and destruction by fire of defendant's house and contents, and that the defendant's negligence caused such fire to be communicated, was insufficient, in that it failed to show any duty owed by the defendants to the plaintiff and a breach thereof, since mere proof of the damage or destruction of the property by fire will not, of itself, authorize an inference of negligence; the exception to the general rule as to locomotives having no application.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 177, 178; Dec. Dig. — 110.]

2. NEGLIGENCE — 31 — ACTS CONSTITUTING VIOLATION OF STATUTE OR ORDINANCE.

Violation of a statute or of a valid city ordinance, being the proximate cause of an injury, per se creates a cause of action and establishes liability.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 50; Dec. Dig. — 31.]

3. NEGLIGENCE — 110 — PLEADING — COMPLAINT — CONSTRUCTION — MUNICIPAL ORDINANCE.

Account in a complaint, alleging violation of a city ordinance, touching the construction of chimneys or flues, which did not allege whether defendant's house was constructed before or after the passage of the ordinance, will be considered as if showing that the house was constructed prior to the passage of the ordinance.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 177, 178; Dec. Dig. — 110.]

4. MUNICIPAL CORPORATIONS — 601 — ORDINANCES — CONSTRUCTION.

An ordinance, touching the construction of chimneys and flues, and providing for notice by an inspector to the owner of any dangerous condition, providing a penalty for failure to place such apparatus in safe condition after notice, and that a chimney shall form a part of the wall or rest on it or on iron hangers, and that the provision is not an exclusive statement of every dangerous condition, and providing, further, that all chimneys, flues, or heating apparatus constructed prior to a certain date shall be considered safe if made to conform to the requirements stated, is not violated by one whose house had been previously constructed, after such person has been notified by the inspector as provided therein.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. — 601.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by J. D. Tarrance against A. L. Chapman and another, for damages for setting fire to and burning his house. Judgment for defendants, and plaintiff appeals. Affirmed.

Count 1 is as follows:

Plaintiff claims of defendant \$5,000 as damages, for that heretofore, to wit, on or about 25th day of April, 1912, plaintiff owned and was occupying with his family, a residence at 817 Forty-Ninth street, in the city of Birmingham, Ala., and owned a large amount of furniture, goods, and effects in said residence, together

with improvements and articles in and upon the curtilages thereof; that on said date said residence and said furniture, goods and effects, and articles were greatly damaged or destroyed by fire, and as a proximate consequence thereof were lost to plaintiff, or rendered of greatly less value to plaintiff, and plaintiff was greatly inconvenienced, vexed, etc. Plaintiff avers that defendant's negligence caused such fire to be communicated to said residence, and to cause plaintiff's said loss and damage.

Count 6:

Plaintiff adopts all of the words of the first count, to and including the claim for injuries and damages caused by said fire, and adds thereto the following: Defendants maintained a flue or chimney on certain premises in said city near to said residence of plaintiff in a manner which was dangerous to plaintiff's said residence, and said flue or chimney was not a part of a wall, nor was it resting on the ground or on iron hangers or plates, and was maintained by defendant in violation of an ordinance of said city of Birmingham, to wit, section 110, of the City Code of Birmingham, Ala., then in force and effect as follows: "If any chimney, flue, or heating apparatus on any premises shall be constructed or maintained in any manner which is dangerous to said premises, or any house, building or erection situated thereon, or on adjoining premises, or premises near by, the inspector shall at once notify the owner, agent or person in charge or control of said premises, on which the said chimney, flue or heating apparatus is situated. If such person so notified fails for a period of 48 hours after the service of such notice upon him to place such chimney, flue or heating apparatus in safe condition, he shall be liable to a fine as prescribed in this chapter; provided, that any chimney or flue not forming a part of a wall and not resting on the ground or on iron hangers or plates, is hereby declared to be unlawful, and is condemned and adjudged to be dangerous as set out in this section; but this provision cannot be construed to be an exclusive statement of every dangerous condition, and any and all other dangerous conditions shall be subject to this section. Provided, further, that all chimneys, flues, or heating apparatus on premises constructed prior to the 17th day of May, 1906, shall be considered safe if they form part of a wall or rest on the ground, or on iron hangers or plates, and that any person notified as set out above in reference to any such chimney, flue or heating apparatus, shall be deemed to have been supplied with such notice, if any such chimney, flue or heating apparatus is made to conform with the requirements contained in this proviso; provided, further, that all chimneys, flues and heating apparatuses constructed since the 17th day of May, 1905, shall conform to all the terms and conditions of this chapter." And as a proximate consequence of said violation of said ordinance by defendant, the building on which said flue or chimney was caught fire and set fire to plaintiff's said residence, and proximately caused plaintiff to suffer the injuries and damages.

Count 2 set out section 29 as to the thickness of the wall of chimneys and the height above the roof, and the size of the flues, section 70, having reference to party walls, and section 71 having reference to smoke flues being lined with cast iron or fireproof terra cotta pipe from the bottom of the flue to the top of the chimney. Count 7 alleges that defendant negligently maintained a certain flue or chimney on certain premises in said city near said residence of plaintiff in a manner which was dangerous to plaintiff's residence, and that said flue or chimney was not a part

of a wall, nor was it resting on the ground or on iron hangers or plates, and was maintained by defendant in violation of an ordinance of the city of Birmingham, to wit, section 110 of the City Code of Birmingham, then and there in force and effect, which ordinance is set out in count 6, and is here referred to and made a part hereof.

Harsh, Beddow & Fitts, of Birmingham, for appellant. Stokely, Scrivner & Dominick and Frank W. Smith, all of Birmingham, for appellees.

GARDNER, J. Suit by appellant against appellees for the recovery of damages for the burning of plaintiff's residence and the contents thereof, to which residence fire was communicated from the burning of a house owned or maintained by the defendants, near by to plaintiff's said residence, in the city of Birmingham. The fire which burned the defendants' house is alleged to have originated from a defective flue or chimney. The trial court sustained demurrers to some of the counts of the complaint; and on account of these adverse rulings on the pleadings the plaintiff took a nonsuit and prosecuted this appeal.

The argument of appellant's counsel is addressed to the rulings of the court on counts 1, 2, 6, and 7. In *Tennessee Coal, Iron & Railroad Co. v. Smith*, 171 Ala. 251, 55 South. 170, is the following:

"All negligence is not actionable, and pleadings, to be sufficient to state a cause of action grounded on negligence, must affirmatively show that the negligence relied upon is actionable. If pleadings as to negligence show a duty owed by the defendant to the plaintiff, and a breach of that duty to the damage or injury of plaintiff, very general averments of negligence will suffice. As is often said, they need be but little more than conclusions; but the duty and its breach must be shown. Merely alleging that a given act was negligence or was negligently done, without more, is not sufficient. * * * Actionable negligence has been defined by this court to be the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence.' * * * In every action grounded solely on negligence there are three essential elements to a right of recovery: First, a duty owing from defendant to plaintiff; second, a breach of that duty; and, third, an injury to plaintiff in consequence of that breach."

[1] A casual reading of count 1 discloses that it fails to show any duty owing by the defendants to the plaintiff and a breach thereof. It requires no argument to show its insufficiency under the decisions of this court. *T. O. I. & R. R. Co. v. Smith*, supra. Mere proof of the damage or destruction of the property by fire, in a case of this character, does not, of itself, authorize an inference of negligence. *Robinson v. Cowan*, 158 Ala. 603, 47 South. 1018. An exception to the general rule as to locomotives, and possibly other agencies of like power and utility (*L. & N. R. R. Co. v. Marbury*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *L. & N. R. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7

Am. St. Rep. 662), has no application to this case (*Robinson v. Cowan*, *supra*).

The ruling of the court on counts 2, 6, and 7 involved the question as to the violation of a city ordinance, and is treated by counsel for appellant in their brief as the question of prime importance on this appeal. Count 6 sets out the ordinance and seems to have been prepared with much care. We will therefore discuss this count alone, as we think that our conclusion thereon necessarily controls the result as to counts 2 and 7 also.

It is the insistence of appellant that the violation of a statute or of a valid city ordinance, the proximate cause of the injury, *per se* creates a cause of action and establishes liability. *Excelsior Steam Laundry Co. v. Lomax*, 166 Ala. 612, 52 South. 347; *Briggs v. Birmingham R. L. & P. Co.*, 188 Ala. 262, 66 South. 95; *Wolf v. Smith*, 149 Ala. 457, 42 South. 824, 9 L. R. A. (N. S.) 338; 7 Mayf. Dig., p. 634; *McQuillin on Munic. Ord.* § 41; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47.

[2] It must be conceded in the instant case that plaintiff is shown to come clearly within the class for whose protection, largely, the ordinance in question was enacted; and, the reasonableness and validity of the ordinance being unquestioned, the general rule, as above stated, contended for by counsel for appellant, is here recognized.

[3] It remains, therefore, to ascertain whether or not the count shows that in fact the ordinance set out therein has been violated by the defendants. The count is silent as to whether or not the defendants' house was constructed before or after the passage of this ordinance. Under our rule of construction of pleadings, the count will be considered as if showing that the house was constructed prior to the passage of said ordinance. The provisions of the ordinance as copied in count 6 are as follows:

"If any chimney, flue or heating apparatus on any premises shall be constructed or maintained in any manner which is dangerous to said premises, or any house, building or erection situated thereon, or on adjoining premises or premises near by, the inspector shall at once notify the owner, agent or person in charge or control of said premises on which the said chimney, flue or heating apparatus is situated. If such person so notified fails for a period of forty-eight (48) hours after the service of such notice upon him to place such chimney, flue or heating apparatus in safe condition he shall be liable to a fine as prescribed in this chapter; and provided, that any chimney or flue not forming a part of a wall and not resting on the ground, or on iron hangers or plates is hereby declared to be unlawful and is condemned and adjudged to be unlawful as set out in this section; but this provision shall not be construed to be an exclusive statement of every dangerous condition, and any and all other dangerous conditions shall be subject to this section. Provided further, that all chimneys, flues, or heating apparatus on premises constructed prior to the 17th day of May, 1906, shall be considered safe if they form part of a wall or rest on the ground, or on iron hangers

or plates, and that any person notified as set out above in reference to any such chimney, flue or heating apparatus shall be deemed to have complied with such notice if any such chimney, flue or heating apparatus is made to conform to the requirements contained in this proviso; provided, further, that all chimney, flues and heating apparatus constructed since the 17th day of May, 1906, shall conform to all the terms and conditions of this chapter."

[4] We are of the opinion that this ordinance clearly shows that it was not the intention to hold one in violation thereof, whose house had been previously constructed, until after such person had been notified by the inspector as provided therein. A contrary construction would give to the ordinance a retroactive effect, and subject to penalty and liability one who had previously constructed his house in full compliance with all the rules, regulations, and ordinances at that time in force. Such a construction we think not only not justified by the language of the ordinance, but in contradiction thereof.

The construction of the count, therefore, as showing the erection of the house before the passage of the ordinance, taken in connection with the failure on the part of the pleader to allege any notice to the defendants by an inspector, as provided in said ordinance, leads us to the conclusion that the count fails to show a violation of the ordinance. We gather from the brief of counsel for appellant that this is the reason which actuated the court in sustaining these demurrers, and in the court's reasoning and action we fully concur.

What is here said is also sufficient to show that there was no error of which appellant can complain in the action of the court in striking from count 7 that portion thereof which sought to fasten liability on account of the violation of the ordinance set out in count 6.

We have discussed the questions argued by counsel for appellant, and conclude that no reversible error is shown. The judgment of the court below is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

DUNN v. DEAN, Judge of Probate.
(3 Div. 239.)

(Supreme Court of Alabama. April 20, 1916.)

1. STATUTES \S 120(3) — TITLE OF ACT — SUFFICIENCY.

Loc. Acts 1915, p. 293, entitled "An act to establish a board of revenue for Conecuh county, to provide for their election and prescribe their powers and duties, to divide the county of Conecuh into five districts, and abolish the court of county commissioners, * * *" is not invalid under Const. 1901, § 45, declaring that each law shall contain one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 171; *Dec. Dig.* \S 120(3).]

2. STATUTES \S 8 $\frac{1}{2}$ (3) — ENACTMENT — LOCAL LAWS — PUBLICATION.

Const. 1901, § 106, declares that no local law shall be passed except in reference to fixing the time for holding courts, unless notice of intention of applying therefor shall have been published in the county where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law. Loc. Acts 1915, p. 293, establishing a board of revenue for Conecuh county, was enacted in 1915 after the Legislature convened in July following a recess. During the recess under the caption "Notice of Local Law" the provisions of the proposed law were published with notice that at the next session of the Legislature the bill would be introduced. *Held*, that as the body of the bill embraced provisions of law operative during the year 1916, the words "next session," contained in the notice of publication, must be construed as meaning next sitting instead of next session, and the publication was sufficient.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. \S 8 $\frac{1}{2}$ (3).]

3. STATUTES \S 76(2) — ENACTMENT — LOCAL LAWS.

Const. 1901, § 106, declares that no special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, and the courts, and not the Legislature, shall judge as to whether the matter of such law is provided by general law. By Loc. Acts 1915, p. 293, the court of county commissioners of Conecuh county was abolished and a board of revenue established, the members being elected by districts, instead of county at large, and holding for different terms than the old commissioners, while the probate judge was not a member of the new board, as he had been of the court of county commissioners. *Held*, that as there was no general law providing for any similar body, the law was not invalid as being on a subject covered by general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78; Dec. Dig. \S 76(2).]

4. JURY \S 31(1) — JURY TRIAL — VACATION OF OFFICE — STATUTE.

Under Const. 1901, §§ 6, 175, respectively declaring that in all criminal cases the accused has the right to be heard, and that all county officers may be removed from office by the circuit court of like jurisdiction, and that the right of trial by jury and appeal in such cases shall be secured, Loc. Acts 1915, p. 296, § 16, which is part of the act creating a board of revenue for Conecuh county and provides for a vacation of offices of members if the board failed or refused to publish quarterly statements of the receipts and disbursements of county funds, is invalid.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214; Dec. Dig. \S 31(1).]

5. STATUTES \S 64(4) — VALIDITY — PARTIAL VALIDITY.

As the invalid section may be stricken from the remainder of the act, leaving a statute complete within itself, sensible and capable of being executed, the invalidity of section 16 does not overthrow the entire act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 61, 195; Dec. Dig. \S 64(4).]

6. CONSTITUTIONAL LAW \S 50 — SEPARATION OF POWERS — BLENDING.

Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county, and giving the board jurisdiction over county finances, such body supplanting the court of county commissioners, and declaring that when sitting the board shall be a court of record, is not invalid under Const. 1901, §§ 42, 43, dividing the powers of government into the legislative, execu-

tive, and judicial departments, and declaring that one department shall not exercise the powers of another.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. \S 50.]

7. STATUTES \S 101(1) — LOCAL LAWS — VALIDITY.

Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county, dividing the county into districts, and providing for the election of members from each district, is not invalid under Const. 1901, § 104, subd. 29, declaring that the Legislature shall pass no local law providing for the conduct of elections or designating the place of voting or changing the existing boundaries of wards or districts, the act only creating the districts originally, and assigning a member to each.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 113; Dec. Dig. \S 101(1).]

8. STATUTES \S 102(2) — LOCAL LAWS — OFFICERS — SALARIES — CHANGE OF.

Const. 1901, § 104, subd. 24, prohibits the enactment of local laws creating, increasing, or decreasing fees, percentages, or allowances of all public officers. Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county and abolishing the commissioners' court, relieved the probate judge from all duties which he exercised as presiding officer of the commissioners' court, providing for election of a president instead, who should receive compensation formerly received by the probate judge. *Held*, that as the compensation theretofore allowed the probate judge was for mere incidental services, the act in withholding the compensation, having relieved him from the duties, was not invalid as decreasing allowances of a public officer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 114; Dec. Dig. \S 102(2).]

On Rehearing.

9. STATUTES \S 285 — ENACTMENT — JOURNALS.

In determining whether a statute was enacted with constitutional formalities, the courts may look only to the journals of the legislative houses.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. \S 285.]

10. STATUTES \S 13 — ENACTMENT — VALIDITY.

Const. 1901, § 62, declares that no bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee in session and returned therefrom, which facts shall affirmatively appear upon the journal of each house. The journal of the House of Representatives showed the introduction of Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county and its reference to the standing committee on ways and means. It then recited the consideration and favorable report of the bill by the standing committee on mining and manufacturing. *Held*, that the law was invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 10; Dec. Dig. \S 13.]

Appeal from Circuit Court, Conecuh County; A. E. Gamble, Judge.

Mandamus by Henry W. Dunn against F. J. Dean, Judge of Probate, to compel respondent to receive relator's declaration and place his name upon the ballot of his party to be voted for the office of county commissioner. From a judgment denying the writ, relator appeals. Reversed and remanded.

Hamilton & Stallworth, of Evergreen, and D. M. Powell, of Greenville, for appellant. E. E. Newton, of Evergreen, for appellee.

McCLELLAN, J. In an appropriate way the appellant sought to qualify as a candidate for the Democratic nomination, in the primaries to be held on the 9th day of May, 1916, for "county commissioner of Conecuh county." His declaration was refused receipt by the judge of probate; and this proceeding seeks the writ of mandamus to compel official action by that officer, to the end that appellant may have the ballot of his party on his aspiration. The judge of probate declined to receive appellant's declaration, for the reason that the office to the nomination for which he aspired had been abolished by a local act approved September 7, 1915 (Local Acts 1915, pp. 293-296). The appellant insists that the local act noted is unconstitutional and void, and is, hence, no valid obstacle to the action he sought the judge of probate to take in his declaration of candidacy for county commissioner. The circuit judge denied the petition for the writ, and this appeal is for a review of his ruling.

The local act under consideration has this title:

"To establish a board of revenue for Conecuh county, to provide for their election and prescribe their powers and duties, to divide the county of Conecuh into five districts, and abolish the court of county commissioners for Conecuh county."

Section 1 establishes a board of revenue for Conecuh county. Section 2 divides the county into five defined districts. Section 3 provides for the election, at the general election in 1916, of one member of the board for, and by the qualified electors in, each of the five districts, fixes the qualifications for incumbents, and apportions the terms so that three of the members first elected shall hold office for two years and two of them for four years, and thereafter that their successors shall be elected for terms of four years. Section 4 provides for regular and special sessions of the board. Section 5 requires the members of the board to elect a president thereof. Section 6 makes provision for filling vacancies on the board. Sections 7, 8, 9, 10, and 12 prescribe the authority, power, and jurisdiction conferred on the board. Section 11 provides for the signature of county warrants by the president of the board, and for other services by the presiding officer, and prescribes that:

"He shall receive a reasonable compensation not exceeding \$3.00 per day nor the amount of \$150.00 per annum."

Section 13 makes further provision for services by the president, and allows him "fifteen cents per one hundred words for recording the proceedings of the said board," and exacts that the recording be done within a fixed period after each meeting. Section 14 provides that, when acting judicially, the board is a court of record. Section 15 pro-

vides for the furnishing of information to the board by the clerks of courts in the county that will serve to acquaint the body with fines and forfeitures taken during the term by the courts and judgments entered during the terms for the use of the county. Section 16 requires the publication, quarterly, by the body of statements of the receipts and disbursements of county funds, and for the vacation of "their offices" if the board fails or refuses to publish the statements required, and for the filling by the Governor of the vacancies thus occasioned when the prescribed certificate of the fact is filed with the Governor. Section 17 provides for the compensation and mileage of members. Section 18 requires the body's sessions to be held at the county seat. Section 19 abolishes the commissioners' court of that county at the expiration of the terms of the present commissioners. Section 20 is the usual repealing clause.

[1] The several grounds on which appellant rests his contention that the local act is void will be indicated in the opinion. The sufficiency of the title before quoted, as for any supposed violation of section 45 of the Constitution, must be pronounced in view of the following authorities: *State v. Teasley*, 69 South. 723; *Thomas v. Gunter*, 170 Ala. 165, 54 South. 283; *Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016; *Sheffield Co. v. Pool*, 169 Ala. 420, 53 South. 1027.

[2] The local act under review was published in June, 1915, in a newspaper in Conecuh county. The caption of the notice so published read:

"*Notice of Local Law.* Notice is hereby given that at the next session of the Legislature of Alabama the following bill, in substance, will be introduced."

The Legislature of 1915 convened in January, 1915, and later, but before the month of June, 1915, recessed until during July, 1915. Section 106 of the Constitution requires the publication of notice of intention to seek the enactment of a local law, its substance being set forth in the notice. It is urged against this local act that the use, in the published notice alone, of the words "next session of the Legislature of Alabama" denoted a purpose to move for the enactment of the substance of the local legislation set forth in the notice at the session of the Legislature to convene in January, 1919, that being, it is urged, the next session of the Legislature of the state. There is no sound basis for such an insistence. The whole publication must be considered in determining the intent thereof. It is manifest from the body of the proposed law as published that the intent of the movers for the proposed legislation embraced provisions of law operative during the year 1916, long previous to the convention of the Legislature in January, 1919. The words "next session" in the caption of the published notice are, in necessary relation to those words, only susceptible of this meaning: During "next sitting" of

the Legislature after the prescription of section 106 as to the period of publication has been complied with.

[3] It is urged that this local act is void for that it violates these provisions of section 105 of the Constitution:

"No special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law; * * * and the courts and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. * * *"

By way of interpretation and construction of section 105 this court has made a number of pronouncements. In view of the objections made against this local law, based upon the quoted provisions of section 105 of the Constitution, it is desirable to bring together these expressions of this court defining the purpose and effect of this section of the Constitution. In *Sisk v. Cargile*, 138 Ala. 164, 171, 172, 35 South. 114, 116, it was said:

"Section 104 of the Constitution prohibits the Legislature from passing a special or local law in any one of 31 specified instances. A local law, as here referred to, is defined, under another section—section 110—to be one which applies to any subdivision or subdivisions of the state, less than the whole, and a special or private law is one which applies to an individual, association, or corporation. There are an indefinite number of local, private, and special interests, impossible to be anticipated, and which the framers of the Constitution did not attempt to enumerate. They did provide by section 105, that 'No special, private or local law, except the law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state.' In this connection it may be stated that there is no general law in Alabama authorizing the levy of a tax for the payment of debts incurred for road purposes, and no relief can be had in the courts, since the levy of a tax is a legislative power. They also provided by section 109 that: 'The Legislature shall pass general laws under which local and private interests shall be provided for and protected.' When, however, the relief in this class of undefined local, special, and private interests is not provided for by general laws, and the Legislature has failed to pass such laws, there is nothing in the Constitution which is a limitation on the right of the Legislature to pass special, private, or local laws except in one of the 31 specified instances named in said section 104. In these instances, the Legislature must pass general statutes for relief, or none can be had, unless the same is already provided for by a general law. Section 109 was intended to impose a duty on the Legislature by the enactment of general laws to that end, to protect local, private, and special interests, but it is not, as in the 31 enumerated instances in section 104, a limitation on its power to pass special laws to this end. The power of the Legislature to pass laws of a private, local, or special interest was unlimited; and, outside or beyond these 31 specified instances, the Legislature has the same power it had before the adoption of the present Constitution, provided there is no general law under which relief is granted or may be had."

In *City Council v. Reese*, 149 Ala. 188, 190, 191, 43 South. 116, 117, it was written:

"It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained

in the section of the Constitution quoted was violated by the enactment of the special or local law. It is of no consequence that the special or local act contains matter germane to the subject expressed in its title, 'to authorize the city council of Montgomery to refund the bonded indebtedness of said city,' etc., which are not in the general law; for, obviously, if the insertion of such matters in a special, local, or private law would obviate the constitutional prohibition, then the prohibition could be easily circumvented and practically rendered nugatory. It is not perceivable that the framers of the Constitution intended the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. It follows, therefore, that we are constrained to hold the act of September 26, 1903, to be unconstitutional and void."

In *Little v. State*, 137 Ala. 659, 668, 35 South. 134, 136, it was said with reference to section 105, among others noted in the opinion:

"This view is emphasized, re-enforced, and made certain to the judicial mind when taken in connection with the sections above referred to, other than section 104, directing that the Legislature shall pass general laws for the cases enumerated in section 104, and providing that no special, private, or local law * * * shall be enacted in any case, which is provided for by general law."

In *Forman v. Hair*, 150 Ala. 589, 593, 594, 43 South. 827, 829, it was said:

"Section 105 of the Constitution is very broad and sweeping in its terms. Its purpose is manifest, and the Legislature is positively forbidden and prohibited from enacting any special, private, or local law, except a law fixing the time of holding courts, and regulating or prohibiting the liquor traffic, in any case which is provided for by a general law, or when the relief sought could be given by any court of this state. Prior to the adoption of the present Constitution, this court held (*Clarke v. Jack*, 60 Ala. 271) that it was the province of the Legislature to determine whether or not the 'cause' was provided for by a general law, or the relief sought could be given by any court. But this section (105) provides that the courts, and not the Legislature, shall judge as to whether the matter of said law is provided by a general law. If, therefore, the issue of the bonds by St. Clair county was provided for by the general law, approved February 26, 1903, the Legislature was forbidden to pass the act approved September 26, 1903, and the courts, and not the Legislature, are to determine that question. But this is not a case provided for by the general law of February 26, 1903, for the reason that the election was held prior to its enactment."

In *Norwood v. Goldsmith*, 168 Ala. 224, 231, 53 South. 84, 86, it was said:

"What was said in the case of *Montgomery City v. Reese*, 149 Ala. 190, 43 South. 116, is equally applicable and true in this case, and is decisive of this question: 'Section 105, art. 4, of the Constitution provides that: "No special, private or local law, except a law fixing the time for holding courts, shall be enacted in any case which is provided for by general law, * * * and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. * * * Nor shall the Legislature indirectly enact any such special, private or local law by the partial repeal of the general law." It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the special or local law,' etc.

In *City Bank & Trust Co. v. State*, 172 Ala. 197, 201-205, 55 South. 511, 512, it was said:

"In application of a pertinent phase of section 105 of the Constitution of 1901 it has been accepted here that a test of the exemption of a local, private, or special law from the condemnation of the section, because provision has already been made therefor by a general law, is whether the proceeding or action contemplated by the local, private, or special law might have been, in substance and not in respect of detail merely, taken or had under the general law. If so, the local, private, or special act violates the section (105) and is void. *Brandon v. Askew*, infra, 172 Ala. 160, 54 South. 605; *City of Montgomery v. Reese*, 149 Ala. 188, 43 South. 116; *Forman v. Hair*, 150 Ala. 589, 43 South. 527; *City of Ensley v. Simpson*, 166 Ala. 360, 52 South. 61; *Norwood v. Goldsmith*, 168 Ala. 224, 53 South. 84. * * * It was also noted, in that case, that by express provisions of section 105 the determination of inquiries whether the matter of the local, private, or special law was 'provided for by a general law,' and whether the relief sought could be 'given by any court,' was committed to the courts, and not left with the Legislature. The soundness of the doctrine of *City of Montgomery v. Reese*, has not been questioned or departed from. It is obvious, from the unequivocal terms of section 105, that the enactment of local, private, and special laws is prohibited in all cases, not expressly excepted in that section (105), where the matter is provided for by general law, or where any court can give the relief the local, private, or special law would afford. In concrete cases the inquiry open must be, not what the section (105) prohibits, but whether the enactment assailed falls within either of the categories created by the section. As appears from the quotation from the *Reese* case, supra, the application of the section is not to be determined by the fact that the enactment assailed is not *ipsis verbis* of the general law, nor by the fact that matter germane to the general law is contained in the enactment assailed. In short, the test is, as before stated, whether the subject-matter of the general law and of the local, private, or special law is the same. Authorities supra."

The local act mentioned is assailed as constitutionally invalid, under section 105, because the subject-matter was, at the time of its approval, already provided for by the general law approved February 26, 1903. * * * The subject-matter of each act, the general and the local, is substantially the same; the latter being more ample in legislatively fixed detail of accomplishment of the purpose common to both acts. In *Green v. State*, 143 Ala. 2, 7, 8, 39 South. 362, 364, it was said:

"The general law was different from this, requiring a special venire for each capital case. The relief sought by this amendment could not be obtained under any general law then existing, or the local law as stated would have been unnecessary. It in no sense, therefore, offends that provision of the Constitution (section 105) which prohibits the Legislature from enacting any special or local law by the partial repeal of a general law."

In *City of Ensley v. Simpson*, 166 Ala. 360, 373, 374, 52 South. 61, 64, it was said:

"The departure worked by section 105 of the Constitution of 1901 has significance. The inhibition now is against special, private, or local laws in any case which is provided for by a general law, of which the courts shall judge. Formerly the inquiry was whether the Legislature

could provide for a particular case by general law. Now the question is whether it has so provided. We need not be understood as impairing the authority of *City Council of Montgomery v. Reese*, 149 Ala. 188, 43 South. 116. The court there said that it could not perceive that the framers of the Constitution intended the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. The effect of the ruling was that the enactment of a general law authorizing municipal corporations to issue bonds to run not exceeding 30 years, while permitted to stand upon the statute books, operated as a constitutional inhibition against any act permitting any particular municipality to issue bonds to run not exceeding 30 years. Appellee's argument applies that decision to the case in hand as follows: The general statute permitting the alteration or rearrangement of municipal boundaries by the acquisition of contiguous territory only, while it stands, must operate as a constitutional inhibition against any act consolidating noncontiguous municipalities, if at the same time, and in order to preserve the unity and contiguity of the consolidated municipality, as perhaps is necessary to the validity of the act (*City of Denver v. Coulehan*, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751), intervening territory, contiguous to both of the constituent municipalities, is included in the act of consolidation. The subject of legislation in the general law is the alteration or rearrangement of boundaries as affecting contiguous municipalities and unincorporated territory. The subject-matter dealt with in the special act is the alteration or rearrangement of boundaries as affecting noncontiguous municipalities as well. Considered in their totality the two acts are not identical as to subject-matter. We therefore conclude that the special act is not obnoxious to section 105 of the Constitution."

In *Brandon v. Askew*, 172 Ala. 160, 163, 164, 165, 54 South. 605, 606, it was said:

"In his opinion, which has been incorporated into the transcript, the learned judge of the Fifteenth circuit held, that the act of March 2, 1907, was violative of section 105 of the Constitution of 1901. The relevant provision of that section is expressed as follows: 'No special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state.' His theory, we gather, was that so long as there is to be found in the statute book a law fixing the salary of circuit solicitors in general terms, the Legislature is without power, when creating a new office of that character, to fix the salary of the new officer at a different amount. This opinion involved of course a holding that the act under consideration is a local act. And it has been so held. *State ex rel. Attorney General v. Sayre*, 142 Ala. 641, 39 South. 240 [4 Ann. Cas. 656]. Whatever of obscurity there may be in this provision of the Constitution, it is certain that it was not intended to prohibit all local legislation. It was not intended to prohibit local legislation on subjects according to any specific classification. That was done in section 104, where those classes of local laws which were to be prohibited are catalogued, and presumptively the framers of the Constitution said in that section all they intended to say on that subject. It was not intended to operate against local legislation in those cases where a local statute undertakes to do something that has been precisely done in a general law. It could not be assumed that the Legislature would waste its time in the duplication of statutes. But if the local bill proposes something different from the provisions of the general law, and not within the catalogue of section 104, and in a case where the relief may not be had in some proceeding outside of the Legislature, how has it been pro-

vided for, and where is the inhibition to enact the local law? It seems, then, that this provision of the Constitution was intended to prohibit the enactment of special, private, or local laws to meet the purposes of particular cases which may be accomplished by proceedings outside of the Legislature under the provisions of general statutes enacted to meet all cases of their general character. And it is made the duty of the Legislature to pass general laws under which local and private interests shall be provided for and be protected. Const. § 109. Such seems to have been the acceptance of this provision in *City Council of Montgomery v. Reese*, 149 Ala. 188, 43 South. 116. It may be conceded that if the Legislature creates a new judge or solicitor, in the absence of provision to the contrary, the new officers would take their salaries under the general provision of the Code. But no Legislature can dispose of the right of its successors to provide for and protect a local, special, or private interest by local, special, or private law, except by the enactment of a general law under which the local, special, or private interest may be adequately provided for and protected without further legislation. There was, of course, and could be, no way of providing for a new circuit with its necessary officers except by a legislative enactment for that purpose. New circuits may therefore be arranged and the salaries of its officers fixed according to the legislative opinion at the time of the public necessity for which provision and relief is to be made. In our opinion the statute creating the Fifteenth circuit, as for the objection here taken to it, evidences in all its parts a valid exercise of the legislative power. *Ensley v. Simpson*, 166 Ala. 366, 52 South. 61."

A consideration of the decisions noted and quoted makes manifest the fact that this court has neither entertained nor expressed any degree of departure from or qualification of the interpretation of the above-quoted provisions of section 105 of the Constitution soundly established in *Sisk v. Cargile*, *City Council v. Reese*, and *Forman v. Hair*, in and by the expressions before reproduced from the opinions in those cases.

The local act under review has no substantial counterpart, in respect of its paramount features and purposes, in any general law to which this court has been referred, or of which it is now informed. This act's chief object and dominant purpose and effect was and is to create a county governing body different in personnel; in the selection of its personnel; in the tenure of its personnel; from that provided by the general laws for the constitution and creation of the courts of county commissioners in the state. The powers, duties, and jurisdiction of the body created by this act are practically the same as those conferred upon and required of the courts of county commissioners. Indeed, if the change sought to be wrought by this local act had been but an effort to alter the name of Conecuh's governing body, there would be no hesitation in pronouncing it invalid under the plain injunction of section 105 of the Constitution. But, as appears from our summary of the provisions of the local act, its purpose and effect is far greater than any mere change of name or alteration in respect of minor detail within the rule established in *City Council v. Reese*, 149 Ala.

188, 43 South. 116. It creates a body constituted of members separately chosen by the electorate of separate districts, thus excluding the judge of probate who, under the general law, was the presiding officer of the commissioners' court. This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (aside from the judge of probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general laws to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that inhibits the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts.

[4, 5] That provision of section 16 of the local act, whereby a failure or refusal to have quarterly statements published is attempted to effect, without trial and without reference to the established methods of impeachments, the vacation of the offices held by the members of the board, is patently void, being offensive to the following sections of the Constitution: 6 and 175. But this particular invalid feature of the act may be stricken therefrom without invalidating the remainder thereof which is "complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected." *State v. Davis*, 130 Ala. 148, 151, 30 South. 344, 89 Am. St. Rep. 23.

[6] This act does not offend sections 42 and 43 of the Constitution by blending in one body powers and authority that may be referred to the executive, legislative, or judicial phases of governmental action. *For v. McDonald*, 101 Ala. 51, 69, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; *Com'rs v. Moore*, 53 Ala. 25; *Jeffersonian Pub. Co. v. Hillard*, 105 Ala. 576, 17 South. 112.

[7] The local act does not violate subdivision 29 of section 104 of the Constitution. It does not purport to make provision for the "conduct of elections," or to designate places of voting, or to change the existing boundaries of wards, precincts, or districts. It assigns a member of the board to each of five districts for his election which the act itself originally creates for the purpose of defining the territory in which the electorate may vote for a member of the board resident of that district.

[8] The compensation provided by this act to be paid to members of the board for services in discharge of their official duties appears to be the same, aside from the limita-

tion of \$150, as that allowed by law for and to the judge of probate and members of commissioners' courts for like services. Code, §§ 3720, 3322. Subdivision 24 of section 104 of the Constitution prohibits the Legislature from enacting any private, special or local law "creating, increasing, or decreasing fees, percentages, or allowances of public officers." In *Miller v. Griffith*, 171 Ala. 337, 342, 343, 54 South. 650, 652, it was said of the quoted provisions:

"That section refers only to changing the compensation during the term of the officer, and cannot be construed as prohibiting the Legislature from making provisions for such matters as [are] applicable to officers subsequently appointed, nor for abolishing offices."

The obvious intent of the quoted provision of section 104 was to require uniformity in respect of fees, percentages, and allowances by prohibiting the enactment of local or special laws on those subjects. The result, in part, of the construction given these provisions in *Miller v. Griffith* was to accord them the same effect as must be accorded section 231 of the Constitution; whereas, the manifest purpose of subdivision 24 of section 104 was to restrain local or special legislation. The error in *Miller v. Griffith* is clear; though it should be remarked that the last clause in the quotation made from the opinion in that case is without fault. The local act under review relieved the judge of probate of certain duties that were but incidental to the service of that office and that officer, and, in consequence of the abolition of these duties, took from him (to be subsequently elected) the compensations theretofore allowed the judge of probate for these merely incidental services. Hence, the act under consideration did not, in any direct, primary sense, create, increase, or decrease the fees, percentages or allowances of a public officer. The subdivision quoted is not offended by this act.

The local act is not void as upon any of the grounds asserted by the appellant, all of which are treated in this opinion. The writ was properly denied.

Affirmed.

ANDERSON, C. J., and MAYFIELD, SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., concur.

On Rehearing.

MCCLELLAN, J. [9, 10] For the first time, in the application for rehearing, the appellant presents and presses the question whether in the passage of the local act under consideration the positive requirements of section 62 of the Constitution were observed. In determining questions of this character the only source of information are the journals of the houses of the Legislature. *Robertson v. State*, 130 Ala. 164, 169, 30 South. 494. Section 62 provides:

"No bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee in session, and returned therefrom, which facts shall affirmatively appear upon the journal of each house."

The Journal of the House of Representatives records the introduction of this bill (H. B. 863) and its reference to the standing committee on ways and means; and, instead of the consideration and report of the bill by the ways and means committee, recites its consideration and favorable report by the standing committee on mining and manufacturing. It is thus conclusively shown that the bill was referred to one standing committee and was later considered by and reported from another standing committee, to which the journal does not affirmatively recite the bill was referred. The bill was therefore not validly enacted into law, the positive requirements of section 62 of the Constitution not having been observed. *Walker v. City Council*, 139 Ala. 468, 36 South. 23; *Tyler v. State*, 159 Ala. 126, 48 South. 672; among others. The bill never became a valid enactment. It is void. The rehearing must be granted; and the prayer of the petition for the writ of mandamus must also be granted.

The order and judgment of the circuit judge is reversed; and a judgment will be entered here awarding the writ of mandamus as prayed.

Reversed and rendered. All the Justices concur.

KNIGHT v. GARDEN. (6 Div. 268.)

(Supreme Court of Alabama. April 20, 1916.)

1. DETINUE §17—EVIDENCE—ADMISSIBILITY.

In detinue for a mule, the general issue being nondetinet, an averment that the allegations of the complaint are untrue is a plea of the general issue, which puts in issue plaintiff's right to recover, and renders evidence negating the right of either plaintiff or defendant admissible; so that, where the mule was claimed under a mortgage, the mortgagor should have been permitted to testify whether he signed the mortgage.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 26-33; Dec. Dig. §17.]

2. DETINUE §6—CHARACTER OF ACTION.

The mortgage of property alleged to have been wrongfully obtained is not the foundation of a suit in detinue, although the right to possession may rest wholly on the mortgage, but the gist of the action is the detention.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 10, 11; Dec. Dig. §6.]

3. RECORDS §20—VALIDITY—"COLLATERAL ATTACK"—"DIRECT ATTACK."

When the validity of the record of a mortgage is put directly in issue by the pleadings of the attacking party, the attack is direct, and the attack is collateral only if there are no proper averments against the record.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 44; Dec. Dig. §20.]

For other definitions, see *Words and Phrases*, First and Second Series, *Collateral Attack*; *Direct Attack*.]

4. DETINUE \S 17 — RIGHTS OF PARTIES — MORTGAGEES.

Where the plaintiff in detinue introduces a mortgage, under which he claimed, the defendant may under a plea of general issue defeat such prima facie right of possession by showing an outstanding title in a third person, or proving payment, or showing that the mortgage has been rendered nugatory, or that the property was a gift, or that the plaintiff is estopped to deny defendant's right of possession.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 26-33; Dec. Dig. \S 17.]

5. PLEADING \S 290(3) — VERIFICATION — NECESSITY.

Code 1907, § 5332, providing that all pleas in abatement or pleas which deny the execution of the instrument in writing, which is the foundation of the suit, must be verified, does not apply to detinue wherein trial is had only on a plea of general issue.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 861, 886½; Dec. Dig. \S 290(3).]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Detinue by Rebecca Garden, as administratrix, against W. M. Knight. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals under section 6, Act April 18, 1911, p. 450. Reversed and remanded.

Finch & Pennington, of Jasper, for appellant. Gunn & Powell, of Jasper, for appellee.

THOMAS, J. The action is in detinue for a mule claimed by virtue of a mortgage. The judgment entry recites that the defendant pleaded the general issue. The exact form of the plea is not disclosed by the record. The plaintiff proved that Lando Patton owned the mule in question, and that he was indebted to appellee's intestate, and that to secure this indebtedness he executed a mortgage to said intestate. The defendant, appellant, proved his purchase of the mule from H. Bonfield, who claimed it by virtue of his foreclosure of a subsequent mortgage from Lando Patton. The court's rulings on the introduction of evidence are presented for review.

[1] The Patton mortgage to plaintiff's intestate having been introduced in evidence, the defendant asked the witness: "Did you sign that mortgage, Mr. Patton?" Plaintiff objected, because the evidence sought to be elicited was "incompetent, irrelevant, immaterial, or illegal," and because there was no plea of non est factum. The objection was sustained, and defendant duly excepted, and, as appellant, now assigns error on this ruling of the court.

The books are agreed that detention is the gist of the action of detinue. *Walker v. Fenner et al.*, 20 Ala. 192. The general issue in this action is non detinet. 3 Chitty's Pl. 1023; Stephens' Pl. pp. 173, 174. An averment that the allegations of the complaint are untrue is a plea of the general issue. Code, § 5331; *Berlin Machine Works*

v. Ala. City Furn. Co., 112 Ala. 488, 20 South. 418. This plea puts in issue the right of the plaintiff to recover (*Foster v. Chamberlain*, 41 Ala. 167; *Wellden v. Witt*, 145 Ala. 612, 40 South. 126; *Lucas v. Pittman*, 94 Ala. 616, 10 South. 603; *Ingersoll-Sergeant Drill Co. v. Worthington & Co.*, 110 Ala. 322, 20 South. 61; *Grunewald v. Copeland*, 181 Ala. 345, 30 South. 878); and evidence negating the right of possession of plaintiff or of defendant is competent (*Snellgrove v. Evans*, 145 Ala. 600, 40 South. 567).

In *Pinckard & Lay v. Bramlett*, 165 Ala. 327, 51 South. 557, it was held that proof of payment of the mortgage debt may be shown in detinue under the general issue, as tending to divest the legal title of the mortgagee to the personal property in question. *Slaughter v. Swift*, 67 Ala. 494.

In *Green v. Sneed*, 101 Ala. 205, 208, 13 South. 277, 46 Am. St. Rep. 119, an action of detinue by a mortgagee against the mortgagor after the law day of the mortgage, it was held that, where the action is not on the original consideration for which the mortgage was executed, but is on the right of recovery of the mortgaged property, and the title asserted by the plaintiff depends upon the validity of the instrument itself, in legal contemplation of the instrument which the defendant executed ceases to be his act the moment it is altered, and that the alteration may be shown. The only plea in the *Green Case*, as shown by the original record in this court, was the general issue; and under that plea proof of the alteration of the mortgage after signature was permitted to destroy the muniment of title upon which the plaintiff relied for recovery.

So in *Carlisle v. People's Bank*, 122 Ala. 446, 26 South. 115, it was held that under the general issue testimony may be introduced to vary or explain the terms of the mortgage on which the plaintiff relies for title, and to defeat the recovery in detinue. *Foster v. Chamberlain & Co.*, 41 Ala. 167.

In *Hoobler v. International Harvester Co.*, etc., 185 Ala. 533, 537, 64 South. 567, 569, Mr. Justice Sayre said:

"The matters involved in the proper pleas to which we have alluded went to plaintiff's title, and might have been proved under the general issue (*Carlisle v. People's Bank*, 122 Ala. 446, 26 South. 115), filed after the rulings on pleas 3, 4, and 8, but the court followed up its rulings on these pleas by excluding from the jury evidence of the fact upon which the pleas were based, evidence tending to disprove the title by which plaintiff claimed, and these rulings were erroneous."

[2-4] In the action of detinue the mortgage in evidence was not the foundation of the suit, although the plaintiff's title or right to the possession of the personalty may rest solely on the mortgage. The suit was for specific property, and the gist of the action was detention. The defendant was not apprised by the complaint of what right of possession the plaintiff would show. When the

validity of a record attacked is put directly in issue by the pleadings of the party attacking it by proper averments, the attack is direct, and not collateral; but, when there are no proper averments attacking the record, although its validity is drawn into the issue of the case, the attack is collateral. *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Dormitzer v. Ger. Savings & L. Soc.*, 23 Wash. 132, 62 Pac. 862. When the mortgage is introduced in evidence as evidence of plaintiff's right of possession, under defendant's plea of the general issue defendant may defeat this prima facie right of possession by showing an outstanding title in a third person (*Wright v. Bush*, 165 Ala. 320, 51 South. 635), or by proving payment (*Pinckard v. Bramlett*, 165 Ala. 327, 51 South. 557), or by showing that the mortgage relied on by plaintiff has been rendered nugatory (*Birmingham Co. v. Gillespie*, 168 Ala. 408, 50 South. 1032). So also may it be shown, under the general issue, that the plaintiff has given the defendant the property (1 *Tidd's Pr.* 650-653), or that the plaintiff has not the unqualified right of possession in its present form (*Seals v. Edmondson*, 73 Ala. 295, 49 Am. Rep. 51), or the right to the entire possession (*Graham v. Myers*, 74 Ala. 432), or is estopped to deny the defendant's right of possession (*Traun v. Keiffer*, 31 Ala. 144).

[§] The rule of pleading declared in section 5332 of the Code has no application to trover and detinue. Under the companion section (3967), declaring a rule of evidence in certain cases, it has been held that a suit in trover for the conversion of a mule, a mortgage collateral to the suit, or inter alios is not within the provision of the statute. *Askew Bros. v. Steiner & Lobman*, 76 Ala. 218. By analogy the words "any instrument in writing, the foundation of the suit," found in section 5332 of the Code, have no application to actions in detinue. We do not mean to say that the rule would be different in a case where there was a suggestion of the mortgage debt under the statutes (Code, § 3789 et seq.). It is sufficient to say that no such suggestion was made in this case, and that the trial was had only on the plea of the general issue.

No good reason exists why, under the plea of the general issue in detinue, the defendant may not deny or impeach the execution of the plaintiff's mortgage introduced in evidence and relied on for his title and for his right of possession.

For the refusal of the trial court to allow defendant, under his plea of the general issue, to deny the execution of the chattel mortgage on which plaintiff rested his right of recovery, the judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

SMITH v. JEFFCOAT. (6 Div. 184;)

(Supreme Court of Alabama. April 6, 1916.)

1. EMINENT DOMAIN — 293(2) — RIGHTS OF PARTIES — COMPENSATION — TIME OF PAYMENT.

A plea in an action of trespass *quare clausum fregit*, attempting to justify, under a probate decree condemning realty to the use of a railroad for a right of way and authorizing it to construct its line thereon, alleging that the plaintiff occupied the premises under a lease from the owner, entered into after condemnation proceeding was filed, and that trespass was only so much as was necessary to permit the use of the land for the right of way, is demurrable if compensation had not been paid for the property, prior to the entry, as required by Code 1907, § 3882.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 800; Dec. Dig. — 293(2).]

2. EMINENT DOMAIN — 124 — COMPENSATION — COMPUTATION.

Compensation to be paid by the railroad for land condemned must be fixed by the valuation of the property, as of the date of the petition for condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 332-344; Dec. Dig. — 124.]

3. EMINENT DOMAIN — 320 — COMPENSATION — EFFECT.

If the railroad compensates the owner for land taken by eminent domain, its right and title vests upon such payment, and, as against intervening rights, relates back to the filing of the petition for condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 851, 852; Dec. Dig. — 320.]

4. EMINENT DOMAIN — 155' — RIGHTS OF PARTIES — RIGHTS ACQUIRED — PENDENTE LITE.

One who acquires a leasehold right in land, against which condemnation proceedings have been filed, takes it subject to the rights of the condemning parties, and can have no compensation for the alleged interest in the land.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 421-424; Dec. Dig. — 155.]

5. EMINENT DOMAIN — 243(2) — DECREE OF CONDEMNATION — CONCLUSIVENESS — PERSONS NOT PARTIES.

If possession of plaintiff, which defendant invaded and attempted to justify, under a probate decree in eminent domain, was acquired prior to filing the condemnation proceedings and plaintiff was not a party, he was not bound by the decree and was not divested of whatever title he had.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 627, 700; Dec. Dig. — 243(2).]

6. EMINENT DOMAIN — 293(1) — RIGHTS OF PARTIES — PLEADING — SUFFICIENCY.

Allegations of replications, where plaintiff sought damages for trespass against his leasehold interest by a railroad which sought to justify under probate deed in eminent domain, was insufficient for failure to show the precise character, time of beginning, and duration of his interest.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 797-799; Dec. Dig. — 293(1).]

7. EMINENT DOMAIN — 266 — ENTRY UPON LAND — EFFECT.

In entering for the reasonable assertion of rights conferred by the statute and a decree of

the probate court condemning land in pursuance thereof, defendant, as the duly authorized agent of the railroad, which condemned the land, was not guilty of a trespass.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 694-696, 702, 703, 706; Dec. Dig. ¶206.]

8. TRESPASS ¶10—TRESPASS AGAINST REALTY—INJURIES TO PERSONALTY.

Damage to personal property inflicted on entering land, under probate decree condemning it for a railroad right of way, does not constitute a trespass against the realty.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 8, 12; Dec. Dig. ¶10.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by W. P. Smith against B. J. Jeffcoat. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

John W. Altman, of Birmingham, for appellant. Forney Johnston and W. R. C. Cocke, both of Birmingham, for appellee.

SAYRE, J. [1] This was an action of trespass *quare clausum fregit* for that defendant entered upon plaintiff's close and moved a storehouse, impairing the storehouse and breaking and destroying articles of personal property therein. Defendant justified under the authority of Birmingham, Ensley & Bessemer Railroad Company and a decree of the probate court condemning the realty to the use of said company for a right of way, authorizing it to construct, maintain, and operate thereon "a double track line of railroad over and upon the said land and through any building within said right of way," alleging that plaintiff occupied the premises under a lease from the owner into which he entered after the proceedings for condemnation had been filed in the probate court, and that on the occasion complained of he did not move the storehouse a greater distance off the right of way than was reasonably necessary in order to construct said railroad. This plea was subject to that ground of demurrer which took the point that compensation had not been made for the property taken prior to the entry complained of, as provided in section 3882 of the Code. This ground of demurrer is now confessed, and for the error in overruling it the cause must be reversed.

[2-4] It is proper, in order to expedite the cause, and we are invited by the parties, to pass upon another question that lays at the root of plaintiff's case. The theory of plaintiff's case was that, regardless of the institution of condemnation proceedings prior to the time of his lease, he acquired a right of possession superior to that of the condemnor, and that he was not concluded by that proceeding because he was not made a party. The compensation to be paid by the railroad company must be fixed by the valuation of the property as of the date of the petition for condemnation. *Southern Ry. Co. v. Cowan*, 129 Ala. 577, 29 South. 985, and cases

there cited. Assuming that defendant will be able to amend his special plea by showing payment or a deposit of the compensation awarded in court for the owner as provided by section 3882 of the Code, prior to the entry alleged, the right and title of the railroad company, under whose authority he entered, vested upon such payment or deposit, and, as against intervening rights, related back to the filing of the petition for condemnation. On the facts stated in the plea, plaintiff acquired his leasehold *pendente lite*, his rights under it were subject to the right of the railroad company petitioning for condemnation, and he was entitled to no compensation as for his alleged interest in the land. 2 *Lewis Em. Dom.* (2d Ed.) § 338; *Schreiber v. Railroad Co.*, 115 Ill. 340, 3 N. E. 427; *In re State House*, 21 R. I. 59, 41 Atl. 1004. The demurrer to the plea, upon grounds other than that first above noticed, was not well taken.

[5, 6] If by his special replication plaintiff intended only to deny that the right and title by which he held possession at the time of the trespass alleged in the complaint had been acquired after the institution of the condemnation proceedings, every purpose of the replication was served by the general traverse filed at the same time, and there was no reversible error in sustaining the demurrer to the special replication. If the possession against which defendant was alleged to have offended was held by plaintiff under right and title acquired before the condemnation proceedings were instituted, the decree was not conclusive against him, and did not divest him of the lawful right, title, or possession he had, because he was not a party to the proceedings. But the substance of the replication, construed against the pleader, seems to be that at the time of the trespass complained of he was in possession under a lease from the owner, and at the time of the institution of the condemnation proceedings he was the owner of a leasehold interest in the premises under a contract of lease from the owner of the legal title. It is not made to appear that the contract under which plaintiff held at the time of the alleged trespass was the same lease under which he held at the institution of the proceedings for condemnation. Consistently with the facts alleged, the right to the possession upon which defendant entered was acquired by contract intervening between the institution of the proceedings and the alleged trespass. Consistently also, the possessory right under which plaintiff held at the institution of the suit expired before the trespass alleged. If so, defendant's entry was not wrong. The replication was bad, therefore.

[7, 8] In entering for the reasonable assertion of rights conferred by the statute and the decree of the probate court made in pur-

suance thereof, defendant, as the duly authorized agent of the railroad company, was not guilty of a trespass. Nor did the fact that defendant's removal of the storehouse resulted in the breaking of plaintiff's lamps, scales, and clock, make defendant a trespasser as to the realty. If defendant was guilty of any wrong in respect of plaintiff's personality, his remedy was by way of a different action. *Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 South. 874. The gist of plaintiff's action, as framed, was the alleged trespass to realty. *Hardeman v. Williams*, 169 Ala. 50, 53 South. 794.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

PEOPLE'S SHOE CO. v. SKALLY.
(1 Div. 925.)

(Supreme Court of Alabama. April 20, 1916.)

1. MASTER AND SERVANT ⇨39(1) — WRONGFUL DISCHARGE — PLEAS IN ABATEMENT OR MITIGATION.

In an employe's action for compensation after wrongful discharge, defendant's pleas, attempting to set up the defense that plaintiff could have received compensation in other employment, purporting to be pleas in bar of the action, and not stating expressly or by fair implication that they were pleas in abatement or in mitigation of damages, were bad on demurrer, since a plea must answer all it professes to answer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 45; Dec. Dig. ⇨39(1).]

2. PLEADING ⇨88—PLEA TO DECLARATION—ANSWERING SINGLE COUNT.

A plea professing to answer the whole declaration, and which answers but one count, is bad on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 162, 181-183; Dec. Dig. ⇨88.]

3. PLEADING ⇨88—PLEA TO DECLARATION—ANSWERING PART.

A plea assuming to answer the whole declaration, but omitting to answer a material part, is bad on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 162, 181-183; Dec. Dig. ⇨88.]

4. MASTER AND SERVANT ⇨42(1)—LIABILITY FOR COMPENSATION—REDUCTION.

An employer, when sued for wrongful discharge, can reduce the amount of recovery by showing that the servant obtained other employment, or might have done so with reasonable diligence, but cannot use the fact to defeat entirely the servant's cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 54; Dec. Dig. ⇨42(1).]

5. DAMAGES ⇨157(2)—GENERAL ISSUE—MATTER IN MITIGATION.

Matter in mitigation of damages is admissible under the general issue.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 437, 447, 449-451, 453; Dec. Dig. ⇨157(2).]

6. APPEAL AND ERROR ⇨1040(6)—HARMLESS ERROR—PLEADING.

In a servant's action for compensation after wrongful discharge, where the matter of reduction of recovery on account of the possibility of

having obtained other employment was litigated under the general issue, error in sustaining demurrer to the plea setting up such matter was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4093, 4097; Dec. Dig. ⇨1040(6); *Pleading*, Cent. Dig. §§ 284, 400, 567.]

7. APPEAL AND ERROR ⇨1042(2)—HARMLESS ERROR—PLEADING.

Where a certain part of a plea is good only in reduction of damages, but not as a defense in bar, the matter is available under the plea of the general issue, and its elimination from the plea by motion to strike is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4111; Dec. Dig. ⇨1042(2); *Pleading*, Cent. Dig. § 1172.]

8. APPEAL AND ERROR ⇨1042(2)—HARMLESS ERROR—STRIKING PLEA.

Error in striking special pleas is harmless when the matters contained therein are available under the general issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4111; Dec. Dig. ⇨1042(2); *Pleading*, Cent. Dig. § 1172.]

9. TRIAL ⇨143 — CONFLICTING EVIDENCE — QUESTION FOR JURY.

Where evidence is in dispute on controverted facts upon which the right of recovery depends, it is proper for the court to decline to peremptorily instruct the jury to find for defendant or to give the affirmative charge with the usual hypothesis.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. ⇨143.]

10. TRIAL ⇨76—OBJECTIONS TO EVIDENCE—TIME.

Objections to questions propounded to witnesses, not made until after the questions are answered, come too late, unless the questions are answered before counsel can object.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 172, 183-190, 237; Dec. Dig. ⇨76.]

11. WITNESSES ⇨346—IMPEACHMENT.

In an action for compensation for wrongful discharge, it was competent for plaintiff to prove, proper predicate being laid, that the general manager of defendant company, a witness in the case, the defense depending on his testimony, had been talking with witnesses in the case, asking them as to what they would testify, what the witnesses had told defendant's counsel, and that the manager told the witnesses they should or must change their testimony.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1133; Dec. Dig. ⇨346.]

12. WITNESSES ⇨388(2)—IMPEACHMENT.

To impeach a witness by contradictory statements, a predicate is required to prevent surprise and give him an opportunity to explain, the rule being that, if his attention is called to the time and place, circumstances and persons involved, and the statements made, the rule is satisfied.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1233; Dec. Dig. ⇨388(2).]

13. WITNESSES ⇨389—IMPEACHMENT.

A witness cannot defeat the introduction of contradictory statements offered to impeach him by stating that he does not remember, etc.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1243-1245; Dec. Dig. ⇨389.]

Appeal from Law and Equity Court, Mobile County; Sanford Berney, Judge.

Action by John Skally against the People's Shoe Company. From a judgment for plaintiff, defendant appeals. Transferred from

the Court of Appeals under section 6, Act April 18, 1911, p. 450. Affirmed.

The declaration was upon breach of contract of employment. The pleas were: The general issue. Plaintiff left the employment of the defendant of his own free will and accord on July 1, 1914, and was not discharged; left such employment without cause on the part of the defendant. That after plaintiff ceased to work for defendant plaintiff did obtain other employment in the same line and character of work and business in which he was theretofore employed by defendant, and in the same community in which plaintiff was theretofore employed by defendant, at a salary of \$100 per month, and worked at such employment for a period of one month. That after plaintiff worked in the employment of defendant plaintiff went into business for himself in the same community in which he was theretofore employed by defendant, from which said business plaintiff realized the sum of \$500. Plaintiff could have, by the exercise of reasonable effort and diligence, obtained employment of the same character in which he had theretofore been employed by defendant and in the same locality and community from the time he ceased to be an employé of defendant. J. L. Cawthon was being examined as a witness; he being the president of the People's Shoe Company. He was asked:

"Now, didn't you have a conversation with Mr. McAtee in your store after he had been over to Mr. Armbrecht's office, Mr. Armbrecht being your attorney, in which you inquired as to what he had told Mr. Armbrecht, and when Mr. McAtee told you, in substance, that he told Mr. Armbrecht he had a contract by the year, that you then told him that would be throwing you down, and he must go to Mr. Armbrecht and change his testimony?"

This question was also propounded as to other witnesses, and, after objection overruled, the witness answered: "No." These witnesses were introduced in rebuttal if such conversation took place between them and Mr. Cawthon, and, after objection overruled, the witnesses answered: "Yes." The charges sufficiently appear.

Armbrecht, White & McMillan, of Mobile, for appellant. Leigh & Chamberlain and Stevens, McCorvey & McLeod, all of Mobile, for appellee.

MAYFIELD, J. This is an action by an employé to recover the salary or compensation he would have received for six months' service but for the alleged wrongful discharge by the employer. The trial was had on the general issue and special pleas setting up the fact that plaintiff voluntarily quit the employment, and that he was not wrongfully discharged. The defendant also filed several pleas, attempting to set up the defense that the plaintiff did receive, or could have received, similar or like employment in the same community, and received, or could have received, ample or full compen-

sation for his services, and that he was therefore not damaged if discharged as alleged.

[1] Demurrers were sustained as to these pleas, and the first assignments of error go to these rulings of the court. These pleas were each clearly subject to the demurrer interposed. They profess or purport to be pleas in bar of the entire action, and not in abatement, or in mitigation of damages. Counsel for appellant are in error in concluding that the pleas do not profess or purport to answer the entire cause of action alleged, but go only in bar of a part, or in mitigation of damages. If they were intended as such by the pleader, the pleas should have said so, either expressly or by fair implication. Counsel for appellant concede that the law and a rule of pleading is that a plea must answer all it professes to answer; but they say these pleas do this. As we have said above, we do not agree with counsel in this construction of the pleas.

[2] A plea professing to answer the whole declaration, and which answered only one count, will be adjudged bad on demurrer. *Adams v. McMillan*, Ex'r, 7 Port. 75; *Tomkies et al. v. Reynolds*, 17 Ala. 109; *Wilkinson v. Moseley*, 30 Ala. 562.

[3] So a plea assuming to answer the whole declaration, but omitting to answer a material part, is bad on demurrer. *Standifer v. White*, 9 Ala. 527; *Mills & Co. v. Stewart*, 12 Ala. 90; *White v. Yarbrough*, 16 Ala. 109.

[4] "The defendant may reduce the amount of recovery by showing such other employment, or that plaintiff might have obtained other employment by the exercise of reasonable diligence; but these facts could not be used to defeat entirely plaintiff's cause of action. *Wilkinson v. Black*, 30 Ala. 329; *Morris & Co. v. Knox*, 96 Ala. 320, 11 South. 207; *Troy Co. v. Logan*, 96 Ala. 619, 12 South. 712." *Fitzpatrick, etc., Co. v. McLaney*, 153 Ala. 586, 592, 44 South. 1023, 127 Am. St. Rep. 71.

[5, 6] Moreover, if the pleas were intended as counsel for appellant contend—that is, in mitigation of damages—such matter was admissible under the general issue, and the record shows that this matter was litigated under the general issue; hence, if error, it would be without possible injury.

[7] Where a certain part of a plea is good only in reduction of damages, but not as a defense in bar, whether such matters are properly stricken from the file, if stricken on motion, is immaterial, for the reason that the matter would be available under the plea of the general issue, and, if so, its elimination from the plea by motion to strike would be without injury. *Hayes v. Miller*, 150 Ala. 621, 43 South. 818, 11 L. R. A. (N. S.) 748, 124 Am. St. Rep. 93.

[8] Error is without injury in striking special pleas when the matters contained therein are available under the general issue.

N. C. & St. L. Ry. v. Karthaus, 150 Ala. 633, 43 South. 791.

The master who wrongfully discharges his servant is liable to an action by the servant whether the latter obtain or fail to obtain other employment, but the master may reduce the recovery by proof of other employment or that the servant might have obtained other employment by reasonable diligence. *Fitzpatrick, etc., Co. v. McLaney, supra*; *Wilkinson v. Black, supra*; *Morris v. Knox, supra*, 96 Ala. 320, 11 South. 207; *Troy v. Logan, supra*.

The real dispute between the parties was of questions of fact: First, whether or not there was a contract of employment from July, 1914, to January, 1915; and, second, whether or not the defendant in fact discharged the plaintiff.

[9] There is no contention that there was any justification for the discharge, nor that plaintiff quit the service. The defendant contends: First, that the employment was by the month, and not by the year, as plaintiff claims; and, second, that plaintiff was not discharged, but left the service voluntarily. While there is some difference as to other questions, the two above mentioned were the main controverted facts upon which the right of recovery depended. The evidence was clearly in dispute as to both of these questions, and therefore the court correctly declined to peremptorily instruct the jury to find for the defendant, or to give the affirmative charge with the usual hypothesis. The trial court, at the request of the defendant, instructed the jury as follows:

"The court charges the jury that, if they believe from the evidence that the plaintiff voluntarily left the employment of the defendant without fault on the part of the defendant, they cannot find a verdict for the plaintiff."

"The court charges the jury that, if they believe from the evidence that the defendant offered to keep the plaintiff in his employ after July 1st until the plaintiff could secure another job at similar employment in the same line of business in the same community at a rate of salary satisfactory to the plaintiff, plaintiff cannot recover."

"The court charges the jury that, unless they believe from the evidence that the plaintiff and the defendant entered into a definite contract whereby the plaintiff agreed to serve the defendant and the defendant agreed to employ the plaintiff for a definite term ending December 31, 1914, they must find for the defendant."

These charges were certainly as favorable to the defendant as it had a right to receive.

[10] There is a great number of assignments of error as to rulings on the evidence. It is unnecessary to treat them separately. Suffice it to say the entire record has been carefully reviewed and each objection and exception examined separately, and that we find no reversible error in any of the rulings. Many of the objections to questions propounded to the witnesses were not made until after the question was answered, and

hence came too late; there being nothing to show that the question was answered before counsel could interpose objection. Parties nor counsel are not allowed to speculate on the answer before interposing an objection to the question. Moreover, there was no motion to exclude the answer in several instances. As to the exceptions based on the sustaining of plaintiff's objections to questions propounded to witnesses, they are each without merit, or it was not shown that the answer would be material or relevant; the questions themselves not being such in their nature to show the competency or relevancy of the proposed answers. We feel sure that, if there could be said to be error in any one of the specified rulings on exception, this record shows that it was without injury to this appellant.

[11] It was certainly competent for plaintiff to prove that the general manager of defendant company had been talking with the witnesses in the case, and asking them as to what they would testify, and what the witnesses had told defendant's counsel, and that the general manager told the witnesses they ought to or must change their testimony. Such matters were certainly admissible when the defendant's president or general manager was a witness in the case, and the defense depended almost entirely upon his testimony. There was no such discrepancy between the predicate laid when the president or manager was on the stand and the questions propounded to the witnesses as to what was said and done by the former as to render the evidence inadmissible. It appears from the record with reasonable certainty that the predicate informed the witnesses of the times, places, and occasions, as well as of the matters inquired about.

[12] In order to impeach a witness by contradictory statements, a predicate is required to prevent surprise and give the witness an opportunity to explain. If the attention of the witness is called to the time and place, circumstances and persons involved, and the statements made, the rule is satisfied. It does not require a perfect precision as to either. *Southern Railway Co. v. Williams*, 113 Ala. 620, 21 South. 328. See *Carlisle v. Hunley, Ex'r*, 15 Ala. 623; *Lewis v. Post*, 1 Ala. 65; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Powell v. State*, 19 Ala. 577; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442.

[13] A witness cannot defeat the introduction of contradictory statements offered for the purpose of impeaching him by stating that he does not remember, and the like answers. *Southern Ry. Co. v. Williams*, 113 Ala. 620, 21 South. 328; *Brown v. State*, 79 Ala. 61; 4 Mayf. Dig. p. 1198.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

DAWSON v. STATE. (2 Div. 602.)

(Supreme Court of Alabama. April 13, 1916.)

1. STATUTES \S 8½(2)—CONSTRUCTION—CONSTITUTIONAL PROVISIONS.

An act of the Legislature, House Bill No. 534, approved February 11, 1915 (Loc. Laws 1915, p. 20), providing for the detachment of the county of Marengo from the First judicial circuit, transferring all causes pending in the circuit court of Marengo county to the Marengo law and equity court, which is clothed with full jurisdiction had by the circuit court before transfer, and repealing all conflicting laws, is not violative of Const. 1901, § 106, providing that no special or private local law shall be passed on any subject not enumerated in section 104, except fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published in the county or counties where the matter affected may be situated, in that the publication of the intent to apply therefor was had only in the county of Marengo, since the holding of the court in Marengo county and its detachment from the First circuit in no manner affected the other counties of the circuit.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. \S 8½(2).]

2. CLERKS OF COURTS \S 7—STATUTES—CONSTRUCTION—INTENTION OF LEGISLATURE.

Under Laws 1909 (Sp. Sess.) p. 339, establishing the Marengo law and equity court, of which section 6 provides that the clerk of the circuit court shall be ex officio clerk of the law and equity court, amended by an act approved March 17, 1915 (Loc. Laws 1915, p. 62), appointing the then clerk of the circuit court clerk of the law and equity court until the next regular election and until his successor be elected and qualified, and an act passed February 11, 1915 (Loc. Laws 1915, p. 20), detaching Marengo county from the First judicial circuit, it being the duty of the court in construing legislative enactments with doubtful meaning to carry out the legislative intent, if possible, at the time of the approval of the amendatory act, the person occupying the position of circuit clerk was still ex officio clerk of the law and equity court.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 21-25; Dec. Dig. \S 7.]

3. CRIMINAL LAW \S 782(9) — TRIAL — INSTRUCTIONS.

In a criminal prosecution, a requested charge that, "You cannot find the defendant guilty unless you believe him guilty beyond all reasonable supposition," was properly refused; supposition having no legitimate sphere or habitation in judicial administration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1877, 1878, 1906, 1907, 1910, 1911; Dec. Dig. \S 782(9).]

4. CRIMINAL LAW \S 1178—APPEAL AND ERROR—QUESTIONS NOT RAISED ON APPEAL.

On appeal of a criminal case after finding on questions insisted upon by counsel in its argument of the case, it is the duty of the court to give careful consideration to all other questions presented by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. \S 1178.]

Appeal from Law and Equity Court, Marengo County; E. J. Gilder, Judge.

Tommie Dawson was indicted for crime, and he appeals. Affirmed.

George Pegram, of Faunsdale, for appellant. W. L. Martin, Atty. Gen., and Lawrence E. Brown, Asst. Atty. Gen., for the State.

GARDNER, J. The indictment in this case was preferred by the grand jury of the circuit court of Marengo county. The trial of the defendant took place in the Marengo law and equity court; the case having been transferred to the docket of that court by virtue of an act of the Legislature approved February 11, 1915, being House Bill 534. Loc. Laws 1915, p. 20. Motion was made by the defendant to strike the indictment from the files of said court on the ground that the case had not been transferred with his consent.

[1] The Marengo law and equity court was established by an act approved August 26, 1909 (General and Local Acts [S. S.] 1909, p. 339). Section 19 of said act provides that, when an indictment has been found in the circuit court, the Marengo law and equity court shall not entertain jurisdiction of the case, except upon the transfer thereof to said court, and section 38 of said act provides for the transfer of such cases by agreement of the parties. The act of February 11, 1915, provides for the detachment of the county of Marengo from the First judicial circuit, and further provides that:

"All causes pending in the circuit court of Marengo county are hereby transferred to Marengo law and equity court, which Marengo law and equity court is hereby clothed with full and complete jurisdiction to try and determine said causes in all respects as fully as said circuit court of Marengo county had before said transfer."

And the second section provides:

"That all laws in conflict herewith are hereby repealed."

The argument of counsel for appellant in support of his motion rests upon his contention that the said act of February 11th is unconstitutional and void as in violation of section 106 of the Constitution of 1901. It is insisted that said act is a local law, and that publication of the intention to apply therefor was had only in the county of Marengo, and that, as the act removed Marengo county from the First judicial circuit, the other counties of this circuit were so affected thereby as that under the provision of the Constitution the publication should have been had in each. That portion of section 106 here pertinent reads as follows:

"No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties."

We are persuaded, however, that the other counties of the First judicial circuit are unaffected, so far as the constitutional provision above quoted is concerned, by the act of February 11th. "The matter or thing to be affected" was the holding of the court in Marengo county and the detachment of said county from the First circuit. The act in no manner affected any of the counties of the circuit, except Marengo, and it was therefore a matter with which the other counties could not be concerned. We think it quite clear that the framers of the Constitution had no intention to require by this section the publication of such notice in every county of a circuit or division when the act is intended to affect only the county which is being detached. If from a chancery division composed of 17 counties it should be decided to detach one county, the argument of counsel for appellant would lead to the result that, to comply with section 106 of the Constitution, such publication would have to be made in each of the 17 counties. Certainly no such unreasonable result can be presumed to have been intended by the framers of the Constitution. We therefore conclude that the act of February 11, 1915, is free from constitutional objection, and that the motion of the defendant was properly overruled.

[2] We find in the record also a motion to quash the venire upon the grounds that the list of names constituting it is not made out by the clerk of the court as required by law, and that the copy of the venire drawn and summoned for the trial of the cause was not properly attested before it was served on the defendant. We do not concede that the motion properly raised the question argued by counsel. Indeed, we are inclined to the contrary view. However, as the question argued and insisted upon is one of general interest to the locality affected, we deem it proper to give an opinion on it. The insistence of counsel appears to be that there was no legally constituted clerk of the Marengo law and equity court at the time of the trial of this case. Under the provisions of section 6 of the act establishing the said court the clerk of the circuit court was declared to be ex officio clerk of the law and equity court. The act establishing the law and equity court was amended in several particulars by an act approved March 17, 1915 (Loc. Laws 1915, p. 62), and which said act amended section 6, in so far as is here pertinent, as follows:

"That section 6 of an act entitled 'An act to create and establish the Marengo law and equity court for Marengo county,' approved August 26, 1909, be amended so as to read as follows: Sec. 6. That the present clerk of the circuit court of Marengo county be and he is hereby constituted and appointed clerk of said Marengo law and equity court, and shall hold said office until the next regular election for state officers in the year 1916, and until his successor is elected and qualified, as herein provided. That at said election for state officers in 1916, and every six years thereafter, a clerk of said court shall be elected by the qualified voters of

said Marengo county, said clerk so elected to hold office for a term of six years and until his successor is elected and qualified, the term of office of said clerk to commence on the same date as clerks of the circuit courts of this state," etc.

The argument is made that as this act was approved on March 17, 1915, and provided that the clerk of the circuit court should be clerk of the Marengo law and equity court, and that, as on February 11, 1915, an act had been passed which detached said Marengo county from the First judicial circuit, therefore there was no clerk of the circuit court, and consequently the amendment was meaningless and without effect. In this argument, however, counsel overlook entirely the duty of the court, in construing legislative enactments of doubtful meaning, to endeavor to carry out the legislative intent, as the intention of the lawmakers is the law.

As previously noted, the act establishing the Marengo law and equity court constituted the clerk of the circuit court ex officio clerk of the new court, and the amendment was intended to designate the person occupying such position of circuit clerk at the time of the detachment of Marengo county from the First circuit, and who was ex officio clerk of the law and equity court at the time of the passage of the amendatory act. At the time of the approval of the act of March 17th, therefore, the said clerk was still clerk of the law and equity court, and, as the act of February 11th had removed Marengo county from the First judicial circuit, the amendment here discussed was clearly for the purpose of providing for the election of the clerk of the law and equity court, for filling any vacancy therein, and for matters of that character necessitated by the withdrawal of said county from the said circuit. We conclude that the legislative intent is entirely clear, and that the contention of counsel for appellant is without merit.

[3] These were the only two questions argued by counsel upon the submission of the cause, but a slight reference was made to the refusal of charge numbered 8, which reads as follows:

"You cannot find the defendant guilty unless you believe him guilty beyond all reasonable supposition."

A charge of similar character was condemned by this court in *McCoy v. State*, 170 Ala. 10, 54 South. 428, where a number of cases are referred to, and the following is quoted from the case of *Johnson v. State*, 102 Ala. 1, 16 South. 99, wherein Chief Justice Stone, writing for the court, said:

"Supposition has no legitimate sphere or habitation in judicial administration."

See, also, case of *Bert Richardson v. State*, 68 South. 57.

[4] We have treated all the questions insisted upon by counsel for appellant in his argument of this cause, and find them without merit. Mindful, however, of our duty in cases of this character, we have given care

ful consideration to the other questions presented by the record. We find in the record no reversible error and nothing deserving of special treatment here.

The judgment of the court below is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

ALLGOOD, State Auditor, v. SLOSS-SHEFFIELD STEEL & IRON CO. (3 Div. 207.)

(Supreme Court of Alabama. April 20, 1916.)

1. STATUTES \S 164—REPEAL BY IMPLICATION—AMENDMENT.

Where an amendment changes the old law in its substantial provisions, it must by a necessary implication repeal the old law so far as they are in conflict.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 239; Dec. Dig. \S 164.]

2. STATUTES \S 161(1)—REPEAL BY IMPLICATION—SUBJECT-MATTER—INCONSISTENCY.

Where a new law, whether in the form of an amendment or otherwise, covers the whole subject-matter of a former law and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 230, 233, 234; Dec. Dig. \S 161(1).]

3. STATUTES \S 164 — IMPLIED REPEAL — AMENDMENT.

Where a statute is amended "so as to read as follows," the amendatory act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment, and so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, and so much of the act as is omitted is repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 239; Dec. Dig. \S 164.]

4. STATUTES \S 170 — IMPLIED REPEAL — REPEAL AND RE-ENACTMENT.

The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed, not as an implied repeal of the original statute, but as a continuation thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 245, 248, 249; Dec. Dig. \S 170.]

5. LICENSES \S 34—RECOVERY OF INVALID LICENSE TAX—STATUTES—REPEAL.

Petitioners in 1907, 1908, and 1909 paid to a probate judge certain sums of money as privilege taxes under the revenue act of March 7, 1907 (Sess. Acts 1907, p. 455), which was unconstitutional and void. Code 1907, \S 2411, which provided for a refund of a proportionate part of the license tax paid for conducting a business afterwards prohibited by law, was expressly amended by Act Aug. 25, 1909 (Sess. Acts 1909, p. 166), re-enacting the original statute and adding that any person who, through a mistake or error of the probate judge, has paid him money not due for such license, or through such mistake has paid an amount in excess of that required by law, shall be entitled to a refund, and that the section should apply in cases where money has heretofore been so erroneously paid within two years before the approval of this act, and, as amended, was further amended by Act Feb. 22, 1915 (Sess. Acts 1915, p. 120), by re-enacting the

amended statute, with an added provision, and the general revenue bill of September 14, 1915 (Sess. Acts 1915, pp. 489-533), re-enacted the amendatory act of 1909 as section 15 thereof without reference to the original statute. *Held*, that neither the amendatory nor the revisory acts of 1915 altered the retrospective limit prescribed by section 2411 as amended, so that the original limitation to money paid since August 25, 1907, was ipso facto retained.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 68; Dec. Dig. \S 34.]

6. LICENSES \S 34 — PAYMENT OF TAX — MISTAKE—REFUND—POLICY.

Code 1907, \S 2411, providing for a refund of a proportionate part of the license tax paid for conducting a business afterwards prohibited by law was intended to promote justice and equity between the state and county and the taxpayer and to correct mistakes either of law or fact.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 68; Dec. Dig. \S 34.]

7. LICENSES \S 34—PAYMENT UNDER INVALID LAW—RECOVERY—LACHES.

The claim of a taxpayer to recover money paid under an invalid license law, if not prosecuted with reasonable diligence, will be shorn of its remedy on common-law practice, even though not barred by any analogous statute of limitation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 68; Dec. Dig. \S 34.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Sloss-Sheffield Steel & Iron Company originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him to issue his warrant to certain license taxes paid into the state treasury under an act declared unconstitutional and void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Tillman, Bradley & Morrow, of Birmingham, and Steiner, Crum & Weil, of Montgomery, for appellee.

SOMERVILLE, J. The following principles of statutory construction must be regarded as thoroughly well settled, both upon the soundest reasoning and the highest authority:

[1, 2] 1. "Where an amendment is made that changes the old law in its substantial provisions, it must, by a necessary implication, repeal the old law so far as they are in conflict. And where a new law, whether it be in the form of an amendment or otherwise, covers the whole subject-matter of the former, and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication." 36 Cyc. 1082 (D); Scott v. Simons, 70 Ala. 352; Ogbourne v. Ogbourne, 60 Ala. 616; Cahall v. Citizens' etc., Ass'n, 61 Ala. 232; Lemay v. Walker, 62 Ala. 39.

[3] 2. "Generally speaking, where a statute is amended 'so as to read as follows,' the amendatory act becomes a substitute for the

original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption; that so much of the act as is omitted is repealed; and that any substantial change in other portions of the original act, as also any matter which is entirely new, is operative as new legislation." 36 Cyc. 1083 (2); O'Rear v. Jackson, 124 Ala. 298, 26 South. 944; In re Estate of Prime, 186 N. Y. 847, 32 N. E. 1091, 18 L. R. A. 713; Moore v. Mausert, 49 N. Y. 332; Pacific, etc., Co. v. Joliffe, 69 U. S. 450, 17 L. Ed. 805; Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429; Bear Lake, etc., Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; Great Northern Ry. Co. v. United States, 155 Fed. 945, 84 C. C. A. 93, affirmed in 206 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567, citing many other cases.

[4] 3. "The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed, not as implied repeal of the original statute, but as a continuation thereof." 36 Cyc. 1084 (E); Endlich on Statutes, § 490; Sutherland on Stat. Construction, § 134; Forbes v. Board of Health, 27 Fla. 189, 9 South. 446, 26 Am. St. Rep. 63; Brown v. Pinkerton, 95 Minn. 153, 103 N. W. 897, 900, 111 Am. St. Rep. 448; Haspel v. O'Brien, 218 Pa. 146, 67 Atl. 123, 11 Ann. Cas. 470, and note 472; White, etc., Co. v. Harris, 252 Ill. 361, 96 N. E. 857, Ann. Cas. 1912D, 536.

[5, 7] Section 2411 of the Code of 1907 provided for a refund of a proportionate part of the license tax paid for conducting a business afterwards prohibited by law. This statute was expressly amended by the act of August 25, 1909 (Sess. Acts 1909, p. 166), which re-enacted verbatim the original statute, and added the following:

"And any person who, through a mistake or error in the probate judge, has paid to the probate judge money that was not due from him for such license, or by such mistake has paid to the probate judge for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded to him the amount in either event so erroneously collected by the probate judge, and the provisions of this section shall apply in cases where money has heretofore been so erroneously paid within two years before the approval of this act."

In October of each of the years 1907, 1908, and 1909 the petitioner paid to the probate judge of Jefferson county certain sums of money as privilege taxes, under the revenue act of March 7, 1907 (Acts 1907, p. 455), which was unconstitutional and void. Thereafter by the act of February 22, 1915 (Sess. Acts 1915, p. 120), the Legislature again amended section 2411 of the Code, as al-

ready amended, by re-enacting the amended statute verbatim, and added thereto a provision requiring the probate judge himself to refund license money paid for conducting a business afterwards prohibited before the probate judge has paid over such money to the state authorities. Later on in the same session, by the act of September 14, 1915 (Sess. Acts 1915, pp. 489-533) the Legislature passed a general revenue bill which re-enacted verbatim the amendatory act of August 25, 1909, as section 15 thereof, and re-enacted also verbatim section 2412 of the Code as section 16 thereof without reference in either case to the original statute.

It will be observed that the limitation of the statute as amended in 1909 to license money "paid within two years before the approval of this act" that is, two years prior to August 25, 1909, is carried forward *ipsis verbis* into the amended statute of February 22, 1915, and also into the general revision of the revenue laws by the act of September 14, 1915. The contention of the respondent is that the use of this original clause in each of the two last-named acts is effective *ex vi terminorum* to initiate a new period of limitation, that is, a period of two years before the approval of each act thereby nullifying the operation of the law as to all erroneous payments made prior thereto. Of the character and policy of this refund statute this court has said:

"It is the successor of preceding statutes having a common object—the promotion of justice and equity between the state and county and the taxpayer. If by mistake, whether of law or of fact, the state or county has, through the medium of taxation, received money of the taxpayer to which it was not entitled *ex aequo et bono*, it is but natural right and justice that the mistake should be corrected and the money refunded." White v. Smith, 117 Ala. 232, 23 South. 525; Bigbee, etc., Co. v. Smith, 186 Ala. 552, 65 South. 37.

This just policy has been steadily expounded by successive acts of legislation.

The limitation of its operation when first applied to license money paid by mistake, to a reasonable period of antecedent time, was natural, and indeed practically necessary. But this was a limitation upon the retrospective operation of the original law and not upon recovery by the taxpayer, whose claim, if not prosecuted with reasonable diligence, will be shorn of its remedy on common-law principles of laches even though not barred by any analogous statute of limitations. 26 Cyc. 392, B, and cases cited; State v. Ben-ners, 172 Ala. 168, 55 South. 298.

Looking to the obvious purpose of the Legislature in its amendatory and revisory acts of 1915 as evidenced by the new provisions added to the original text of the amendatory act of 1909, we can discover no intention in either of these later acts to alter the limit of the retrospective operation of the law as prescribed by the act of 1909. Certainly there could have been no intention to shift that operation a second time within a year

as to license money erroneously paid, and leave its operation unchanged, and indeed unlimited, as to other license money.

Applying the rules of construction above declared, it results that the acts of 1915, although they nominally and severally repeal by implication the previously existing statutes by re-enactment, continue in force without interruption the provisions of section 2411 of the Code, as amended by the act of 1909, and the original limitation to money paid since August 25, 1907, is ipso facto retained. In other words the reiterated phrase, "paid within two years before the approval of this act," must be construed as speaking from its original enactment and operating constantly from that date. For this conclusion we have the highest authority. A New York statute gave jurisdiction to the Court of Appeals to review "every actual determination hereafter made," etc. A later statute re-enacted the original as above written, and extended the jurisdiction to other cases.

The following extract from the opinion of Denio, C. J., in *Ely v. Holton*, 15 N. Y. 595, 598, is in principle as applicable here as it was there:

"The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken would be made irregular or void by force of the subsequent statute, and confusion of every kind would be introduced. Nor do we think that the consideration that the amended section reads, as the original one did, that this court shall have jurisdiction to review determinations 'hereafter made,' limits the effect of the amended portions or the newly introduced provisions to cases in which the judgments appealed from were rendered after the amendment took effect. That is a portion of the old section which is preserved unaltered. When it was first enacted, it was thought expedient to confine the review by this court to future judgments and orders; but the incorporation of the amendment into a section which was originally thus limited does not prove that the new provisions are to be confined to determinations future in relation to the time the amendment took effect. The theory of amendments, made in the form adopted in the present instance, we take to be this: The portions of the section which are repealed are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect. In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the one above suggested of preserving a harmonious text, so that, when future editions shall be published, the scattered members shall easily adjust themselves to each other."

In a later case a different bench of the same court construed the word 'hereafter' in an amended materialmen's statute and said:

"It follows that the word 'hereafter,' in the first line of section 1 of chapter 402, Laws of 1854, being contained in the section as amended by chapter 588, Laws of 1869, continues to speak from the time of the passage of the act of 1854, and applies to and includes all labor and materials after that time." *Moore v. Mausert*, 49 N. Y. 332.

See, also, the case of *Barrows v. People's etc., Co.* (C. C.) 75 Fed. 794, wherein a similar construction was placed on the phrase "now existing," where a former act was re-

enacted with a repetition of those words; the holding being that they must be applied as of the date of the original, and not of the amended, act.

The petition shows that petitioner is entitled to have a refund of the money claimed, and the trial court did not err in overruling the demurrers thereto, and in awarding on the evidence a peremptory writ of mandamus to respondent requiring him, as state auditor, to draw his warrant upon the treasurer for the amount claimed.

The judgment of the city court will therefore be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ALLGOOD, State Auditor, v. DWIGHT MFG. CO. (3 Div. 206.)

(Supreme Court of Alabama. April 20, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Dwight Manufacturing Company, originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him to issue his warrant for certain license taxes paid into the state treasury under an act declared unconstitutional and void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Dortch, Martin & Allen, of Gadsden, for appellee.

SOMERVILLE, J. Affirmed on the authority of *M. C. Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.*, 71 South. 724.

ALLGOOD, State Auditor, v. ALABAMA CO. (3 Div. 204.)

(Supreme Court of Alabama. April 20, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Alabama Company, originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him to issue his warrant to certain license taxes paid into the state treasury under an act declared unconstitutional and void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Tillman, Bradley & Morrow, of Birmingham, for appellee.

SOMERVILLE, J. Affirmed on the authority of *M. C. Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.*, 71 South. 724.

ALLGOOD, State Auditor, v. STANDARD OIL CO. (3 Div. 208.)

(Supreme Court of Alabama. April 20, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Standard Oil Company, originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him

to issue his warrant to certain license taxes paid into the state treasury under an act declared void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Tillman, Bradley & Morrow, of Birmingham, for appellee.

SOMERVILLE, J. Affirmed on the authority of M. C. Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co., 71 South. 724.

ALLGOOD, State Auditor, v. GRASSELLI CHEMICAL CO. (3 Div. 209.)

(Supreme Court of Alabama. April 20, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Grasselli Chemical Company, originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him to issue his warrant to certain license taxes paid into the treasury under an act declared unconstitutional and void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Tillman, Bradley & Morrow, of Birmingham, for appellee.

SOMERVILLE, J. Affirmed on the authority of M. C. Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co., 71 South. 724.

ALLGOOD, State Auditor, v. SEMET SOLVAY CO. (3 Div. 210.)

(Supreme Court of Alabama. April 20, 1916.)

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Mandamus by the Semet Solvay Company, originally directed to C. Brooks Smith, as State Auditor, and revived against M. C. Allgood, as his successor in office, to compel him to issue his warrant to certain license taxes paid into the state treasury under an act declared unconstitutional and void. From a judgment granting the writ, the Auditor appeals. Affirmed.

W. L. Martin, Atty. Gen., for appellant. Tillman, Bradley & Morrow, of Birmingham, for appellee.

SOMERVILLE, J. Affirmed on the authority of Allgood, State Auditor, v. Sloss-Sheffield Steel & Iron Co., 71 South. 724.

(139 La.)

No. 21950.

MAGGIORE v. LOCHBAUM.

(Supreme Court of Louisiana. April 27, 1916. Dissenting Opinion May 12, 1916.)

(Syllabus by Editorial Staff.)

1. ELECTIONS ⇐22 — LEGISLATIVE POWER — BALLOT.

The General Assembly has the power to prescribe an official ballot, which shall conform to the requirements of the law, including the placing thereon of the names of the candidates selected according to law, and an election without the use of the official ballot is no election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. ⇐22.]

2. ELECTIONS ⇐198 — POWER OF LEGISLATURE—CONDUCT OF ELECTION.

The General Assembly has the power to prescribe the manner in which an election shall be conducted, and an election not conducted as prescribed is no election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 170; Dec. Dig. ⇐198.]

3. ELECTIONS ⇐181—NOMINATION—PARTY.

One nominated at the primaries on the Democratic ticket, whose name has been placed upon the official ballot in defiance and disregard of law, cannot be validly elected to an office as an Independent by the electors writing his name on the ballots.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 156; Dec. Dig. ⇐181.]

4. ELECTIONS ⇐180(1)—BALLOT—PARTY DEVICES.

Where a name has been properly and legally placed on the ballot, an elector may vote for the bearer without committing himself to the party under whose emblem the name appears.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 151; Dec. Dig. ⇐180(1).]

5. ELECTIONS ⇐159—BALLOT—INDEPENDENT VOTER.

Though a name is not placed upon the ballot under any emblem, an elector may vote for the bearer by writing the name himself.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 124; Dec. Dig. ⇐159.]

6. ELECTIONS ⇐270 — CONTEST — CONSTITUTIONALITY OF STATUTE.

Act No. 198 of 1912, § 6, providing that if, from any cause, a final judgment is not obtained before the date of the general election, and the final decision of the court should be that the contestant's name should have appeared upon the ticket in such election, whereas the contestee's name in fact appeared, the subsequent election of such contestee shall be treated as a nullity, is not an unwarranted interference with the right to hold office, and with the right of the elector to vote for whom he may please, so that, where plaintiff contested defendant's nomination as the Democratic candidate for town marshal, pending which the election occurred, and defendant received a majority vote as an Independent, the dismissal of the suit was erroneous.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 247; Dec. Dig. ⇐270.]

Provosty, J., dissenting.

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Election contest by Angelo Maggiore against E. S. Lochbaum. Exception of prescription maintained, and suit dismissed, and, on plaintiff's appeal, judgment reversed and remanded by the Court of Appeal for trial on the merits; and from an order maintaining a peremptory exception of no cause of action and dismissing the suit, plaintiff appeals. Judgment annulled, and case remanded.

Fred A. Middleton and E. A. O'Sullivan, both of New Orleans, for appellant. Dart, Kernan & Dart and Frank J. Clancy, all of New Orleans, for appellee.

MONROE, C. J. Plaintiff alleges that he was a candidate for the nomination to the office of marshal of the town of Kenner, in

the Democratic primary election held in that town on March 14, 1916, and that according to the returns, as promulgated by the Democratic municipal committee, he received 57 and his opponent 59 votes, but that, by reason of the facts that certain legally qualified electors, whom he names and who would have voted for him, were denied the right to vote, and certain persons, who were not entitled to vote, were allowed to do so, and voted for the defendant, and because of certain other matters, which he specifies, and with respect to which he alleges that the law was disregarded, the return of the committee deprives him of the nomination. Wherefore he prays that defendant be cited, and after due proceedings that he be decreed to be the legally selected Democratic nominee for said office. The district court maintained an exception of prescription and dismissed the suit, and plaintiff appealed to the Court of Appeal, for the reason that the petition alleges that the office in controversy is worth \$1,500. The Court of Appeal reversed the judgment appealed from and remanded the case, and, the day appointed for the election (April 18) having in the meanwhile arrived and the election having been held, defendant filed a further pleading in which he alleges (quoting in part) as follows:

"That plaintiff's petition shows that it now discloses no cause of action * * * and [defendant] pleads the peremptory exception of no cause of action; * * * that this cause is now moot, and should be dismissed for the reason that on April 18, 1916, an election was held * * * by which respondent was elected, as an independent, to the office here in contest by the following vote:

E. S. Lochbaum, Democrat35
E. S. Lochbaum, Independent55

"Further answering, in the alternative, respondent avers that Act 198, § 6, of 1912, does not apply herein, and, so far as it affects respondent's rights to the office here in contest, is null, void, and unconstitutional, for the reason that it violates articles 1, 2, 15, 202, 210, and 212 of the Constitution of the state, * * * and that, if it is attempted to apply to the general election, it is also unconstitutional, null, and void, as being in violation of Act 152 of 1898, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and Act 243 of 1914, and Revised Statutes, arts. 1419, 1430, and Act 106 of 1892; that the act of 1912 aforesaid does not amend the said statutes and, as expressing more than one object in its title, so far as declaring respondent's title to the office herein is a nullity, is null and void; * * * that the said statute deprives respondent of his property without due process of law, is a deprivation of the equal protection of the laws to petitioner (respondent), is an ex post facto law and a bill of attainder, and is therefore in violation of article 1, § 9, of the Constitution of the United States and of section 1 of the Fourteenth Amendment."

The case was dismissed, in the district court, by a judgment reading as follows:

"When, after hearing the evidence and argument of counsel herein, on the peremptory exception, it is ordered that the peremptory exception herein filed be maintained."

It was conceded, upon the argument in this court, that in order to arrive at the conclusion expressed in his judgment the judge

à quo sustained defendant's attack upon the constitutionality (in its application to this case) of the following provision of section 6 of Act 198 of 1912, to wit:

"If from any cause a final judgment is not obtained before the date of * * * the general election and the final decision of the court should be that the contestant's name should have appeared upon the ticket in such * * * election, whereas the contestee's appeared in fact, then in that event the subsequent nomination and election of such contestee shall be treated as a nullity."

And, hence, the present appeal to this court.

[1-8] The contention of the appellee is stated by his counsel, in the brief herein filed, as follows:

"(1) One who has been nominated on the Democratic ticket can be validly elected to an office as an Independent by the elector writing his name on the ballots.

"(2) When the general election occurs during the trial of an election contest, and the contestee is elected to the office at that election, the trial falls as a moot case.

"(3) That portion of section 6 of Act 198 of 1912 which annuls the general election where a primary election contest is pending, and where the contestee has not been declared the nominee in the contest, although he has been elected to the office, is unconstitutional, as being an unwarranted interference with the right to hold office and with the right of the elector to vote for whom he may please."

All of the authorities to which the counsel refer concede to the General Assembly the power to prescribe an official ballot, the power to prescribe the manner in which elections shall be conducted is denied by no one, and, if an election is not conducted in the manner so prescribed, including the use of the official ballot, it is no election, within the contemplation of the law. The official ballot is, however, made official by its conformity to the requirements of the law, which includes the placing thereon of the names of the candidates selected according to law; and where a name has been placed thereon which has not been so selected, the sanction declared by the law is the nullity of the attempted nomination and following election. It is no doubt true, under our law, that where a name has been properly and legally placed on the ballot an elector may vote for the bearer, without committing himself to the party under whose emblem the name appears; and we have held that, though a name is not placed upon the ballot under any emblem, an elector may vote for the bearer, by writing the name himself. But where, as in this case, it is contended that a name has been placed upon the official ballot in defiance and disregard of the law, the penalty denounced is the nullity of the pretended nomination and subsequent election; and, unless that penalty can be enforced, the scheme of nominating by primary elections is an utter abortion.

As the law requires that cases of this character shall be decided within 24 hours, we find ourselves unable to discuss in detail the

various points suggested by appellee's counsel, but our consideration of them has been sufficient to satisfy us that they are not well founded, and that the provision of Act 198 of 1912, which he attacks, is not obnoxious to the objections of unconstitutionality which are leveled against it, and our conclusion is that the exception was improperly sustained, and that the case should be heard and decided on its merits.

It is therefore ordered that the judgment appealed from be annulled, and that this case be remanded to be proceeded with according to law and to the views hereinabove expressed; the costs of the appeal to be paid by the appellee, and those of the district court to await the final judgment.

PROVOSTY, J. (dissenting). Plaintiff and defendant were rival candidates for the office of marshal for the town of Kenner at the primary election held to nominate the candidates of the Democratic party for the general election of April 18, 1916. The defendant was returned as having been nominated, and his name was put on the official ballot, and plaintiff filed the present suit for contesting the nomination.

The election law provides two modes of voting at a general election: One, by stamping the party emblem at the head of the ticket, whereby every candidate of the party whose emblem has been stamped is voted for, these names being printed on the ticket below the emblem. Another mode is by writing the name of the person voted for on the ticket. By the former mode the party nominee is voted for; a party vote is cast. Of the other mode the election law (Act 152, p. 266, of 1898, § 75) says:

"If [the voter] desires to vote for a person other than [the nominee] he must write the name of such person in the space provided for such purpose."

By this mode of voting, an independent, or nonparty, vote is cast. At the general election, the defendant was voted for in both of these modes; i. e., as the party nominee, by those voters who stamped the party emblem, and as "a person other than the nominee," or as an independent candidate, by the voters who wrote his name on the ticket. Of the former there were 35; and of the latter, 55. The latter votes constituted a majority of the votes, and were returned as having been cast at the general election for defendant as an independent candidate, and he was declared elected.

In *Lacombe v. Laborde*, 132 La. 435, 61 South. 518, where the candidate defeated at the primary was voted for by his name being written on the ballot, in the same way that defendant's name was written in the present case, the election was maintained; and this, notwithstanding the following provision of the primary election law, which provision is also invoked in this case:

"Nor shall he [the defeated candidate] be permitted to be himself a candidate in opposition to any one nominated at or through a primary election in which he took part." Section 27 of Act 49, p. 66, of 1906.

The defendant in the case at bar, having been thus elected, filed an exception urging that, the general election having taken place, the question of who should be the candidate at it was a mere moot question, and that therefore this suit should be dismissed. Against that contention the plaintiff invokes the provision of section 6 of Act 198, p. 385, of 1912 (which is the Primary Elections Law), reading:

"If from any cause a final judgment is not obtained before the date of * * * the general election and the final decision of the court should be that the contestant's name should have appeared upon the ticket in such * * * general election, whereas the contestee's appeared in fact, then in that event the subsequent * * * election of such contestee shall be treated as a nullity."

To my mind it is very plain that that statute can operate to annul the election of a contestee only in a case where he has been elected as a contestee, in his quality of contestee, or official candidate of a party, or, in other words, as the result of his name having been printed on the official ballot as such. It cannot be made to operate to preclude some other political party from adopting such contestee as its candidate, and electing him as its candidate, or to preclude independent voters from doing that same thing. The statute is designed to regulate only the primary election, not the general election. It deprives the contestee of any advantage he might have derived from the primary election, but does not disqualify him from being eligible by the suffrage of independent voters at the general election. To give it the latter operation would be making it regulate the general election, which is a thing, entirely beyond its object, purpose and scope.

One of the learned counsel of plaintiff admitted in argument that this statute strikes with nullity only the election of the contestee, not the election itself. The other counsel argued that, in the event of the contestee being held not to have been the nominee, the election itself would be null, because then the Democratic party would not have had any candidate at the election.

I do not think that the failure of one of the political parties to put forward a candidate at a general election will entail nullity upon the election. And in my opinion it makes no difference whether such failure to put forward a candidate was voluntary, or the result of a family squabble, or, in other words, of a contest between claimants of the nomination.

Plaintiff also makes the same contention that was unsuccessfully made in the *Laborde Case*, supra, namely, that the defeated candidate at a primary is ineligible at the general election.

It is also argued that, the qualifications of

the candidate for the office in question in this case being a matter entirely within the discretion of the Legislature, that body had the right to prescribe as one of these qualifications that the candidate should not have been defeated at the primary election. That argument appears to me to be unanswerable, and so appeared to me in the Laborde Case, but the majority of the court thought differently in that case.

I therefore think the judgment ought to be affirmed; and I, in consequence, respectfully dissent.

(139 La.)

No. 21861.

STATE v. MCGARRITY.

(Supreme Court of Louisiana. April 24, 1916.
On Application for Rehearing,
May 13, 1916.)

(*Syllabus by the Court.*)

1. JUDGES — 16(2) — RECUSATION — APPOINTMENT OF SUBSTITUTE.

Where the trial judge in a criminal case recuses himself by reason of having been employed and consulted prior to his accession to the bench on behalf of the prosecution, the question whether a lawyer or a judge of an adjoining district is to be appointed to act in his stead is to be determined in accordance with the provisions of section 2 of Act No. 40 of 1880, which requires the appointment of a lawyer having the qualifications of a judge of the court in which the prosecution is pending, and "if no lawyer having the necessary qualifications can be obtained at the term of court at which the recusation is declared," then the appointment of a judge of an adjoining district.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 56-59; Dec. Dig. — 16(2).]

2. JUDGES — 16(1) — RECUSATION — APPOINTMENT OF SUBSTITUTE.

When a motion to recuse the presiding judge in a criminal case is made under section 2 of Act No. 40 of 1880 during the morning hour of the court, and is taken under advisement until after the noon recess, and an order of recusation is then handed down declaring the recusation, reciting that no lawyer having the necessary qualifications could be found to act instead of the recused judge, and appointing a judge of an adjoining district to discharge that function, and defendant, through counsel, objects to such appointment, and asserts that legally qualified lawyers could be found who would be willing to act, an issue of fact is presented upon which the defendant is entitled to be heard, and it is reversible error for the recused judge to insist upon the appointment as thus made until that issue is inquired into and determined.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 46, 53-56; Dec. Dig. — 16(1).]

3. JUDGES — 16(2) — SUBSTITUTE JUDGE — OATH.

The judge of an "adjoining district," appointed to sit in a recused case, is not required to take any special or additional oath of office, since sitting in such cases is part of the duty that he is already sworn to discharge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 56-59; Dec. Dig. — 16(2).]

4. HOMICIDE — 158(1) — EVIDENCE — ADMISSIBILITY.

The charge of manslaughter negatives the idea of premeditation or malice, and in a case in which there were several eyewitnesses to the homicide evidence of previous threats on the

part of the accused is inadmissible, whether offered to prove the intent to provoke a difficulty or to show who was the aggressor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 293; Dec. Dig. — 158(1).]

Appeal from Third Judicial District Court, Parish of Blenville; J. B. Holstead, Judge.

S. C. McGarrity was convicted of manslaughter, and appeals. Conviction and sentence annulled, and case remanded.

Stubbs & Theus, of Monroe, and Wimberly & Dormon and J. T. Reeves, all of Shreveport, for appellant. B. G. Pleasant, Atty. Gen., T. T. Land, Dist. Atty., of Homer (G. A. Gondran, of New Orleans, H. B. Warren, of Ruston, R. L. Williams, of Arcadia, and William C. Barnette, of Shreveport, of counsel), for the State.

MONROE, C. J. Defendant having been charged with manslaughter, his counsel moved that the presiding judge of the trial court be recused, on the ground that prior to his (then) recent appointment to the bench he had been employed and consulted in the cause on behalf of the state and, further, moved that a lawyer having the necessary qualifications be appointed in his stead, or, if no such lawyer could be found at or during the then term of the court, that the judge of an adjoining parish be appointed to try the case. Some hours later, on the same day, the judge entered an order containing the recitals that he had been employed as counsel as alleged in the motion, that he sustained the motion to the extent of recusing himself, and that, "having requested and solicited each lawyer in the district having the qualifications of a judge of the third judicial district court * * * to act as special judge and try said case, and after each of said lawyers had refused to try said case, or act as special judge, * * * and, it being impossible to secure a lawyer having the necessary qualifications to act as special judge, * * *" he appointed Hon. J. B. Holstead, judge of an adjoining district, to act in that capacity.

Counsel for defendant objected to the action so taken, and took a bill of exception thereto, which reads in part as follows:

"No action was taken on the motion to recuse, and the court took a recess until 2 o'clock p. m. of same day, and at said hour, * * * without hearing defendant and without giving him an opportunity of showing that a lawyer possessing the necessary qualifications of a judge of this court resided within the district who was competent to try the cause, and that, as a matter of fact, at least five lawyers possessing the qualifications of a judge of this court do reside within the district, and, over the objection of defendant and his counsel, the Honorable J. El. Reynolds, presiding judge, * * * filed an order of recusation, and appointed Hon. J. B. Holstead, judge of the Fourth judicial district, to try the same, and the said Judge Holstead, being present in court, took his seat as special judge to try this cause; to which ruling of the judge of this court and the act of Judge Holstead in assuming jurisdiction the defendant then and

there excepted and reserved this bill of exception. * * *

The statement per curiam attached to the bill reads:

"When the motion was filed, the court stated * * * that the motion to recuse would be sustained, and asked if there was any objection to the court passing on the application and recusing himself. Attorney for defendant, J. C. Theus, stated he thought not, if the court was ready to sustain the motion. The judge of the court having personally applied to every lawyer in the district having the qualifications of a judge to try this case, and each of said lawyers having refused to act as judge in this case, called Judge J. B. Holstead, of the Fourth judicial district court, to try this case."

The causes for which a judge "shall be recused" are specified in section 1 of Act No. 40 of 1880, and are: (1) His being interested in the cause; (2) being related to one of the parties within the fourth degree; (3) having been employed or consulted as advocate in the cause; (4) being father-in-law, son-in-law, or brother-in-law of one of the parties; (5) having rendered judgment in the cause in any other court. The next section deals with the question of the selection of the judge who is to act in the place of him who is recused, and reads:

"Sec. 2. * * * That, in cases in which a district judge shall be recused, except for cause of interest, he shall, for the trial thereof, appoint a lawyer having the qualifications of a judge of the district court in which the recused case is pending, and if no lawyer having the necessary qualifications can be obtained at the term of court at which the recusation is declared, the judge (recused) shall immediately appoint some district judge of an adjoining district to try the case, who shall be notified of his appointment in the manner provided in section 3 of this act."

[1] Acts Nos. 40 of 1880, 35 of 1882, 74 of 1884 and 185 of 1898 are referred to in the brief filed on behalf of the state, but only Acts Nos. 40 of 1880 and 74 of 1884 are said to have any bearing on this case. The act of 1880, as we have seen, is strictly applicable. The act of 1884 is entitled "An act to provide for the interchange of district judges throughout the state," and it provides:

"Section 1. * * * That in addition to the provisions of law now existing for the trial of recused cases in the several district courts of this state, the district judges of [the] same parish or district, or of adjoining districts, may interchange for the trial and disposition of all such recused cases.

"Sec. 2. * * * That it shall be the duty of the district judges above mentioned to proceed to the court, at any legal term, when recused cases are pending, when required and notified as now provided, and to try and determine or make legal disposition of [the] same."

"Sec. 3. The district judges, when so interchanged, shall exercise all the powers necessary for the full and final determination of said recused cases."

There is no repealing clause, and, considering that the act purports to add to, and not to subtract from, the existing legislation upon the subject of the trial of recused cases, and in the matter of the interchange of judges is merely permissive, and not obliga-

tory, we find no ground upon which to base the conclusion that it was intended to supersede the mandatory provision of section 2 of Act No. 40, of 1880, which declares that in a case such as this the judge shall appoint a lawyer, if there is one with the proper qualifications to be found, "at the term of court at which the recusation is declared," and which in so doing, not only imposes an obligation on the judge, but confers upon the litigants before him the right to demand that the obligation be discharged, and, as a corollary thereto, the right to be heard in the assertion of their demand.

[2] In a very large proportion of the cases, and particularly criminal cases, which are brought to this court, where the statements of the judge and the litigant, or his counsel, conflict as to some alleged fact not otherwise presented or susceptible of presentation, that of the judge is accepted as controlling; but where, as in this case, the law confers upon a defendant in a criminal prosecution a certain right the enjoyment of which is made dependent upon the determination of a question of fact, and the defendant desires to be heard upon that question, the ruling of the judge, in deciding the question, whilst denying the hearing, is subject to review when properly brought before this court. The trial judge in this case states that he had applied to every qualified lawyer in the district to act in his place, and that all of them had refused to assume that responsibility. According to the bill of exception, defendant, through counsel, objected to the appointment of the judge ad hoc at the time that the order was entered, upon the ground, in effect, that the trial judge was mistaken, and that there were qualified lawyers who had not been requested to act and who would be willing to do so, thus presenting an issue upon which the ex parte finding of the judge was not conclusive, but upon which defendant was entitled to be heard, and the determination of which without affording him that opportunity was a reversible error—a conclusion at which we arrive the more readily for the reason that the statute seems to contemplate an investigation extending beyond a few hours, since it provides for the appointment of the judge of an adjoining district "if no lawyer having the necessary qualifications can be obtained at the term of court at which the recusation is declared."

[3] It is argued that the judge who acted in the case was not qualified, because he failed to take an oath as special judge or judge ad hoc, but we are referred to no law requiring such additional oath, and, as it was as much a part of his duty, as judge of the Fourth judicial district court, to sit in a recused case in the Third judicial district, when legally appointed and notified, as to discharge any other duty of his office, an additional oath was unnecessary.

[4] The trial judge, over the objection of defendant, admitted the testimony of Dr.

Mosely to the effect that about a month or six weeks prior to the homicide defendant had said to him:

"If old man Jim Howell ever attempts to arrest me and take me before Bob Williams, I am going to kill the ————. I am not going to put my head in a halter to do it, but I am going to get him." (Jim Howell, it will be understood, was the decedent, who was town marshal, and "Bob Williams" was the mayor.)

There was reversible error in the ruling. Defendant was prosecuted upon the charge that he "did then and there feloniously kill and slay J. S. Howell, contrary to the form of the statute," etc., being a charge of manslaughter, which is defined to be "the unlawful killing of another without malice aforethought, either express or implied"; the absence of malice and premeditation being characteristics which distinguish it from murder. 21 Cyc. 683, 734, 739.

"Voluntary manslaughter is the killing of another intentionally, but in a sudden heat of passion due to adequate provocation, and not with malice." *Id.* 736.

In *State v. Lewis*, 133 La. 1095, 63 South. 597, the defendant charged with manslaughter, sought to introduce evidence of prior amicable relations with the deceased, but it was held to have been properly excluded. The court said:

"The charge implies a killing in the heat of blood on sudden provocation. * * * Whether the homicide was willful or accidental was a question dependent on the action of the parties at the time of the killing. The prior relations of the parties, * * * were not involved in the issue before the jury. If, in such a case, the defendant can prove prior amicable relations, the prosecution can prove prior quarrels, threats, and difficulties."

The testimony of Dr. Mosely tended to prove malice and premeditation and to show that defendant had committed murder, a crime with which he was not charged. It was likely to have been highly prejudicial to him. In the bill that was reserved upon the point the trial judge says:

"This witness was sworn after the witness P. A. McGuire, and the statement of fact contained in the bill of exception to the reception of the threat made to P. A. McGuire is made a part of this bill of exception as completely as if reproduced and copied herein."

It appears, however, that after the judge had incorporated the statement of fact in the McGuire bill counsel for defendant, being dissatisfied with it, abandoned the bill, which was therefore not filed in the record, and hence was not copied in the transcript. It appears also that the state, upon discovering the absence from the transcript of the judge's statement, as constructively incorporated in the bill now under consideration, called for it by a writ of certiorari, by way of return to which the judge sent up what he conceived to be the McGuire bill, including the statement, as he recalled it, to which defendant's counsel has interposed various objections. The original McGuire bill, with the statement

in question, having been returned to defendant's counsel, with the understanding on the part of the judge that it would be filed, we think he was entitled to rely on its being filed, for the purposes of the Mosely bill. We are informed through counsel's pleadings or brief that the statement was made in the trial court that the McGuire bill had been abandoned and would not be filed. We express no opinion upon the question of the right of counsel to abandon and withhold from the record a bill which had been presented to, and signed by, the trial judge; in fact, the information that we have in regard to the particular incident here in question does not enable us to form an opinion concerning it; but we feel authorized, under the circumstances, to resort to the statement which the judge has sent up as containing his reasons for admitting the testimony of Dr. Mosely.

It appears that the homicide was committed in the immediate presence of several eye-witnesses. The judge says:

"There was a conflict of testimony as to whether the deceased had drawn his pistol when he was shot or not; some testifying that he had, and some that he had not. In a case of this kind the court believes that threats are admissible to show defendant's intent to provoke a difficulty; to show that he was the aggressor."

If defendant had been charged with murder, the ruling would, no doubt, have been correct, and possibly it might have been admissible if there had been no witnesses who were present and were able to state what occurred at the moment of the killing, as tending to show who was likely to have been the aggressor; but, as the case is presented, we conclude that the reasons assigned for the admission of the testimony are insufficient.

There are some other rulings that are complained of, but the disposition that we make of the case renders it unnecessary that we should review them.

For the reasons thus assigned, it is ordered that the conviction and sentence herein appealed from be annulled, and that the case be remanded to the district court, to be further proceeded with according to law and to the views hereinabove expressed.

O'NIELL, J. (concurring). Although I am of the opinion that the testimony of Dr. Mosely that the defendant threatened to kill Jim Howell a month or six weeks before their fatal difficulty was admissible, I concur in the decree rendered in this case. A bill of exceptions was reserved to a ruling of the trial judge excluding evidence that Jim Howell was much larger and stronger than the defendant. The bill discloses that there was evidence before the jury that Howell struck the defendant with a stick just before the defendant shot Howell; and a serious question of fact before the jury was whether the life of the defendant was in danger when he fired the fatal shot. My opinion is that,

under these circumstances, evidence of the superior physical strength of Jim Howell was admissible.

On Application for Rehearing.

PER CURIAM. In the case of State v. Wooten, 136 La. 560, 67 South. 386, to which we are referred in the application for rehearing, it appears from the statement of the trial judge that the testimony as to prior threats which had been made by the accused (charged with manslaughter) was admitted, because, although there were eye-witnesses to the killing, their testimony was conflicting, and left in doubt the question, Who began the difficulty? In the instant case there was no conflict in the testimony upon that point. The judge states (from recollection) his finding upon the bill to the testimony of McGuire, as follows:

"The testimony had shown that defendant, in the town of Arcadia, shot and killed the deceased, who was town marshal; that defendant had had a cow in the pound pen; that defendant had sent some money to the marshal for the release of the cow, which was returned on the claim that it was not enough; that on learning this the defendant took a drink of whisky and put a pistol in his pocket, and, as one witness swore, said, 'I'll see the damn son of a ————'."

"The defendant then went to the place where the marshal made his headquarters during the daytime, and there accosted the marshal and said to him, 'Uncle Jimmie, I let my cow out of the pound pen; you can do whatever you want to with me;' and the deceased said, 'Yes, yes, Mack; I'll have take you before the mayor, let us go;' and the defendant said, 'By God, I'm not going now;' and the deceased said, 'Yes; you are,' and laid his hand on defendant's shoulder, or caught him by the coat sleeve, and defendant jerked loose and said, 'God damn it; I'm not going.' And then deceased struck defendant over the head two or three licks with a walking stick, the effect of which, some of the witnesses said, caused the defendant to stagger backward, with his hands raised as if to ward off the blows. The blows caused some bruises, but no skin broken. The defendant backed off some 10 or 15 feet, then shot and killed the deceased—

"Here there was a conflict of testimony as to whether the deceased had drawn his pistol when he was shot or not, some testifying that he had, and some that he had not, the preponderance in weight being that he only attempted to draw his pistol when he saw that defendant was going to shoot him. The testimony as a whole produced on the court's mind the conclusion that the purpose of the marshal was solely to carry the defendant before the mayor, and that he made no effort to use his pistol until he saw that the intent of the defendant was to shoot. Taking all of the testimony in the case up to the time of the ruling, the proffered testimony was competent on the question of intent, and who provoked the difficulty; what was the purpose of the defendant in seeking the marshal and confessing the deed and voluntarily surrendering to stand trial. This appears to be a reasonable conclusion deduced from the words of the defendant.

"The stick used was exhibited to the jury. In a case of this kind the court believes that threats are admissible to show defendant's intent to provoke a difficulty; to show that he was the aggressor."

It will be seen, therefore, that there was no conflict in the testimony as to the manner in which the affray began, or as to its progress, until the last moment, when the fatal shot was fired; and, as we understand the record, there were at least three eye-witnesses to testify to the actual facts as they occurred at that time. We are therefore satisfied that there is no error in holding that testimony tending to show that defendant was acting from the beginning with the premeditated intention of killing the deceased was improperly admitted, since he was not prosecuted on that charge.

(139 La.)

No. 20797.

VIATOR v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

CARRIERS \S 331(5)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger who attempts to stand on the step of a fast moving street car, and falls and is injured, is not entitled to recover damages from the railway company, especially if the circumstances rendered the passenger's conduct exceptionally imprudent and the railway company was not at fault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1379; Dec. Dig. \S 331(5).]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Florian Viator against the New Orleans Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Prowell & Prowell, of New Orleans, for appellant. Dart, Kernan & Dart, of New Orleans, for appellee.

O'NIELL, J. The plaintiff has appealed from a judgment rejecting his demand for damages for personal injuries which he suffered by falling from a street car of the defendant company, on which he was a passenger. He alleges that he was thrown from the rear platform of the crowded car by the reckless running of the car by the employees of the defendant company, at a high rate of speed, over a track that had become uneven, rough, and dangerous, by the neglect of the defendant company to keep it in repair.

The car was crowded at the time of the accident; the seats were all occupied, several passengers were standing in the aisle, two were on the front platform with the motor-man, and five or six were on the rear platform with the conductor.

The plaintiff and two other witnesses testified that the car was traveling at a high rate of speed and was bouncing and surging immediately before and at the time of the accident; but the preponderance of the evidence is that the passengers did not observe anything unusual in the speed or running of

the car. The evidence leaves no doubt that the track was in first-class condition.

The plaintiff testified that he boarded the car on Canal street, on the Tulane belt line, and stood in the aisle, intending to get off at Carrollton avenue; that when the car was within one block from the avenue, he worked his way through the crowd to the rear platform and said to the conductor, "Next corner." He says that the conductor was then talking to a colored passenger, and, saying something about being four minutes late, gave the motorman a bell signal to keep going and not stop to take on more passengers. As the plaintiff stepped from the car door to the platform and turned to take hold of the doorknob, according to his testimony, a low place in the track caused the car to bounce or surge, and a passenger jostled against him and knocked him over the side of the platform to the ground.

The conductor, who was standing between the controller and the brake, at the rear end of the rear platform, looking into the car at the time of the accident, testified that he did not hear the plaintiff say, "next corner," nor observe that he gave any signal to stop the car; and that he (the conductor) did not know that the man had fallen from the car until he heard the breaking of a bottle, looked back and saw the plaintiff on the track. The conductor had the car stopped immediately and ran to the man's assistance, but before he got to him the plaintiff arose and walked away, saying to the conductor that a man had shoved him off of the car, but that he was not hurt. The doctor who attended to his injuries, however, testified that, although perhaps not permanently injured, the plaintiff had suffered severe bruises and considerable pain.

It is remarkable that the plaintiff's statement, that he was jostled or jolted off of the platform of the car, is not corroborated by any witness, notwithstanding there were five or six passengers with him on the platform at the time of the accident. The four witnesses who saw him fall testified that the plaintiff appeared to step down deliberately from the platform to the side step, as if intending to alight, and that they did not observe anything alarming until he slipped or fell from the step to the ground. The testimony of these witnesses, that the plaintiff lost control of himself after getting down from the platform to the side step of the car, is corroborated by these circumstances: It had been raining and the car step was wet and slippery, the plaintiff had suffered the loss of his left hand, was wearing an artificial hand, and carried a bottle of varnish under his left arm.

Our conclusion is that the accident was not caused by any fault on the part of the employees of the defendant company, but was the result of the plaintiff's imprudence in at-

tempting, under the prevailing circumstances, to stand on the step of the car.

The judgment appealed from is affirmed.

SOMMERVILLE, J., takes no part.

(139 La.)

No. 21835.

STATE v. SMITH.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS — 219 — INDICTMENT OR INFORMATION — NAME OF PURCHASER.

The state is not required to inform the defendant, in a bill of information or indictment charging him with having unlawfully sold intoxicating liquor, of the name of the purchaser.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 237-239; Dec. Dig. 219.]

2. CRIMINAL LAW — 698(1) — TRIAL — RECEPTION OF EVIDENCE — OBJECTIONS.

Under the common-law doctrine of *aider by verdict*, the defendant in a criminal prosecution must object to the introduction of evidence to prove that the offense was committed on another date than that stated in the indictment or information, or he will be held to have waived any objection on that score.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1851, 1853; Dec. Dig. 698(1).]

Appeal from Fifth Judicial District Court, Parish of Winn; Cas Moss, Judge.

Lee Smith was convicted of retailing intoxicating liquors without a license, and appeals. Affirmed.

Huey P. Long, Jr., of Winnfield, for appellant. R. G. Pleasant, Atty. Gen., and Julius T. Long, Dist. Atty., of Winnfield (G. A. Goudran, of New Orleans, of counsel), for the State.

O'NIELL, J. The appellant was convicted of retailing intoxicating liquor without a license, and was sentenced to pay a fine of \$305 and costs and to serve six months imprisonment in the parish jail, and, in event of his failure to pay the fine, to serve an additional term of 12 months in jail. He relies upon two bills of exception for a reversal of the verdict and sentence.

[1] The first bill was reserved to the ruling of the district judge refusing to compel the district attorney to inform the defendant in a bill of particulars of the name of the person to whom the state intended to prove the liquor was sold. It has been decided at least four times recently that the state is not required to inform the accused of the name of the purchaser in a bill of information or indictment charging the illicit sale of intoxicating liquor. See *State v. Selsor*, 127 La. 515, 53 South. 737; *State v. John*, 129 La. 212, 55 South. 766; *State v. Munlin*, 133 La. 60, 62 South. 351; *State v. Colle*, 137 La. 673, 69 South. 90. We adhere to these decisions.

[2] The second bill of exceptions was reserved to the overruling of the defendant's motion for a new trial. The complaint is that the proof did not correspond with the bill of particulars as to the date of the alleged crime. In the statement per curiam in the bill of exceptions it is said that the proof was that the crime was committed on the 21st of December, although the state had charged in the bill of particulars that it was committed on the 22d of that month.

The purpose of requiring the prosecuting officer to inform the accused person of the exact date of the alleged crime, if he demands that information, is twofold: First, to enable him to prepare his defense; and, second, to prevent another prosecution for the same offense. The furnishing of a bill of particulars therefore might cause a grave injustice if the prosecuting officer were permitted, over the defendant's objection, to prove that the crime was committed on another date than that stated in the bill of particulars. In the case before us, however, the defendant did not urge any objection to the introduction of the evidence when it was offered. He was informed with particularity of the transaction which the prosecuting officer intended to prove against him. The bill of particulars identified the sale by stating the kind and quantity of the liquor sold, the price paid, and the place of the sale with precision. It is not, and cannot be, contended that the transaction proven was not the same transaction referred to in the bill of particulars. The only complaint is that the defendant was convicted of a crime committed on the 21st of December, in a prosecution for the commission of that particular crime on the 22d of December. Our opinion is that the defendant's failure to object to the introduction of the evidence, when it was offered, of the commission of the crime on another date than that stated in the bill of particulars, was a waiver of any complaint on that score. See *State v. Stover*, 111 La. 92, 35 South. 405; *State v. Doucet*, 136 La. 181, 66 South. 772; *State v. Gremillion*, 137 La. 291, 68 South. 615. The common-law doctrine of *aider by verdict* is recognized in our jurisprudence. See *Marr's Criminal Jurisprudence*, p. 821, § 476.

The conviction and sentence appealed from are affirmed.

(139 La.)

No. 21871.

MONIOTTE v. BOUANCHAUD, Sheriff, et al.
(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR 781(2)—REVIEW—MOOT CASE.

Where through failure to perfect plaintiff's right to appeal from a judgment dismissing the injunction had been lost, an appeal from an order, adjudging the surety on the bond given in perfecting the appeal from dismissal of the in-

junction, will be dismissed, the matter being moot.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. 781(2).]

Appeal from Twenty-First Judicial District Court, Parish of Pointe Coupee; Joseph E. Le Blanc, Jr., Judge.

Suit by J. Franklin Moniotte against Lamartine Bouanchaud, Sheriff, and others. From a judgment dissolving an injunction, plaintiff appealed, and thereafter judgment was rendered on a rule declaring the surety on the bond given in the original appeal to be insufficient, and plaintiff appeals. Appeal dismissed.

Claiborne, Claiborne & Claiborne, of New Roads, for appellant. William C. Carruth and Bouanchaud & Kearney, all of New Roads, for appellees Bennett.

PROVOSTY, J. An appeal having been taken from a judgment dissolving an injunction, and it having been perfected by the giving of bond, a rule was taken in the trial court to show cause why the surety on the appeal bond should not be declared to be insufficient. Judgment was rendered on this rule declaring the surety to be insufficient, and the matter now to be considered is an appeal from the latter judgment.

Appellee calls attention to the fact that the transcript of the first, or main, appeal has never been filed in this court, and that the time for doing so has long ago expired, so that the appeal has lapsed, and that, this being so, the present appeal, which is but in aid of the other, presents but a moot case, and should therefore be dismissed.

Appeal dismissed.

(139 La.)

No. 20511.

BOARD OF ADMINISTRATORS OF CHARITY HOSPITAL v. RICHHART et al.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW 230(2)—LICENSES 7(1)—EQUAL PROTECTION OF LAWS—AUCTION SALES—"PROPERTY TAX."

The so-called duty or charge imposed upon auction sales, for the benefit of the Charity Hospital in New Orleans, by section 145 of the Revised Statutes of 1870, as amended by Act No. 53 of 1882 and by Act No. 46 of 1904, is not a tax on the property; and the statutes do not violate any provision of the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. 230(2); Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. 7(1).]

For other definitions, see Words and Phrases, First and Second Series, Property Tax.]

2. AUCTIONS AND AUCTIONEERS 2—STATUTORY PROVISIONS.

Act No. 163 of 1910, relating to auctioneers, prescribing their qualifications, defining their

duties and authority and fixing their compensation, does not purport to embrace all of the law on the subject of auction sales or to supersede all previous laws on that subject. The provisions of Act No. 46 of 1904, imposing a so-called duty on auction sales, for the benefit of the Charity Hospital in New Orleans, are not contrary to or inconsistent with any of the provisions of Act No. 163 of 1910, and were not repealed by the section of the latter statute repealing all laws or parts of laws contrary to or inconsistent therewith.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. § 1; Dec. Dig. ¶2.]

3. STATES ¶131—APPROPRIATIONS—LIMITATION AS TO TERM — "SPECIFIC APPROPRIATION."

The dedication to the Charity Hospital in New Orleans, by Act No. 46 of 1904, of the funds to be derived from the so-called duty imposed upon auction sales, is not a specific appropriation, within the meaning of article 45 of the Constitution, limiting such appropriations to a term of two years.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129; Dec. Dig. ¶131.]

For other definitions, see Words and Phrases, Specific Appropriation.]

Appeal from Fifteenth Judicial District Court, Parish of Jefferson Davis; Alfred M. Barbe, Judge.

Action by the Board of Administrators of the Charity Hospital against Ballis A. Richhart and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Modisette & Adams, of Jennings, for appellants. R. G. Pleasant, Atty. Gen., and Harry Gamble, Asst. Atty. Gen., for appellee.

O'NIELL, J. The defendants, an auctioneer and the surety on his bond, have appealed from a judgment rendered against them, in solido, for the charge or duty of one-half of 1 per cent. of the price of property sold at public auction.

The action is founded upon sections 145 and 3340 of the Revised Statutes of 1870, as amended by Act No. 53 of 1882 and Act No. 46 of 1904, providing that all property sold at public auction by an auctioneer (except such as may be exempt by law) shall be subject to a duty of one-half of 1 per centum of the price of each and every adjudication, to be paid by the vendor and turned over by the auctioneer to the Charity Hospital, of New Orleans.

The defenses are: First, that the statute is unconstitutional, in that it discriminates in favor of sheriffs, who are ex officio auctioneers, and against other auctioneers; second, that, if the act was constitutional, it was repealed by Act No. 163 of 1910, relating to auctioneers; and, third, that, if the other provisions of the statute prevail, the appropriation to the Charity Hospital has expired, under article 45 of the Constitution, providing that no appropriation shall be made for a longer period than two years.

Opinion.

[1] The statute on which the plaintiff's demand is founded does not make an arbitrary classification or discrimination, in requiring auctioneers to collect and turn over to the Charity Hospital the charge imposed upon auction sales. The constitutionality of this law has been contested several times in vain. See *Boye v. Girardey*, 28 La. Ann. 718; *Wintz v. Girardey et al.*, Board of Administrators of Charity Hospital, Intervener, 31 La. Ann. 381, *State v. Girardey*, 34 La. Ann. 620, and Board of Administrators of Charity Hospital v. Girardey, 36 La. Ann. 605. In the cases cited, it was held that this duty or charge imposed on auction sales by the state was not a tax on the property; that the right to have one's property sold at public auction by an auctioneer was not an absolute right, but a privilege which the state might grant or withhold, and for the exercise of which the Legislature had exacted a charge of the owner of the property and imposed a duty upon the auctioneer, without violating any provision of the Constitution.

[2] Section 145 of the Revised Statutes, as amended and re-enacted by Act No. 53 of 1882 and Act No. 46 of 1904, was not repealed by Act No. 163 of 1910. The latter statute provides for licensing public auctioneers, prescribes their qualifications, defines their duties and authority, and fixes their compensation. The concluding section of the act repealed all laws or parts of laws contrary to or inconsistent therewith. But there is nothing in Act No. 46 of 1904 contrary to or inconsistent with any of the provisions of Act No. 163 of 1910; nor does the latter statute purport to embrace all of the law on the subject of auction sales.

[3] The dedication of the duty, as it is called in the statute, to the Charity Hospital, of New Orleans, was not an appropriation, within the meaning of the term as used in article 43 of the Constitution of 1879, article 45 of the Constitutions of 1898 and 1913, viz.:

"No money shall be drawn from the treasury except in pursuance of specific appropriation: * * * nor shall any appropriation of money be made for a longer term than two years."

The dedication to the Charity Hospital of the charge or duty to be collected by auctioneers was not a specific appropriation of money belonging to the state. The purpose of limiting the term for which the Legislature might make a specific appropriation of the money of the state is obvious; but, manifestly, there was no purpose or intention of limiting the term of a dedication of a fund to be derived in the manner provided by the statute in question.

The judgment appealed from is affirmed.

WHITE et al. v. WILLIS. (No. 17874.)
(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. APPEAL AND ERROR \S 1170(1)—**POWER TO REVERSE — JURISDICTION — CONSTITUTIONAL PROVISION.**

Under Const. 1890, \S 147, providing that no judgment or decree in any chancery or circuit court in a civil case shall be reversed or annulled on the ground of want of jurisdiction from error as to whether the cause was of equity or common-law jurisdiction, but if the Supreme Court find error other than as to jurisdiction, it may remand to the court which in its opinion can best determine the controversy, the court will not reverse for the sole reason that the complainant has misjudged his forum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4082, 4066, 4454, 4540; Dec. Dig. \S 1170(1).]

2. EQUITY \S 35—**JURISDICTION—GROUNDS.**

Where the affairs of a defunct banking establishment were being administered in chancery, and the receiver, suing to recover, alleged overdrafts, was not in a position to have personal knowledge of the various items of a deposit account between the bank and the defendants, and the amended bill of complaint charges that the defendants neither admit nor deny the correctness of the bank statement, but refuse to bring their passbooks and other evidences of debit and credit, and refuse to disclose the contents thereof, said evidence in the possession of defendants being necessary for a settlement, the chancery court had jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 99-102; Dec. Dig. \S 35.]

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Suit by J. H. Willis, receiver of the bank of Pickens, against Mrs. F. A. White and another. From a judgment overruling a demurrer to the bill, the defendants appeal. Affirmed and remanded.

G. H. McMorrough, of Lexington, for appellants. Noel, Boothe & Pepper, of Lexington, for appellee.

STEVENS, J. [1] Appellee, as receiver of the Bank of Pickens, exhibited the bill of complaint in this cause against Mrs. F. A. White and Mrs. Ora Arnold Mounger, appellants, praying for an accounting and a personal decree for the balance of an alleged indebtedness evidenced by an overdraft. There was a demurrer to the bill, the demurrer overruled, and an appeal granted to settle the principles of the case. It is sufficient to say that we have examined the bill as amended, and that the bill states a cause of action, whether an accounting is necessary or not. The chancellor has assumed jurisdiction of the case, and under the Constitution, as repeatedly announced by this court, we cannot reverse for the sole reason that the complainant has misjudged his forum. If the chancellor had not assumed jurisdiction, he would have transferred the case to the circuit court.

[2] Aside from section 147 of the Constitution, there were at least plausible grounds

for invoking the jurisdiction of equity. In this case the affairs of a defunct banking establishment are being administered in chancery. The receiver is not in position to have personal knowledge touching the various items of the deposit account which appellants had with the bank, and the bill as amended expressly charges that the defendants neither admit nor deny the correctness of the bank statement, but refuse—

“to bring their passbook, checks, and other evidences of debit and credit,” and “refuse to disclose even the contents thereof, said passbook and other evidences of debit and credit in possession of defendant being necessary for a true and just statement and settlement,” etc.

The claim here sued for is not one evidenced by a particular writing, but is an overdraft, the balance of a deposit account extending over many years of banking business done by appellants with the Bank of Pickens.

We see no new principle of law to be decided in this case. The only mistake the chancellor made was in granting an appeal, thereby delaying a trial of this case on the merits, and possibly preventing the receiver of the Bank of Pickens from long since filing his final account.

The decree is affirmed, and the cause remanded, with leave to appellants to answer within 30 days after receipt of mandate by the clerk of the court below.

Affirmed and remanded.

SOUTHWESTERN CO. v. WYNNEGAR et al.
(No. 17693.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

PRINCIPAL AND SURETY \S 42—**DISCHARGE OF SURETY—WHAT EFFECTS.**

That the creditor did not inform sureties, when they executed a second contract of suretyship, that their principal was in default on a prior contract for which they were already bound, will not as a matter of law discharge the liability of the sureties on the second contract; the principal not having committed any offense, and the creditor having the right to assume that he would subsequently discharge the indebtedness.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 86-90; Dec. Dig. \S 42.]

Appeal from Circuit Court, Prentiss County; J. H. Mitchell, Judge.

Action by the Southwestern Company against T. J. Wynnegan and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

E. C. Sharp, of Booneville, and W. H. Kler, of Corinth, for appellant. Jas. A. Cunningham and J. E. Berry, both of Booneville, for appellees.

POTTER, J. This is a suit brought by the Southwestern Company, a book publishing corporation of Nashville, Tenn., against T. J.

Wynnegar on a letter of credit executed by T. J. Wynnegar and J. J. Taylor, as sureties guaranteeing the account of Paul Wynnegar for books, cash, etc., which the said Southwestern Company agreed to furnish and furnished to Paul Wynnegar.

The only question to be determined in this case is whether or not the sureties on the letter of credit sued on are released from liability thereon, because at the time the letter of credit under consideration was executed the principal in the case, Paul Wynnegar, was already indebted to appellant in a large sum on account of default in a previous contract, and for which previous contract the same sureties were responsible in the sum of \$600, which fact was not disclosed to appellee or his cosurety; no inquiry with reference thereto having been made. It was contended in the court below that the failure on the part of the appellant to notify these sureties that their principal had defaulted on the first contract was a fraudulent concealment, and that therefore the letter of credit in question was void as to the sureties, and the trial court accepted this view of the case and gave a peremptory instruction in favor of the defendant.

We think this was error. In his brief counsel for appellee relies on the text, 32 Cyc. 66, section (IV), subsection (B), which is as follows:

"Knowledge of a prior default of the principal known to agents of the obligee at the time a surety executed a bond making himself liable therefor, will prevent an action being maintained thereon; but the general rule is that knowledge by a public agent of prior defaults of a public officer will not affect the liability of sureties on the bond of such officer, as a public agent has no authority to represent the state or county in such matters."

The only case cited in support of the text is the case of *Franklin Bank v. Cooper*, 39 Me. 542; but that is a case wherein the principal at the time the bond was executed was an embezzler, and his acts of dishonesty were known to the officers of the bank and not to the surety.

This is a different case. The principal in this case, it is true, was insolvent and indebted to the Southwestern Company, but no inquiry was made with reference to whether or not he was so indebted by the sureties. This principal had committed no criminal offense and had been guilty of no act of dishonesty, and the Southwestern Company had reason to believe that the previous indebtedness would probably be paid by him. In the case of *Sebald v. Citizens' Deposit Bank*, 105 S. W. 130, 31 Ky. Law Rep. 1244, 14 L. R. A. (N. S.) 377, the court held that mere knowledge on the part of the payee of a note uncommunicated to the surety of the insolvency of the maker at the time the note is executed will not release the surety from liability thereon. And to the same effect are the cases of *Ham v. Greve*, 34 Ind. 18, *Farmers'*

& D. Nat. Bank v. Braden, 145 Pa. 473, 22 Atl. 1045, *First Nat. Bank v. Johnson*, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468, *Bank of Monroe v. Gifford*, 72 Iowa, 750, 32 N. W. 669, and *Noble v. Scofield*, 44 Vt. 281, all digested in the note to the above-cited case. While the precise question here presented may not have been the issue in the above cases, the same principle is, for if, when a creditor knows of the insolvency of his principal, he is under no duty without inquiry to disclose such insolvency, though such insolvency is not known to the surety, it follows that the creditor is under no obligation without inquiry to disclose to the principal that the surety has not paid a particular indebtedness, and especially is this true when the surety is also a surety for the previous indebtedness on another contract, for the creditor has the right to presume that the surety, not having made any inquiry of him, had ascertained from his principal the state of the previous contract.

The granting of the peremptory instruction for the defendant was error.

Reversed and remanded.

SOUTHWESTERN CO. v. WYNNEGAR.

(No. 17692.)

(Supreme Court of Mississippi. May 15, 1916.)

Appeal from Circuit Court, Prentiss County; J. H. Mitchell, Judge.

Action between the Southwestern Company and T. J. Wynnegar. From the judgment, the company appeals. Affirmed.

E. O. Sharp, of Booneville, and W. H. Kier, of Corinth, for appellant. Jas. A. Cunningham and J. B. Berry, both of Booneville, for appellee.

PER CURIAM. Affirmed.

WEBB v. STATE. (No. 18762.)

(Supreme Court of Mississippi, Division B. May 15, 1916.)

CRIMINAL LAW — 378 — EVIDENCE — REPUTATION OF DEFENDANT.

In a prosecution for selling whisky, where defendant's counsel has asked one of defendant's witnesses if he knew defendant's general reputation as a law-abiding citizen, and had received an answer in the negative, evidence for the state in rebuttal as to defendant's general reputation was prejudicial, as the state cannot put defendant's reputation in evidence, unless he first puts it in issue, and as the negative answer proved nothing and did not put his reputation in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 842; Dec. Dig. — 378.]

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Walker Webb was convicted for selling whisky and appeals. Reversed and remanded.

G. M. Johnson, of Sardis, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, P. J. Appellant was convicted for selling whisky. At the trial the defendant's counsel asked one of defendant's witnesses if he knew defendant's general reputation for being a law-abiding citizen. The witness answered in the negative. The state, in rebuttal, offered witnesses to prove the general reputation of the defendant for being a law-abiding citizen. Defendant objected to this evidence, and his objection was overruled by the court. This was error, and may have been extremely prejudicial to defendant. The state cannot put the reputation of the defendant in evidence unless he first places it in issue. His question did not put his reputation in issue. The witness' answer proved nothing, and, nothing being proven, there was nothing to rebut.

The other assignments of error are without merit.

Reversed and remanded.

HOME MUT. FIRE INS. CO. v. PITTMAN. (No. 17856.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. CONTRACTS §155—CONSTRUCTION.

An instrument is to be construed most strongly against the person who draws it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. §155.]

2. CONTRACTS §161—CONSTRUCTION.

An instrument will be construed so as to give effect to every part, unless they are in conflict, and, if possible, every clause contained in an instrument will be harmonized with every other clause therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 742, 743; Dec. Dig. §161.]

3. INSURANCE §164(1)—FIRE INSURANCE—CONSTRUCTION OF POLICY.

Where a policy of fire insurance provided that if the interest of insured in the property was or should become other or less than perfect, legal and equitable title, except as stated in writing the contract should be void, and that, in case the interest of insured was not sole ownership, the company should not be liable by virtue of the contract for any sum exceeding the actual cash value of insured's interest, such second clause related to the situation where the ownership was less than legal and equitable title, and the fact had been noted on the policy in writing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 347-350; Dec. Dig. §164(1).]

4. INSURANCE §282(1)—FIRE INSURANCE—FORFEITURE—LACK OF TITLE.

Where fire insurance was taken out by plaintiff, who was not the owner of property, but a tenant of his wife, the house burned being situated on her land, the policy, providing that it should be void unless insured had perfect legal and equitable title, was forfeited.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 602, 635; Dec. Dig. §282(1).]

5. INSURANCE §141(4)—FIRE INSURANCE—FAILURE TO READ POLICY.

The holder of a policy of fire insurance, who had possession thereof for a long time before loss, was bound by its terms, though he did not read it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 262; Dec. Dig. §141(4).]

Appeal from Circuit Court, Yalobusha County; J. B. Eckles, Judge.

Suit by N. A. Pittman against the Home Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Case reversed, and suit dismissed.

McLaurin & Armistead and T. G. Birchett, all of Vicksburg, for appellant. Creekmore & Stone, of Coffeeville, for appellee.

POTTER, J. This was a suit begun by N. A. Pittman, appellee, in this court, plaintiff in the court below, against the Home Mutual Fire Insurance Company, appellant here and defendant in the court below.

The defendant was a mutual fire insurance company, and, upon appellee's request, insured, in one policy, two dwelling houses belonging to the appellee; dwelling house No. 1 was insured for \$400, and dwelling house No. 2 for \$600. Dwelling house No. 2 was destroyed by fire on the 28th day of June, 1912; and the appellant filed his suit in the circuit court to recover on the policy. It developed, after the fire, that the house destroyed was situated on land not owned by appellee but by his wife. The said house, the uncontradicted facts show, was built thereon permissively and without understanding or agreement between the appellee and his wife, and was occupied by their son as a residence. The defendant denied liability and tendered the premium, which tender was refused.

The policy in question contains the following clause:

"If there is, or shall be, other prior, concurrent, or subsequent insurance, whether valid or not, on said property, or any part thereof, without the company's written consent, or if said building, or either of them, now is or shall become vacant or unoccupied, or if the hazard become increased in any way, whether under the control and knowledge of the member, or not, or if the property or any part thereof shall be sold or conveyed, or if the property insured now is, or shall become, incumbered by mortgage or otherwise, or any change takes place in the title, occupation or possession thereof whatsoever, or if foreclosure proceedings shall be commenced, or if the interests of the member in said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title and ownership, free from all liens whatsoever, except as stated in writing hereon, or if the buildings or either of them stand on leased ground (or land of which the assured has not a perfect title), or if this contract shall be assigned without the company's written consent hereon, then, and in any such case, this contract shall be absolutely null and void."

The defendant filed the plea of general issue, and gave notice thereunder setting out the above clause of the policy sued on, and offered to prove that the provisions of the policy sued on were violated by the plaintiff in that the interest of the plaintiff was not, at the time of the issuance of the policy, a perfect, legal, and equitable title of ownership of the property sued for, free from all

liens whatsoever, and that the building, the object of the suit, stood on leased land, or land of which the assured had not a perfect title on account of which the policy sued became absolutely null and void. The plaintiff relied on another clause in the policy as contradictory of the clause above quoted and relied upon by the defendant. That clause is as follows:

"In case the interest of the member in said property is not the sole, absolute and unconditional unincumbered ownership thereof, both in law and in equity, this company shall not be liable to the member by virtue of this contract any sum exceeding the actual cash value of the interest of the member at the time of the loss after deducting from the actual cash value of said property the amount and value of all outstanding rights, interests and incumbrances thereon, but in case this contract is by its terms made specially payable, in whole or in part, in case of loss to any mortgagee or incumbrancer, the amount of the interest of any mortgagee or incumbrancer shall not be deducted in estimating the value of the property."

[1] It is admitted that at the time the policy was issued, and at the time of the fire, that the plaintiff's interest in the property burned was less than a perfect, legal, and equitable title and ownership; and it is admitted that the building which was burned stood on leased ground, as the plaintiff was tenant at will on his wife's land. It is insisted, however, that the insurance policy is to be construed most strongly against the insurance company, and most strongly in favor of the insured, on the well-established doctrine that an instrument is to be construed most strongly against the drawer; and that under the second clause quoted, the defendant company had agreed that in case the interest of the assured in the property covered was not sole, absolute, and unconditional unincumbered ownership thereof, to be liable by virtue of the contract sued on for a sum not exceeding the actual cash value of the interest of the assured at the time of the loss after deducting from the actual cash value of said property the amount in value of all outstanding rights, interests, and incumbrances thereon; in other words, the plaintiff insists that while one clause provides that the title of the insured must be sole, unconditional ownership, etc., that another clause provides for the payment of loss in case the insured is not the sole and unconditional owner of the property covered by the policy.

[2, 3] It is a well-settled rule of construction that an instrument will be so construed as to give to every part thereof effect, unless the parts are in conflict; and, if possible, every clause contained in an instrument will be harmonized with every other clause therein. And if the second clause under consideration is read in connection with the first clause, we inevitably conclude that the second clause is dealing with a situation where

the ownership in the property is less than a perfect legal and equitable title, and where this fact has been noted on the policy in writing. For the first clause sets out that if the interest of the assured in the policy shall become any other or less than a perfect, legal, and equitable title and ownership, etc., "except as stated in writing hereon," the contract shall be null and void.

[4] This policy contains no exception in writing denoting a title less than perfect ownership; and therefore the second clause quoted in this opinion has no bearing on the case at bar. The conditions contained in the first clause above quoted were violated because at the time the insurance was taken out the plaintiff was not the owner of the property, but was a tenant of his wife; the house burned being situated on her land, and the policy was forfeited. *Liverpool, etc., v. Cochrane*, 77 Miss. 348, 28 South. 932, 78 Am. St. Rep. 524; *Rosenstock v. Insurance Co.*, 82 Miss. 674, 35 South. 309.

[5] The assured in this case urges that he did not sign the application for insurance contained on the back of his policy, and that he did not read the policy until after his property was destroyed. The policy itself, however, had been, for a long time, in the assured's possession, and if he did not read the terms thereof he is bound thereby nevertheless. He cannot lay the policy aside and contend that he does not know the provisions in the policy that are contrary to his interests, while claiming his rights under the provisions therein contained that are favorable to him. *New York, etc., v. O'Dom*, 100 Miss. 219, 56 South. 379, Ann. Cas. 1914A, 583; *Germania, etc., v. Bouldin*, 100 Miss. 677, 56 South. 609. In the case of *Georgia Home Insurance Co. v. Holmes*, 75 Miss. 390, 23 South. 183, 65 Am. St. Rep. 611, the insurance company with knowledge that property was incumbered insured it and was therefore held to have waived the antimortgage clause in its policy. In the case of *Scottish Union & National Insurance Co. v. Wylie*, 70 South. 835, the insurance policy had been issued on the request of the assured, and the policy had not been delivered to the assured at the time of the fire, and the company's agent, with knowledge of the mortgage on the property covered, accepted the premium for said policy after the fire. This is a very different case from the one under consideration.

A peremptory instruction was given in this case for the plaintiff and a like instruction was refused upon request of the defendant. The court below erred in granting the plaintiff a peremptory instruction, and also in refusing the defendant the peremptory instruction requested by it.

This case is therefore reversed, and suit dismissed.

ELLIOTT v. ILLINOIS CENT. R. CO.
(No. 17901.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

MASTER AND SERVANT \Leftrightarrow 180(1), 204(1) — **INJURIES TO SERVANT — FELLOW-SERVANT RULE.**

Under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, § 8658]), declaring that a railroad company shall be liable for injury or death resulting in whole or in part from the negligence of the officers, agents, or employés of such carrier, the fellow-servant rule is abrogated, notwithstanding the defense of assumption of risk is preserved; and, though the two defenses originally grew out of the same principle, a servant does not assume the risk of a fellow servant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359, 368, 544; Dec. Dig. \Leftrightarrow 180(1), 204(1).]

Appeal from Circuit Court, Tishomingo County; W. H. Kier, Special Judge.

Action by Oscar Elliott against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

T. A. Clark, of Belmont, and W. L. Elledge, of Iuka, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

POTTER, J. The appellant in this suit, plaintiff in the trial court, filed his declaration in the circuit court of Tishomingo county against the appellee, charging that the defendant railroad company, while engaged in interstate commerce, injured him, and sought damages in the sum of \$15,000. The declaration sets out that, while the defendant company was engaged in both inter and intrastate commerce, the plaintiff was employed by it as a section hand, and it was his duty to assist in the upkeep and repair of defendant company's tracks. In his employment it was necessary for him to assist in running a certain hand car used in and about his aforesaid employment to transport hands, tools, and materials for the work in which he was engaged, and from time to time to help remove the said hand car from the track of defendant company so as not to obstruct same. And that on or about the 24th day of May, 1912, plaintiff and other servants of the defendant company, while engaged about their usual duties, and as a part of said duties, and with the help of the section foreman, one W. A. Robinson, were removing said hand car from said track of defendant, to the west side thereof, and that while he was on the west side of the hand car and the ground on which plaintiff was working was slanting west, the said foreman "suddenly and without notice or warning to the plaintiff, willfully, wantonly, and recklessly," etc., negligently threw the weight of said hand car against plaintiff, badly injuring

him. To this declaration the defendant filed the plea of the general issue. And in support of his declaration, the plaintiff introduced evidence that, if believed by the jury, would establish the facts therein set out. At the close of the testimony, the defendant moved the court to grant it a peremptory instruction, and the motion was sustained. From this action of the court the defendant appeals to this court.

The railroad company defended this action upon the ground that, under the plaintiff's own theory of the case, he had assumed the risk complained of, and was therefore not entitled to recovery. But under the plaintiff's version of this case, his injury was caused, not through any risk assumed by him, but through the negligence of one of his fellow servants; and although it may be true that the doctrine of fellow servant and the doctrine of assumption of risk originally grew out of the same principle—that of an implied contract on the part of the employé to assume the risks incident to the negligence of his fellow servant or to assume the risks incident to his employment and known to him—nevertheless at this time each of these doctrines are well established in the jurisprudence of this country, and both is as distinct from the other now as if their origin were entirely different. In the case of Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 501, 34 Sup. Ct. 635, 58 L. Ed. 1069, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, relied on by appellee, this distinction is recognized in the following paragraph quoted therefrom:

"This clause has two branches; the one covering the negligence of any of the officers, agents, or employés of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employé of the plaintiff, and the other relating to defects and insufficiencies in the cars, engines, appliances," etc.

In so many words the statute has declared that a railroad company is liable—

"for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier." 35 U. S. Statutes at Large, par. 2, p. 65 (U. S. Comp. St. 1913, § 8658).

The decision relied upon states affirmatively that this clause has the effect of abolishing in this class of cases the common-law rule that exempts the employer from responsibility for the negligence of a fellow servant of the plaintiff.

It is not controverted that the plaintiff was employed by a common carrier by railway, then engaged in interstate commerce, and, according to the evidence adduced by him, while so engaged he was injured by the negligence of a fellow servant. The court erred in granting the defendant the peremptory instruction requested.

This cause is therefore reversed and remanded.

**HENRY et al. v. BOARD OF SUPRS OF
SUNFLOWER COUNTY. (No. 17578.)**

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

**1. ANIMALS \S 50(2)—STOCK LAW—ORDER OF
SUPERVISORS—VALIDITY.**

That the territory embraced in a proposed stock law district, being less than a whole county, is one or more townships, or less than 36 square miles, or a part or parts of the county separated by natural boundaries, are jurisdictional facts, which must affirmatively appear of record before an order of the board of supervisors declaring the stock law in force in a supervisor's district of the county is valid.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. \S 149-152; Dec. Dig. \S 50(2).]

**2. EVIDENCE \S 10(1)—JUDICIAL NOTICE—
BOUNDARIES.**

The circuit court cannot take judicial notice of the boundary lines of supervisor's districts of a county.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 9; Dec. Dig. \S 10(1).]

Appeal from Circuit Court, Sunflower County; Monroe McClurg, Judge.

Certiorari by J. A. Henry and others against the Board of Supervisors of Sunflower County. From a judgment for defendants, petitioners appeal. Reversed, and judgment ordered in the Supreme Court for petitioners.

S. F. Davis, of Indianola, for appellants.
Geo. H. Ethridge, Asst. Atty. Gen., for appellee.

POTTER, J. "This is an appeal from the circuit court of Sunflower county, and involves the validity of an order of the board of supervisors declaring the stock law in force in district No. 2 of Sunflower county. The case was carried to the circuit court on certiorari, the petition for the writ setting forth the proceedings as they appeared before the board of supervisors, making the judgment and petition exhibits to the petition for a certiorari. The board of supervisors of said county ordered an election to be held in district No. 2 of that county, as provided in chapter 219 of the Laws of 1912, and commanded the election commissioners to hold said election in the said district, the command of the board to the election commissioners being addressed to them by name and reciting as follows:

"You are hereby directed to hold an election in district No. 2 on the 31st day of December, A. D. 1912, for the purpose of determining whether or not the stock law shall be put in force in said district as provided in chapter 219 of the Laws of 1912."

"The election commissioners reported to the board of supervisors on the 6th day of January, 1913, which report appears on page 7 of the record, in which the following is recited:

"We, the undersigned, election commissioners in and for Sunflower county, Mississippi, hereby certify that, pursuant to the order of this honorable board, a stock law election was held in

and for districts Nos. 2, 3, and 4 of said Sunflower county, and we have canvassed the returns of said election, and found the following results, to wit: In district No. 2, 58 votes for the stock law and 13 votes against the stock law."

"The report then declares that the stock law election in district No. 2 resulted in favor of the stock law. The board then entered an order, which appears on page 8 of the record, in which is recited that the election in district No. 2 was held as required by law and that it appeared that two-thirds majority of those voting of the resident freeholders and leaseholders for a term of three years or more voted affirmatively for said stock law, and that it was ordered by the board that said stock law be and is declared to be in full force in district No. 2 of said county. This order was entered on the 6th day of January, 1913. On page 14 of the record is an agreement entered into between the attorneys for Henry and Holmes and the attorney for the board of supervisors, for use on the hearing before the circuit court, in which it was agreed that the orders set out in the record are true transcripts of the proceedings before the board, and that the cause might be tried at that term of the court. The court denied the relief prayed for by the appellants and upheld the action of the board of supervisors."

The above statement of facts is copied from the brief of the Assistant Attorney General, representing the appellee.

[1] The record in this case fails to show the number of square miles contained in district No. 2 of Sunflower county, and in fact it is only by indulging a presumption that we know from the record that district No. 2 of Sunflower county means supervisor's district No. 2 of Sunflower county. The record does not show that the territory embraced in the proposed stock law district under consideration is one or more townships, or a part of two or more townships, or less than 36 square miles, or that it is a part or parts of the county separated by natural boundaries. All these facts are jurisdictional, and must affirmatively appear of record before an act of the board of supervisors is valid. *Garner v. Webster County*, 79 Miss. 565, 31 South. 210. In the exercise of the statutory power conferred on the board of supervisors to establish stock law districts the board is a court of limited and special jurisdiction, and the judgments of such court are not, in and of themselves, evidence of the right of jurisdiction, nor of its lawful exercise; but every jurisdictional fact must be shown on the face of the record. *Bolivar County v. Coleman et al.*, 71 Miss. 832, 15 South. 107; *Lester v. Miller*, 76 Miss. 309, 24 South. 193.

[2] Under the statute, in order for the board of supervisors to pass a valid order putting in force the stock law, their records

must show affirmatively that the territory, being less than a whole county, includes one or more townships, or a part of two or more townships not less than 36 square miles, or a part or parts of the county separated by natural boundaries. The circuit court cannot take judicial notice of the boundary lines of supervisor's districts. *Elzey v. State*, 70 South. 579. The record in this case does not show, as it must, that the statutory requirements were complied with. This case is therefore reversed, and judgment here for petitioners.

Reversed, and judgment here.

WHEELER v. LAUREL BOTTLING WORKS. (No. 17892.)

(Supreme Court of Mississippi, Division B. May 15, 1916.)

1. NEGLIGENCE ⇨134(1)—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show negligence of a bottling company in bottling liquid and supplying it to plaintiff, who was injured by explosion of a bottle when removing it from the ice chest, where it left the cause of the explosion to speculation, merely suggesting that some bottles were defective, but failing to identify the one which exploded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267; Dec. Dig. ⇨134(1).]

2. NEGLIGENCE ⇨27 — DUTIES — BOTTLING LIQUIDS.

The manufacturer or vendor must take reasonable precaution that receptacles are sufficient for the purpose for which they are used.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. ⇨27.]

3. NEGLIGENCE ⇨27, 121(3)—EVIDENCE—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not apply where a bottle of Coca-Cola exploded when the vendee was removing it from the ice chest, but such was an unforeseen accident, for which there was no liability.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 25, 218; Dec. Dig. ⇨27, 121(3).]

4. NEGLIGENCE ⇨134(1)—EVIDENCE—SUFFICIENCY.

Evidence that one bottle exploded is insufficient of itself to charge the bottling company with conducting its business in an unusual or unsafe way, or using unsafe appliances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267; Dec. Dig. ⇨134(1).]

Appeal from Circuit Court, Jones County; J. M. Arnold, Judge.

Action by John S. Wheeler against the Laurel Bottling Works. From a judgment on peremptory instruction for defendant, plaintiff appeals. Affirmed.

B. A. Boutwell and Pack & Collins, all of Laurel, for appellant. Deavours & Hilbun and Shannon & Schaubert, all of Laurel, for appellee.

STEVENS, J. Appellant instituted this action against appellee to recover damages alleged to have been sustained for the loss of one of plaintiff's eyes. Mr. Wheeler, the

appellant, was the owner of a restaurant in the city of Laurel, Miss., and at his restaurant, among other things, he sold soft drinks, including bottled Coca-Cola, which was manufactured, bottled, and sold by appellee. He kept the bottled drinks in an ordinary ice box, the top or lid of which opened upwards and worked or hung upon hinges at the back of the box. It appears that appellant kept his restaurant open all night, and some time after 1 o'clock in the night he went to the ice box to see about his Coca-Cola, and, on lifting the lid of the box, a bottle of Coca-Cola exploded, projecting a small piece of glass into the right eye. From the injury thus inflicted it became necessary to remove the eyeball. It was the custom of appellant to place 50 pounds of ice in the box, and then to stack about four dozen bottles of Coca-Cola upon and around this ice. The declaration is in four counts. The first is based upon the alleged negligence of the defendant in overcharging the bottles with too much carbonic acid gas; the second, in using defective and dangerous bottles; the third, on the alleged failure of the defendant to test or inspect the bottles; and the fourth, upon the general negligence alleged in making use of defective bottles, knowing them to be defective. The cause proceeded to a trial, and at the close of the plaintiff's testimony the court sustained the motion of the defendant to exclude the evidence and to grant the defendant a peremptory instruction.

The evidence shows that the bottle of Coca-Cola that caused the injury was bottled by appellee at its regular bottling works in the city of Laurel. It is further shown that appellee made use of two kinds of bottles, one what is termed a "light-colored" and the other a blue bottle. One witness, a discharged employé of appellee, testifies that many of the light-colored bottles were defective. The substance of the testimony of this witness is that these bottles were thinner than the blue bottles; that many of them had thin places in them; that the company would sell to the retail trade in cases of 24 bottles each, making delivery by means of a truck or conveyance owned and operated by appellee; that in hauling the bottles for delivery they would frequently burst in the case, and that customers frequently required the agent of appellee to make good certain bottles which would be found to be broken when taken out of the case in the usual course of the customer's business. This witness, Tillis Walters, had driven for some months the delivery wagon of appellee, loading the wagon in the morning and returning some time that day either for a new load or to leave the conveyance at the plant of appellee during the night. In making his reports he would account for the bottles charged to him when he would start out

with a load, and sometimes he would be allowed credit for broken bottles. The witness furthermore testifies that he himself had no practical experience in bottling Coca-Cola, but that he understood that the pressure put upon the bottles when filled was supposed to be about 60 pounds. He further says that sometimes the pressure would crush a bottle in the process of filling. The witness further testifies that he commented upon the frequent breaking of the light-colored bottles in a conversation with a Mr. Richards, the manager and bookkeeper. The evidence of this witness that appellee was supposed to use 60 pounds' pressure in the process of bottling was the only testimony as to how much pressure was in fact put on the bottles, and witness further indicates that, so far as he knew, there was no one designated by appellee to test the bottles. Witness on cross-examination admits that if a bottle is defective it will generally crush in the process of attempting to fill it. There were only three witnesses introduced for the plaintiff, Mr. Walters, the former driver of appellee's wagon, a Mr. Deloney, an employé of appellant, and the appellant himself. There is no proof, of course, as to which particular bottle exploded, and there is no testimony showing exactly what caused the explosion. There is no proof that appellee did not make use of the usual and ordinary method of bottling Coca-Cola.

[1] The question for decision, therefore, is whether negligence on the part of appellee is shown or proved. There are very few reported cases of the kind now under review, and no previous case of this kind by our own court has been cited by counsel for either side. A case very similar to the one at bar is that of *Guinea et al. v. Campbell*, 22 Quebec Official Law Reports 257, in which Judge Archibald, among other things, says:

"It is proved that glass is not a substance that becomes weakened by use, unless from the application of some physical force it is cracked. If it were cracked at the time of filling, the proof shows that it would explode in that operation, and so if the crack occurred at any time when the pressure existed within, it would immediately explode. I am driven to the conclusion that when the bottle in question was placed in her refrigerator by the plaintiff, it was sound and strong enough to support the pressure of the liquid. What then could have caused the explosion? The forces of nature as to the contractions and expansion of bodies by change of temperature are practically irresistible. Thus most of us have seen vessels burst, stonework thrown out of place, etc., by the expansion that takes place in the conversion of water into ice. So we have seen glass vessels broken by putting hot water within them, and in this case the thicker the glass the more likely the breakage. The cause of this phenomenon is that glass is in a high degree unelastic. When hot water is put into a tumbler it quickly raises the temperature of that portion of the glass with which it is in contact and causes expansion, while the outer surface of the tumbler remains unaffected. If the expansion of the inner surface proceeds beyond the degree of elasticity, breakage must occur. Where the glass is thin, changes of temperature, either from within or without,

pervade almost immediately the whole substance of the glass, and thus breakages from that cause are much rarer. In the present case the proof shows that the bottle in question was placed in the refrigerator immediately under the ice box, which was very copiously supplied with ice. It may easily be assumed that the bottle was at a low pressure. On the other hand, the day was warm, and when the refrigerator door was opened, air of a much higher temperature would come in contact with the bottles, and would raise the temperature of the outer surface of the glass, while the inside was kept cold by the liquid within, and the law of nature above referred to had its effect. * * * It [the law] recognizes facts as being caused by inevitable accident, and it relieves from responsibility when such has been the case. * * * In consequence, I am of the opinion that the accident, if not due to the imprudence of the plaintiff in cooling the bottle too much and then exposing it to a current of warm air, was due to an inevitable accident for which defendant is not liable."

[2] We think the case from which we have so freely quoted is a well-reasoned case, and one that announces a sound principle. While there are general statements by the witness Walters that the light-colored bottles used by appellee were defective, yet an analysis of the entire deposition of this witness convinces us that the defect upon which the witness lays so much emphasis was the thinness of the bottle that would cause it to break in transportation. The plaintiff, therefore, in attempting to reach the jury with his case is compelled almost altogether to rely on the doctrine of *res ipsa loquitur*. Just what caused the explosion in the instant case is a matter largely of speculation. The bottles were piled on and around the large cake of ice, and it is possible that when plaintiff raised the lid of the ice box, the slight jar might have caused the bottles on the melting ice to slip or readjust themselves. It may be that the inrush of the warm air of a June night might have caused a rapid expansion of the glass. If the glass of the particular bottle was a thin glass, which the witness Walters complains of breaking so easily, then, as suggested by Judge Archibald, such bottle would have more likely accommodated itself to the rapid process of expansion than would a thicker glass. It has been expressly held by the courts to be common knowledge that bottles containing seltzer or vichy water or champagne or ginger ale or cider sometimes explode, and that it does not necessarily follow from the act of explosion itself that the vender is liable. The true rule seems to be that the manufacturer or vender must take reasonable precaution that the receptacles are sufficient for the purpose for which they are used. This is not a case where highly explosive, dangerous or noxious products are sold to a vendee without notice of the nature or quality of the product sold. In the case of *Glaser v. Seltz et al.*, 35 Misc. Rep. 341, 71 N. Y. Supp. 942, involving the explosion of a siphon of seltzer water, the court says:

"It is common knowledge that bottles containing seltzer or vichy water or champagne or gin-

ger ale, or cider will sometimes explode, and that barrels containing cider may explode. But it does not necessarily follow that the vendor of these commodities in such bottles or barrels is liable for the explosion, in the absence of misconduct on his part, which misconduct must be affirmatively proved."

The only case that appears to support the contention of appellant is that of *Payne v. Rome Coca-Cola Bottling Company*, 10 Ga. App. 762, 73 S. E. 1087, but it is to be observed that the court, in concluding the opinion in that case, does not decide whether the mere explosion itself would be sufficient. On this point the opinion says:

"As to whether an inference of negligence would arise against the manufacturers upon mere proof of the explosion, without more, we express no opinion."

[3] We do not think the doctrine of *res ipsa loquitor* applies in this case. The bottle at the time of the injury was not under the control or management of the manufacturer. The unfortunate occurrence appears to be one of those unforeseen accidents for which appellee under the facts of this case should not be held liable.

[4] The proof is not satisfying that appellee made use of bottles that were too weak to stand the pressure put upon them in the ordinary process of bottling, and this one instance of a bottle bursting under the circumstances disclosed by this record is, in itself, not sufficient to charge appellee with conducting its business in an unusual or unsafe fashion or making use of unsafe appliances. There is too much conjecture about the whole case to upset the ruling of the trial court in granting the peremptory instruction.

Affirmed.

DINWIDDIE v. GLASS et al. (No. 17872.)
(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. PARTNERSHIP ⇐165—LIABILITY OF PARTNERS.

The liability of partners is joint and several.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. ⇐165.]

2. ATTACHMENT ⇐12—NONRESIDENT—EQUITY.

Under Code 1906, § 536, providing that the chancery court shall have jurisdiction of attachment suits based upon any indebtedness, whether legal or equitable, against any nonresident, the chancery court, on a bill against a nonresident partner to enforce his individual liability for a debt, had jurisdiction to issue an attachment against his individual real estate in Mississippi.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 38, 39; Dec. Dig. ⇐12.]

3. ATTACHMENT ⇐2 — CHANCERY JURISDICTION—CONSTITUTIONALITY OF STATUTE.

Such provision, which, as interpreted by the courts to give a cumulative remedy and a concurrent jurisdiction to chancery, was a part of the equity jurisprudence of the state when

the Constitution of 1890 defined the jurisdiction to be exercised by the chancery court, and by section 159, subd. "f," expressly vested it with full jurisdiction in "all cases of which the state court had jurisdiction under the laws in force when this Constitution is put into operation," is constitutional.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 5-7; Dec. Dig. ⇐2.]

Appeal from Chancery Court, Quitman County; J. A. May, Chancellor.

Bill by H. D. Glass and another against Robert Dinwiddie, with attachment in chancery. Demurrer overruled, and defendant appeals. Affirmed.

W. M. Donaldson, of Marks, for appellant.

STEVENS, J. This is an attachment in chancery, instituted by appellees as complainants in the court below against appellant, a nonresident of the state, whose domicile and post office address is Louisville, Ky. The bill properly charges and sets out an indebtedness due complainants by the Dinwiddie Stave Company, a partnership composed of Robert Dinwiddie, the defendant, and appellant here, and his partner, C. S. Crawford. The bill charges that the defendant is the owner of certain real estate in the town of Marks, Quitman county, Miss., particularly described in the bill, the prayer of which is for an attachment in accordance with the provisions of section 536, Code of 1906. The attachment was properly levied, and the defendant was personally served with process, and in response to the summons he appeared and interposed a demurrer, the substance of which is the averment that equity has no jurisdiction; that the remedy at law is full, adequate, and complete; that the nonresident partner cannot be attached in chancery when the partnership business is conducted in Mississippi and one of the partners is a resident of this state; and that the statute in question (section 536, Code of 1906) is unconstitutional, in that it attempts to confer a statutory jurisdiction in excess of the jurisdiction conferred on chancery courts by the Constitution. The demurrer was overruled, but an appeal was granted to settle the principles of the case.

[1, 2] The remedy invoked in this case is purely statutory. Complainants have brought themselves within the terms of the statute. This is neither an action against the partners jointly nor one against the partnership property. The liability of partners is joint and several, and the theory of the bill is that appellant, a nonresident partner, is individually liable to the complainants for the debt here sued for. Complainants seek a personal decree against him alone, and an attachment against his individual estate. There is nothing in the statute denying to complainants the right to maintain a suit of this character. The proceeding is manifestly different from attachments at law, and the

statute construed by our court in *Barney & Hines v. Lumber Co.*, 95 Miss. 118, 48 South. 232. Section 536 of the Code, authorizing this attachment in chancery, expressly gives this remedy to creditors when the debtor is "nonresident, absent or absconding," and has lands and tenements within this state that can be reached by attachment. The case is therefore different from that of *Barney & Hines v. Lumber Co.*, supra.

[3] The constitutionality of the statute cannot now be doubted or questioned. While the terms of the statute have been from time to time broadened in the process of re-enactment, the basis of the jurisdiction here conferred has been a part of the statutory law of our state from its earliest time, and, at the time of the adoption of our present Constitution, was a well-recognized part of equity jurisdiction. There is no brief on file by counsel for appellee, and we therefore do not have the benefit of their citations or views, or the views of the learned chancellor who rendered the decree complained of. It is stated, however, by Mr. Justice Clayton, in *Freeman v. Gulon et al.*, 11 Smedes & M. 58, that the early statute which contains the material provisions of the present statute "is copied precisely from one which has been in force in Virginia for many years, and the jurisdiction seems to have been exercised there, without reference to the residence of the complainants," and that "as early as 1807 a statute was in force regulating the mode of proceeding in equity against absent defendants," but only in cases at that time in which equity had original jurisdiction. It is further stated in this opinion that in 1822 the present statute was passed, commenting on which the opinion further observes:

"It is needless to conjecture what induced the Legislature thus to enlarge the jurisdiction of equity. The statute in regard to attachments at law had been in force for years, and experience might have shown defects which are now concealed. Certain points, however, appear manifest. The property which is proceeded against may be clothed with trusts or covered with frauds, in a manner which may make the remedy more ample in chancery than at law. The rights, too, of the parties may be more carefully guarded. * * * These reasons might have induced it to give a cumulative remedy, and to create a concurrent jurisdiction in this respect in chancery. * * * There is no objection to this view, growing out of the Constitution, because that instrument, in establishing 'a superior court of chancery, with full jurisdiction in all matters of equity,' had reference to the system of equity then in force in this state, as derived from the English system, and modified by our legislation."

And in *Statham et al. v. New York Life Ins. Co. et al.*, 45 Miss. 581, 7 Am. Rep. 737, our court, in answer to the jurisdictional question there raised, said:

"This is the renewal of a controversy which prevailed in the High Court of Errors and Appeals for several years, whether the complainant (in such a case as this) must not show in his bill a distinct ground of equity, in addition to the fact that his debtor is absent from, or a

nonresident of, the state, and that the home 'defendant has effects belonging to or a debt due to him,' that the 'absconding' or nonresident debtor has lands or tenements in this state. Which view of the subject ought to have prevailed, as an original proposition, was not considered by this court an open question in *Scruggs et al. v. Blair* (decided October term, 1870) 44 Miss. 406; but it readhered to what was laid down in *Trotter v. White*, 10 Smedes & M. 612, accepting as the doctrine which had been established 'that the basis of the jurisdiction is purely statutory, and depends on the condition of facts, stated in the statute.'"

See, also, *Wallace v. Lucas*, 42 South. 607.

The statute, therefore, as interpreted by our court, was a part of the jurisprudence of the state when the framers of the present Constitution defined the jurisdiction to be exercised by the chancery court, and instead of undertaking to limit the jurisdiction which the courts had expressly declared to be conferred by the statute, it is to be observed that section 159, subd. "1," expressly declares the chancery court to have full jurisdiction in "all cases of which the said court had jurisdiction under the laws in force when this constitution is put in operation." There can be no question, therefore, about the constitutionality of the act in question.

This disposes of the points argued by counsel for appellant, and it follows that in our judgment the decree of the court below should be affirmed, and the cause remanded, with directions to the defendant to answer within 30 days after receipt of mandate by the clerk of the court below.

Affirmed.

AETNA INS. CO. v. COWAN, County Treasurer. (No. 17891.)

(Supreme Court of Mississippi, Division B. May 15, 1916.)

1. PLEADING \S 131—CONFESSION AND AVOIDANCE—INSURANCE.

Where the petition alleged total destruction of an insured building, a plea in abatement that there was only a partial loss on such building, and that an adjustment and appraisal had not been had, is a sufficient plea in confession and avoidance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 277, 278; Dec. Dig. \S 131.]

2. INSURANCE \S 576(1)—RIGHTS OF PARTIES—ARBITRATION—WAIVER.

Where the insurer, under a policy containing a loss payable clause in favor of the county treasurer, attempted to arbitrate the loss as permitted by the policy, but failed to include the treasurer in such arbitration, the insurer did not waive its right to an arbitration with the treasurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1436; Dec. Dig. \S 576(1).]

3. INSURANCE \S 581—RIGHTS OF PARTIES—LOSS PAYABLE CLAUSES—EFFECT—INDEPENDENT CONTRACT.

A loss payable clause in a policy of fire insurance, to the effect that "any loss proved due the assured shall be held payable to the county treasurer, as his interest may appear," does not create a new contract with the treasurer, independent of the liability to the assured, though

by Code 1906, § 2596, certain provisions peculiar to the mortgagee are written into every insurance contract by operation of law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1444-1447; Dec. Dig. ¶581.]

Appeal from Circuit Court, Jackson County; J. I. Ballenger, Judge.

Action by R. W. Cowan, Treasurer of Jackson County, against the Ætna Insurance Company. From a judgment for plaintiff on peremptory instruction, on sustaining his demurrers to defendant's pleas, defendant appeals. Reversed and remanded.

This is a suit brought by R. W. Cowan, treasurer of Jackson county, Miss., on a policy issued by the Ætna Insurance Company to Mrs. J. M. Pelham, insuring a certain dwelling house in Pascagoula, Miss., for \$2,500, and insuring certain household furniture in the same policy for \$500, the total amount of the policy being for \$3,000. In this policy was a loss payable clause, which provided that:

"Any loss or damage that may be ascertained and proven to be due the assured under this policy shall be held payable to the treasurer of Jackson county, Mississippi, as his interest may appear. Understood that loss payable clause applies to first item of this policy for \$2,500 on building and not on the second item of household furniture."

On the 23d day of March, 1914, a fire occurred which totally destroyed the household furniture, and, according to appellee's version of the case, also totally destroyed the building insured, but according to the appellant's version the destruction of the building was only partial. There was a disagreement between the parties as to the extent of the damage done the building, and an appraisal was demanded under the provisions of the policy sued on, one appraiser having been appointed by Mrs. Pelham, the holder of the policy, and another appraiser by the insurance company, and an umpire was selected by the two; and when the appraisers met the amount of damage to the building insured under the policy sued on was fixed at the sum of \$2,029.33. The treasurer of Jackson county, who was payee in the loss payable clause, was not a party to this appraisal. The insurance company tendered the amount of said award \$2,029.33 to him, but the tender was refused. After this tender was refused the insurance company, on the 17th day of June, 1914, demanded of Cowan, treasurer, another appraisal as to the damage done to the building, upon the theory that the loss to the building was a partial loss, and that under the terms of the policy it was entitled to an appraisal of the damage done. The county treasurer, however, refused to appoint an appraiser, claimed a total loss, and on the 30th day of June, 1914, filed his suit in the circuit court of Jackson county for the full amount of the \$2,500 item of the policy, and alleged in his declaration that the destruction of the building was complete, and that the loss was a total loss, and that he

was entitled to the entire amount for which the building was insured. To this declaration the defendant filed a plea in abatement, setting out that the loss to the building was only a partial loss, and that under the terms of the policy sued on that the defendant was entitled to an appraisal in the manner provided in the policy before a suit could be brought, and that the suit was begun prematurely by reason of the fact that the plaintiff had refused to submit to an appraisal. The above plea was demurred to by the plaintiff upon 12 grounds, and we set out those argued and relied upon by the plaintiff as follows:

"First. The averment in said plea that 'there was only a partial loss on the property insured under the policy sued on,' while not a direct and positive denial of the allegation in the declaration that said property was destroyed by the said fire, is in conflict therewith, and therefore said plea is defective and insufficient."

"Third. It is shown on the face of said plea that defendant, with knowledge of the interest of plaintiff in the said subject-matter of insurance, elected to, and did, ignore plaintiff and enter into said arbitration proceeding with the said Mrs. J. M. Pelham alone, and that said alleged arbitration failed through no fault of plaintiff, whereby the defendant waived its pretended right to require the plaintiff to enter into an appraisal and arbitration, as to the extent of the said loss, or damage."

"Fourth. It is shown on the face of said plea that the demand of defendant upon plaintiff for appraisal and arbitration was subsequent to that entered into by and between defendant and the said Mrs. Pelham, and was attempted by defendant without making the said Mrs. J. M. Pelham a party thereto, and that such attempted appraisal and arbitration was merely for the purpose of ascertaining the extent of said loss or damage to said property, without admitting defendant's liability for loss or damage as would be so awarded, but reserving therefrom the question of the liability of defendant, under the terms of said policy, for such loss or damage."

"Twelfth. It is shown in and by said plea that there was, by means of the insertion in said policy of said loss payable, or mortgagee clause, a new and independent contract, in no way dependent upon the original policy between the owner and the insurer of said property, made between the plaintiff and the defendant, under which the plaintiff is entitled to recover in this suit within and by said policy."

The court sustained the demurrer of appellee to appellant's plea in abatement, and granted the peremptory instruction in appellant's favor for the entire amount sued for, and from the action of the court in granting the peremptory instruction the appellant appeals.

McLaurin & Armistead, of Vicksburg, for appellant. W. M. Denny, of Pascagoula, for appellee.

POTTER, J. (after stating the facts as above). [1] It is contended by the appellee in this case that the declaration alleges that the loss to the building in question was a total loss, and therefore the matter in controversy was not subject to an appraisal, as the defendant company was liable for the full amount of the policy as to the item in

question, regardless of the extent of the loss under section 2592 of the Code of 1906 which provides:

"When real property or buildings, household or kitchen furniture, insured against loss by fire and situated within this state are totally destroyed by fire, the company shall not be permitted to deny that the property insured was worth, at the time of the issuing of the policy, the full value upon which the insurance was calculated."

The appellee contends that the plea of the defendant does not deny that the building in question was destroyed by fire—

"unless the averment in the plea that 'there was only a partial loss on the property insured under the policy sued on' could be construed as such denial. Neither does the plea admit the truth of the allegation that the building was destroyed. The object of the pleading is to put upon the record altercations of the parties until they come to an issue of fact or law. And after the declaration the pleading must be either a traverse or a confession and avoidance."

[2] This plea is a plea in confession and avoidance. When the defendant sets out in its plea that the loss was a partial loss, it thereby admits that a loss occurred, and the only question now to determine is whether or not the defendant's plea in abatement would be a defense to the suit in question if the matters set out therein were established by a preponderance of the evidence. In so far as whether or not there was a total loss, or only a partial loss, the issue is undoubtedly made by the pleadings. We will therefore construe the matters set out in defendant's plea in avoidance of plaintiff's suit. In the first place it is insisted that the right of appraisalment was waived by the appellee in undertaking an appraisalment or arbitration with Mrs. Pelham by ignoring or not making the county a party thereto. The only result, however, of such failure on the part of the insurance company to make the county a party would be to make the arbitration void as to the county, and after its refusal to be bound by the award the insurance company conceded that the appraisalment was void in so far as it affected the interest of the county and offered another appraisalment. It seems that Mrs. Pelham was satisfied with the award in so far as she was concerned; and, if she settled with the company on the original award as to her interests in the policy, we do not see how the plaintiff's interests were detrimentally affected thereby. The original award was void as to the county treasurer. The insurance company conceded this, and in so far as the county's interests were concerned, the parties were in the same position that they would have been had no appraisalment been made. In fact, as to the county, there has been no appraisalment.

[3] The main contention of the plaintiff is based on the twelfth ground of the demurrer, and is that the loss payable clause constitutes a new and independent contract in no way dependent upon the original policy between the owner and the insurer, and that conse-

quently the plaintiff was not bound by the appraisalment agreement in the policy. We do not think this contention is sound. The mortgagee's contract and his rights thereunder are the same as the rights of the insured, except as modified by section 2596 of the Code of 1906 prescribing a form of mortgage clause to be written in all policies, and providing that the mortgagee shall not be subject to certain forfeitures therein enumerated which the insured is subject to. The provisions of this section of the Code are written into every policy containing a mortgage clause by operation of law. The section in question automatically writes itself into the insurance contract. *Bacot v. Phoenix Ins. Co.*, 96 Miss. 223, 50 South. 729, 25 L. R. A. (N. S.) 1226, Ann. Cas. 1912B, 262. This the appellee contends makes a new and independent contract between the mortgagee and the insurance company in no way dependent upon the original policy between the owner and the insured. It may be true that a new and independent contract is made between the mortgagee and the insurance company by the insertion of the mortgage clause, but after all the policy itself is the contract between the insurer and the mortgagee. It is upon the policy and its terms that the mortgagee must recover in the event of loss, and the only difference between the contract of the mortgagee and the assured are the provisions of section 2596, which writes certain provisions into every mortgage clause, relieving the mortgagee from certain forfeitures that may be incurred by the assured. It is upon the policy that the mortgagee must recover if at all. If, as he insists, there exists an independent contract between himself and the insurer, where are the terms of that contract to be found except in the policy of insurance? The policy designates the kind of insurance undertaken. The policy designates the property the policy covers. The policy names the maximum amount recoverable thereunder. If the mortgagee has an independent contract of insurance from that of the assured, the terms of the contract nevertheless are the same, except as modified by law. By an independent contract, however, our court meant nothing more than, if the policy of insurance is void as between the insurance company and the assured on account of some act or omission on the part of the assured, that nevertheless it will be valid and binding between the insurance company and the mortgagee. Except for section 2596 mortgage clauses would probably be so written that the mortgagee, though not himself at fault, could not recover in any case where the assured himself could not recover.

In our opinion the question of whether or not the loss under consideration was a total loss should have been submitted to the jury under proper instructions, and if the jury found that the loss was a total loss, the company should have been required to pay the

full amount of the \$2,500 item of the policy, and if the jury found that the loss was only partial, the suit should have abated pending a submission of the matter to appraisal according to the terms of the policy.

Reversed and remanded

TANNER v. TANNER et al. (No. 17926.)
(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. HOMESTEAD §60—NECESSITY OF OCCUPANCY AS HOMESTEAD—AMOUNT AND VALUE.

Whether land constitutes a homestead depends on whether the land is actually used and occupied for homestead purposes, the statutory exemption being not of land generally to the value of \$3,000, and not exceeding 160 acres, but of land actually occupied as a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 88, 89; Dec. Dig. §60.]

2. HOMESTEAD §18—RIGHT TO CHOOSE.

The head of the household has the right to choose the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 19-27; Dec. Dig. §18.]

3. HOMESTEAD §81—EXEMPTIONS—CHARACTER OF ESTATE.

Ownership of land in fee simple is not essential to impress the estate with the homestead character.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114-118; Dec. Dig. §81.]

4. HOMESTEAD §214—USE OF LAND—EVIDENCE—SUFFICIENCY.

Evidence that the owner occasionally took wood for household purposes from a 40-acre tract of wild and unfenced land, separated by three-fourths of a mile from the land on which he resided, is insufficient to show use as a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 397-399; Dec. Dig. §214.]

Appeal from Chancery Court, Montgomery County; D. M. Kimbrough, Chancellor.

Suit by Mrs. Mary J. Tanner and others against S. L. Tanner. From a decree for petitioners, defendant appeals. Reversed and remanded.

Flowers, Brown, Chambers & Cooper, of Jackson, and J. T. Dunn, of Eupora, for appellant. W. R. S. Wilburn, of Winona, for appellees.

POTTER, J. This was a suit filed in the chancery court of Montgomery county by Mrs. Mary J. Tanner, Mrs. Hessie Bailey, and Mrs. Evaline Hawkins against S. L. Tanner, all the parties to the suit, both complainants and defendants, being the heirs at law of J. T. Tanner, deceased. The bill of complaint alleged that complainants were the owners and tenants in common of 160 acres of land in Montgomery county, and described the lands. The bill alleged that Mrs. Mary J. Tanner owned an undivided one-fourth interest in the property described, Mrs. Evaline Hawkins an undivided one-fourth interest, and Mrs. Hessie Bailey an undivided one-fourth interest in said lands, and the defend-

ant a like interest, and that the lands described comprised the homestead of J. T. Tanner, the husband of Mrs. Mary J. Tanner and the father of the other complainants and defendant; that J. T. Tanner died intestate on the 9th day of January, 1911, leaving the lands described in the bill of complaint as his only real property; and that it was the desire of the widow, Mrs. Mary J. Tanner, that the said lands be partitioned. The bill then averred that on the 3d day of May, 1902, J. T. Tanner attempted to convey, and did execute, a deed, in consideration of \$1 and love and affection, to the defendant, S. L. Tanner, to the land described in the bill of complaint as the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 1, township 17, range 7 east, and that Mrs. Mary J. Tanner, the wife of J. T. Tanner, deceased, did not join in said conveyance to the defendant, and that she did not know the deed to said lands had been made until after the death of her husband, J. T. Tanner. The bill alleged that at all times subsequent to the making of the deed in question until the death of J. T. Tanner the land above described had been used as a part of the homestead tract, and that the deed in question was void because Mrs. Mary J. Tanner, the wife of J. T. Tanner, did not join in the execution of said deed. And there was prayer for cancellation of the deed in question and for sale for partition of the entire 160 acres of land, payment of attorneys' fees and costs, and distribution of net proceeds.

As to 120 acres of the land described in the bill of complaint, S. L. Tanner, the defendant, in his answer admitted that the complainants in said bill and himself were the owners and tenants in common of said lands, but denied that the complainants were the tenants in common with him in the 40-acre tract described in the bill of complaint as the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 1, township 17, range 7 east, and denied that this 40-acre tract comprised any part of the homestead of J. T. Tanner, his father, during the lifetime of the said J. T. Tanner, and denied that the deed to him was void because of the failure of Mrs. Tanner to join in same, and set out that he was the sole and only owner of the 40 acres deeded to him by J. T. Tanner. The proof in this case shows that J. T. Tanner in his lifetime owned 160 acres of land, the land described in the bill of complaint; that he owned 120 acres of this land at the time of his death, but had deeded 40 acres of same on the 3d day of May, 1902, to J. T. Tanner, but that Mrs. Tanner, the wife of J. T. Tanner, did not join in this conveyance. The proof also establishes that the 120-acre tract of land and the 40-acre tract in controversy are three-quarters of a mile apart, counting the distance from the nearest points. There was a dwelling house on the 120-acre tract, but this dwelling

house was not in use as a homestead by J. T. Tanner at the time the deed in question was made, but J. T. Tanner and his family lived in the dwelling house belonging to his daughter, on a tract of 40 acres adjoining the 120 acres owned by him, and that the 40 acres owned by his daughter, and upon which his family lived with him, was used by all the parties as a pasture, and that, in addition to this, Mr. Tanner, for many years previous to his death and at the time of the execution of the deed in question, cultivated a 39-acre tract of land adjoining the 120 acres owned by him and the 40 acres upon which he lived, and belonging to his daughter, under an agreement with C. R. Joiner, the owner of the 39 acres, that if Tanner would pay the taxes he could cultivate this tract of land and have the profits. The proof further establishes that none of the 40 acres conveyed in the deed were cleared and cultivated, and it was all woodland, and there was no testimony of any use of the 40 acres in question for homestead purposes except that occasionally J. T. Tanner obtained wood for fuel therefrom. The chancellor held that the 40 acres in question were used as a homestead, and that the conveyance to S. L. Tanner was void because Mrs. Tanner did not join in the deed, and from this decree S. L. Tanner appeals. In the case of *Mounger v. Gandy*, 69 South. 817, this court held that:

"Homestead laws are liberally construed in favor of the exemptionist, but never as a pretext to claim that which does not really and substantially exist. All the many liberal opinions of the court on this subject are vitalized by the principle, well expressed by Tarbell, J., in *Campbell v. Adair*, 45 Miss. 170, in the following language: 'One of the leading objects of these statutes is to create, preserve, and protect a home for the family, for the wife, mother, and children, as well as for the husband and father. A characteristic feature of home is a place of residence, of which occupancy is an essential element. As a general rule, to constitute a homestead there must be actual occupation and use of the premises as a home for the family. The premises must be appropriated, dedicated, or used for the purpose designated by the law, to wit, as a home, a place to abide and reside on, "a home for the family."'"

[1] In the case of *Mounger v. Gandy*, supra, Augustus Gandy lived with his father and owned lands adjoining the lands there in controversy, and while he and his wife were members of his father's household and living on lands owned and occupied by his father as a homestead, he mortgaged the lands in question, and Carry Gandy, his wife, did not join in the execution and delivery of the deed of trust. The lands were wild and uncultivated and not inclosed, with the possible exception of 2 or 3 acres on the northern line of the S. W. ¼ of the N. W. ¼ of section 18, where there was evidence that Augustus Gandy's fence inclosed a small portion of this land, which was cultivated by the said Augustus Gandy. There was no evidence that the land in question contiguous to the land upon which

the Gandys lived was used for homestead purposes, and consequently the court held that under the facts in that case the land in controversy did not constitute a homestead. The test, after all, is whether or not land is used for homestead purposes. The law does not exempt to every head of a household who lives in the country 160 acres of land worth not more than \$3,000, but the statute exempts to the head of the household a homestead consisting of 160 acres of land worth, not exceeding in value, \$3,000.

[2-4] In the present case there was no evidence that this isolated 40-acre tract was used for homestead purposes, except that occasionally fuel for household use had been gotten from there. The family occupied 79 acres of land as tenants at will, and Mr. J. T. Tanner farmed the 120 acres of land adjoining the 79 upon which he lived. He was the head of the household, and had a right to choose the homestead. By selling the 40 acres he evidently intended to choose the land upon which he lived, and the land cultivated by him and adjoining that upon which he lived, as his homestead. Ownership in fee simple of the homestead is not essential. *McGrath v. Sinclair*, 55 Miss. 89; *King v. Sturges*, 56 Miss. 606; *Hinds v. Morgan*, 75 Miss. 509, 23 South. 35. The evidence in this case fails to establish that the land in question was used for homestead purposes. The chancellor erred in holding the 40-acre tract a part of the homestead.

It was also error to charge the 40 acres of land in question with attorneys' fees and other expenses incident to the suit for partition.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. BASSETT. (No. 16881.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. COMMERCE §8—STATE REGULATIONS—TELEGRAPH COMPANIES.

A suit for damages for a mistake in the transmission of a telegram between points in the state under a contract made in the state before Act Cong. June 18, 1910, c. 309, § 7, 36 Stat. 544 (U. S. Comp. St. 1913, § 8563), including telegraph companies as public service agencies under federal control, was governed by the law of the state.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8.]

2. TELEGRAPHS AND TELEPHONES §54(5)—NEGLIGENCE IN TRANSMITTING MESSAGE—LIMITATION OF LIABILITY.

Under Const. 1890, § 195, declaring telegraph companies common carriers in their line of business subject to liability as such, a stipulation limiting the amount of damages on un-repeated messages was void, and the company was liable for actual damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 43, 46; Dec. Dig. §54(5).]

3. TELEGRAPHS AND TELEPHONES ¶67(5) — NEGLIGENCE IN TRANSMISSION — REMOTENESS.

Where defendant telegraph company, receiving a message for plaintiff, the manager of a baseball team, stating that he could get games "no guarantee," changed the words in transmission to "to guarantee," in consequence of which plaintiff took his team to such games, which he would not have done had the message been correctly transmitted and incurred expenses, the damages were the direct consequence of the negligence, and recoverable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 68; Dec. Dig. ¶67(5).]

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action by Frank H. Bassett against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sykes & Sykes, of Aberdeen, for appellant. W. A. Blair, of Tupelo, for appellee.

POTTER, J. This suit was brought in a justice of the peace court and appealed to the circuit court, and from a judgment there for \$81.40 is appealed here, and is for actual damages for the incorrect transmission of a telegram addressed to the appellee.

Said message was sent from Tupelo, Miss., to Jackson, Miss., and is as follows:

"May 13, 1909, F. H. Bassett, Jackson, Miss. Can get games Friday and Saturday. Sixty forty. No guarantee. Wire answer. [Signed] C. R. Sharp."

In transmitting the telegram from Sharp to Bassett the words "no guarantee" were changed to "to guarantee," and the message as delivered read:

"Can get games Friday and Saturday. Sixty forty. To guarantee. Wire answer."

The appellee paid the charges on the message. And the appellee, being the manager of a baseball team, upon receipt of the message in question called Mr. Sharp, the sendee, over the long-distance telephone and told him that he and his baseball team would come to Tupelo. In accordance with this promise, Mr. Bassett went with his team to Tupelo and two games were played, Bassett's team winning both of them; but he received therefor only \$20, which was 60 per cent. of the gate receipts. The expenses of his team to Tupelo were \$101.40, and he sued for this amount less the \$20 proceeds from the games played received by him, in all, \$81.40, upon the ground that he would not have gone to Tupelo and incurred this expense had not the message above mentioned been so altered in transmission as to indicate that his expenses on the proposed trip were guaranteed.

The message in question was filed at the Tupelo office, and the evidence shows that it was transmitted through the New Orleans, La., office of defendant company, where the mistake in transmission occurred. And the testimony further shows that though Tupelo

and Jackson are both points in Mississippi, that messages are necessarily sent to Jackson from Tupelo either by way of New Orleans, La., or Memphis, Tenn.

It is contended by the appellant in this case that in view of the fact that this message was sent to Jackson by the way of New Orleans and the error in transmission was made at the relay station of the defendant company in the city of New Orleans, that therefore this case is controlled by the laws of the United States, and that the state laws are superseded with respect to telegraph companies by the act of Congress known as the Carmack Amendment.

[1] The contract in question for the dispatch of this message was made on May 13, 1909, and is controlled by the laws then in force. It was by an act of Congress, approved June 18, 1910, that telegraph, telephone, and cable companies were included in the public service agencies under federal control. Volume 36, p. 544, U. S. Statutes at Large. Until the passage of this act no federal act was in force with reference to contracts of this nature, and this contract was made in this state, and both sender and sendee were here; therefore the law of Mississippi controls in this suit. *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1068, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

[2] In the case of *Postal Telegraph Co. v. Wells*, 82 Miss. 733, 35 South. 190, our court held that under the Constitution of 1890, paragraph 195, declaring telegraph companies common carriers in their line of business subject to liability as such, a telegraph company cannot limit its liability for negligence in sending a telegram by stipulating against liability in case of unrepeatable or cipher messages. We are therefore of the opinion that the stipulation limiting the amount of damages in unrepeatable messages was void under the law of Mississippi at the time the message in question was transmitted, and consequently in this case the defendant company is liable for actual damages, unless it is freed from liability upon some other ground.

[3] It is urged, however, that the damages are too remote, and that the message in question did not sufficiently put the telegraph company upon its inquiry as to the nature and extent of the damages which would probably grow out of its negligence in incorrectly transmitting the message in question. We think the proof shows that damages sustained were the direct consequence of the appellant's negligence in changing the phrase "no guarantee" to "to guarantee," and that the reading of the message as filed with its agent at Tupelo clearly indicates the nature of the damages likely to have grown out of an incorrect transmission of the message in question.

Affirmed.

YAZOO & MISSISSIPPI V. R. CO. v. SMITH. (No. 17703.)

(Supreme Court of Mississippi, Division B. May 15, 1916.)

1. RAILROADS — 369(3) — INJURIES TO PERSONS ON TRACKS — PERSONS ENTITLED TO LOOKOUT—TRESPASSERS.

As a general rule, a railroad company is entitled to a clear track, and owes no obligation to keep a lookout for trespassers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1261; Dec. Dig. — 369(3).]

2. RAILROADS — 376(2) — INJURIES TO PERSONS ON TRACKS—PRECAUTIONS AS TO PERSONS SEEN ON TRACK—TRESPASSERS.

As a general rule, a railroad company is required only to refrain from injuring trespassers after their position of peril on the track is discovered, the degree of care in such case incumbent upon railroad employes being more or less determined by circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1276; Dec. Dig. — 376(2).]

3. RAILROADS — 378—INJURIES TO PERSONS ON TRACKS.

It would be negligent for a railroad company to anticipate that a child seen on the track would take care of itself to the same extent as the ordinary adult would.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. — 378.]

4. RAILROADS — 378 — TRESPASSERS ON TRACKS—CHILDREN.

A child on railroad tracks, though of tender years, may be classed as a trespasser, as respects the care required of the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. — 378.]

5. RAILROADS — 359(2) — TRESPASSERS ON TRACKS—CHILDREN.

Although the age of the child may be important in determining his contributory negligence, or the railroad company's duty after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees, not invited or enticed by it, than it is to keep them safe for adults.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239; Dec. Dig. — 359(2).]

6. RAILROADS — 378 — TRESPASSERS ON TRACKS—EVIDENCE.

In an action for injuries to a child on a railroad track, evidence that when the child was seen, immediately every possible effort was made to stop the train and to save the child showed no negligence available to plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. — 378.]

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action by Tiny Bell Smith, by next friend, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

St. John Waddell, of Memphis, Tenn., and F. A. Montgomery, of Tunica, for appellant. P. H. Lowrey and R. A. Tribble, both of Marks, for appellee.

COOK, P. J. This suit was brought by the appellee, a little girl hardly 2 years of age, by her next friend and father, in the court

below for \$14,000, damages on account of having her right hand crushed by one of defendant's trains on August 1, 1913, resulting in the loss of all of the hand except the thumb, and in the declaration filed for her it is alleged that the accident was caused by the negligence of appellant's employes in the handling of the train which caused the injury. To appellee's declaration appellant pleaded the general issue of not guilty, and the case was tried before a jury on these pleadings. There was a verdict in favor of the appellee for \$14,000, the amount claimed in her declaration, and a motion made by appellant for a new trial, which was overruled, and a judgment entered against appellant for the amount of the verdict, and from which judgment this appeal is prosecuted.

On August 1, 1913, the defendant owned and was getting gravel from, for the purpose of ballasting and keeping up its railroad track, a gravel pit at a place called Buxton, some 3 or 4 miles south of a station called Sarah, on its line of railroad that ran through Tate county, Miss., and on this morning it had loaded a train of 14 cars with gravel at the pit, with the caboose in front of them and a locomotive behind them, the locomotive, however, headed in the direction of the cars so as to shove the cars in front of it. These cars were equipped with what is called a "Ledgerwood" engine that was supplied with steam through a pipe from the locomotive engine, and the steam thus supplied to the Ledgerwood engine would draw a heavy plow over the cars, this plow being so shaped that it would shove the gravel, or unload it on each side of the cars as it was pulled over the train. By this arrangement a train of this character could be unloaded along the main line of railroad while under way, and without stopping or obstructing the passage of other trains. The 14 cars with the caboose and locomotive, constituted this train, and it was destined to be unloaded along the main line of defendant's railroad some distance north of the station of Sarah. One of the witnesses in the case stated that a gravel train thus equipped could be unloaded while under way in 10 or 15 minutes. This train was equipped with air brakes on every car, including caboose and locomotive, and all of the same were in first-class working condition, and were tested and examined by the engineer and conductor before starting out on the trip from the gravel pit. This train pulled out from the gravel pit onto the main line of defendant's track, and started on its journey early in the morning, going north, the caboose and loaded cars being in front of the locomotive, with the locomotive head-on to the cars pushing them, and everything in good working order. The crew of the train consisted of the conductor, a flagman, an engineer, a fireman, and a brakeman, and the evidence showed these men were all

experienced men in the business in which they were engaged.

The station of Sarah consisted of a depot and a ginning plant on the east side of the railroad track, with Coldwater river on the immediate west side of the railroad, and in a narrow space between the river and the railroad are one or two small stores, and just north of the depot is a blacksmith shop, and just north of it was the home where plaintiff lived; plaintiff's home being along the edge of a cut the railroad enters at that point. South of the depot at Sarah, some 150 feet, is a road crossing, and north of the depot a distance of 408 feet, is another public road crossing leading from the east westward to a bridge across Coldwater river. Just at this north road crossing, the railroad in going north, enters a cut, on the west bank of which was situated the house where plaintiff lived with her father and mother, the house being situated some 200 feet or more north of the north public road crossing. There was no one living on the east bank of the cut, and the same was growing with trees, and the sides of the cut were probably 10 feet deep.

The depot at Sarah is near the center of a curve in the railroad; that is, in coming northward to the depot the curve is to the west; after leaving the depot, going north, the railroad curves to the east until after getting past the north road crossing, where it enters the cut, and there it curves again to the east, and in leaving the cut on the north it curves back again to the west. The cut was occasioned by the line of hills bounding the Mississippi Delta on the east coming down at that point to Coldwater river, and the cut was made through the edge of these hills because at that point the river was only a few feet or a short distance west of the railroad track.

The conductor was in the caboose, and came out on the front platform of same down on the steps, and threw off a message, and, there being none for him to receive, got back up into the caboose. The flagman, expecting the train to come to a full stop, came down off of the caboose where he was stationed to the ground, and, there being no message for them, signaled the engineer to go ahead, and immediately got back up on top of the caboose. The conductor, in the meantime, had got back to his seat in the cupola of the caboose, and was looking out ahead on the west side of the track; the flagman was on top of the caboose, either standing on top of the cupola, or between the cupola and the front end of the caboose. The train did not come to a full stop at the depot, but after finding out that there were no orders for them, the signal was given, and the train proceeded on its way northward, accelerating its speed so that, by the time the caboose reached the road crossing north of the depot, it was running, as stated by some of the witnesses, at from 7 to 10 miles per hour.

There was no one on the public road or at the crossing.

On account of the curve in the track to the east from the depot until after it crossed the north road crossing, the conductor, being on the west side of the caboose, could not see the track ahead. The flagman, however, on top of the caboose, had a better view; and, as the caboose reached or was passing over the north road crossing, the flagman saw something on the track, about 150 feet north of the road crossing, which he did not at first clearly distinguish, and then he saw that it was the plaintiff, a little child, a mere baby, out on the track, and he immediately called to the conductor, "There is something on the track—I believe it's a baby"—gave the engineer a stop signal, and ran back to get down off of the top of the caboose onto the front end to render what assistance he could. In the cupola, where the conductor's seat was situated, was an appliance for throwing on all of the air brakes on the train in an emergency, and as soon as the flagman called to the conductor that a baby was on the track, and without ever seeing or knowing where the child was, the conductor immediately applied the air in full force and in emergency on the entire train. The engineer was at his post of duty, and saw the signal of the flagman to stop, and immediately shut off the steam and raised his hand to put the air on the train, and found it had already been applied from the caboose. The track north of the north road crossing has a slight downgrade to the north. The child was on the track about 150 feet north of the north road crossing and at the entrance to the cut, at a point where a path crossed the track. The child had evidently crawled over the west rail of the track out of the low weeds and grass growing up close to the cross-ties, and had straightened up in the track between the rails when the flagman first discovered it, and at which time the caboose, on which the flagman was standing and in which the conductor was sitting, was just crossing the north road crossing and was on the down grade incline of the track. When the air was applied to the train and the steam shut off, the impact of the cars in striking each other was violent, and the noise of same was heard by every one who testified in the case, and all speak of it as an emergency stop. The train, at the time the child was discovered, was going at a speed variously estimated at from 8 to 10 miles per hour, and both the engineer and conductor testified that it could not be stopped under a distance of less than 800 feet, going at the rate of speed it was, and heavily loaded as the cars were.

When the flagman first discovered the child on the track, he did not, at the instant, recognize it as a child, but when he did recognize it, he at once called to the conductor that there was a child on the track, and gave the stop signal to the engineer, and then ran

to the ladder, leading from the top of the caboose to the platform, to get down where he could render assistance. The conductor, without ever seeing the child, immediately applied the air to the train with all force, and springing down out of the cupola inside of the caboose, ran out on the platform on the north end of the caboose and saw the child lying with its head and arm on the west rail of the track. Although all of this happened in a few seconds, yet the train had slowed down very greatly and was coming to a stop. The conductor saw, however, that it would not stop before reaching the child. There was a small trestle or drain between him and where the child lay that prevented him from jumping off and running ahead of the train to the child, this drain being so wide and deep that he could not jump it or get across it and beat the train to the child. The child was lying with its head and arm on the west rail of the track just north of this drain, some of the witnesses say within 30 feet of it, and the conductor stepped down on the lower step of the platform on the west side of the caboose, and, holding on to the iron rail of the platform with his right hand, leaned over, and with his left hand shoved the little child's head and body off of the rail, but it was clinging to the rail with its right hand, which the wheel of the caboose ran over and mangled. The caboose, being the lightest car of the train, and with the air applied, was jumping and jerking as the train was coming to a stop, and the oscillations of it caused the foot of the conductor to slip on the step, throwing his entire weight against his right arm with which he was holding to the iron railing, skinning his arm, and, if he had fallen, would have himself been killed by the train. He saved the life of the child, but was unable to save its hand. The train came to a dead stop after the caboose had passed where the child was, about two car lengths, but before the caboose had passed, the conductor had jumped off on the ground and picked the little thing up and gave it to the witness King, who carried it immediately to its parents. Doctors were employed, and the fingers of the child's hand were amputated, skin grafting was applied, and within four or five months the hand had healed over and was comparatively well, with no complications to be apprehended from the wound.

There were four eyewitnesses to the accident, and there were the flagman Varn, Conductor Gordon, and two persons who lived in the neighborhood and were at the blacksmith shop on the edge of the cut at the time, having some work done. They were Curtis King and C. H. Holloman. King and Holloman were introduced on the trial as witnesses for the plaintiff. Varn, who was absent when the trial came off, had given a written statement of the occurrence the day after it happened, and this statement by

agreement was taken as his testimony, and the conductor, Gordon, testified orally.

The witness Varn stated that he was on the top of the cupola when the caboose reached the north road crossing, and that when he first saw the child he was unable to tell what it was on account of the grass and the child being so small; that when he got nearer he saw that it was a baby, and immediately called to the conductor that there was a baby on the track, and ran to the ladder and tried to get down to get it off, but by the time he could get off the top of the caboose it had passed by where the child was, and the conductor had run out on the platform and reached out and shoved the child off of the track, and that at the time the caboose ran over the child's hand the train was not running exceeding 3 miles per hour, and stopped in about two car lengths; that everything possible was done to keep from striking the child, but it could not be avoided.

Plaintiff's witness Curtis King stated that he was at the blacksmith shop on the west side of the railroad at the edge of the cut, having some work done at the shop, when the accident happened, and saw the entire occurrence. This witness stated that his attention was first attracted to the train as the caboose was coming over the north road crossing by hearing the air applied to the train, and saw the flagman running on the top of the caboose back to the cupola, and that the conductor was, at the time, in the cupola, and that he then looked along the railroad track and saw the child when the caboose was about 30 feet from it, that he saw the conductor when he applied the air on the train from the cupola, and that the conductor immediately got down out of the cupola and ran out on the steps of the caboose and reached down off of the steps to the child; that the train was then slowing down and stopped in about two car lengths after the caboose had passed the child. Witness further stated that he saw the conductor push the child off of the track, and then jump off of the moving car and pick it up; that the conductor in reaching from the car after the child, came very near falling; that the flagman was the next man to the conductor after he picked the child up, and that witness was the next. In the opinion of this witness the train was going at 12 or 15 miles per hour when the air was first applied, and that when the alarm was first given about the child, the conductor was in the cupola looking out of the window on the west side. On cross-examination this witness reiterated all the foregoing facts, and in addition thereto described the curve in the railroad at the point of the accident, and the cut, and that the bumping together of the cars when the air was applied was what attracted his attention to the train; that the flagman and conductor and little child were in plain view, and when asked what he saw the conductor do, replied—

"that he did his work very fast, and that in swinging down off of the steps of the caboose came very near falling."

He was then asked as follows:

"Q. Well, state to the jury there what else there was these two men could have done. (Meaning conductor and flagman). A. I don't think they could have done any more. They done their duty. Mr. Gordon done some mighty fast work or he would have never got out there to save the child. He just saved the child's life."

The plaintiff's witness C. H. Holloman tells of the occurrence as follows: Witness stated that he was at the blacksmith shop, assisting in having some work done to a wagon, and had gotten on his horse to go to a camp from which he was hauling logs, and that his attention was attracted to the train by either the conductor or flagman hollowing, and the man that was hollowing came down off of the caboose, and the car then passed between him and a mound, shutting off his view, and the next he saw was this man standing on the steps of the caboose, and he then saw him jump off of the step, pick up the child, and that the caboose stopped in about two car lengths; that at the time he saw the man on the steps of the caboose, he was leaning over reaching down toward the ties in a dangerous position, and that the train was, at the time, making an emergency stop; that if the conductor had fallen off at the time he was reaching down, the train would have run over him.

The question was then asked the witness as follows:

"Q. The fact is there is nothing in the world that conductor could have done to save that child except what he did do, was there? A. No, sir."

The conductor, Gordon, says that he expected to stop at the depot at Sarah for orders, and as the caboose passed the depot, the train having slowed up to some 3 or 4 miles per hour, he threw off a message, and, learning that there were no orders for him, got back up in the caboose and took his seat in the cupola, with his hand resting on or near the air valve, and was looking out ahead or northward along the track; that the flagman had got down off of the caboose onto the ground, and had given the engineer the signal to come ahead, and had then gone back on top of the caboose, which was his proper station; that in passing Sarah all proper signals were given for both crossings, and the bell was kept ringing; and that when the signal was given the engineer to come ahead, the speed of the train was accelerated so that, when the caboose reached the north road crossing, they were going about 8 miles per hour. He further stated that from his seat in the cupola looking out on the west side of the train, he did not have a full view of the track ahead on account of the curve in the track, and that about the time the caboose reached the north road crossing, the flagman hollowed to him that there was something on the track; he

believed it was a baby; that he (the witness) immediately applied the air to the train in emergency; that at the time he did not see the child, and that it did not take him a second to apply the air brakes to the train, and that he immediately jumped down out of the cupola and got out on the front platform of the caboose and saw the child just ahead of the caboose, and it was then in a reeling position, with its head and arms on the west rail of the track, and that he got down on the lower step of the caboose platform, holding onto the iron rails with his right hand and reaching over to pick the child up, but the jerking of the train overbalanced him, and he missed the child, barely touching it; that as he swung back he shoved the child's head and body off of the rail, and then almost immediately stepped off on the ground and pulled the child out from under the car and handed it to Curtis King, who had got there by that time. Witness further states that the caboose stopped in about two car lengths after passing the child. He further stated that when he was overbalanced by the jerking and rolling of the caboose, that it threw all his weight against his right arm, skinning the arm some, but that he held on until he had pushed the child off of the rail. This witness was then asked why he could not, when the train was coming to a stop, jump off and run ahead and beat it to the child, and answered as follows:

"A. I could not jump off and run ahead of the train the way the track was there. If I had jumped off before I got to the trestle, I could not have gotten across, and after I got on the trestle there was not room enough on the side to get back on top of the dump and outrun the train. If there had been a level place like a road crossing or depot, I could have got off and outrun the train."

When the train passed the depot, going north, all the employes were at their posts of duty; the engineer was in his place where he could control the engine on a second's notice; the fireman was at his post of duty; the flagman was on top of the caboose, keeping a lookout ahead, having his attention first directed to the north public road crossing, seeing that everything was clear at that place, and the conductor was in his place in the cupola of the caboose, with his hand on the air valve, and all proper signals had been given by the engineer, such as blowing the whistle for the crossing and depot, and the ringing of the bell. The brakeman was on the engine or the car just ahead of the engine, having been instructed to stay on that end of the train in order to protect the train in case of a stop on the main line; that is, the brakeman would go back from that end of the train with the flag. The train was about 600 feet in length, and the cars loaded with gravel would average, including the weight of the car, 65 or 70 tons to the car. These employes in charge of the train all acted promptly and expeditiously when the

child was discovered on the track 150 feet beyond the north road crossing, as above set forth.

The father of the child, and in whose name this suit was brought as next friend, states that the accident happened about half past 7 o'clock in the morning on August 1, 1913, and just before it happened he was lying on the porch of his house up on the edge of the cut on the west side of the railroad, his house being some 200 feet north of the north road crossing, and was playing with his youngest child, a baby, and that the plaintiff came and lay down on the pallet with him, and he sent her to bring his shoes, and she brought them, and afterward he did not notice where she went. He further stated that some few minutes before the plaintiff brought him his shoes, he had sent another daughter, a half-sister of plaintiff about 13 years of age, to set out some potato slips in a patch he had east of the railroad, and that after this older child had been gone some four or five minutes, his attention was attracted by the jamming together of the cars of the train in coming to a stop, and he heard some one hollow, "Did it kill her?" and he thought at first that his older daughter had got careless and had been struck by the train, but on running out to the gate he was met by the witness King with the little child (plaintiff) in his arms; that the train had stopped by the time he got to the gate, and he found that the plaintiff's hand and fingers had been mashed and torn all to pieces. This statement of facts, taken from appellant's brief, is indorsed by the appellee's counsel as "a fairly accurate statement of the facts so far as it goes, but some salient parts of the evidence are not mentioned."

The additional facts relied on by appellee to sustain the judgment against appellant are that the curves in the track mentioned in appellant's brief did not obstruct the view of the point where the child was injured from any point between the depot and the place of the injury, and that the train crew could have seen from the top of the caboose or from the rear of the platform of the caboose the scene of the injury at any point between the depot and the place of the accident. The fact that the flagman said the child was in the middle of the track when he first saw her is stressed as an important feature of the case. Appellee's counsel conclude from the evidence that the child had gotten across the track, and, hearing the approaching train, she tried to retreat, and was caught before she had cleared the track, and if the flagman and conductor had been diligent, they could have seen the child in time to have prevented the accident. It is manifest from the entire record that the conductor and flagman made every reasonable effort to save the child after she came into their view. In fact, there is no room for doubt that, after the child was seen, the

employees of appellant did everything humanly possible to prevent the injury.

Of what negligence is complaint made? It is asserted that, when the train reached the depot, the flagman, for no reason, abandoned his place on the rear of the train, and got off on the ground, and that his absence from his station at the crucial moment was the proximate cause of the accident. It is assumed that the employees were negligent if they failed to keep a lookout for the child on the track; that if the flagman had remained at his post he could have seen the child in time to give the alarm, stop the train, and save the child. It only remains for us to decide whether or not the appellant was bound to lookout for children on the track.

[1, 2] As a general rule, a railroad company is entitled to a clear track, owes no obligation to keep a lookout for trespassers, and is required only to refrain from injuring trespassers after their position of peril is discovered. Of course, circumstances may, and do, have something to do with the degree of care incumbent upon railroad employees after the trespasser is seen.

[3] It is no doubt true that it would be negligent to anticipate that a child would take care of itself to the same extent as the ordinary adult would. It may not be too much to say that had the employees of the railroad company in the present case discovered the child in time to avert the accident, and had failed to make every possible effort to stop the train, they would have been guilty of a wanton wrong.

[4] It is argued here that the child in this case could not be termed a trespasser. There is some conflict in the authorities upon this subject. Some decisions may be found which hold that a child of such tender years cannot be classed a trespasser, but we think the decisions so holding are illogical and unsound. The failure to distinguish trespass from contributory negligence seems to be the weakness in this line of decisions. It might be said that a child cannot be guilty of a willful wrong because of its lack of ability to distinguish right from wrong, but we think the child in this case was a trespasser in the legal sense. Cyc. vol. 33, p. 773. The general rule has been relaxed in the attractive nuisance cases.

[5] *Railway Co. v. Williams*, 69 Miss. 639, 12 South. 957, is not precisely in point, as there was a special plea in that case averring the unusual precocity of the child and her sufficient discretion, but it seems that the court in that case announced a general rule in this language:

"Until he saw the child and her peril, he owed her no other or greater duty than that due any trespasser whatever. Only when the engineer sees the trespasser is a child is he brought under a rule of greater care and caution."

"The true rule seems to be that, although the age of the child may be important in determining the question of contributory negligence, or

the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers, or bare licensees, not invited or enticed by it, than it is to keep them safe for adults." Elliott on Railroads, 1259, vol. 3.

We believe that this has always been the rule in this state. Many cases are assumed wherein it is not questioned that children may be trespassers, and it is impossible, in our opinion, to sustain any other view.

[8] To restate our views of this case, we think it would be straining the facts unduly to say that any sort of negligence is shown by the evidence, and, besides, if there was negligence, it consisted in the failure of the flagman to remain at his post every instant of the time to maintain a constant lookout for trespassers on the track, and even though the flagman was negligent to this extent, his negligence cannot be of any avail to the plaintiff.

Reversed and dismissed.

YAZOO & M. V. R. CO. v. HUFF et al. (No. 17746.)

(Supreme Court of Mississippi, Division B.
May 15, 1916.)

1. RAILROADS — 378 — DEATH OF PERSONS ON TRACKS — ACTIONS — SUFFICIENCY OF EVIDENCE.

In action for death of child on railroad tracks, evidence that, when an unknown object was first detected on the track, the engineer gave alarm whistle and, on discovery that the object was a child, made all possible effort to stop the train showed no negligence on part of the company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. 378.]

2. NEGLIGENCE — 33(3) — CARE AS TO TRESPASSERS — CHILDREN.

As to whether a child is to be classed as a trespasser, his having reached years of discretion is not material.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 47; Dec. Dig. 33(3).]

3. RAILROADS — 378 — DEATH OF PERSONS ON TRACKS — CARE AS TO TRESPASSERS — CHILDREN.

Until a child on railroad track is distinguished by an engineer, not indistinctly as a mere object, but as a human being, the engineer is under no obligation to stop his train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. 378.]

4. RAILROADS — 378 — DEATH OF PERSONS ON TRACKS — PRECAUTIONS AS TO PERSONS SEEN ON TRACK — CHILDREN.

If an engineer in the operation of a fast-moving train discerns a helpless infant on the track, he, as well as the company, is under the absolute duty of exercising the highest degree of care and doing everything possible to prevent injury to the innocent child.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. 378.]

5. EVIDENCE — 588 — WEIGHT — INCREDIBLE EVIDENCE.

In an action for death of a child on railroad track, testimony of the engineer of a fast train that he did not see the child, even as an object, until within 150 feet is not necessarily

rendered incredible by measurements after the accident, showing that an engineer could have seen the small child a distance of 500 feet, since the actions of an engineer of a fast train should not be viewed in the light of a calm and deliberate test, made by witnesses standing on the track and looking intently at a small child, which they knew was being put on the track for the very purpose of making the test.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. 588.]

Appeal from Circuit Court, Tallahatchie County; J. B. Eckles, Judge.

Action by Eddie Huff and others against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiffs, defendant appeals. Judgment set aside, and judgment for defendant entered.

James Stone & Son, of Oxford, for appellant. Gary & Rice, of Charleston, for appellees.

STEVENS, J. Appellees recovered a judgment in the sum of \$5,000 against appellant for the alleged negligent killing of a little negro boy about four years old, the child of appellees. It appears that the little boy went to sleep upon the track of appellant about 5 miles west of the town of Charleston. At the point where the child was lying there was a considerable curve, and there is testimony showing that the distance the engineer, being on the lookout, might have seen the sleeping child was approximately 500 feet. The train that caused the injury complained of consisted of five flat cars, heavily loaded with green oak timbers, and was running at the rate of not less than 20 miles an hour. There was a new switch stand in the curve of the track some 520 feet or more from the point where the child was lying and near a public road crossing, and, in passing over this road crossing and by this new switch stand before reaching the place of the accident, the testimony shows that the engineer blew his whistle and directed a good deal of his attention to the new switch then being put in there. The evidence discloses that the train was properly equipped with air brakes and otherwise, and that the track was a good one. The engineer says that:

"After I passed this switch, I noticed both my engine and tank were coming all right, and I glanced down the track and saw a small object in the track after I got some distance by this switch stand, and it was several instances before I discovered it was a human. As soon as I discovered it was a human, I put my brakes in emergency, and threw sand upon the rail, and did everything in the world that an engineer could do to avoid the accident."

He also says:

"As soon as I discovered it was an object on the track, I sounded the alarm whistle."

He further says:

"The object did not move; it was lying inside the rails, and its head was towards the middle of the track. It was very hard to see it at all. To show you how small the object was, the pilot of the engine ran over the child, and there was a little bolt in the ash pan, and

that hit him in the back of the head. The pilot to the engine is very low to the ground. It passed over this human and didn't tear it up whatever. * * * It never moved a muscle when I blew the whistle; didn't move a muscle at any time. I walked out where I could see it, wishing that I could save it."

The engineer further testifies that it was from 375 to 400 feet from the time he put on the brakes until the engine stopped, and that "no human living being could have stopped that train sooner."

[1] At the close of the testimony the court declined to grant a peremptory instruction requested by appellant, but submitted the cause to the jury. It is contended by counsel for appellees that the evidence shows the child was seen by the engineer as he was passing the switch stand; that this switch stand was 520 feet or more from the place where the child was lying, and that therefore the engineer was guilty of negligence in not stopping his train earlier. We have examined this record with much patience and care to determine whether there is sufficient conflict in the testimony upon which the jury could predicate negligence. In our judgment the proof fails to show any negligence whatever. The evidence is undisputed that the subject of this most unfortunate accident was a very small negro boy; that he was lying between the rails at a point where there is a pronounced curve in the roadbed; that it was impossible for the engineer to detect or at first discern that the object he saw was a human being; and that when he did first discern that a human life was in danger, he applied the emergency brakes, sanded the rails, and did everything in the world that an engineer could do to stop the train and prevent the accident. He gave the alarm whistle when the unknown object was first detected. The object did not move at the alarm, and the engineer, of course, could not appreciate the necessity of stopping his train until he discerned that the object was at least probably a human being. Eddie Huff, the father of deceased, admits that it was 172 steps from the switch to where the body was found. To the same effect was the testimony of Ida Shields, another witness introduced by plaintiff. It appears that some time after the accident certain inspection or measurements were had under the direction of the attorneys for the plaintiff and in taking these measurements witness John Sevier testified that he counted the steps from the switch stand to the point where the child was killed as 170. This was not a case reflecting an injury done at a public road crossing, within the confines of a municipality, or in a congested district. This accident occurred in the country, and at a point where the employees of the railroad had a right to expect a clear track. Without elaboration, therefore, we think this case is controlled by the principles this day announced by us in the case of *Y. & M. V. R. R. Co. v. Tiny Bell Smith et al.*, 71 South. 752.

[2-4] It is contended by counsel for appel-

lees that the deceased was a child of such tender years that he could not be guilty of contributory negligence, and could not be classed as a trespasser. We think in this case it is immaterial whether the child had or had not reached the years of discretion. The question is not whether the deceased was guilty of contributory negligence, but whether appellant was negligent. We approve the statement of Woods, J., in *Railroad Co. v. Williams*, 69 Miss. 631, 12 South. 957, as follows:

"The test of responsibility is, Did the striking of the child by the train occur after the engineer had seen—not might or ought to have seen—that is, discerned or distinguished, the girl. Until the girl had been seen, discerned to be a human being, the engineer was under no obligation to the trespasser to check or stop his train, whatever may have been his obligation to the passengers who were being hauled by him."

It may be conceded as a true rule, founded upon justice and a proper value of human life, that if an engineer in the operation of a fast-moving train discerns a helpless infant on the track, he, as well as his company, is under the absolute duty of exercising the highest degree of care and doing everything possible to prevent injury to the innocent child. The rule, however, presupposes knowledge by the engineer of the child's presence and danger. In our judgment the engineer in the instant case has met all the requirements of this rule. To hold otherwise would convict him of manslaughter. It is hard to believe that a responsible engineer would gamble with the life of a child of tender years; and that he did not in this case is manifest from the undisputed testimony.

[6] The engineer is most positive in his testimony that he did not see the object at all until within 150 feet of it. He then did not at first know what the object was. He did the very natural thing of sounding the alarm, and there is no evidence that he took his eyes off the object, and that he failed to act promptly and effectively in applying the brakes and stopping the train. The whole tragedy was enacted within a few moments of time. That the train was brought to a quick stop is conclusively shown by all the testimony in the case. The plaintiff, by taking certain measurements after the accident, attempted to show that an engineer could have seen the small child a distance of at least 500 feet. We do not think, however, the actions of the engineer should be viewed in the light of a calm and deliberate test, made by witnesses standing on the track and looking intently at a small child, which they knew was being put upon the track for the very purpose of making the test. The engineer of a fast-moving train has many duties to perform, and it is not unreasonable that he, as he says, did not, in fact, see the object at all until within 150 feet of the child, and when it was absolutely too late to prevent the injury.

The peremptory instruction requested by

appellant should, in our judgment, have been granted; and therefore, without reference to any other assignments of error relied upon, we think the judgment of the lower court should be set aside, and that judgment should be entered here for appellant.

FAISON v. VESTAL, City Marshal.

(Supreme Court of Florida. April 25, 1916.)

(Syllabus by the Court.)

HABEAS CORPUS \S 109—DISPOSITION OF PERSON—REMAND.

Where on habeas corpus proceedings it appears that the petitioner is held under a sentence that is illegal, the petitioner may be remanded for a proper sentence, he having his right to bail as the law provides pending the imposition of a legal sentence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. \S 109.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Application by George E. Faison for writ of habeas corpus to E. D. Vestal, City Marshal. From a judgment remanding the petitioner to custody, he brings error. Affirmed.

Dickenson & Dickenson, of Tampa, and G. B. Wells, of Plant City, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for defendant in error.

WHITFIELD, J. The circuit judge issued a writ of habeas corpus upon a petition alleging that Faison was illegally detained in custody by Vestal, city marshal of Plant City, under a conviction upon an affidavit charging that on stated days Faison "did sell intoxicating liquors, contrary to the city ordinances of said city," etc. It is further alleged that the ordinance is void, in that it illegally authorizes a double sentence of both fine and imprisonment. As justifying the detention the marshal relied upon a mittimus reciting a violation of the ordinance making it unlawful "to directly or indirectly sell or offer for sale any intoxicating liquors, wines, or beers or any spirituous, vinous, or malt liquors of any kind whatsoever within the corporate limits of the city of Plant City, Fla.," and imposing a penalty of "a fine of not less than fifty dollars (\$50.00) or more than one hundred dollars (\$100.00) or by imprisonment in the city jail for not less than ten (10) days or more than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court, for the first offense and by a fine of not less than one hundred dollars (\$100.00) or more than five hundred dollars (\$500.00) or by imprisonment in the city jail for not less than thirty (30) days or more than sixty (60) days or by both such fine and imprisonment in the discretion of the court for each offense subsequent to the first offense." The mittimus requires the marshal

to take and keep Faison in his custody "subject to hard labor in the city of Plant City, Fla., for the full period of sixty (60) days."

The circuit judge held that the ordinance—"authorizes imprisonment for not more than 30 days or a fine of not more than \$100 for the first offense, which is the maximum penalty prescribed by law, and further finds that the respondent has no legal right or authority to confine the petitioner for a longer period than 30 days, which has not yet been fully served by the petitioner."

"The court further finds that the ordinance in question is not unconstitutional or void and not in conflict with the municipal charter of the city of Plant City, or the Constitution, or the laws of the state of Florida, and that a valid judgment may hereafter be entered imposing upon the petitioner a fine of not more than \$100 or imprisonment for not more than 30 days, or both such fine and imprisonment, in the discretion of the court."

"It is thereupon considered, ordered, adjudged, and decreed that the petition be denied, and that the petitioner, George E. Faison, be, and he is hereby, remanded to the custody of the respondent to serve such sentence as may be lawfully imposed upon him in conformity with and within the limitations of this order and decree."

A writ of error to this judgment was allowed by the circuit judge under the statute.

Section 14, c. 6389, Acts of 1911, the special charter act of the city of Plant City, Fla., authorizes the city to pass "all such ordinances * * * as may be expedient and necessary for the preservation of the public peace and morals," etc., provided "that for no one offense made punishable by the ordinances and laws of the said city, shall a fine of more than five hundred dollars be assessed, nor imprisonment for a period of time greater than 60 days." It does not appear that the ordinance conflicts with the local option laws of the state regulating the sale of intoxicating liquors, wines, or beer. Assuming that the circuit judge correctly held the city could not legally "confine the petitioner for a longer period than 30 days," and assuming also, as contended for the petitioner, but not deciding, that the portion of the sentence of the petitioner by the municipal court "to hard labor in the city" is not authorized, the petitioner is charged with a municipal offense, and apparently has been convicted under such charge. If the sentence imposed be illegal, the petitioner is not thereby entitled to a discharge, but may be remanded for a proper sentence; he having his right to give bail as the law provides pending the imposition of a legal sentence. See McDonald v. Smith, 68 Fla. 77, 66 South. 430; Porter v. State, 62 Fla. 79, 56 South. 406. It does not appear that the ordinance, as construed by the circuit judge, is wholly void under the statute conferring powers upon the city of Plant City. A second offense is one offense, though not the first offense; and a proper sentence may avoid questions as to the legality of a double sentence. The judgment entered by the circuit judge complies

with the statutory provision that at the hearing the court shall "either discharge him, admit him to bail or remand him to custody, as the law and the evidence shall require." Being "remanded * * * to serve such sentence as may be lawfully imposed upon him" is a remand to custody as the law and the evidence requires, and the petitioner is not thereby denied his right to bail under the law pending sentence.

If the petitioner has not been legally tried on the affidavits charging the offense, he may be so tried upon being remanded, and, if he is not tried and sentenced, or sentenced promptly, he may exercise his right to give bail.

Judgment affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

COMMERCIAL NAT. BANK v. JORDAN.
(Supreme Court of Florida. April 27, 1916.)

(Syllabus by the Court.)

1. CORPORATIONS — 657(3) — FOREIGN CORPORATIONS — CONTRACTS — ENFORCEMENT.

Chapter 5717, Laws of Florida 1907, entitled "An act to prescribe the terms and conditions upon which foreign corporations for profit may transact business or acquire, hold or dispose of property in this state," does not declare all contracts, notes, or other securities made by or on behalf of any foreign corporation in this state before it has complied with the statutory requirements to be absolutely void. The legislative purpose as appearing in such act being to render such contracts unenforceable in the hands of the corporation or its assigns, but enforceable against it or them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2537-2539; Dec. Dig. 657(3).]

2. BILLS AND NOTES — 375 — FOREIGN CORPORATIONS — CONTRACTS — ENFORCEMENT — "ASSIGNS."

Section 4 of chapter 5717, Laws of Florida 1907, declaring every contract made by or on behalf of any foreign corporation affecting its liability or relation to property within the state before it shall have complied with the provisions of the act to be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them, does not expressly nor by necessary implication declare that a negotiable promissory note, taken by such corporation in a business transaction in this state before it had complied with the requirements of the statute, shall be void in the hands of a bona fide holder for value and without notice of the transaction of which such note formed a part.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. 375.

For other definitions, see Words and Phrases, First and Second Series, Assigns.]

3. BILLS AND NOTES — 375 — INDORSEMENT AND TRANSFER — BONA FIDE PURCHASERS.

Where a negotiable promissory note taken by a foreign corporation in a business transaction in violation of the provisions of chapter 5717, Laws of Florida 1907, passes into the hands of an indorsee in good faith, without notice, before maturity and for value, it is not subject in his hands to such defenses as may

have been available under the statute by the maker against the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. 375.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by the Commercial National Bank against William S. Jordan. Judgment for defendant, and plaintiff brings error. Reversed, with instructions.

John C. Cooper & Son, of Jacksonville, for plaintiff in error. Powell & Pelot, of Jacksonville, for defendant in error.

ELLIS, J. [1-3] The question presented by this record is: Whether a negotiable promissory note in the hands of an indorsee in good faith and without notice, for a valuable consideration before maturity, is enforceable against the maker, where the promissory note in question was given by the maker in renewal of a note which had been given to a foreign corporation in payment for certain shares of the common stock of the corporation, which corporation had not transacted any business in Florida prior to June 1, 1907, and which at the time the original and renewal notes were executed had not complied with the provisions of chapter 5717, Laws of Florida 1907, entitled "An act to prescribe the terms and conditions upon which foreign corporations for profit may transact business, or acquire, hold or dispose of property in this state."

The sections of chapter 5717, Laws of Florida 1907, which are involved in this question are 1, 4, and 6, which are as follows:

"Section 1. That no foreign corporation shall transact business or acquire, hold or dispose of property in this state until it shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have received from him a permit to transact business in this state."

"Sec. 4. Every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state before it shall have complied with the provisions of this act shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

"Sec. 6. This act shall not apply to any foreign corporation whatever transacting business in this state at the time this act shall take effect: Provided, that any such foreign corporation hereafter increasing its capital stock shall comply with the provisions of section 3 in relation thereto."

In the case of Ulmer v. First National Bank of St. Petersburg, 61 Fla. 460, 55 South. 405, this court said, speaking through Mr. Chief Justice Whitfield, that chapter 5717, Acts of 1907, does not conflict with nor impose unlawful burdens upon interstate or foreign commerce, nor does it deny to foreign corporations any right secured to them by the state or federal Constitutions. The court having under consideration a similar contract, made by a foreign corporation which had not complied with the statute, held that

the making of such contract in the state on behalf of the foreign corporation violates the statute, and the note a part of the contract or transaction will not be enforced by the courts of the state. The case cited, however, does not decide the point presented here, because the pleadings in that case showed that the note was taken by the indorsee bank with notice of and subject to its infirmities under the existing laws, while in the case at bar the pleadings show that the indorsee bank is a holder of the paper for value in good faith and without notice of the paper's infirmities under the law.

The note was executed and delivered in violation of the statute. It was part of the transaction which section 1 of the act forbade the corporation to engage in until it had complied with the conditions named in the section. Section 8 of the act makes the violation of the provisions of section 1 by a foreign corporation, or any officer or agent of such a corporation, a misdemeanor, and subjects the corporation to punishment by fine, and its officer or agent violating the provisions of the act to fine or imprisonment, or both. So the transaction upon which the promissory note rests was not only in violation of the statute, but was a crime punishable by fine and imprisonment.

In 8 R. O. L. p. 1016, subject, "Bills and Notes," section 224, the doctrine is announced that it by no means follows, "because a contract made in violation of law, common or statutory, is void between the original parties; that if given the form of negotiable paper, it is void in the hands of a bona fide holder. Indeed, it is the distinguishing characteristic of the law of negotiable paper that, when a contract takes that form it is not in the hands of a bona fide holder, subject to the defense which avoided it in the hands of the original parties. It is well settled by the authorities that, no matter how illegal or immoral the consideration of a note or bill, it is valid in the hands of a bona fide holder for value, unless some statute makes the instrument absolutely void." In support of this text the following authorities were cited: *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. 399, 122 Am. St. Rep. 370, reported also in 4 Ann. Cas. 347. A check was certified by an officer of a bank when the drawer of the check at the time did not have the amount thereof standing to his credit on the bank's books. The certification of the check under the foregoing circumstances was forbidden by the statute of Michigan, and punishable as a crime. The check found its way into the hands of a bona fide holder for value before maturity. The court held that the check was not in the hands of a bona fide holder subject to the defense of illegality in its inception, and cited approvingly *Vinton v. Peck*, 14 Mich. 287, *State Capital Bank v. Thompson*, 42 N. H. 369, *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40, *Smith v. Bank*, 9 Neb. 31, 1 N. W. 893, where the

court expressed its disapproval of a statement contrary to the doctrine quoted made in *Kittle v. De Lamater*, 3 Neb. 325, *Hart v. Machine Co.*, 72 Miss. 809, 17 South. 769, *Press Co. v. Bank*, 58 Fed. 321, 7 C. O. A. 248, *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827, 50 Am. St. Rep. 860, where a note obligating the maker to pay usurious interest was held to be valid in the hands of a bona fide holder in the absence of a statute which in express terms or by necessary implication declared the note to be void. Judge Carpenter, speaking for the court, said:

"That though the statute, by necessary implication, made the contract made in violation thereof absolutely void as to nonnegotiable contracts, and as to negotiable contracts in the hands of persons having knowledge of the defects, yet * * * the statute will not be considered to have that effect should the contract be negotiable in form, and be found in the hands of a bona fide holder."

There is a note following this case as reported in 4 Ann. Cas. 347, in which the decisions of many states are cited in support of the proposition that:

"A negotiable contract will be enforced at the suit of a bona fide holder, notwithstanding the instrument would be unenforceable between the original parties by virtue of statutory enactment, unless the statute expressly declares the contract utterly void and of no effect." *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827, 50 Am. St. Rep. 860.

In the latter case it was said:

"If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void."

The note was for the payment of a sum of money at a usurious rate of interest. The statute in force at the time declared all such contracts and assurances to be for an "illegal consideration." Prior to the enactment of that statute, the laws of Virginia declared such contracts to be void. 1 *Parsons' Notes & B.* 218; 1 *Daniel on Negotiable Instruments* (5th Ed.) §§ 197, 198, 808; *Irwin v. Marquett*, 28 Ind. App. 383, 59 N. E. 38, 84 Am. St. Rep. 297. The statute under consideration in that case expressly declared "all notes, bills, bonds, conveyances, mortgage or other securities" when the consideration therefor was for money won on the result of a wager, etc., "shall be void." Our conclusion is that the availability of a defense, interposed to the enforcement of a negotiable promissory note in the hands of a bona fide holder, that the consideration for the note was illegal or that it rests upon a contract or transaction forbidden by statute, depends upon the legislative intent to make

such notes in the hands of such a holder void as clearly expressed by the statute or made to appear by necessary implication.

The statute does not in express terms declare that all contracts, notes, or other securities, made by or on behalf of any foreign corporation before it shall have complied with the statutory requirements shall be absolutely void or of no effect whatsoever, nor did this court, in the Ulmer Case, 61 Fla. 460, 55 South. 405, hold that such was the legislative intention. The language of the court was:

"If the statute has been violated by the foreign corporation in acquiring the note or in making a contract of which the note is a part, the corporation cannot enforce the payment of the note in the courts of the state; and if the note was taken by the indorsee bank with notice of and subject to its infirmities under the existing laws, the bank cannot recover through the courts."

In the case of *Campbell v. Daniel*, 68 Fla. 282, 67 South. 90, this court, having under consideration the same statute, and speaking through Mr. Justice Cockrell, said:

"The statute does not forbid the municipality or any citizen of the state entering into a contract with a nonregistered foreign corporation; to the contrary, the statute in terms permits the enforcement of the contract on its behalf."

Here the essential difference between a void and a voidable contract was pointed out. The clear legislative purpose was to render such contracts unenforceable in the hands of the corporation or its assigns, but enforceable against it or them. The use of the word "void" in the statute, in connection with those following, necessarily conveys a meaning different from what would have been the word's significance had it stood alone. While the statute uses the word "void," it describes a "voidable" contract.

Now in this case the contract took the form of a negotiable promissory note, an instrument to which, Mr. Daniel, in his work on *Negotiable Instruments*, says, the law extends peculiar protection "because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect." 1 *Daniel on Negotiable Instruments*, § 197. Yet the maker of the note saw fit to give to it the character of negotiability. He knew or could have ascertained whether the corporation was authorized to transact business in this state when the note was executed. He did not even name the corporation as payee, but named as payee one whom the instrument did not show had any connection with the corporation as officer or agent. He gave out this "courier without luggage" knowing that it was likely to find its way into the hands of an innocent purchaser before maturity. If he may escape upon the defense set up, it must be because the statute expressly or by necessary implication declares that a negotiable promissory note given under such circumstances shall be void in the

hands of a bona fide holder without notice of the transaction of which it formed a part. Does the use of the word "assigns" in the following connection, "shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them," show by necessary implication such to be the legislative purpose? We think not. The word "assigns," when used to designate those who have acquired ownership of a negotiable instrument from the payee or prior indorser, is not synonymous with the word "indorsees." Where a bill or note payable "to order" is transferred without indorsement, the transferee takes by the law only the right which the payee had and therefore subject to any defense the payer may rightfully assert as against the payee. The instrument may be transferred without indorsement, it is true, but in such case the assignment is not in the usual course of business in accordance with mercantile custom, consequently only such title passes to the assignee as the assignor had and subject to any defense the payer may rightfully assert against the assignor. 1 *Daniel on Negotiable Instruments*, § 741; 3 R. C. L. pp. 966, 1034. The indorsement must be written on the instrument transferred, a transfer by another and entirely distinct instrument is not permissible and will not pass the legal title to a note payable to order free from the defenses the payer may rightfully assert. 1 *Daniel Neg. Inst.* §§ 741-664a. One who holds a promissory note payable to order under such a transfer must aver and prove the assignment, he stands in the shoes of his assignor and can recover subject to such defenses as were available against him, although the holder took the note in good faith for value. 1 *Daniel Neg. Insts.* §§ 729-741; 4 *Am. & Eng. Ency. Law* (2d Ed.) pp. 255-257; *Haug v. Riley*, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 244. One who takes the instrument as an indorsee, however, in good faith, before maturity and for value, becomes the owner of the instrument and it is not subject in his hands to such defenses as may have been available against the payee. The word "assigns" therefore does not mean "indorsees" in the connection used in the statute, nor is there any indication in the statute that the word was intended to include indorsees. To give the word assigns that meaning would be to read into the statute a purpose which from the ordinary meaning of the words used the Legislature did not have.

The plaintiff in error, who was the plaintiff below, declared upon the promissory note as indorsee. The defendant sought by his plea to avail himself of the defense afforded by the statute in cases where the foreign corporation or its indorsee with notice of the instrument's infirmities seeks to enforce the contract. The plaintiff demurred to the plea, and the court overruled the demurrer. This action of the court is assigned as error. We think the assignment is well taken. The judg-

ment of the lower court is therefore reversed, with instructions to sustain the demurrer to the third plea.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(139 La.)

No. 20447.

BRINSON et al. v. SCOTT.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR ~~§~~150(6)—RIGHT OF REVIEW—PERSONS AGGRIEVED—CREDITOR OF PERSON NOT PARTY.

Where a judgment against a garnishee is appealed from by persons who, although appealing as creditors of defendants, argue in the Supreme Court that they are creditors, not of defendants, but of the succession of the deceased husband of one of the defendants and father of the other defendants, and that the garnished funds belong to the succession, and nothing shows that the funds received by the garnishee as belonging to defendants did not belong to them, the appeal will be dismissed, since appellants have no pecuniary interest in the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 944, 945; Dec. Dig. ~~§~~150(6).]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Joseph B. Lancaster, Judge.

Action by Theodric A. Brinson and another against Mrs. Letha L. Scott, individually and as tutrix of the minor heirs of George A. Scott, deceased, in which judgment was rendered against defendant in both capacities, and notice of execution and garnishment was served on the Commercial Bank of Bogalusa, W. L. Young, State Bank Examiner, and another. From a judgment against the garnishee, W. B. Aycock and another appeal, claiming to be creditors of defendant. Dismissed.

Miller, Miller & Fletcher, of New Orleans, for appellants Aycock and Williamson. St. Clair Adams, of New Orleans, for appellee Commercial Bank. Benj. Moore Miller, of Covington, for appellees Brinson and others.

PROVOSTY, J. Garnishment proceedings having been issued in this suit, and judgment rendered against the garnishee, the present appeal is from that judgment. It is by persons who in the petition for the appeal alleged themselves to be creditors of the defendants, but who now in this court no longer so pretend, but argue that they are creditors of the succession of George Scott, the deceased husband of one of the defendants, Mrs. Letha L. Scott, and the father of the other defendants, and that the funds in the hands of the garnishee belong in reality to the said succession.

The funds were received by the garnishee as belonging to the minors, and nothing

shows that they did not so belong. The appellants, therefore, who are not creditors of the minors, have no pecuniary interest in the matter, and, as a consequence, the motion which has been made to dismiss the appeal on that ground must be sustained.

Appeal dismissed.

(139 La.)

No. 21862.

STATE v. LANDRY.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by Editorial Staff.)

STATUTES ~~§~~8½(1)—CHARTERS—POWER OF LEGISLATURE—NOTICE OF INTENTION.

Const. art. 48, declares that the Legislature shall not pass any local or special law creating a corporation or amending, renewing, or extending its charter, but that such prohibition shall not apply to a municipal corporation having 2,500 or more inhabitants. Article 50 declares that no local or special law shall be passed on any subject not enumerated in article 48, unless notice of intention to apply shall have been published. Held, that under its general power to organize a city wherever and whenever public interest may require, the Legislature may pass a local law abolishing the charter of a village and incorporate the village and surrounding territory as a city without any previous publication; hence Act No. 14 of 1914, incorporating the city of Bogalusa and including the village of Richardsontown, which act was passed without publication, is valid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. ~~§~~8½(1).]

Monroe, C. J., and O'Niell, J., dissenting.

Appeal from City Court of Bogalusa; C. Ellis Ott, Judge.

Z. P. Landry was convicted of crime, and he appeals. Affirmed.

F. J. Heintz, of Covington, for appellant. R. G. Pleasant, Atty. Gen., and J. Vol Brock, Dist. Atty., of Franklinton, for the State. Bascom D. Talley, City Atty., of Bogalusa, amicus curiæ.

PROVOSTY, J. The special act of the Legislature incorporating the city of Bogalusa included the village of Richardsontown within the city limits, and abolished its charter. Act 14, p. 15, of 1914, sections 1 and 60. "With the consent of the inhabitants of said village," says the act. Whether at that time the village was a going municipality in the sense of having a set of officials for the administration of its affairs, or, in other words, whether its charter was being used, or, indeed, had ever been used, does not appear.

The accused was prosecuted before the city court for violation of Act 211, p. 403, of 1914, against the sale of near beer containing more than 2 per cent. alcohol.

He challenged by plea the constitutionality of the incorporation of the city, and, incidentally, the jurisdiction of the court. His plea was overruled, he was convicted, and has appealed.

He contends that the section of the said city charter abolishing the charter of the village

of Richardstontown is unconstitutional, and that its unconstitutionality entails that of the entire charter, for the reason that we are not to suppose that the Legislature would have been willing to adopt this charter unless it could at the same time abolish that of the village, as, otherwise, the anomalous situation would be brought about of a dual municipal government.

The said section abolishing the charter of the village is unconstitutional, he contends, because the abolition of the charter of a town is a matter of local concern, and, it not being one of those enumerated in article 48 of the Constitution, could be validly legislated upon only after previous notice of the intention to do so had been published as required by article 50 of the Constitution; and the enactment of said section was not preceded by such publication.

No doubt the abolishing of the charter of a town is a local object, and is not one of those enumerated in article 48, and therefore legislation upon it would, under article 50, have to be preceded by publication: but whether the Legislature would not have been willing to adopt said charter, even though advised of the nullity of the said section abolishing the village, is at best doubtful, and a statute will not be pronounced unconstitutional in mere doubt.

However, we will not rest our decision on that rather vague foundation, but solidly on the validity of said section, and this validity we deduce as follows:

In a statute organizing the government of a city many matters of purely local concern have necessarily to be dealt with. For instance, let us suppose that the condition of certain parts of the territory to be embraced within the city is such as to require special treatment by drainage, or grading, or otherwise, and that the expense of such work would inure specially to the benefit of these parts; it would not seem that there could be any question but that there could be validly included in the city charter, without the previous publication required by article 50, special provisions affecting these parts thus to be treated and not affecting the other parts of the territory of the city. Again, let us suppose that the condition of certain territory was such as to make it advisable that in the public interest the area should be constituted into a city, but that it was already organized into half a dozen or more villages or towns; would not the unlimited and unrestricted authority of the Legislature to organize cities carry with it the authority to abolish the charters of all these villages and towns and put the entire territory under one single government, without previous publication? It seems to us that the unrestricted authority to organize a city wherever and whenever the public interest may require would carry

with it the authority to adopt all such legislation as might be necessary for carrying that purpose into effect, even though bearing upon an object purely local in character, such as could not under article 50 be separately legislated upon without previous publication. As further illustration, let us suppose that a town attains the population required for a city, and that a new charter is needed; could not the Legislature validly enact this charter, and, as an incident thereto, abolish the town charter without the necessity of previous publication. We think that to hold the contrary would be to place upon article 50 a construction never intended.

The charter of the city of Bogalusa is therefore held to be valid in its entirety.

Judgment affirmed.

O'NIELL, J. (dissenting). I am of the opinion that section 60 of Act No. 14 of 1914, abolishing the village of Richardstontown, is unconstitutional, for the following reasons: Article 48 of the Constitution prohibits the General Assembly from adopting any local or special law creating a corporation or amending, renewing, extending, or explaining its charter; and it provides that the prohibition shall not apply to a municipal corporation having 2,500 or more inhabitants. Article 50 declares that the General Assembly shall not pass a local or special law on any subject not enumerated in article 48, unless notice of the intention to apply for the passage of the statute shall have been published in the locality where the matter or thing to be effected is situated, which notice shall state the substance of the contemplated law, shall be published in the manner required for judicial advertisements for 30 days before the introduction of the act, and shall be exhibited in the General Assembly and be mentioned in the statute. These requirements were not complied with in Act No. 14 of 1914, to create the city of Bogalusa and abolish the village of Richardstontown. Section 60, purporting to revoke the charter and abolish the village of Richardstontown, would have been a local and special law, if valid. The Legislature was not prohibited from passing a special or local law revoking the charter and abolishing the municipal corporation, provided the requirements of article 50 of the Constitution had been complied with, because revoking a charter or abolishing a municipal corporation is not one of the subjects enumerated in article 48. But, to enact a local or special law on a subject not enumerated in section 48 of the Constitution, the Legislature had to comply with the requirements of article 50 of the Constitution. For these reasons, I respectfully dissent from the opinion and decree rendered in this case.

MONROE, C. J. I concur in the foregoing dissenting opinion.

(139 La.)

No. 21803.

CALCASIEU TRUST & SAVINGS BANK v.

WETHERELL, Assessor, et al.

(Supreme Court of Louisiana. April 24, 1916.)

*(Syllabus by the Court.)*1. STATUTES \S 121(1)—SUBJECTS AND TITLES—TAXATION.

The general object of Act No. 182 of 1906 is to provide a mode for the equalization of assessments, which object is clearly enough expressed in its title; and section 3 of the act, declaring that each taxpayer shall make a sworn return of his property, prior to April 1st of each year, upon penalty of being estopped from contesting the correctness of the assessment, is one of the means provided for the establishment of a basis for the action of the board, created by the act and charged with the accomplishment of its object. The act does not, therefore, contravene article 31 of the Constitution by reason of the inclusion therein of section 3.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173; Dec. Dig. \S 121(1).]

2. STATUTES \S 141(2)—AMENDMENT—REPEAL—PUBLICATION.

Act No. 182 of 1906 is a piece of independent legislation which does not purport to amend or re-enact any law, but repeals all laws in conflict or inconsistent with its provisions. It does not therefore come within the meaning of article 32 of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 209; Dec. Dig. \S 141(2).]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by the Calcasieu Trust & Savings Bank against S. P. Wetherell, Assessor, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McCoy & Moss, of Lake Charles, for appellant. James A. Williams, City Atty., of Lake Charles, for appellees City of Lake Charles and A. W. Carlson, Tax Collector. Edwin F. Gayle and James A. Williams, both of Lake Charles, for appellees Lake Charles School Board. T. A. Edwards, Dist. Atty., of Lake Charles, and J. H. Jackson, Asst. Dist. Atty., of De Ridder, for appellees Opdeville, State Auditor, Wetherill, Assessor, and Reid, Tax Collector.

Statement of the Case.

MONROE, C. J. Plaintiff seeks to have corrected its assessment for the year 1913 by requiring the assessor to assess it upon certain lands which were owned by it on January 1st of that year (sold on February 6th, and thereafter assessed to its vendee) and deducting the land assessment from the assessment, as made upon its capital and surplus. It is met by pleas of no right or cause of action and estoppel, based on its failure to allege compliance with section 3 of Act 182 of 1906, and the fact of its non-compliance. That section reads as follows:

"That it shall be the duty of each taxpayer, the parish of Orleans excepted, to fill out a list of his property and make oath to its correctness,

in the manner and form prescribed by existing laws and return the same to the assessor, on or before the first day of April of each year, in default of which, for any cause whatever, he shall be estopped from contesting the correctness of the assessment list filed by the assessor."

It is admitted that no sworn list was returned by plaintiff as thus required, but plaintiff attacks the law requiring such list, as in contravention of articles 31 and 32 of the Constitution, which declare that:

"Art. 31. Every law * * * shall embrace but one object and that shall be expressed in its title.

"Art. 32. No law shall be revived, or amended by reference to its title, but in such cases, the act revived, or section as amended, shall be re-enacted and published at length."

[1, 2] The act of which the section quoted forms part does not purport to amend or re-enact any law, but is an independent statute, which declares that all laws or parts of laws in conflict, or inconsistent, with its provisions are repealed. Article 32 of the Constitution has therefore no application to it. It is entitled:

"An act to provide a mode of equalizing assessments levied on all classes of real and personal property in the state of Louisiana (except as provided by article 226 of the Constitution); to create a * * * board of equalization, to prescribe its duties and powers, to fix the time and place of its meetings, to fix the compensation of its members, to provide for carrying into effect the provisions of this act and repealing all laws in conflict with or inconsistent with its provisions."

The statute confers upon the board created by it the power, within certain limits, to increase or reduce assessments, with a view to their equalization, and, as establishing a basis for its action, prescribes certain conditions relating to the finality of assessments, in order that it may be informed as to the time and circumstances at and under which it shall deal with them. The general object is expressed clearly enough in the title, and the condition prescribed by section 3 is one of the several means provided for its accomplishment.

We find no conflict between it and the article 31 of the Constitution, and the judgment appealed from is accordingly affirmed.

(139 La.)

No. 20541.

HAMBURGER, Jr., et al. v. PURCELL.

(Supreme Court of Louisiana. April 24, 1916.)

*(Syllabus by the Court.)*1. TAXATION \S 816—CONFIRMATION OF TAX TITLE—CONCLUSIVENESS.

Where a purchaser of property, adjudicated to the state for taxes, brings the suit authorized by Act No. 101 of 1898, and tenders to a court of competent jurisdiction, *ratione materiae*, the title so acquired, for confirmation, the owner, having the opportunity, who then fails to urge the defenses which may be open to him, cannot thereafter be heard to urge them in a collateral attack upon the judgment obtained in such suit when offered in evidence in support of an exception of *res judicata*, pleaded against an action

brought by him under Act 38 of 1908, authorizing the institution of suits to establish title to real estate where none of the parties are in actual possession of the same.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1385, 1615, 1616; Dec. Dig. 4816.]

2. JUDGMENT 495(2)—VALIDITY—PRESUMPTION.

A judgment rendered without citation of the defendant is void, and may be so treated whenever invoked, but the presumption is that a judgment, rendered by one upon whom the law has conferred such authority, is based upon the conditions required by the law, and is valid, and that presumption is not rebutted by the ex parte allegation (even though supported by his affidavit) of the person condemned, to the effect that he was not cited, or that some other legal requirement has been omitted; he must prove that he was not cited, or, where a curator ad hoc has been appointed to represent him, must prove the nonexistence of the conditions authorizing such appointment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 934; Dec. Dig. 495(2).]

3. TAXATION 809(2)—PETITION—VERIFICATION—TAX TITLES—SUIT TO TRY TITLE.

Act No. 101, of 1898, authorizing suits for the confirmation of tax titles, does not require a sworn petition, and there was no such requirement, as to such suits, in any other statute prior to the passage of Act No. 157 of 1912 (assuming that act to be applicable, but expressing no opinion to that effect). Hence the fact that the plaintiff, in a suit for confirmation of title, has not sworn to the allegations that the whereabouts of the former owner are unknown, does not justify the conclusion that the appointment of a curator ad hoc was made by the judge upon an insufficient, or no, showing as to the existence or whereabouts of such former owner.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1601; Dec. Dig. 809(2).]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Philip Adam Hamburger, Jr., and others against Edward H. Purcell. From a judgment for defendant, plaintiffs appeal. Affirmed.

Wm. Winans Wall, of New Orleans, for appellants. John Watt, of New Orleans, for appellee. Louis Alfred Ducros, of New Orleans, amicus curiae.

Statement of the Case.

MONROE, C. J. Plaintiffs, Philip Adam Hamburger, Jr., and Rosa Catherine Moore, bring this suit, as sole heirs of their mother, Catherine Schmidt (widow, by first marriage, of Philip Adam Hamburger, Sr., and deceased wife, by second marriage, of William Andrew Moore, deceased), to establish title, under Act 38 of 1908, to four squares of ground, alleged to have been acquired by Moore as property of the community then existing between him and his last wife. Plaintiffs aver that Edward H. Purcell has caused to be registered an alleged title, acquired from the state of Louisiana, under Act 80 of 1888, as amended by Act 126 of 1896, and that the same is an absolute nullity for the reason that the sales to the state,

upon which it is predicated, were made by descriptions which either refer to other property than that owned by petitioner's parents, in 1890, 1881, 1882, and 1883, or else is so vague and indefinite as to describe no property.

They pray that Purcell be cited, and that they be declared the owners of the four squares described in their petition.

Defendant pleaded various exceptions (in the alternative) as follows: That the citation was defective; that the petition was not verified as required by law; res judicata; that plaintiffs are not the heirs of the William A. Moore whose title was acquired by defendant, and hence are without right to prosecute this suit or stand in judgment herein; that defendant has been in actual possession of the property in question for many years, and as the act (No. 38, of 1908) authorizes an action to establish title only to property not in the actual possession of either claimant, plaintiffs are without right to prosecute this suit thereunder; the prescriptions of 3, 10, 20, and 30 years.

The record discloses the following note of evidence, made upon the trial of the exceptions, to wit:

"Admission. It is admitted that the property in dispute is situated in the town of Milneburg, on the lake front, between the Northeastern Railroad and Elysian Fields street, and that the same is swamp land, subject to overflow from the lake. That Edward H. Purcell, after the purchase of the property from the state auditor, had the same surveyed and the corners of said squares marked by stakes."

Defendant offered the record No. 94,877, Division B, of the Civil District Court, in the matter of Edward H. Purcell v. Mrs. Theresa Le Bon et al., and especially the judgment rendered therein on December 14, 1911, and signed December 20, 1911.

"To which offer, counsel for plaintiffs objected, on the ground that they were never made parties to said suit, nor cited therein, although, at the time, they were residents of the city of New Orleans, and well known to the plaintiff; * * * that the property described in the petition was never sold at tax sale and was made to appear to have been sold only by a fraudulent certificate of the state tax collector changing the description in the conveyance office, which certificate was made out more than 15 years after the alleged tax sale, and the auditor's deed was obtained to the property by said Purcell upon the production of a certified copy of a change of description, made by the register of conveyances and based upon said fraudulent certificate of the state tax collector."

Counsel for plaintiff then offered:

"The alleged auditor's deed, issued to Edward H. Purcell, purporting to convey title to the property described in the petition herein, and also offered * * * to be produced, copy of the certificate, issued by the state tax collector, forming the basis of the change of description in the tax deeds to said property by which it was sold to the state * * * for the taxes of * * * 1890, 1881, 1882, and 1883, and, also * * * the original inscription * * * in the conveyance office, showing the changes in the description of property sold to the state

for said years in the name of William A. Moore, with leave to substitute a copy."

To which counsel for defendant objected, on the ground that the judgment in the matter of Edward H. Purcell v. Mrs. Theresa Le Bon et al., constituted *res judicata* against plaintiff. In reply to which objection plaintiffs' counsel stated that he charges fraud, and "that fraud cuts down everything."

The record discloses no ruling by the trial judge upon the several objections so made, but the evidence objected to appears to have been admitted, and establishes the following facts:

The suit of Purcell v. Le Bon et al. was brought under Act 101 of 1898, to confirm tax titles to a number of pieces of property, including (as sixthly described in the petition):

"Four certain squares of ground in the third district (Milneburg) designated as squares 58, 59, 72 and 73, bounded as follows: Square 58 * * * by Arts, Painters, New York, and Mexico streets; square 59 * * * by Arts, Mexico, Music, and New York streets; square 72 * * * by Edinburg, Mexico, Music, and Arts streets; and square 73 * * * by Edinburg, Mexico, Arts, and Painters streets."

The petitioner's derangement of the title to said squares was as follows:

"That he acquired the sixth above-described property from the state of Louisiana by a deed from W. S. Frazee, auditor thereof, dated November 23, 1903, numbered 1716, and registers C. O. Book 195, folio 589, on June 21, 1904; that the state of Louisiana acquired same by an adjudication to it, made by P. L. Bouny, state tax collector of the lower district of New Orleans, for taxes due the state for 1880, dated July 28, 1884, and registered in C. O. Book 125, folio 128, on July 28, 1884, and, as per corrected description, made by F. P. Dudenhefer, state tax collector of the third district, registered in C. O. Book 195, folio 253, on February 26, 1904; that William A. Moore acquired same from Hugh Robinson by act before E. Bouny, N. P., on May 31, 1866, registered in C. O. Book 90, folio 572, and that said William A. Moore, if alive, and his heirs and legal representatives, if he be dead, were the former owners of said property."

The petitioner further alleged that the former owners of the property, if alive, and their heirs and legal representatives, if they were dead, were unknown to him, as were, also, their addresses, and that it was necessary that a curator ad hoc be appointed to represent them; and an order appointing such curator was indorsed upon the petition upon the day following its filing.

Plaintiff herein filed in evidence two deeds from the auditor to Edward H. Purcell, both purporting to have been executed on November 23, 1903; the one, pursuant to an adjudication to the state, made on November 27, 1883, for taxes of 1880, of the property of Wm. A. Moore, described as follows:

"Third District.

"Square 58 to 73, bounded by Music, Arts, Dublin, Vienna, 4 squares; being more properly described as follows, to wit:

"Four certain squares of ground and improvements thereon, in the Third district of the city

of New Orleans, near Milneburg, designated as squares Nos. 58, 59, 72, and 73.

"As per tax collector's certificate annexed hereto and made part hereof."

The other, pursuant to an adjudication to the state, made on December 5, 1883, for taxes of 1880, of the property of Anthon Werner, described as follows:

"Third District.

"Squares Nos. 111 to 118, bounded by Music, Arts, Dublin, Vienna, three squares.

"Being more properly described as follows, to wit:

"Three certain squares of ground and improvements thereon, in the Third district of the city of New Orleans, designated as squares Nos. 111, 117, 118.

"As per tax collector's certificate annexed hereto and made part hereof."

He also filed copies of the tax collector's procès verbal, of date July 28, 1884, and of page 128 of the tax sale book for 1880, from which it appears that, according to the original entry (in the sale book), the collector sold the property in question as "squares 58 to 73, bounded by Music, Arts, Dublin, and Vienna streets, 4 squares"(?) to which original entry there appear to have been added some interlineations, of figures and words, including the figures "195, p. 253."

He likewise filed the tax collector's certificates, referred to in the auditor's deeds, together with certain communications, which accompanied the certificates from the tax collector to the register of conveyances and purport to authorize the register to make the corrections as hereinabove indicated.

The certificates are dated, respectively, December 12, 1903, and February 20, 1904, and were registered on February 26, 1904, in Book 195, pp. 252, 253, and the auditor's deeds were registered on June 21st following, in the same book, page 589. The city maps which we have consulted, show that Music, Arts, Dublin, and Vienna streets bound but a single square.

Opinion.

[1] The judgment appealed from decrees "that the plea of *res adjudicata* be sustained and plaintiff's suit be dismissed at his cost." No ruling appears to have been made upon any other exception, and no note or reservation of any bill of any exception, by either litigant, to any ruling or failure to rule, appears in the transcript. The sole question presented for the consideration of this court, then, is, Did the trial judge properly sustain the exception of *res judicata*, as predicated on the judgment rendered in the suit brought by the present defendant for confirmation of title?

The plaintiff in that suit tendered the title here attacked, and prayed that it be confirmed and quieted, in accordance with Act 101 of 1898, and that act authorized the bringing of such a suit, in the manner in which it was brought, the court was vested with jurisdiction *ratione materiæ*, and the grounds, now relied on by the present plaintiffs for the

purposes of attack, were then open to them for the purposes of defense. It therefore, follows that, unless the trial court was without jurisdiction, *ratione personæ*, the judgment in question cannot be attacked collaterally, even for fraud. We are then to inquire whether it has been shown that the trial court was without jurisdiction *ratione personæ*.

[2, 3] As appears from the statement of the case which precedes this opinion, plaintiffs objected to the offer of "the record," and "especially the judgment," in the suit for confirmation of title, on the ground, among others:

"That they were never made parties to said suit nor cited therein, although, at the time, they were residents of the city of New Orleans and well known to plaintiff in said suit."

As we have stated, the transcript discloses no ruling on that objection, nor any demand upon, or refusal by, the court to make a ruling, or any exception or reservation on the subject by plaintiffs. Neither, upon the other hand, does it disclose any attempt on the part of plaintiffs to prove the allegations above quoted, or either of them, though they were collaterally attacking a judgment which must be presumed to be valid until the contrary is shown.

Counsel for plaintiffs suggests that "the petition in the suit relied on as *res judicata* * * * is not sworn to," and that "no showing whatever was made to justify the appointment of a curator ad hoc." But he has pointed to no law requiring that the petition in such case should be sworn to, and he has made no attempt to prove, either that the judge a quo was informed, uninformed, or misinformed, as to the existence or whereabouts of the plaintiffs, and the bare record conveys no information to us on that subject save—

"that the former owners of said property, if alive, and their heirs and legal representatives, if they be dead, are unknown to him [petitioner], and likewise, their addresses are unknown."

Act 101 of 1898, under which the confirmation suit was brought, declares that:

"If the former proprietor [of the property, the title to which the purchaser from the state seeks to confirm] be a nonresident of the state, or be unknown, or his residence be unknown, the court shall appoint a curator ad hoc to represent him."

The act does not require the petition for confirmation of title to be sworn to, and, in the absence of proof to the contrary, the presumption is that the judge in this instance acted upon sufficient information, and that the curator ad hoc whom he appointed properly discharged the duties of his office. *Stoner v. Flournoy*, 28 La. Ann. 851; *Cooley v. Seymour*, 9 La. 276.

A judgment rendered without citation is, no doubt, absolutely void, and may be so treated whenever invoked, but the presumption is that a judgment rendered by a sworn officer is based upon the conditions required

by law and is valid, and that presumption is not rebutted by the *ex parte* allegation (even though verified by his affidavit) of the party condemned, to the effect that he was not cited, or that some other legal requirement was omitted.

"So [says Mr. Cross] where judgment appears to have been rendered without citation, it devolves on plaintiff in the action of nullity, not only to allege the want of citation, but that he had not cured, by appearance or plea, the illegality of the citation. *Bledsoe v. Erwin*, 33 La. Ann. 615." Should be *Stevenson v. Whitney*, 33 La. Ann. 655.

"And so, where a curator and the court are charged with a culpable neglect of duty, the burden is on the plaintiff to prove the negative, that no attorney for absent heirs was appointed." *Gibson v. Foster*, 2 La. Ann. 503. See, also, *Howell v. City of New Orleans*, 28 La. Ann. 681.

In the instant case, the record shows that defendants (plaintiffs herein) were cited through a curator ad hoc, duly appointed, and that he appeared and answered for them.

Their remedy, therefore, was in an action of nullity, and not in the collateral attack which they are here attempting. *C. P. 606, 607*; *Bell v. Francke & Danneel*, 23 La. Ann. 509; *Brigot v. Brigot*, 47 La. Ann. 1304, 17 South. 825; *Bruno v. Oviatt*, 48 La. Ann. 471, 19 South. 464; *Equitable Securities Co. v. Block*, 51 La. Ann. 478, 25 South. 271.

The judgment, appealed from is accordingly affirmed.

(139 La.)

No. 20850.

STATE *ex rel.* POWELL v. MONTGOMERY,
Registrar of Voters.

(Supreme Court of Louisiana. April 24, 1916.)

(*Syllabus by the Court.*)

ELECTIONS §73 — REGISTRATION—RIGHT TO REGISTER—CONSTITUTIONAL PROVISION.

A voter who has removed from one precinct to another in the same parish has the right within six months after such removal to register and vote in the precinct from which he removed.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 69, 70; Dec. Dig. §73.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Proceeding by the State, on the relation of Frank J. Powell, against Samuel A. Montgomery, Registrar of Voters for the Parish of Orleans. From a judgment for relator, defendant appeals. Affirmed.

R. G. Pleasant, Atty. Gen. (Daniel Wendling, of New Orleans, of counsel), for appellant. Walter L. Gleason, John C. Davey, and H. O. Cage, all of New Orleans, for appellee.

LAND, J. The judge below held that a voter who had removed from one precinct to another in the same parish has a right within six months after such removal to register and vote in the precinct from which he removed. We think that the ruling is correct. Section 1 of article 197 of the Constitution of 1913 provides that:

"Removal from one precinct to another in the same parish shall not operate to deprive any person of the right to vote in the precinct from which he has removed until six months after such removal."

Until the expiration of said six months the status of the voter remains the same, and to deny his right to register would be to deny his right to vote especially reserved to him by the organic law.

Judgment affirmed.

(139 La.)

No. 21779.

STATE v. ABRAHAM.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1020—APPEAL—JURISDICTION—AMOUNT OF FINE—"ACTUALLY."

In a sentence to pay a fine in an amount exceeding \$300, and in default of payment to be imprisoned, a fine exceeding \$300 is actually imposed within the meaning of article 85 of the Constitution, conferring on this court appellate jurisdiction in criminal cases; the penalty of imprisonment being added as a means of enforcing payment of the fine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. §1020.]

For other definitions, see Words and Phrases, First and Second Series, Actual.]

2. CRIMINAL LAW §101(2)—JURISDICTION—TRANSFER OF CAUSES.

When a criminal prosecution is commenced in a court of competent jurisdiction, there is no process by which it can be transferred to another court, of concurrent jurisdiction, and what the prosecuting officer cannot do directly, he should not do indirectly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 200, 205; Dec. Dig. §101(2).]

Provosty, J., dissenting on the merits.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Charles Abraham was convicted of retailing intoxicating liquors without a license, and appeals. Reversed, and defendant discharged.

Scheen & Blanchard, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (G. A. Goudran, of New Orleans, of counsel), for the State.

On Motion to Dismiss Appeal.

MONROE, C. J. Plaintiff was convicted of having retailed intoxicating liquors without having obtained a license so to do, and was (quoting from the minutes of the court) "sentenced by the court to pay a fine of \$305, and costs, and, in default of paying said fine, to serve an additional two months in jail; and it is further ordered that he be worked upon the public works of the parish of Caddo, as

the law directs." He has appealed, and the state moves to dismiss the appeal, on the ground that this court is without jurisdiction thereof.

[1] The jurisdiction of this court in criminal cases is confined to questions of law, and, upon such questions, extends to all cases.

"Whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars, or imprisonment exceeding six months, is actually imposed." Const. art. 85.

The argument in support of the motion is that, in this case, the fine of \$305, which, if "actually imposed," would bring the case within our appellate jurisdiction, has not been actually imposed, because it was open to defendant to escape it by suffering imprisonment for two months, with the concomitant of working upon the public works, for a shorter period than six months; it being well understood that the "hard labor," the possibility of which confers jurisdiction on this court, is hard labor in the penitentiary.

The penalty of imprisonment is, however, provided in all cases in which fines are imposed, not as an alternative which a defendant is likely to prefer to the penalty prescribed for his offense, but, in the interest of the state, as something worse, and, hence as a means of enforcing the payment of that penalty; the theory being that the average and normal individual will most certainly not prefer the loss of his liberty, and (so far as this case is concerned) subjection to the disgrace of compulsory work, as a convict, on the public roads of the parish, to the loss of his money.

Section 980 of the Revised Statutes declares that:

"Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year."

But the defendant now before the court probably received the sentence specifically prescribed by Act 66 of 1902 for the offense of which he was convicted, as follows, to wit:

"Shall be fined not less than \$100 nor more than \$500; and in default of payment of fine and costs shall be imprisoned for a term within the discretion of the court; or shall suffer fine and imprisonment as the court may deem proper."

Probably the vast majority of offenders against the criminal laws are without visible assets through which the fines imposed upon them could be collected, and, if no means were provided for enforcing their collection, the sentence to pay a fine would be, in their ears, but as the tinkling cymbal and sounding brass.

What the law has done, therefore, has been to provide that a fine shall be actually imposed, and, in order that it shall be actually paid, has made the further provision that, if

it be not paid, the convict shall be subjected to something worse, because of his default.

That view of the matter has, apparently, been accepted by the lawmakers, the courts, and the bar during the greater part of the past century, and the view now suggested by the state seems never to have been presented until quite recently (in the case of *State v. Authement*, 139 La. —, 72 South. —), when we were, at first, disposed to consider it favorably. We are satisfied, however, upon further reflection, that, in prescribing the penalty of fine, and in default of payment imprisonment (as in this case), the intention was that the fine should be considered, and should be actually imposed, for jurisdictional and all other purposes.

The motion to dismiss the appeal is therefore overruled.

On the Merits.

[2] It appears from the record that defendant excepted to the jurisdiction of the trial (district) court, on the ground that the prosecution had been commenced in the city court (the jurisdiction of which, with respect to such matters, is concurrent with that of the district court), and that issue was joined and the case set for trial when the district attorney entered a nolle prosequi, and thereafter recommenced the prosecution in the district court; his reason for pursuing that course being, as alleged in the exception:

"That the said * * * case was one of a large number which had been made against various defendants on the testimony furnished by the same paid detectives and spotters, and that, after the lodging of the charges in said court, some of the cases were put on trial, and the result thereof was that the witnesses upon whose testimony the state was depending, being paid detectives and spotters were wholly discredited, and it was shown that the said testimony of the said spotters was wholly unworthy of belief, and, after it was ascertained that no conviction could be had in that court, upon the testimony of said spotters, then the district attorney entered nolle prosequi in all the cases pending and untried, and in this case, and it was only with the purpose of transferring said charges to the district court * * * that the charges were dismissed in said court."

The identical question thus presented, arising out of the same circumstances, has been considered by us in *State v. Mike Milano*, 71 South. 131, and in *State v. Abraham*, 71 South. 193, and it has been there held that:

"When a criminal prosecution is commenced in a court having jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction; and what the prosecuting officer cannot do directly, he should not do indirectly."

We adhere to the view thus expressed.

The conviction and sentence appealed from are therefore annulled, and the defendant discharged.

PROVOSTY, J., dissents on the merits.

(139 La.)

No. 20636.

ORLEANS-KENNER ELECTRIC RY. CO. v. CHRISTINA et al.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. EMINENT DOMAIN — 167(5) — JURORS — PEREMPTORY CHALLENGES — STATUTES — REPEAL.

The Civil Code (article 2632) allows no peremptory challenges of jurors in expropriation suits; the Code of Practice (article 511) allows four such challenges in all civil cases; the Revised Statutes (section 592) declares that, in case any of the provisions of the Code of Practice should be "contrary or repugnant" to those of the Civil Code, they (the provisions of the Code of Practice) shall prevail. There is, however, no such conflict or repugnancy between the respective provisions above mentioned; those of the Code of Practice dealing with civil cases, in general, and those of the Civil Code with a particular class of cases, which the law makes an exception to the general rule.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 455; Dec. Dig. — 167(5).]

2. EMINENT DOMAIN — 215 — COMPETENCY OF JUROR — BIAS.

A freeholder of a parish is not, necessarily, disqualified, on account of bias, from serving as a juror in an expropriation suit, because he favors the building of the railroad, the projector of which is the plaintiff, and voted in favor of a tax in aid of the enterprise, nor, because the road may, at some future time, be extended through his land.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 553; Dec. Dig. — 215.]

3. EMINENT DOMAIN — 215 — QUALIFICATIONS OF JURORS — "FREEHOLDER."

Unless the contrary is made to appear, the law presumes that married persons live under the régime of the community, and that property acquired in the name of either is acquired as the property of the community. Hence, though real estate be acquired in the name of the wife, if it be acquired during the existence of the marriage, and it be not shown that it was acquired with her paraphernal funds, or, that she and her husband were separate in property, it is sufficient to qualify the husband as a "freeholder" and as a juror in a proceeding for expropriation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 553; Dec. Dig. — 215.]

For other definitions, see *Words and Phrases*, First and Second Series, *Freeholder*.]

Appeal from Second Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Action by the Orleans-Kenner Electric Railway Company against Joseph Christina and others. From a judgment for plaintiff, defendants appeal. Affirmed.

E. A. O'Sullivan, of New Orleans, for appellants. Peter Stiff and Conrad A. Buchler, both of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. Plaintiff brought this suit for the expropriation of a strip of land, 30 feet wide, extending across a tract belonging to the defendants, fronting the Mississippi river and extending in the direction of the lake at a point about 7 miles above

the city of New Orleans, the whole amount sought to be taken being 1.9 acres, for which a tender was made before suit of \$237.50. Defendants deny the necessity for the expropriation, estimate the value of the land at \$2,000, and demand \$1,500 additional, by way of damages. The jury brought in a verdict for \$237.50, as the value of the land, with "no damages," and defendants have appealed.

The evidence abundantly shows that \$100 an acre is a good price for the land in question, being \$40 an acre more than it could have been sold for before the scheme for the building of the railroad was announced; it also shows that the road is in an interurban enterprise; that the cars will be propelled by electricity; that it will be the only road that will traverse defendant's property, and, instead of being an injury, will be an advantage thereto. In fact, defendant's counsel, in his brief, barely refers to the amount of the award and devotes his attention to certain questions concerning the organization of the jury, to wit: That, though the Civil Code (article 2632) declares that "in impanelling the jury" (in an expropriation case) "either party may challenge for cause, * * * no peremptory challenge shall be allowed," the Code of Practice (article 511) allows to each party four peremptory challenges, in civil cases, in general, in addition to challenges for cause, and, the Revised Statutes (section 592) declares that, "in case the Code of Practice should contain any provisions contrary or repugnant to those of the Civil Code, the provisions of the former shall prevail," and hence that defendant should have been allowed four peremptory challenges which privilege was denied him.

[1] We do not, however, find the quoted provisions of the respective Codes "contrary or repugnant" to each other, since those of the Code of Practice relate to civil cases, in general, and those of the Civil Code to a particular class of cases which the law has thought proper to make, in the matter of challenges as well as in other matters, an exception to the general rule.

[2] One juror testified that there was a proposition that the plaintiff company should also build a road on the Metairie Ridge, about 5 miles from the property of the defendant, and that, in the event of its doing so, the road will run through property belonging to him; that he would be willing to give the right of way; that he had voted for the imposition of a tax in aid of the construction of the road; and it was objected that he was disqualified by reason of bias. The advantage to the public, and to the defendant, from the building of the road is really not disputed, and we find no reason to believe that the juror who thus testifies had any bias that would operate to the prejudice of the defendant in the matter of the amount that should be paid for his land.

[3] Another juror was objected to on the ground that he was not a freeholder of the parish, within the meaning of the law requiring a jury of freeholders. The juror gave the following testimony on the subject.

Being asked whether he was a property holder in the parish, he answered, "No, sir." He then testified that he lived with his wife upon certain premises in the parish; that the property stood in the name of his wife; that he was separate in property from his wife; that he and his wife lived under the community of acquets and gains; that his wife bought the property during their marriage; that she bought it from Mr. Collette; that Collette bought it from him (the witness); that it still stood in the name of his wife. We find in the record an act of sale, of date September 13, 1913, from the witness Kerner to Mrs. Annie Multer, wife of Collette, and an act, of date October 11, 1913, from Mrs. Annie Multer to Mrs. Theresa Multer, wife of Kerner; the recited consideration in both sales being the same. The judge a quo, in overruling the objection, said that he had understood that the juror was a freeholder because his wife acquired a piece of property during the community, and that, as the act of sale contained no recital to the effect that it had been purchased with paraphernal funds, he concluded that it was community property, and hence that the juror was competent.

Unless the contrary is made to appear, the law presumes that married persons live under the régime of the community, and that property acquired in the name of either is acquired as the property of the community. And we do not find that the confused testimony of Mr. Kerner rebuts those presumptions in so far as they apply to his marital relations; we therefore agree with the judge a quo that he was a good juror.

The judgment appealed from is accordingly affirmed.

(139 La.)

No. 20457.

LANGSTON v. TREMONT LUMBER CO.
(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT — 213(3), 240(2) — INJURIES TO SERVANTS — ASSUMPTION OF RISK—LOGGING TRAIN.

Where one, who had been conductor of a logging train for two months and a brakeman thereon for six months, held in place with his foot a frog for putting derailed cars on the track, and in so doing was injured by a log falling from a derailed logging car being pulled onto the track, he could not recover for injury, since he assumed the risk and was negligent, although the spikes on the frog were so worn or broken that it would not stay in position unless held, and the prior derailment was due to the negligence of the railroad, and plaintiff examined the cars as to their being properly loaded before putting them back on the track; it not appearing that he did not know the danger of standing near a logging

car, especially when being shunted back on track by means of frogs, or that he could not have held the frog in position in a less dangerous way, and the evidence showing that, if the frog was defective, he could easily have had it repaired.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 561, 752; Dec. Dig. § 213(3), 240(2).]

2. MASTER AND SERVANT § 240(2)—INJURIES — CONTRIBUTORY NEGLIGENCE — CUSTOMARY METHODS.

An experienced conductor of a logging train, who, while holding in place with his foot a railway frog while getting derailed loaded logging cars back on the track, is injured by a log falling from a car, is not relieved from his contributory negligence, barring recovery, by showing that he had previously held the frog in position in this way, and had frequently seen others do it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 752; Dec. Dig. § 240(2).]

3. MASTER AND SERVANT § 247(4)—INJURIES — PROXIMATE CAUSE.

Where an experienced logging train conductor was injured by a log falling from a derailed loaded car, which he was attempting to put back on the track by a railway frog which he was holding in place with his foot, the proximate cause of his injury was not the first derailling of the cars, but his own contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 798; Dec. Dig. § 247(4).]

Appeal from Fifth District Court, Parish of Jackson; Cas Moss, Judge.

Action by J. E. Langston against the Tremont Lumber Company. From a judgment for plaintiff, defendant appeals. Judgment set aside, and suit dismissed.

Stubbs & Theus, of Monroe, for appellant. R. C. Culpepper and Hundley & Hawthorn, all of Alexandria, and J. Rush Wimberly, of Shreveport, for appellee.

PROVOSTY, J. Either from defective condition of the track, or too great speed, or overloading, a number of the cars of the log train of the defendant company, loaded with logs, ran off the track. For getting the cars back on the track two iron appliances, called frogs, are used. One of them is placed on the inner side of one of the rails; the other, on the outer side of the other rail. The wheels mount them, and are by them shunted to the rails. The one on the outer side of the rails is turtle-shaped—flat-bottomed and dome-topped. For being held in position while the wheel ascends it, it is provided underneath with spikes, which sink into the wood of the cross-tie under the weight of the ascending wheel.

Plaintiff was the conductor of the train. While the car was being pulled up, he held his foot against the outer frog. One of the logs fell upon him, breaking his thigh, and bruising him painfully.

Defendant contends that for this great misfortune which befell him he is himself to blame; that he knew very well that logs are liable to fall from these log trains while in motion; and that, therefore, when he placed himself so close to the car that, if a log

fell, it would fall upon him, he voluntarily incurred the danger from which he suffered.

[1, 2] Plaintiff's contention is that the spikes underneath the frog had flattened out or been broken, so that it was necessary for him to hold it in position with his foot in the manner he did; that this defective condition of the frog was due to the negligence of the defendant company, because he had notified the defendant company of it, and the defendant company had failed to provide another frog, or to repair this one, although promising to do so; that the master owes the servant the duty of providing safe appliances to work with; and that a servant using a defective appliance after the master has promised to repair it may recover for an injury resulting from the defect of the appliance.

Plaintiff had had charge of this train as conductor for two months, and, previous to that, had been brakeman on it for six months, and the danger of logs falling from moving log trains, is well known to those operating these trains. Plaintiff, therefore, cannot plead ignorance of this danger, and we do not understand him as doing so; nor of the fact that this danger is greater when a car is being shunted back on the track with more or less of a jerk than when it is being moved on the track. By occupying this position, therefore, he assumed this risk, and the question must simply be whether his doing so was a necessary part of his duty.

The evidence shows, we think, that if, as a fact, this frog was defective, as contended, plaintiff could easily have had it repaired, or procured another. But, leaving that aside, it is not shown why plaintiff should have had to hold this appliance in position with his foot, and not in some other less dangerous way. He says he had done it before, and had frequently seen others do it; but this falls far short of showing any necessity for doing it. No attempt is made to show that this frog could not have been held in position by other means, or, indeed, that the use of it was the only way in which the cars could have been put back on the track. No necessity is shown, therefore, for using it, and still less for putting the foot against it.

Perhaps, if plaintiff had stood at a distance such as experience in such cases might have given him reason to believe was safe, and as a result of the defective condition of this appliance a log had flown out and hit him, this defective condition might have been looked upon as the sole cause of his injury. But, under the circumstances of this case, his imprudence in unnecessarily standing so near was manifestly a contributing cause, to say the least, and constitutes contributory negligence.

Plaintiff also says that, before beginning the work of putting the cars back on the

track, he took the precaution of examining them, and ascertaining that the logs had not been disturbed by the derailment, and were all in proper position. But this did not justify him in standing so near, since he knew that the fact of logs being in appearance safely loaded is no guaranty against their falling.

[3] His learned counsel argue that:

"The proximate cause of an injury is the efficient cause; that is, the one that sets the other causes in motion which produce the injury."

And they say that in the instant case this proximate cause is to be found in the bad condition of the track and the overloading of the cars.

If it be conceded that the defective condition of the track, or the overloading of the cars, caused the derailment, and that this was due to the negligence of the defendant company, this negligence could have been the proximate, or legal, cause of the injury only if the injury had occurred while the derailment was in progress, or, in other words before the physical forces set in motion by it, or, let us say, by the bad condition of the track, or the overloading of the cars, had come to rest. After these physical forces had come to a complete rest, what occurred subsequently was not caused by them, but by some other operating agency. The situation of the cars after the derailment was nothing more than a condition upon which these subsequent agencies operated. *Schultz v. Eckardt Mfg. Co.*, 112 La. 568, 36 South. 593, 104 Am. St. Rep. 452.

We do not wish to be understood as holding that an employé is justified in knowingly using a defective instrument, tool, or appliance, taking the risks, simply because a promise has been made by the employer to repair the instrument or to furnish another. It has not been necessary to pass on that point, and we have not done so.

The judgment appealed from is set aside, and the suit is dismissed, with costs in both courts.

(139 La.)

No. 20947.

STATE ex rel. NEW ORLEANS LAND CO.
v. REGISTER OF CONVEYANCES et al.
(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. MANDAMUS \S 82 — SUBJECTS OF RELIEF
— CANCELLATION OF RECORDS.

Mandamus is not a proper proceeding to cancel inscriptions on the books of the recorder of conveyances.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 139, 177-179; Dec. Dig. \S 82.]

2. RECORDS \S 6 — RECORDING WRITTEN INSTRUMENTS—NOTARIAL ACT.

An affidavit by former owners, in the form of a notarial act, containing a disclaimer of title to certain real estate, and an acknowledgment of title and possession in another, is a

proper subject of inscription on the books of the recorder of conveyances.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 7; Dec. Dig. \S 6.]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge pro tem.

Application by the State, on the relation of the New Orleans Land Company, for mandamus to the Register of Conveyances and the Nylka Land Company, Limited. Judgment for relator, and defendant Land Company appeals. Reversed, and suit dismissed.

Wm. Winans Wall, of New Orleans, for appellant. Charles Louque, of New Orleans, for appellee.

LAND, J. This is a proceeding by mandamus to cancel from the conveyance records of the parish of Orleans certain documents which the defendant company claims as muniments of title to a certain tract of land fronting on Gentilly Road. The documents include an auditor's deed, a sale for city taxes, a judgment of the civil district court, and an affidavit made by Hamilton Sims and wife.

The defendant company excepted to the petition and proceedings on the ground:

"That there is no law authorizing the cancellation of title to real estate from conveyance records by rule, summary process, or mandamus."

The exception was in terms overruled, but the judgment only ordered the cancellation of the affidavit. The defendant company has appealed.

We quote from brief of counsel for relator and appellee:

"The cancellation of said registry is sought on the ground, as alleged:

"That said affidavit is false in every respect and is a fraud attempted to be perpetrated on your petitioner (the New Orleans Land Company) as owner of the Morgan tract, described in the deed hereto annexed wherein P. H. Morgan sells to the New Orleans Land Company."

The legal contention of the relator is that an affidavit is not and cannot be considered as a title to real estate, and that the truth or falsity of the contents of a recorded affidavit relating to real estate may be inquired into and adjudged in a mandamus proceeding.

In the affidavit signed by Sims and wife, it is stated that he purchased the property by notarial act in December, 1864, and had been in undisturbed possession of the same to the date of the affidavit, August 1, 1913; that the property was sold to the state for delinquent taxes "during the year 1880 to 1885," and was conveyed by the state through mesne conveyances to the Nylka Land Company, and forms a part of the property conveyed by certain judgments of the civil district court.

Sims and wife further declared that "the purpose of the affidavit and quitclaim is to place in authentic form the facts as enumerated herein," which vested possession and

ownership of the tract in said company. "which affiants declare to be the true and lawful owner of said property, and which they now hold for said company."

The affidavit contains a formal recognition of, and acquiescence in, the tax title of the defendant company, by the former owners of the property, and a formal declaration by the affiants that they held possession of the property for said company. If Sims and wife were the former owners of the tract of land, their affidavit amounts to a ratification of the tax sale, and of the title and possession of the defendant company.

The relinquishment of title by Sims and wife had the legal effect of an estoppel against the subsequent assertion by them, their heirs and assigns, of any right, title, and interest in the property. *Williams v. Drew*, 47 La. Ann. 1622, 18 South. 623. The common-law doctrine has been thus expressed:

"One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon, is estopped afterward to assert such right or title." 16 Cyc. 757.

The affidavit presents the much stronger case of the recognition of legal title in, and surrender of possession to, the Nylka Land Company.

The affidavit, in the form of a notarial act, was properly recorded, as it related to and affected title to real estate, and its registry was necessary to protect rights therein of the Nylka Land Company, as unrecorded instruments relating to real estate do not affect third persons.

The case of *Raymond v. Villere*, 42 La. Ann. 488, 7 South. 900, is fatal to the contention of the relator that mandamus is a proper proceeding to cancel inscriptions on the conveyance books. In that case the court held that parties in whose favor such inscriptions exist cannot be forced to appear as defendants in mandamus suits to litigate their rights of ownership.

We approve and reaffirm this doctrine.

It is therefore ordered that the judgment below be reversed, and it is now ordered that this suit be dismissed, and that the relator pay costs in both courts.

(139 La.)

No. 21873.

SUCCESSION OF CARBAJAL.

In re CLAVIJO et al.

(Supreme Court of Louisiana. April 24, 1916.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT \S 189—COMPENSATION OF ATTORNEY—CONTINGENT FEE—DISMISSAL BY CLIENT.

The first paragraph of the proviso, contained in Act No. 124 of 1906, is complete in itself, to the extent that it makes lawful that which was before unlawful, so that an attorney, who recovers property under a written contract whereby he is to receive a portion thereof as his

compensation, may thereafter recover his compensation. But, as though to guard against the inference that an interest in the subject-matter of the suit necessarily includes the right to keep the suit in court against the wishes of the litigant, the second paragraph deals with that question as a separate proposition, and declares that "it shall be lawful to stipulate" to that effect; and the third paragraph goes farther, and provides that such a stipulation may be made binding upon the opposing litigant by service upon him of the contract containing the stipulation so authorized. To dislocate the proviso, and give effect to the one paragraph, without reference to the others, would violate the accepted canons of construction, and is legally impossible.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 407-411; Dec. Dig. \S 189.]

2. ATTORNEY AND CLIENT \S 189—COMPENSATION OF ATTORNEY—CONTINGENT FEE—COMPROMISE OR DISCONTINUANCE.

Where a contract between attorney and client, whereby the attorney is to receive a portion of the money or property recovered as his compensation, contains no stipulation to the effect that the suit shall not be compromised or discontinued by either without the written consent of the other contracting party, the client may compromise or discontinue at will, leaving the attorney to his remedy by an action on quantum meruit for services rendered.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 407-411; Dec. Dig. \S 189.]

In the matter of the succession of N. J. Carbajal. Application by Mrs. Juanita Carbajal Olavijo and another for certiorari and prohibition. Granted.

Titche & Rogers, of New Orleans, for relators. E. K. Skinner and Sanders, Brian & Sanders, all of New Orleans, pro se.

MONROE, C. J. The relatrix (Mrs. Clavijo) is one of the seven children and heirs of the decedent, N. G. Carbajal, and her corelatrix, Mrs. Rosa L. Martin, is her mother, widow by first marriage of N. G. Carbajal, and by second marriage of Francis Martin.

Mrs. Clavijo, it appears, entered into a written contract with Messrs. Sanders, Brian & Sanders, members of the bar, whereby it was agreed that they should bring suit, in her behalf and against her mother, to annul her father's will, and that they should receive, as their compensation, 15 per cent. of the money or property that might be so recovered, whether under a final judgment or by compromise agreement; and the suit was brought accordingly (in the civil district court), and after certain exceptions had been disposed of an answer was filed. Shortly thereafter Mrs. Clavijo called at the office of her counsel and requested that the suit be discontinued, but she was informed that nothing would be done in the matter until she brought her husband to ratify her instructions, or until the counsel received further evidence that he had ratified them. On the next morning, at about 10:45 o'clock, the counsel filed in the civil district court their original contract of employment, and while that was being done a messenger arrived at

their office with a letter of ratification from Mr. Clavijo, which letter the messenger declined to leave with the stenographer, whom he found in the office, but, leaving a copy, returned with the original at 11:25 o'clock. The counsel, however, declined to discontinue the suit (on the ground that they had an interest which entitled them to prosecute it), and upon the following day Mrs. Clavijo filed a petition in court, announcing her abandonment thereof, and presented to the trial judge the form of an order for the dismissal of the same, which the judge refused to sign. The defendant, Mrs. Martin, then filed a motion in the suit, setting forth that it had been abandoned, and praying that it be dismissed, whereupon the judge ordered that a rule issue requiring plaintiff's counsel to show cause why such an order should not be made; but, after hearing, the rule was discharged, and Mrs. Clavijo and Mrs. Martin then presented to this court the application for certiorari and prohibition which we are now considering.

[1, 2] We may start with the proposition that, prior to the passage of Act No. 124 of 1906, a contract for a contingent fee gave an attorney no interest in the subject-matter of the litigation to which the contract might relate, but entitled him only to a privilege upon the judgment, if and when obtained, and that, notwithstanding such contract, it was within the power of the client to discontinue the suit at will, leaving to the attorney his right of action on quantum meruit for services rendered. Rev. St. § 2897; *Louque v. Dejan*, 129 La. 526, 56 South. 427, 38 L. R. A. (N. S.) 389; *Gurley v. City of New Orleans*, 41 La. Ann. 75, 5 South. 659. In fact, until that act was passed, a contract between an attorney and client, whereby the former was to receive as compensation for his services "any portion of the land or any other property * * * in dispute or sued for" was "null and void to all intents and purposes," according to the express language of the act of 1808 (*Mazureau & Hennen v. Morgan*, 25 La. Ann. 281), though in *Flower v. O'Conner*, 7 La. 207, a distinction was drawn between a *portion of*, or *interest in*, the property sued for, and a *commission on* the amount sued for, and that distinction has since been recognized. *Martinez v. Succession of Vives*, 32 La. Ann. 308; *Andirac v. Richardson*, 125 La. 883, 51 South. 1024. The act of 1906 (page 210) reads as follows:

"Be it enacted * * * that section 2897 of the Revised Statutes of 1870 be amended and re-enacted so as to read as follows:

"In addition to the privileges enumerated in title twenty-first of the Civil Code, * * * a special privilege is hereby granted to attorneys at law for the amount of their professional fees on all judgments obtained by them, and on the property recovered by said judgment, either as plaintiff or defendant, to take rank as a first privilege thereon.

"Provided, that, by written contract, signed by the client, attorneys at law may acquire as their fee in such matter an interest in the sub-

ject-matter of the suit, proposed suit or claim, in the prosecution or defense of which they are employed, whether such suit or claim be for money or for property, real, personal or of any description whatever.

"And in such contract of employment, it shall be lawful to stipulate that neither the attorney nor the client shall have the right, without the written consent of the other, to settle, compromise, release, discontinue or otherwise dispose of such suit or claim.

"Either party to said contract shall have the right at any time to file same with the clerk of the district court where the suit is pending or is to be brought, and to have a copy made and served on the opposing party and due returns made as in case of petitions in ordinary suits; from and after the date of such service, any settlement, compromise, discontinuance or other disposition made of such suit or claim by either the attorney or the client without the written consent of the other, shall be null and void, and such suit or claim shall be continued and proceeded with as if no such settlement or discontinuance had been made."

It will be seen, then, that the only method which the statute thus quoted provides, whereby the plaintiff in a suit can be prevented from exercising the right, which he previously possessed, of compromising and discontinuing the same, is the insertion in the written contract of employment, between him and his attorney, of a stipulation to that effect, and that even such stipulation will not necessarily be binding on the defendant, unless the contract with the stipulation in it is served upon him as provided by the statute.

There is no such stipulation in the contract here relied on, and it will not do to say, merely because the statute confers upon the attorney the right to acquire an interest in the subject-matter of the suit, brought or to be brought by him, that the contract of itself gives him the right to prevent the compromise or discontinuance of such suit by his client. The argument to that effect would be stronger if the statute did not contain the provision authorizing a stipulation on that subject to be written into the contract, though even then it could hardly be sustained, for the attorney, who is to receive a commission on the amount recovered, and who is accorded a privilege upon the judgment that he may obtain, unquestionably has an interest, of a sort, in the prosecution of the suit, and yet it is well settled that his client may discontinue the suit, and thus defeat both the recovery and the privilege; and so an intervener may be the only litigant who has a real interest in the subject-matter of the litigation, and yet the suit may be discontinued by the plaintiff.

The statute in question is to be construed, like any other statute, as a whole, and, construing all of its parts together, it is evident that if the lawmaker, in conferring upon an attorney the right to acquire an interest in the subject-matter of the suit that he is employed to bring, intended that the grant should carry with it the divestiture of the right of the client to compromise, discontin-

ue, etc., the provision for stipulation on that subject is mere surplusage.

But we cannot assume that a statute is incumbered with language of apparent importance which means nothing. The first paragraph of the proviso is complete in itself, to the extent that it makes lawful that which was before unlawful; so that an attorney, who recovers property under a written contract whereby he is to receive a portion thereof as his compensation, may also recover his compensation. But, as though to guard against the inference which the counsel here made respondents seek to draw, that an interest in the subject-matter of the suit necessarily includes the right to keep the suit in court, against the wishes of the litigant, the second paragraph deals with that question as a separate proposition, and declares that "it shall be lawful to stipulate" to that effect; and the third paragraph goes a step farther, and provides that such stipulation may be made binding upon an opposing litigant by service upon him of the contract containing the stipulation so authorized. To dislocate the proviso, and give effect to the one paragraph, without reference to the others, would violate the accepted canons of construction, and is legally impossible.

It is therefore ordered that the respondent judge and counsel be prohibited from further proceeding in the matter of *Mrs. Juanita Carbajal Clavijo v. Succession of N. G. Carbajal*, No. 65760 of the docket of the civil district court, and from further impeding the plaintiff therein in discontinuing the same.

(139 La.)

No. 20723.

DARCOURT v. BRUNET et al.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by Editorial Staff.)

1. JUDGMENT \S 587—RES JUDICATA.

Where plaintiff's attorney wrongfully pledged mortgage notes on plaintiff's property to the bank for his individual use and after foreclosure the bank agreed to reconvey the property upon payment of the debt, *held* a judgment against plaintiff, in an action to set aside the pledge and annul the foreclosure sale, or in the alternative to secure to plaintiff the rights of said attorney in such contract, was not res judicata of a subsequent action to enforce such contract, which plaintiff had secured by assignment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1089; Dec. Dig. \S 587.]

2. MORTGAGES \S 199(4)—APPLICATION OF INCOME TO DEBT—ACCOUNTING.

Under a contract, providing that the creditor will apply the net revenues of property to the debt upon the extinguishment of which he will reconvey the property to the debtor, the rendering of one account does not cut off the right of the debtor or his assignee to demand subsequent accounts.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 520, 521; Dec. Dig. \S 199(4).]

3. PLEADING \S 228—EXCEPTIONS—DETERMINATION.

Exceptions of no cause of action must be determined from the face of the petition, and where the petition contains no reference to a former action, an objection based on what transpired at such former action cannot be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. \S 228.]

4. JUDGMENT \S 735 — RES JUDICATA — ISSUES CONCLUDED.

On exceptions of res judicata, an objection that the petition shows that plaintiff at the former trial concealed the fact that he was the assignee of the contract now sued on cannot be considered, where the assignment of such contract was not discussed nor adjudicated at such former trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. \S 735.]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Eugene Darcourt against Adele Brunet and others. From an order sustaining exceptions, plaintiff appeals. Reversed and remanded.

E. Howard McCaleb, of New Orleans, for appellant. Charles I. Denechaud and Charles Louque, both of New Orleans, for appellees Adele Brunet and others. Dufour & Dufour, of New Orleans (H. Generes Dufour, of New Orleans, of counsel), for appellees Liquidators' and Citizens' Bank & Trust Co.

PROVOSTY, J. In November, 1894, the plaintiff, Darcourt, made his two notes to his own order, and by himself indorsed in blank for \$2,500 and \$2,000, respectively, payable one year after date, secured by mortgage upon real estate owned by him in this city, and delivered same to his lawyer, Mr. Fourchy.

In April, 1895, the lawyer pledged same to the Citizens' Bank as collateral on a demand note of his own of that date in favor of the bank for \$1,850; and also as security for any other debt the pledgor might then or at any future time be owing to the bank. The bank accepted the pledge in perfect good faith, assuming that the lawyer was the owner of the notes.

In January, 1896, the bank foreclosed on the pledged notes; and, at the foreclosure sale, on April 2, 1896, bought in the property.

On June 22, 1896, the said pledgor, and the bank entered into the following contract:

"Whereas the Citizens' Bank of Louisiana hold in pledge two mortgage notes amounting to forty-five hundred dollars, one of \$2,000.00, the other for \$2,500.00, both past due, to secure the note of hand of P. L. Fourchy for eighteen hundred dollars (\$1,800.00); and, whereas the property mortgaged to secure the said two notes of two thousand and twenty-five hundred dollars was seized and sold at the suit of said Citizens' Bank of Louisiana against the maker of said notes, No. 48280 of the docket of the civil district court for the parish of New Orleans and said property was adjudicated by the sheriff to the Citizens' Bank of Louisiana for account of

said Citizens' Bank of Louisiana in the case of Citizens' Bank v. Darcourt.

"Now it is agreed between said P. L. Fourchy and the Citizens' Bank of Louisiana that said adjudication does not extinguish the debt of said P. L. Fourchy and that said Citizens' Bank of Louisiana is not liable for any part of the price of adjudication and that the said bank only take the title as a continuation of said security of the note of said P. L. Fourchy for the sum of eighteen hundred and fifty dollars (\$1,850.00) and that whenever the said P. L. Fourchy will pay the bank the amount of his entire debt, including overdraft, interest, costs, etc., the bank will retransfer said property to him or his heirs or assigns.

"It is agreed between the parties that in the meantime the bank will lease or rent said property in its own name, collect the rents, pay the taxes, insurance and repairs, crediting said P. L. Fourchy with the rents and charging the said disbursements to him."

On October 30, 1896, the bank took a rule on the civil sheriff to show cause why he should not place it in possession of the property. On December 7, 1896, this rule was made absolute, and the sheriff was ordered to put the bank in possession. But apparently he failed to do so, for on April 19, 1897, the plaintiff in this case, Darcourt, who had continued in possession of the property, took a rule in the terminated foreclosure suit upon the civil sheriff and the bank, alleging that the bank had held the two mortgage notes merely as collateral for certain loans to Fourchy, and that before a writ of ejectment should issue against him, the bank should be required to render a statement of Fourchy's account for the security of which the notes stood as collateral. What was ever done with this rule, or when Darcourt was dispossessed, does not appear. The attorney of Darcourt in this rule was Mr. Fourchy, the same who had pledged the notes.

More than four years thereafter, on November 28, 1900, Darcourt brought suit against the bank and Fourchy. He alleged that he (Darcourt) was the owner of the property in question; that he had executed the said two mortgage notes for his own use, and that Fourchy had had no authority to pledge them; that the debt for which they were pledged was for overdrafts of said Fourchy, and that the bank had accepted said pledge with full knowledge that the said notes did not belong to Fourchy, and that he was without right to dispose of them; that by virtue of a contract between the bank and Fourchy the bank was holding the title to said property merely as of property belonging to Fourchy and for his benefit, and as security for the debt of Fourchy, on the condition that the rents and revenues of the property were to go in extinguishment of said debt, and that the title was to revert to Fourchy as soon as said debt was paid; that said debt was only of \$1,800; and that the said property realized more than that amount at the sheriff's sale. He prayed that he be decreed to be the owner of said property, or, if that relief could not be granted, then that he have judgment against Fourchy for \$4,000, and de-

claring him to be entitled to the benefit of the said contract between the bank and Fourchy, and that the bank be required to furnish a statement of its account with Fourchy.

To that suit Fourchy filed an exception urging that the petition showed no cause of action, and was too vague, general and indefinite; and that the matter was *res judicata* as to him.

Later he filed an answer, pleading the general denial.

The bank in its answer related its transactions with Fourchy, and alleged that it had accepted the pledge in perfect good faith; that Fourchy had had the consent of plaintiff for making the pledge; that plaintiff had recognized its validity, and had solicited time in which to pay the debt; that it had acquired the property at the foreclosure sale, but had subsequently made said contract with Fourchy. It denied that plaintiff had any interest in this contract.

In the course of the trial it filed a statement of Fourchy's account which showed a debit balance of \$554.44 against him. This was the balance against him after the price of the foreclosure sale of the Darcourt property, to wit, \$3,625, had been credited to him. The bank was entitled to retain either this price or the property, so that for redeeming the property under the hereinabove transcribed contract Fourchy would have had to pay this \$3,625, plus the said balance of \$554.44; and plus also whatever expenses the bank might have had to incur in connection with the property, after deduction of whatever revenues might have been derived from it; with interest added on all the items.

The judgment in the case was rendered in July, 1902. It was in favor of the bank dismissing plaintiff's suit, and in favor of plaintiff against Fourchy for \$3,076.55.

The said Darcourt property consisted of two pieces of real estate. In September, 1904, the bank sold one of them to its codefendants in the present suit, Adele, Berthe, and Justine Brunet.

The present suit was filed in January, 1914. Plaintiff alleges that Fourchy has transferred to him all his rights under the said contract of June 22, 1896; that at the time same was entered into the debt of Fourchy was less than \$500; that the revenues of that one of the pieces of property sold by the bank to its codefendants, the Brunets, exceed by at least \$6,480 the said debt; that the bank and the said Brunets should be made to furnish an account of said revenues, and, in default of their doing so, should be condemned in solido to pay this \$6,480; that the sale by the bank to the Brunets was made without warranty, and was so made with full knowledge on the part of the said Brunets of the existence of the said contract between the bank and Fourchy, of June 22, 1896, which had been duly recorded in the conveyance office of the parish

of Orleans on August 20, 1902, two years before the said sale. He prays for judgment annulling the sale to the Brunets, decreeing him to be the owner of said property, and condemning said Brunets and the bank in solido to pay him \$6,480, or such amount as may be found to be due upon a full accounting.

The defendants filed exceptions of no cause of action and res judicata. This latter exception was sustained. And the plaintiff has appealed.

The cause of action in the two suits appears to us to be entirely different. In the first, the plaintiff was suing to set aside the pledge and to annul the foreclosure sale; and, in the alternative, to be adjudged to be entitled to the rights of Fourchy under the said contract of June 22, 1902. He was denied that relief. He subsequently acquired these rights from Fourchy, and is now suing upon this contract. The two demands are manifestly different.

[1] On its face, the petition unquestionably shows a cause of action, for the terms of said contract thus sued on are plain; and, therefore, if plaintiff is, as alleged, the transferee of Fourchy's rights under it, and if, as alleged, Fourchy's said debt has been paid; and if, as alleged, said contract was duly recorded prior to the sale by the bank to the Brunets, there is nothing left but to give plaintiff judgment for the property, and for whatever excess of revenues the bank has derived or should have derived from the property by a proper administration unless, for the reasons hereinafter stated, the contract can be considered as having been renounced or has lapsed.

The theory upon which the plea of res judicata is sought to be sustained is this: On the trial of the plea, defendants offered in evidence the entire record of the former suit, and they now argue that by this record it appears that the bank furnished in that suit to the plaintiff, Darcourt, a statement of the Fourchy account, and that by this statement it appeared that the Fourchy debt, not only had not been reduced by any payments or receipts of revenues, but had been increased by necessary expenses on the property and by the accretion of interest to an amount evidently beyond any sum that could ever possibly be realized from said property, and that the present suit is nothing more, in reality, than a demand that the bank furnish another statement of the same account.

[2] The inconclusiveness of this argumentation is obvious. The bank cannot, and does not, pretend that the judgment in this former suit cut Fourchy off from his rights under this contract. No one can say that after that judgment had been rendered Fourchy could not have gone to the bank, and paid his debt and demanded a transfer of the title to the property. And that this right which he thus had he might have transferred to the plaintiff, as he eventually did, or to any body

else, no one will we imagine gainsay. Moreover, the furnishing of one account to plaintiff under said contract could not have put an end to said contract, or cut off Fourchy's right of later on demanding another account. Non constat that the revenues from the property might not have paid the debt subsequently to the rendition of the first account. And this right which Fourchy had to call for a second account he could transfer to another person.

[3, 4] The date of plaintiff's acquisition of the said contract from Fourchy is alleged in the petition to have been October 29, 1900. Plaintiff says that this date is here erroneously stated; the true date having been October 29, 1902. But defendants would hold plaintiff to the allegation; and, basing themselves upon it, they argue that the said contract had already been transferred to plaintiff at the time he filed his first suit, which was on November 28, 1900, and that plaintiff concealed that fact from the court, and, as a consequence, cannot now be allowed to maintain the present suit.

Anything more vague than this argument it would not be easy to conceive. In the first place, in support of which one of the said exceptions is it being made? That of no cause of action, or that of res judicata? If in support of the former, then the answer to it is that the fact of this former suit having been brought is not alleged in the petition, and therefore cannot be considered in connection with the exception of no cause of action, since that exception must be decided from the face of the petition. If said argument is made in support of the plea of res judicata, the answer is that that point was not discussed, let alone adjudicated, in the former suit. If, therefore, this argument has any merit, the proper place for it is not under either of these exceptions.

And we may as well add here that if all the allegations of the first suit touching the invalidity of the pledge had been true, the demand based upon them would in no wise have been inconsistent with an allegation of the ownership of said contract by transfer from Fourchy. The one demand would have been founded upon plaintiff's own right, and the other, founded upon Fourchy's rights, and the latter could well have been urged in the alternative without inconsistency. There would have been no inconsistency in plaintiff's saying that Fourchy and the bank had defrauded him, and that Fourchy had sought to repair the fraud as far as in his power lay by transferring to him his rights under this contract, such as they were, and that if he (plaintiff) could not recover by proving the fraud, then that he desired to be recognized as transferee of the rights of Fourchy and entitled to exercise them.

Another argument is that the said Fourchy contract was not made to last forever, and that it had terminated before the filing of this suit. But no clause in the contract is

pointed to as so providing, and no reason is given for that conclusion; all that is said is that it is just so. While in all probability more time has elapsed than the parties contemplated should be the life of said contract, there is no limitation of time in it, and it was one which from its very nature had in prospect considerable duration. Therefore, unless the case can be brought under the doctrine of *Joffrion v. Gumbel*, 123 La. 391, 48 South. 1007, the contract was yet in full force when this suit was brought. Whether it can be brought or not under the said doctrine is a question which cannot be determined on these exceptions, but only from a consideration of all the circumstances of the case, after a full hearing.

The judgment appealed from is therefore set aside, the exceptions of no cause of action and *res judicata* are overruled, and the case is remanded for further proceedings according to law. The defendants to pay the costs of this appeal.

O'NIELL, J., dissents.

(139 La.)

No. 21555.

CITY OF SHREVEPORT v. HESTER (NATALIE OIL CO. et al., Interveners).

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 278(2) — IMPROVEMENTS—INITIATION OF PROCEEDINGS.

Under Act No. 210 of 1914 the questions whether any pavement shall be laid in a municipality, and, if so, what kind of pavement are left, on the one hand, to the municipal authorities, if they choose to take the initiative, and, on the other, to the property holders, and neither the creditors of the municipality nor of the property holders, whether mortgage creditors or otherwise, are required to be consulted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. $\S\S$ 737, 738; Dec. Dig. \S 278(2).]

2. MUNICIPAL CORPORATIONS \S 413(1)—PUBLIC IMPROVEMENTS—LIEN.

If the property holders take the initiative, and ask for a cheap pavement that is unsuitable for the street upon which it is to be laid, the municipal authorities let the contract, the contractor lays the pavement in accordance therewith, and, though its unsuitableness be thereafter demonstrated, the property holders have only themselves to blame, and neither they nor their mortgage creditors have any standing to contest the enforcement of the lien for the cost.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. $\S\S$ 1014, 1020; Dec. Dig. \S 413(1).]

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Action by the City of Shreveport against J. G. Hester. The Natalie Oil Company and another intervened. Judgment for plaintiff, and the interveners appeal. Affirmed.

Thigpen & Herold, of Shreveport, for appellants. Lewell C. Butler, City Atty., of Shreveport, for appellee.

Statement of the Case.

MONROE, C. J. The city of Shreveport, assuming to proceed under the authority of Act No. 210 of 1914, caused considerable street paving to be done in its "Exposition Heights subdivision," and thereafter brought this suit to obtain recognition against certain abutting lots owned by defendant of the lien and privilege accorded by the statute for the proportion of the cost due by the lots. Defendant made no appearance, but the Natalie Oil Company and Mr. M. Kaufman intervened, as holders of notes secured by mortgage and vendor's privilege on the lots in question, which mortgage they were then in the act of foreclosing, and did subsequently foreclose, and it was agreed that their intervention should stand as their answer to plaintiff's petition; the original defendant being tacitly eliminated. They set up various grounds of opposition to plaintiff's demand, but in this court are urging practically but one, viz., that the work done was and is of no benefit to the property and hence was unauthorized by Act 210 of 1914, and that to enforce the alleged lien for the cost would amount to a taking of the property without due process of law. There was judgment in the court *a qua* establishing the amount due and recognizing and enforcing against the lots the special lien and privilege accorded by the statute therefor, and the interveners have appealed.

The work of paving is shown to have been done by the Healy Construction Company, under a contract with plaintiff of date, as we assume, September 3, 1914, and a certain guaranty by the original defendant (Hester) which was annexed thereto; but we find neither the contract nor the guaranty in the record, and we might have some difficulty in considering the case were it not that the appellants appear to concede all that could be shown by those instruments and rely upon the defense as above stated, and the evidence by which they conceive it to be supported.

It appears from that evidence that the "Exposition Heights subdivision" is as yet somewhat remote and unfrequented, and we infer that the idea of paving it, with a view of bring it nearer in point of accessibility to the marts of trade or the habitations of man, and of rendering it more desirable when reached, originated with the owners, rather than with the city. Thus we find the following in the well-considered opinion of our learned brother of the district court, to wit:

"An examination of the original contract between the city of Shreveport and the Healy Construction Company * * * shows that said contract was entered into * * * on the 3d day of September, 1914. This contract expressly states that: 'Payment for the work herein proposed shall be as follows: The city to pay 90 per cent. of its entire proportion in cash when the entire street is graveled, sprinkled, and rolled and is thrown open for traffic, and the re-

mainder of its portion upon final acceptance of the street by the city council. The abutting property owners and the street railway companies are to have the option of paying their respective amounts. * * *. On the same day, to wit, September 3, 1914, the following letter, signed by J. G. Hester, was addressed to the mayor and council: * * *. In consideration of the execution of contract for paying with gravel Alabama avenue, Boss avenue, and Sumner street, I hereby agree to pay for all intersections * * * which are chargeable against the city.'

"At the bottom of this letter we find the following: 'Accepted. We hereby accept the above agreement of J. G. Hester to pay for the intersections in Alabama avenue, Boss avenue, and Sumner street, and to hold the city harmless from the payment of the above intersections, and accept J. G. Hester's personal obligation to pay same. [Signed] Healy Construction Company, by S. B. Lawrence, Jr.'

"We also find the following letter, signed by J. G. Hester and addressed to the mayor and council:

"In requesting the city to advertise for bids and to let contract for graveling streets in Exposition avenue, I agreed to pay for the intersections chargeable to the city. The council has agreed to accept my agreement to do this without putting up security for the same, upon acceptance of said guaranty by the contractors. I hand you herewith the guaranty, accepted by the Healy Construction Company.'

"This agreement and letters are annexed to the contract between the city and the Healy Construction Company for the paving with gravel of the above-named streets."

The contract price for the work appears to have been 92 cents per square yard.

The work was completed and accepted by the city probably in December, 1914. This case was tried on May 6, 1915.

There were but two witnesses called to the stand. Mr. J. H. Boss (called by defendant) testified that he owned property on Alabama and Sumner streets and Boss avenue and that he had examined those streets on the morning of the trial; that in several places they were badly washed; that there had been very little travel on some of the streets, and the top of the ground seemed to be soft, and that in other places which had been traveled over the dirt had become pretty well packed. He found generally, as we understand his testimony, that the surfaces of the streets had been washed from the middles to the sides, leaving about one-third available for use, and even that had to be used carefully, as there were ditches.

Mr. George Wilson (called by plaintiff) succeeded to the office of city engineer just after the completion of the work, and it devolved on him to receive it, a duty which he does not seem to have relished particularly, though he concedes that the work was done according to the contract, and based his dissatisfaction upon the opinion that gravel was not the kind of paving to lay in mud streets that were not used. His testimony reads, in part, as follows:

"Q. Now, I notice this contract calls for 92 cents per yard? A. Yes, sir. Q. State whether at that time they could have done a better job than that for 92 cents a yard. A. I don't think so; I think—I don't think they made much money out of it. * * *. Q. Did you examine

the work after it was finished? A. Yes, sir. Q. In what condition did you find it? A. In pretty good shape. Q. Was that a new subdivision just opened? A. Yes, sir; isolated, too. Q. What would you say would be the present condition of that gravel if it had had much traffic over it constantly, every day since its completion? A. Well, I think it would have been all right. * * *"

On cross-examination:

"Q. Now, in your report of December 8, 1914, you say, as city engineer, that the work done was utterly useless? A. Yes, sir. Q. What did you mean by that? A. Well, I don't believe in graveling in cities; on good roads that is all right, where the traffic is confined to a narrow path, and it seems to me that this was useless, and has proven so on King's Highway."

Opinion.

[1] Section 1 of Act 210 of 1914 provides that the authorities of any town or city in the state having a population exceeding 1,000 (city of New Orleans excepted) and all incorporated parish seats shall have—

"the power to pave, gravel, macadamize, resurface, repair, or otherwise improve the streets and alleys, or any part thereof, not less than one block, within the corporate limits, and shall have the power to levy and collect special taxes or local assessments on real estate abutting the street or alley to be improved, for the purpose of defraying a part of the cost of such work, repair or improvement, as hereinafter provided."

And then follow provisions in regard to the apportionment and collection of the costs of the work, etc.

Under section 2 the work may be done (as it appears to have been done in this instance) upon the petition of the property holders, and in such case it must be done as set forth in the petition, which means that the property holders are then entitled to the kind of pavement they ask for. Section 4 reads in part:

"That the sum assessed against real estate and railroad track and roadbed shall be due and collectible within ten days after the completion of the work and its acceptance by the municipality, and, if not paid within ten days, the municipal authorities shall have the power to proceed by suit against the said owners and said real estate. * * * to collect the delinquent assessments, and said municipality and its transferees shall have a special privilege on said property * * * to secure the payment of the sum assessed against it, with eight per cent. per annum interest thereon from the expiration of said ten days until paid, which privilege shall be a first privilege over and above all other claims, except taxes, and shall affect third persons from the date of registry of the assessment in the mortgage book of the parish in which such real estate is situated."

It will be seen from the foregoing that the questions whether any pavement shall be laid, and, if so, what kind of pavement, are left, on the one hand, to the municipal authorities, if they take the initiative, and, upon the other, to the property holders, and that neither the creditors of the municipality nor of the property holders, whether mortgage creditors or otherwise, are required to be consulted.

[2] If (as was done in this instance) the property holders ask for a cheap pavement that is unsuitable for the street upon which

It is to be laid, the municipal authorities let the contract, the contractor lays the pavement in accordance therewith, and, though its unsuitableness be thereafter demonstrated, the property holders have only themselves to blame, and neither they nor their mortgage creditors have any standing to contest the enforcement of the lien for the cost.

The judgment appealed from is therefore affirmed.

(139 La.)

No. 20455.

VICTORIA LUMBER CO., Limited, v.
WELLS et al.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY \S 100(3) — SURETYSHIP—DISCHARGE OF SURETY—ALTERATION OF CONTRACT.

In a suit by a materialman against a compensated surety company, on a statutory bond, under a building contract, the company cannot invoke the law concerning voluntary sureties, and ask that the rule strictissimi juris be applied, where it is shown that the owner and contractor have dispensed with one of the provisions of the contract, and agreed verbally, instead of in writing, to alter and add to the building contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 163; Dec. Dig. \S 100(3).]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the Victoria Lumber Company, Limited, against Mrs. Kate Wells and others. From a judgment for defendant Mrs. Kate Wells, and against defendant Fidelity & Deposit Company of Maryland, for a less sum than was prayed for by plaintiff, plaintiff appeals, and the Fidelity & Deposit Company of Maryland answers, asking for a reversal. Modified and affirmed.

Herndon & Herndon, of Shreveport, for appellant. Hall & Jack, of Shreveport, for appellee Wells, Thatcher & Welsh and Alexander & Wilkinson, all of Shreveport, for appellee Fidelity & Deposit Company of Maryland.

SOMMERVILLE, J. Plaintiff, a furnisher of materials, under a building contract, sued the owner, the contractor, and the security for a balance of \$2,351.11 for materials which went into the building referred to, with the exception of materials to the value of \$85.24, which were not shown to have gone into the building.

The owner filed an exception of no cause of action, which was properly sustained, as the petition showed that the owner had taken a bond for the security for the materialmen, mechanics, and laborers, as provided by law, and that the bond had been properly recorded. The judgment will be affirmed.

The contractor was declared a bankrupt.

The Fidelity & Deposit Company of Mary-

land, the surety, resisted the claim of the plaintiff on the grounds that the building contract was not made in accordance with the law, as the owner obligated herself to pay all of the bills, and because the contract had been violated by material alterations in the specifications, which released the security.

The first ground is without merit. The contract is between E. R. Darrow and Mrs. K. H. Wells, the owner. And it is stipulated in article 1 that:

"The contractor shall and will provide all the materials and perform all the work for the erection and completion of an apartment house, corner of Travis and Marshall streets, as shown on drawings and described in specifications"

—prepared by architects named. It was agreed that the sum to be paid by the owner to the contractor should not exceed \$23,000.

"Owner to pay all bills for materials and to pay subcontractors. Contractor to receive weekly payments for labor upon certificate of architects."

The contractor executed the contract, and all payments were made by the owner to him. Mrs. Wells did not undertake to execute the contract herself. This defense appears to have been overruled, and the ruling will be affirmed.

The evidence shows that material changes and some additions were made in and to the building during its course of construction, by agreement between the owner and the contractor. The original cost of \$23,000 was exceeded by some \$11,000, and the bills were paid by the owner. But the building remained the same building described in the contract.

Plaintiff's suit is for a balance on account for lumber and millwork. The district judge allowed plaintiff \$772.10, which represented items found in the original specifications, and he rejected the balance, for alterations in and additions to the specifications.

Plaintiff has appealed from the judgment, and the surety company, appellee, has answered, asking for a reversal of the judgment.

Two bonds were taken by the owner—one in her favor, individually, for the faithful performance of the contract, signed by the contractor and the Fidelity & Deposit Company of Maryland. The other bond was taken by Mrs. Wells, the owner, nominally, under the law, "to insure payment of wages of laborers, workmen, and mechanics, and claims of furnishers of materials and supplies."

It was stipulated in the bond:

"The condition of the above obligation is such that, whereas, the above bounden E. R. Darrow, builder and contractor, has this day entered into a contract, which is hereto annexed and made part hereof:

"Now, if the said contractor shall fully and promptly pay the wages of all laborers, workmen, and mechanics employed by him, or his subcontractors, on said work, and shall fully and promptly pay the claims of all persons who furnish materials or supplies actually used in the

erection and construction of said buildings and improvements, and shall deliver to said Mrs. K. H. Wells said buildings and improvements free from all claims aforesaid, then this obligation to be null and void; otherwise, to remain in full force and effect for a period of ninety days from the completion of said buildings and improvements.

"It is expressly understood and stipulated, by and between the parties to this bond, that same is given in accordance with Act 180 of the Acts of the General Assembly of Louisiana of 1894; and every workman, mechanic, and laborer, and all furnishers of materials, engaged in the erection of said building, shall have his individual right of action on this bond to insure the collection of his claim on same."

It is this individual right of action on the bond, which was given to insure its claim, that plaintiff is seeking to enforce; and it is met by the defendant surety company with the defense that it is a surety, and not an insurer, and that the law with reference to sureties is *strictissimi juris*, and that it has been relieved by the action of the owner and contractor in disregarding that provision of the contract between them, saying: That all alterations and changes should be upon written order of the architect, with the amount stated at the time.

The real question to be considered, therefore, is whether the act of the Legislature, No. 180 of 1894, p. 223, as amended by Act No. 123 of 1896, p. 179, under which the bond in suit was taken, constituted the owner of the building the agent or representative of the persons who supplied labor and material after the contract and bond were executed, in such a sense that the owner's action in consenting to changes in the contract with the contractor must be imputed to the laborers and materialmen, and held to deprive them of all recourse against the surety.

In disposing of a similar point under an act of the Congress of the United States, the Supreme Court say:

"The bond which is provided for by the act was intended to perform a double function. In the first place, to secure to the government, as before, the faithful performance of all obligations which the contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained material or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States.

"The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, and the government's name being used as obligee in the latter agreement merely as a matter of convenience."

The bond sued upon was an agreement between the obligor therein and materialmen and laborers that the latter should be paid for whatever materials or labor they might supply in the execution of the building contract. It contained an agreement between the owner of the building and the contractor, as mere nominal parties, and for convenience

only, and the security company, the sole obligor, that the referred to materialmen and laborers would be secured for all amounts due them on the building referred to in the bond.

The act of the Legislature, No. 180, 1894, p. 223, as amended by Act No. 123, 1896, page 179, has for its object the security of materialmen and laborers.

The title of the act is as follows:

"An act relative to contracts for buildings and the security of workmen and furnishers of material."

And in section 1 of the act it is clearly stated that the bond is to be taken by the owner for the security of materialmen and laborers, viz.:

"That any person who makes a contract for one thousand dollars and over, with a builder or contractor or undertaker, to repair, reconstruct, build or construct a building, shall require of the builder, contractor or undertaker good and solvent security to the full amount of the contract for the payment of all the workmen, mechanics and laborers and all those who furnish materials and supplies actually used in the building, and each workman, laborer, mechanic and furnisher of materials, shall have his individual right of action against the said security. * * *"

The contract, or bond, under the statute, is not the accessory promise by which a person binds himself for another already bound, as is provided for in article 3035 of the Civil Code. Here Mrs. Wells, the owner, was bound only in the event that she failed to require the bond mentioned in the act.

And the rules of law with reference to the ordinary contract of suretyship cannot be applied indiscriminately to such case. If this were a suit by the owner of the building against the surety of the contractor, a different question would be submitted for solution.

But, it being a suit by a real party in interest, who was represented in the making of the bond by the owner of the building, in a purely representative capacity, the contract must be considered without reference to the owner of the building.

The bond states that it is "to insure payment of wages of laborers, workmen, and mechanics, and claims of furnishers of materials and supplies"; and in the body of the bond, such provision is made in the words:

"It is expressly understood and stipulated, by and between the parties to this bond, that same is given in accordance to Act No. 180 of the Acts of the General Assembly of Louisiana of 1894, and every workman, mechanic, and laborer, and all furnishers of material engaged in the erection of said building, shall have his individual right of action on this bond to insure the collection of his claim on same."

It is stated in the bond that the building contract is annexed thereto and made a part thereof; and it is argued by defendant that all the provisions of the building contract are written into the bond, and are binding upon plaintiff. The act of the Legislature, in giving to materialmen and laborers a bond in connection with building contracts, and in giving to them personal and individual rights of action on such bonds, gave to such ma-

terialmen and laborers real rights of which they cannot be deprived by any unauthorized acts of the owner or the contractor, or by any one other than themselves. Indeed, the building contract provides for alterations, and for an extension of the time in which the work was to have been completed.

Materialmen and laborers, therefore, are not concerned as to alterations made in the work, or whether these alterations were agreed to in writing between the owner and the contractor or not. That such agreements should be in writing, and the amounts fixed, were stipulations in favor of the owner, in which materialmen and laborers could have no interest. And because these third parties, the owner and contractor, without consulting plaintiff, agreed to set aside this provision of the contract, as they undoubtedly had the right to do, the spirit and the letter of the law would be clearly violated if, because of such action, materialmen, mechanics, and laborers were deprived of the security which the law gives specially to them.

Under the law and present conditions, which give to materialmen, mechanics, and laborers on buildings security for their goods and wages, with bonds by compensated sureties, or insurers, to protect them, it is obviously unjust and unlawful to apply the rules of law concerning voluntary sureties.

A similar rule of construction appears to have been adopted in the case of *Cowles v. U. S. Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838:

"Where a building contract provided that no alterations should be made except on a written order of the architects, and that, when so made, the value of the work added or omitted should be computed by the architects and the amount added to or deducted from the price, a waiver of the requirements of a written order by the contractor did not relieve a compensated surety from liability."

The waiver of this provision in the contract and bond did not in any way affect the person who furnished the material.

In the case of *Conn et al. v. State ex rel. Stutsman*, 125 Ind. 514, 25 N. E. 443, it appears to have been held, under a statutory bond, with security for the faithful performance of the work and the prompt payment of material and labor debts incurred in the prosecution, and giving laborers and materialmen a right of action on the bond, the sureties were not released from liability to unpaid laborers and materialmen because of alterations made in the contract.

In the case of *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302, which involved an action on a contractor's bond, it was held:

"Such a bond being executed and filed, the principal obligor and the nominal obligee cannot, either by agreement or act, affect the right or interest of the parties really interested in and secured by it, to wit, those doing work on, or furnishing material for, the building. Without the consent of those parties, they cannot discharge it, nor impair its obligation. It is true

such work must be done and material furnished pursuant to—that is, in fulfillment of—the contract between the owner and contractor. Whether, and how far, the terms of the original contract existing when the bond was executed may be changed by them, the building to be constructed continuing substantially the one originally contracted for, without affecting the claims of those doing work, and furnishing material, it is unnecessary to decide. Certainly a mere extension of the time to complete the contract would have no such effect. The work and material would still be done and furnished in fulfillment of the original contract. If the bond were for the performance of that contract, an agreement between the principals, without the consent of the sureties, extending the time for its performance, or changing any of its material terms, might have the effect to discharge the sureties. But this is no such bond. It is not conditioned that the contractor will perform his contract to construct the buildings, but that he will pay for all labor and material which, to fulfill that contract, he employs or procures." "The rights of the real obligees in such bond, to wit, those furnishing material or labor, * * * cannot be affected by any agreement or act of the principal obligor and the nominal obligee."

Similar rulings may be found in *Hohn v. Shideler*, 164 Ind. 242, 72 N. E. 575, and *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 403.

In the case of *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018, the court held, with reference to a provision in the contract as to alterations and changes:

"Doubtless this clause of the specifications was designed to meet and obviate the hardship of the decisions releasing sureties on account of small changes and alterations in the plans and specifications of buildings and other works. To give the language of the provision that effect when used in instruments such as that we are now considering will work no injustice, but, on the contrary, conduce to a fair and equitable administration of justice."

In *Dewey v. State*, 91 Ind. 173, it was held:

"The statute required the bond to be executed, and it was executed, to secure the accomplishment of two purposes, namely: First, the faithful performance and execution of the work by the contractors; and, second, the prompt payment by the contractors of all debts incurred by them in the prosecution of the work, 'including labor, materials furnished, and for boarding the laborers thereon.' * * * With the accomplishment of the second of the purposes, after the taking of such bond, the board of commissioners had nothing whatever to do.

"If the contractors failed to promptly pay such debts, incurred by them in the prosecution of the work, the right of action therefor against them and their bondsmen, under the statute, was in the laborer, materialman, or the person furnishing board to such contractors. * * * This right of action cannot be defeated, * * * by any act done, or omitted to be done, by the board of commissioners of the county."

And again in *Hornel v. American Bonding Company*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, the court says:

"The only basis for this claim found in the record is that changes were made in the work and extras ordered amounting in value to \$1,804.39. Those orders in writing amounted to only \$442.80; but there was evidence tending to show that the whole thereof was audited and allowed by the architect before payment. The contract expressly reserved the right of the owner to make such changes and order extras without limit."

The court concluded:

"If a building contract, the performance of which by the contractor is secured by a bond of guaranty insurance, reserved the right of the owner to make changes in the work and order extras in writing without limitation, the mere fact that such changes are made and extras ordered verbally, but the architect audits and allows the amount thereof before payment, does not release the insurer. [Brandrup v. Empire State Surety Co.] 111 Minn. 376, 127 N. W. 424; [Smith v. Molleson] 148 N. Y. 241, 42 N. E. 669; [Cowles v. U. S. Fidelity & Guaranty Co.] 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838. * * *

"The overwhelming weight of authority supports the proposition that the rule of strictissimi juris, by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies, which make the matter of suretyship a business for profit, that their business is essentially that of insurance, and that therefore their rights and liabilities under their contracts will be governed by the laws of insurance. Hence, as declared in the above decision, if the contract of suretyship is ambiguous, or fairly open to two constructions, it will be construed in favor of the assured."

In the case of *U. S. Fidelity & Guaranty Co. v. United States*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, it is stated in the body of the opinion:

"The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

In the case of *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 90 C. C. A. 274, 279, 163 Fed. 690, the court say:

"Fully recognizing the rule of strictissimi juris as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts underwritten by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, guaranteed by it, operated injuriously to affect its rights and liabilities."

The court then quotes what is above quoted from 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, and continues:

"The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute."

Plaintiff is entitled to recover from the defendant surety company the value of the materials furnished by it for the construction of the building for which the defendant became surety in favor of plaintiff and other materialmen, mechanics, and laborers.

It is therefore ordered, adjudged, and decreed that the judgment in favor of Mrs. Kate Wells be affirmed, and that the judgment in favor of plaintiff and against the Fidelity & Deposit Company of Maryland be amended, by increasing it to \$2,265.87, and, as thus amended, it is affirmed, at the cost of the surety company.

(189 La.)

No. 20523.

BANK OF COUSHATTA v. YARBOROUGH et al.

(Supreme Court of Louisiana. May 9, 1916.)

(Syllabus by the Court.)

1. PUBLIC LANDS \S 61(2) — UNITED STATES LANDS—CONVEYANCE BY STATE.

The approval, by the Secretary of the Interior, of a list of swamp lands, selected for conveyance to the state, under the act of Congress of March 2, 1849, c. 87, 9 Stat. 352, constitutes the title of the state, and, where an entire section is so listed and approved, there is no authority in the register of the land office, to dispose of it as a fractional section, and, still less, to sell the unsurveyed part of such section, uncovered by the recession of water.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. \S 193; Dec. Dig. \S 61(2).]

2. PUBLIC LANDS \S 61(8) — UNITED STATES LANDS—SWAMP LANDS.

When an approved list of swamp lands specifically mentions a whole section, and, the survey having been incomplete, contains the statement that the land area is estimated, an entryman who buys upon the basis of such estimated acreage and under a description calling for all of a "fractional" section acquires no title to the unsurveyed balance of the section, subsequently uncovered by the recession of water.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. \S 203; Dec. Dig. \S 61(8).]

3. WATERS AND WATER COURSES \S 98—RIPARIAN RIGHTS—ENFORCEMENT.

In order to entitle a purchaser of public lands to recover, in his capacity of riparian proprietor, land which is unsurveyed and is uncovered by the recession of water, he must allege and show the existence of the conditions prescribed by law, if such there be, entitling him to recover.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 104; Dec. Dig. \S 98.]

Appeal from Eleventh Judicial District Court, Parish of Red River; *W. T. Cunningham*, Judge.

Action by the Bank of Coushatta against *J. C. Yarborough* and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas W. Nettles, of Coushatta, for appellant. Scarborough & Carver, of Natchitoches, and Foster, Looney & Wilkinson, of Shreveport, for appellees.

Statement of the Case.

MONROE, C. J. Plaintiff brings this suit for the recovery of the "southwest fractional quarter of section 34, township 13 north, range 11 west, containing 151.70 acres, being that part of section 34 lying west of Boggy bayou." It alleges that the property was mortgaged to it to secure a note for \$3,600, executed by R. W. & B. D. Yarborough, that the note was not paid at maturity, and that it foreclosed the mortgage and bought in the property, but that Charles R. and John C. Yarborough have possession and decline to surrender it. It sets up title, through mesne conveyances, under William T. Fortson, who, in 1859, bought from the state of Louisiana warrant No. 7087, for 560 acres of swamp and overflowed land, for which, on July 6, 1859, he is said to have received patent No. 6829, for "all of fractional Sec. 34, T. 13 N., R. 13 W.," containing 560 acres. It alleges, in the alternative, that the property was adjudicated to it for \$2,500; that, after deducting costs, there is a balance of the mortgage debt, still due, of \$1,884.48, for which it has judgment against the original debtors; and, that, if Charles R. and John C. Yarborough ever acquired any title to the property in question, which it denies, such title inured to it, for the reason that R. W. & B. D. Yarborough, its authors in title, purchased said property from John C. Yarborough on January 14, 1905, by an act of sale in which it was erroneously described as "that portion of section 24 lying south of Butler's slough and east of Boggy bayou," when the intention was to "convey all that portion of said section * * * lying north of Butler's slough and west of Boggy bayou," and that said John C. Yarborough warranted the title so intended to be conveyed, and is therefore petitioner's warrantor, and that he having purchased from Charles R. Yarborough, with warranty of title, the latter is also the warrantor of petitioner. Further pleading in the alternative, petitioner alleges that, should the land here claimed be decreed to belong to John C. and Charles R. Yarborough, it should have judgment against them holding said land to be burdened with the mortgage indebtedness of \$1,884.48, with interest, costs, etc., and ordering the property to be seized and sold therefor. And the prayer of the petitioner is in conformity with the allegations.

Defendants John C. and Charles R. Yarborough set up title to the land in question, as having been acquired by Charles R. Yarborough, by patent from the state, of date, February 1, 1907 (an undivided half interest therein having been subsequently sold by him to John C. Yarborough). They deny that there was any error in the description of the land sold by John C. Yarborough to R. W. & B. D. Yarborough, and further deny that Fortson, or any one claiming under him, ever acquired the whole of section 34, or any

part of it to the westward of Boggy bayou, and allege that R. W. & B. D. Yarborough have been discharged in bankruptcy from the claim set up by plaintiff.

It appears, from the evidence, that "John Boyd, deputy surveyor and agent of the state for selecting swamp lands," on June 27, 1850, made a selection of "fractional section 34," as inuring to the state under the act of Congress of March 2, 1849, the list prepared by him containing the statement and figures (under the heading "Area") "Not ascertained," and (under the heading "Remarks by the Register") "542.00." But, according to the certificate from the Department of Interior, of date May 7, 1852, the list that was approved carried section 34 as a whole section, the "estimated area" of which was 560 acres, and it is shown, beyond question, that no survey of the lower half of the section was then made, because it was submerged beneath the waters of Bayou Pierre Lake, nor was the border of the lake meandered. In the course of time, however (probably by reason of work done by the state, the levee boards and the United States), Bayou Pierre Lake appears to have gone dry, or partially so, and in 1906 the Governor ordered the uncovered land in section 34 to be surveyed, after which, on February 1, 1907, he issued the patent to Charles R. Yarborough to "the fractional southwest quarter of section 34 (lake land), * * * containing 151.70 acres, according to the official plat of survey in the state land office."

Mr. W. S. Trichel, called as witness for plaintiff, testified that he made the survey under the authority of the register of the state land office, who had been ordered by the Governor to have the unsurveyed portion of section 34 surveyed; that he found 151 and a fraction acres west of Boggy bayou; that section 34 is a full section of 640 acres; that he had examined the plat of the original survey made by the United States engineer in 1835, and that it shows that no survey was made to the westward of Boggy bayou; that the land dividing the high land in the section from the lake had not been meandered until that work was done by him; that the section lines of the original survey stopped at the waters edge; that, as no line dividing the high land from the lake bottom had been surveyed, the acreage of the land sold to Fortson was, necessarily, estimated, and "there was no acreage given by the government surveys in their returns to the United States."

The register's testimony corroborates that of Mr. Trichel. He says:

"Surveys were made by the United States government of the high land in this section, and the state of Louisiana surveyed the dried lake, or low lands. The United States, however, did not."

He further says that the line dividing the high from the low lands was not surveyed prior to the survey by Trichel, and hence

that in the sale to Fortson the acreage was necessarily estimated.

The patent issued to Fortson was not produced, and the register testified that, prior to November 21, 1861, verbatim copies of the patents issued were not kept in the land office. The record, as copied and produced, shows that the patent in question called for "all of frac'l" section 34, containing 560 acres; but, on the other hand, as we have stated, the section was approved to the state, as a full section, the "estimated area" of which was 560 acres.

Opinion.

No effort was made to sustain, by evidence, plaintiff's allegation that there was error in the description of the land sold by John C. Yarborough to R. W. and B. D. Yarborough, and the questions suggested by that allegation need not be further considered.

[1] Section 34 having been specifically approved to the state as "the whole of section 34," with an "estimated area of 560 acres," the whole of it, surveyed and unsurveyed, immediately fell under the dominion of the state law, as then existing and as thereafter enacted. The act of 1849 provided that lists of swamp lands, selected for conveyance to the state, should be certified by the deputies and surveyor general to the Secretary of the Treasury (afterwards to the Secretary of the Interior), who should approve the same, so far as they were not claimed or held by individuals, "and, *on that approval*, the fee simple to said lands" should "vest in the state of Louisiana, subject to the disposal of the Legislature thereof"; and, further, that:

"In making out a list of those swamp lands subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is of that character, shall be included in said list, but, when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom: Provided, however, that the provisions of this act shall not apply to any other lands, fronting on rivers, creeks, bayous, water courses, etc., which have been surveyed into lots or tracts, under the acts of March 3, 1811, 2 Stat. 602, c. 46, and May 24, 1824, 4 Stat. 34, c. 141," etc.

Upon a copy of one of the plats of survey, filed in evidence, there appears the legend, "All within green lines is swamp land," and the green lines include the west half of section 35 and all of section 34, save the southwest corner, which was then under water; hence, as the section had not been divided into lots or tracts, the law required that the whole of it should be conveyed to the state, "subject to the disposal of the Legislature thereof." Act of Congress of March 2, 1849, c. 87, 9 Stat. 352, to be found in volume 1, Digest to Revised Statutes of Louisiana of 1870, p. 154, and Rev. St. 1870, p. 569.

The Legislature, in 1855 (Laws 1855, No. 247), enacted a law (afterwards incorporated in the Revised Statutes) authorizing the sale of warrants, to be located on the surveyed lands so acquired, and containing the following provisions in regard to lands lying

beneath the waters of shallow lakes, to wit:

"Any shallow lakes which have become the property of the state and are susceptible of being reclaimed, wholly or in part, and not navigable, the area of which has been ascertained by survey recognized by the state, may also be sold under the provisions of this section. No lands shall be sold for less than one dollar and twenty-five cents per acre. The register of the state land office shall procure plats or maps of all swamp lands donated to Louisiana, certified by the surveyor general, and shall mark thereon, on each tract of land purchased, the number of the certificate issued therefor, and shall keep a well bound book in his office, in which shall be entered, in proper form, all the lands thus sold, to whom sold, and for what price, which book and map shall be carefully preserved and shall be deemed official records." R. S. La. §§ 2929, 2930.

[2] A copy of the plat or map of section 34, thus required, was produced by the register, and shows that the upper part of the section, to the north and east, as we take it, of Boggy bayou, was sold for certificate 7087 to W. T. Fortson, and the southwest corner was sold, after the survey by Trichel, for certificate 1806, shown to have been issued to C. R. Yarborough. The official record, therefore, does not, so far, show the sale of the land in dispute to plaintiff's author in title and leaves plaintiff's contention in that respect with no other support than is to be found in the language of the entry upon the books of the land office to the effect that his author acquired "all of fractional section 34" containing 560 acres, but which entry is not shown to be a verbatim copy of the patent to which it refers. That contention is based upon the idea that the state had acquired section 34 as a fractional section, that, as such, it contained 560 acres, and that plaintiff, having acquired all of it, is entitled to 560 acres, whether they were originally to be found in the supposed "fractional section" or not. But the title of the state—i. e., the list as approved by the Secretary of the Interior—showed that section 34 was acquired as a whole, and not as a fractional, section, and the law so required; and the title also showed that there had been but a partial survey, and that the acreage was merely estimated, and could not have been otherwise; and, finally, under the law by which the entryman and the register alike were governed, the register had no authority to sell, or to include in a sale, the submerged and unsurveyed land. The estimation of the acreage, evidently and necessarily, related to the visible land which was assumed to have been surveyed and was taken as constituting all of the supposed fractional section, and, in getting all of that land, the entryman got all that he bargained for, unless he thereby also acquired some right of accretion which would entitle him to part, or all, of the land contained in the whole section, as it might be uncovered and surveyed. He could not have acquired such right, however, because the register could no more have sold that right to him than he could

have sold the unsurveyed land itself, since the owner, the state, had not authorized him to do so.

[3] It is argued here, though we find nothing in the petition on the subject, that the entryman acquired the right of accretion as a riparian proprietor, but it is not clear that the survey upon which his title is predicated extended to the border of the lake. Conceding, arguendo, however, that it did, and that the law which withholds unsurveyed land from sale is not to be considered, the conditions which might entitle plaintiff, as the successor of his entryman, to land uncovered by the recession of the waters of the lake are not shown to have existed. It is not suggested that the land here claimed is alluvion, added to that of which the entryman went into possession, "successively and imperceptibly," by the waters of a river or a stream (as contemplated by C. C. art. 509), nor yet that it is land which has been left dry by running water, retiring, imperceptibly, from one of its shores, and encroaching upon another (within the meaning of C. C. art. 510).

We understand it to have formed the bottom of a shallow lake which has been drained by the act of man and the expenditure of public money, and, in that case, the law has provided for its disposition. The judge a quo rejected plaintiff's demand and dismissed his suit, and for the reasons assigned, his judgment is

Affirmed.

(139 La.)

No. 20721.

REYNOLDS v. BOARD OF COM'RS OF ORLEANS LEVEE DIST.

(Supreme Court of Louisiana. April 24, 1918.
Rehearing Denied May 22, 1918.)

(Syllabus by the Court.)

1. LEVEES §16—CONSTRUCTION—CONTRACT—INTERPRETATION.

The provision in a contract to build a levee that the decision of the executive committee of the levee board on differences arising between the contractor and the board's engineer in charge of the work shall be final and binding upon the parties refers only to matters over which the engineer has supervision and direction by the terms of the contract or by necessary implication.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

2. LEVEES §16—CONSTRUCTION—CONTRACT—VALIDITY.

To hold that the decision of the executive committee of the levee board, party to the contract, on any arbitrary dispute made by the board's engineer or on a dispute upon a matter not under his direction or supervision, is binding upon the contractor, would make the contract depend upon a potestative condition and render it null.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

3. RELEASE §33—OPERATION AND EFFECT—SEVERAL CLAIMS.

The plaintiff, having sued on several claims, does not, by accepting payment of one of them with an express reservation of all his rights in the suit, waive or abandon his right to prosecute the suit on the remaining claims.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 78, 79; Dec. Dig. §33.]

4. LEVEES §16—CONSTRUCTION—CONTRACT—EXTRA WORK.

Where a contract for building a levee provides that the contractor may obtain earth from the adjacent battures, and the contractor has made his bid in contemplation of using the batture, and has gone to considerable expense planking the road to it, and the levee board thereafter deprives him of the use of the batture and compels him to transport earth a greater distance, he is entitled to compensation for the extra cost of transportation.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

5. LEVEES §16—CONSTRUCTION—CONTRACT—"ADJACENT."

The term "adjacent to" is not restricted to the meaning "abutting," "adjoining," "contiguous to," or "bordering upon." It has been held to mean "lying close by," "near to," or "in the neighborhood or vicinity of." Therefore, when the contractor and the engineer of the levee board in charge of the work of building a levee construe the expression in the contract "adjacent battures" to include the batture extending beyond the end of the levee, the contract should be carried out accordingly.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

For other definitions, see Words and Phrases, First and Second Series, Adjacent.]

6. LEVEES §16—CONSTRUCTION—CONTRACT—EXTRA WORK.

Under the provision in a contract to build a levee that, if the executive committee of the levee board deems any change necessary in the extent or location of the levee or in the dimensions or quantity of work required, the contractor shall make the change at the same rate of compensation stipulated in the contract, provided such change shall not exceed 20 per cent. in excess or in diminution of the contract price, the executive committee increased the length of the levee to an extent exceeding 27 per cent. of the original contract price; and the contractor protested against doing the work at the rate of compensation stipulated in the contract for the work originally agreed upon, and did the additional work under protest and reserving his right to demand the actual value of the additional work. *Held*, in a suit on a quantum meruit, the contractor is entitled to recover the actual value of the extra work required of him.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

7. LEVEES §16—CONSTRUCTION—INTERPRETATION OF CONTRACT—"CASUALTY."

Under the provision in a contract to build a levee, whereby the contractor assumes all risks from accidents and casualties of every kind that may occur before the completion and acceptance of the work, the contractor must bear the loss of material and work resulting from a cave or sinking of the ground under the levee before its completion or acceptance.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. §16.]

For other definitions, see Words and Phrases, First and Second Series, Casualty.]

8. LEVEES ~~§~~16 — CONSTRUCTION—CONTRACT—EXTRA WORK.

By the terms of a contract to build a levee the contractor was allowed to use dirt from the adjacent batture. Another contractor employed by the levee board to remove old piling from the river, under the supervision and direction of the board's engineer, and against the protest of the first contractor, used dynamite and caused the batture to recede and be lost. *Held*, the first contractor is entitled to compensation from the levee board for the excess cost of transporting the dirt a greater distance.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 6; Dec. Dig. ~~§~~16.]

(Additional Syllabus by Editorial Staff.)

9. WORDS AND PHRASES—"CATASTROPHE."

"Catastrophe" means a notable disaster; a more serious calamity than might ordinarily be understood from the term "casualty."

Appeal from Civil District Court, Parish of Orleans; T. O. W. Ellis, Judge.

Action by Hampton Reynolds against the Board of Commissioners of the Orleans Levee District. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

James Wilkinson, of New Orleans, for appellant. George H. Terriberry and Parkerson & Parkerson, all of New Orleans, for appellee.

O'NIELL, J. The plaintiff, appellee, is the successor to Reynolds & Co., contractors, who built levees for the defendant under four separate contracts. When the work was completed and accepted by the board of commissioners, the plaintiff demanded compensation for extra work and losses which he claimed had been imposed upon him, amounting to \$40,255.08 in excess of the original contracts. The board of levee commissioners referred the claims to its executive committee, who met and adopted a resolution, referring the matter to the board's attorney, and authorizing him to appoint an expert engineer to examine into the claims and make a report to the board or to the executive committee. It was suggested that Capt. Hardie, a member of the executive committee of the board and city attorney for New Orleans, pass upon the claims as an expert; but he declined on account of his official position, and suggested that the matter be referred to H. S. Douglas for his expert opinion as an engineer. The minutes of the meeting of the executive committee disclose that the plaintiff was present and expressed his willingness to have the matter settled by an expert examination into his claims, and agreed to pay half of the expense.

It appears that the executive committee of the board approved four of the plaintiff's bills, aggregating \$2,385.86, viz.: Bill No. 4, contract No. 2 (for loss of time of the laborers in the plaintiff's employ getting out of the way of dynamite explosions by another contractor who was employed by the

board to remove piling from the river near the new levee), \$1,137.50, and force account bill on contract No. 2, \$99.01, on contract No. 3, \$209.83, and on contract No. 4, \$939.52.

Pursuant to the resolution of the executive committee, the attorney for the board referred the remaining claims to the engineer, H. S. Douglas, for his expert opinion. Thereafter the plaintiff abandoned nine of his claims, aggregating \$17,148.71, and of the remaining claims Mr. Douglas, in a detailed report to the attorney for the board recommended payment of the following, viz.:

(1) Contract No. 2, bill No. 5, for additional cost of hauling 6,000 cubic yards of earth a greater distance than was contemplated in the contract, caused by the alleged arbitrary withdrawal of permission to use the batture near the new levee	\$ 1,500.00
(2) Contract No. 2, bill No. 7, for extra compensation for constructing a levee from the middle of Poland street, that is, from the end of the levee described in the contract, to Kentucky street, the claim being for the difference between the contract price of the work described in the contract and the alleged value of the extra work.....	4,200.00
(3) Contract No. 3, bill No. 1, for the loss of dirt deposited in place by the contractor and lost by the sinking of the foundation (plaintiff claimed \$1,687.50), allowed.....	199.99
(4) Contract No. 4, bill No. 1, for earth lost by the sinking of the levee foundation in the vicinity of Eighth street, 2,700 cubic yards at 90 cents	2,430.00
(5) Contract No. 1, bill No. 5.....	2,039.13
(6) Contract No. 2, bill No. 9.....	3,419.55

Total recommended by Engineer Douglas for payment.....\$13,788.67

Mr. Douglas advised that one of the plaintiff's bills, referred to as contract No. 2, bill No. 6, amounting to \$6,050, be not paid. It is for the loss of 11,000 cubic yards of earth that the plaintiff claims was blown out into the river from the batture in front of the levee between Poland and Mazant streets by the explosions of dynamite used by a contractor employed by the levee board to remove the old piling from the river. The plaintiff contends that it was stipulated in the contract that he might use the batture, and that by the loss of it he was compelled to haul the material a greater distance at an extra cost of 55 cents per cubic yard.

Col. S. F. Lewis, engineer for the levee board, advised the board's attorney that the claims approved by Mr. Douglas should not be paid, excepting the four bills approved by the executive committee, amounting to \$2,385.86. The attorney was of the same opinion, and submitted the matter to the levee board, with the report of Mr. Douglas and with his (the attorney's) advice that only the four bills approved by the executive committee, amounting to \$2,385.86, should

be paid. By a resolution of the board the advice and recommendation of the attorney was approved and adopted.

The plaintiff sued for \$22,224.53; that is, for the claims approved by the executive committee, amounting to \$2,385.86, for those approved by Mr. Douglas, amounting to \$13,788.67, and for bill No. 6, contract No. 2, rejected by Mr. Douglas, amounting to \$6,050. Thereafter the defendant paid the amount of the four bills approved by the executive committee of the board, \$2,385.86, less \$250, being half of the fee of the expert, Douglas; and the plaintiff prosecuted his suit for the balance, \$19,838.67.

Judgment was rendered in favor of the plaintiff for \$14,379.98, with legal interest from judicial demand. The district judge did not state in his reasons for judgment what claims were allowed or rejected; but, as the difference between the amount claimed by the plaintiff and the amount of the judgment is \$5,458.69, and the sum of the two bills, contract No. 1, bill No. 5, \$2,039.13, and contract No. 2, bill No. 9, \$3,419.55, amounts to \$5,458.68, it is assumed that the district judge rejected these two items, and that the judgment contains an error of one cent in the addition of the remaining items. The defendant has appealed, and, as the plaintiff has neither appealed nor answered the defendant's appeal, the claims referred to as contract No. 1, bill No. 5, \$2,039.13, and contract No. 2, bill No. 9, \$3,419.55, are eliminated from the case.

Opinion.

[1] The defendant contends that the ruling of the executive committee was binding upon the parties to the contracts and is not subject to review by the courts, under the following stipulation in each contract, viz.:

"Should differences arise between the contractor and the engineer in charge, the matter shall be submitted to the executive committee of the board, whose decision shall be final and binding upon the parties."

The plaintiff contends that the foregoing clause refers only to disputes or differences as to matters over which the engineer is given authority within the terms of the contract, and particularly the following provisions, viz.:

"The work shall be done under the direction and supervision of the engineer designated by the board, whose directions shall be complied with, and of such local inspectors as may be appointed by the board of commissioners. He shall have the right to condemn all work not in accordance with the spirit or text of this agreement, or which shall not be in accordance with the dimensions, locations, and methods of construction prescribed by him or provided in these specifications."

Construing similar clauses in a contract, in the case of *Shea v. Sewerage & Water Board*, 124 La. 290, 50 South. 166, it was held that they meant merely that the engineer was to be the judge of the manner of doing the

work, and had final authority only to decide whether the contractor complied with the specifications and to condemn his work if he did not comply.

[2] It is not legally possible to hold that the clause, "Should differences arise between the contractor and the engineer in charge, the matter shall be submitted to the executive committee of the board, whose decision shall be final and binding upon the parties," meant that the engineer could arbitrarily dispute any claim of the contractor, that the board of levee commissioners or its executive committee could arbitrarily maintain the engineer's contention, and that their ruling could not be questioned. That construction of the contract would make it depend upon a potestative condition, and would characterize it as a nudum pactum, because the fulfillment of the obligations of the board of levee commissioners would then depend upon the will of its own engineer and executive committee. Such a potestative condition, as defined in article 2024, R. C. C., would render the contract null, in the terms of article 2034, R. C. C.

Such clauses in a contract are valid and binding upon the parties in so far as they make the representative of one of the parties the sole and final arbiter of the matters to which his authority is limited in the terms of the contract. That is as far as the authorities cited by the learned counsel for the levee board go. They all qualify their opinion that such a clause in a contract is valid and binding with a proviso; e. g., unless legal cause for refusing to abide by the ruling of the arbiter is shown, or unless fraud or collusion or an arbitrary ruling, or a gross mistake implying bad faith on the part of the arbiter, is shown by the complainant. The questions whether the dispute is within the jurisdiction conferred upon the arbiter by the terms of the agreement and whether his ruling was so arbitrary as to amount to fraud or bad faith are for the courts to decide.

The defendant's counsel relies upon the ruling in *McNamara v. Board of Commissioners of the Tensas Basin Levee District*, 44 La. Ann. 829, 11 South. 278, to the effect that the only relief afforded the contractor when he objected to a change in the extent or location of the levee, as directed by the engineer of the levee board, was by the terms of the contract an appeal to the state board of engineers. In that case, however, the complaint was as to a matter within the authority or jurisdiction conferred upon the engineer by the terms of the contract; and the tribunal that was made the final arbiter of the dispute in that case was not the executive committee of the contracting levee board, but the state board of engineers.

[3] The defendant's attorney also contends, though perhaps not so confidently, that by accepting the \$2,385.86 paid by the levee board after the suit was filed the plaintiff

waived all other demands. The receipt bears this reservation, signed by the plaintiff and by the former attorney for the defendant, viz.:

"This receipt is made and given without prejudice to the rights of either party to the above-mentioned suit, and it is agreed by the plaintiff that it shall have the same effect as if legal tender of the above-mentioned amounts had been deposited in the registry of the court."

The "above-mentioned suit" referred to the caption of the receipt, viz.:

"No. 91,581, Division A, Civil District Court. Reynolds & Company versus Board of Commissioners of the Orleans Levee District."

If the amount paid had been deposited into the registry of the court, it would not have defeated the plaintiff's right to proceed with his suit on the disputed claims. The purpose expressed in the receipt was to avoid the very consequence now claimed by the defendant; and we see no reason of law or equity for holding that they did not avoid it.

[4] Taking up the disputed claims in their proper order, the first is on contract No. 2, bill No. 5, for additional cost of hauling 6,000 cubic yards of earth a greater distance than was contemplated in the contract, caused by the alleged arbitrary withdrawal of permission to use the batture adjacent to the old levee.

[5] The batture in question was not directly in front of the old levee, or between it and the river, but extending beyond the end of the levee. The contract provided:

"A portion of the earth for this levee can be obtained from the old levee and adjacent battures."

The plaintiff construed the expression "adjacent battures" to include the batture extending beyond the end of the old levee as well as that directly in front of it. The meaning of "adjacent to" has not been restricted to *abutting, adjoining, contiguous to, or bordering upon*; it has been held to mean *lying close by, near to, or in the neighborhood or vicinity of*. See *Corpus Juris*, vol. 1, p. 1194 et seq. The engineer of the levee board gave that liberal construction to the term and agreed that the plaintiff might use the batture beyond the end of the levee. In consequence of this agreement, the plaintiff spent about \$600 building a plank run for conveying the dirt to the new levee. There is no dispute that after the plaintiff began using the batture he was stopped by the defendant and was compelled to haul the earth a greater distance at an extra cost of \$1,500. We agree with the district judge that this was not a matter on which the ruling of the executive committee of the defendant board was final and conclusive.

[6] The claim of \$4,200 referred to as contract No. 2, bill No. 7, is for extra compensation for building the extension of the levee from one of the limits fixed in the contract; that is, from the middle of Poland street to Kentucky street. The specifications annexed to the contract called for a levee "about 1,

000 feet in length, commencing near the lower side of Mazant street, and running down stream to the center of Poland street." There is a clause in the contract as follows, viz.:

"Should the executive committee deem any changes necessary in the extent or location of the levee, or in the grade line, dimensions, or quantity of work required, such change shall be made by the contractor at the same rate of compensation as hereinafter stipulated, provided such change shall not exceed 20 per cent. in excess or in diminution of the contract price."

The defendant contends that the executive committee had the right, under the clause quoted, to change the extent and location of the levee and increase its length and the quantity of work required, as it did, by ordering the plaintiff to continue the levee from the center of Poland street to Kentucky street, and that the contractor was bound to build the additional length of the levee at the same rate of compensation stipulated in the contract. The rate of compensation stipulated in the contract was 90 cents per cubic yard. The evidence shows that it was worth \$1.15 per cubic yard to build the additional length, because the conditions regarding accessibility of material were less favorable to the contractor, especially after the defendant withdrew permission to use the batture below Poland street. The increase in the length of the levee required 16,800 cubic yards more earth, for which the plaintiff makes an extra charge of 25 cents per cubic yard. The evidence fully justifies the extra charge, if the plaintiff was not bound to build the additional length of levee at the rate of compensation stipulated in the contract. Whether he was or was not so bound depends upon whether the change in the length of the levee required by the executive committee came within the right to require any change in the extent or location of the levee or in the dimensions or quantity of work required at the same rate of compensation, not exceeding 20 per cent. in excess of the contract price. The change required by the executive committee was nothing more nor less than an increase in the extent in one of the dimensions of the levee and in the quantity of work required. But the cost exceeded 20 per cent. of the contract price. The total yardage paid for under contract No. 2 was 77,300 cubic yards. The contract originally required only 60,500 cubic yards; hence the increase in the length from the middle of Poland street to Kentucky street made the cost exceed the contract price by 27¼ per cent. The extension of the length of the levee from the center of Poland street down to Kentucky street was not provided for in the contract; and the plaintiff was not bound to do the work at the same rate of compensation stipulated in the contract for building the levee that was described in the contract. The defendant was not entitled to have 20 per cent. additional work done at the rate of compensation stipulated in the contract and 7¼ per cent.

of it at its actual value, because the plaintiff was not bound to do the extra work, exceeding by more than 20 per cent. the original work, at any rate of compensation; and it is not to be presumed that the executive committee would have required him to extend the length only 20 per cent. at the rate of compensation stipulated in the contract. At any rate, the executive committee did not require him to increase the length (and consequently the cost) only 20 per cent., and that was the limit of their right to increase the work to be done. The plaintiff protested against building the levee from the center of Poland street to Kentucky street, and did the work under protest, with reservation of his right to demand the actual value of the work, and only to avoid having the defendant undertake it and charge the excess cost to him. Our conclusion is that the decision of the executive committee as to this claim was not final or conclusive, and that the judgment allowing the claim is correct.

[7, 8] The claims designated as contract No. 3, bill No. 1, for \$199.99, and contract No. 4, bill No. 1, for \$2,430, are for the loss of earth deposited in place and lost by the sinking of the foundation. In our opinion, the sinking of the ground under the levee was an accident or casualty, for which the contractor assumed the risk, in the following provision in the contract, viz.:

"The contractor takes all risks from accidents, floods, and casualties of every kind which may occur before the completion and acceptance of the work, and shall sustain all damages and injury that may be caused thereby."

The sinking of the ground under the levee occurred before the completion or acceptance of the work, and the resulting loss must be borne by the plaintiff. The expert engineer to whom the claims were submitted approved these items on the ground that the caving of the foundation was a catastrophe, and not a casualty. Our understanding of the word "catastrophe" is that it means a notable disaster; a more serious calamity than might ordinarily be understood from the term "casualty"; but the assumption of all risks from accidents and casualties of every kind was intended to include, and must be held to include, an accident, casualty, disaster, or calamity so serious and important that it might be termed a "catastrophe." Our conclusion is that these two claims should have been rejected.

[8] The claim designated as contract No. 2, bill No. 6, for \$6,050 for the loss of 11,000 cubic yards of material in the batture in front of the levee between Poland street and Mazant street by the explosion of dynamite used in removing piling, is resisted on the ground mainly that the damage was done by an independent contractor, for whose fault the defendant denies responsibility. The evidence sustains the allegations that the dynamite explosions caused the batture to sink;

that more than 11,000 cubic yards of material that was available under the terms of the contract was lost; and that the plaintiff was compelled to transport that amount of dirt from a place near Audubon Park, at an extra cost of 55 cents per cubic yard. It is argued by the defendant's counsel that the levee board did not direct the contractor employed to remove the piling to use dynamite, and that the plaintiff did not complain to the contractor of his using dynamite instead of pulling out the piling. This is true; but it is also true that the engineer of the levee board supervised and had authority to direct the manner of removing the piling, and that the plaintiff complained to the levee board while the blasting was going on. The contractor employed to remove the piling was not at fault for using dynamite so long as the engineer of the levee board permitted its use. The defendant was at fault for permitting another contractor to violate a right that had been granted to the plaintiff under his contract. The defendant acknowledged a degree of responsibility in this respect by paying for the time lost by the plaintiff's employees in getting out of the way of the blasts of dynamite. Our opinion is that the claim for loss of material by the destruction of the batture was a matter of which the decision of the executive committee of the levee board was not final or conclusive, and that the claim was properly allowed by the district court.

For the reasons assigned, it is ordered and decreed that the judgment appealed from be amended by reducing the amount from \$14,879.98 to \$11,849.99. As thus amended, the judgment is affirmed; the costs of the appeal to be borne by the appellee.

(139 La.)

No. 20899.

CITY OF SHREVEPORT v. CHATWIN (two cases). SAME v. VICTORIA LUMBER CO. SAME v. ROBINETTE.

(Supreme Court of Louisiana. April 24, 1916. Rehearing Denied May 22, 1916.)

(Syllabus by Editorial Staff.)

1. MUNICIPAL CORPORATIONS \S 365—PUBLIC IMPROVEMENTS—ACCEPTANCE—EFFECT.

An acceptance of paving work by the city authorities was binding upon the property owners, in the absence of fraud or error.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 898; Dec. Dig. \S 365.]

2. ESTOPPEL \S 114—PLEADING.

It is not necessary to plead an estoppel in avoidance of a defense alleged by answer.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 304; Dec. Dig. \S 114.]

3. MUNICIPAL CORPORATIONS \S 282(1)—PUBLIC IMPROVEMENTS—SPECIFICATION OF MATERIALS.

Where one part of a street needs to be more solid than another, the city council has the authority to adapt specifications for paving

work to such need, though the material in that part is more expensive than in the other part.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 750; Dec. Dig. § 282(1).]

4. MUNICIPAL CORPORATIONS §571 — ENFORCING COST OF IMPROVEMENT—REVIEW—MATTERS NOT URGED BELOW.

In a city's suit for the cost of paving a street in front of defendants' abutting lots, the ground that, as a street railroad chose to make its roadbed 19½ feet wide instead of 16 feet, as previously, its proportion of the cost of paving should be increased accordingly, not urged in the pleadings, will not be considered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1285; Dec. Dig. § 571.]

5. MUNICIPAL CORPORATIONS §568(2)—PUBLIC IMPROVEMENTS—ASSESSMENT—EVIDENCE.

Evidence as to the width of the street railway's roadbed was admissible in support of the claim that 30 cents per yard of the cost of the concrete under the roadbed should be deducted from the general cost of the pavement and charged to the railway alone.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1282; Dec. Dig. § 568(2).]

6. PLEADING §387 — ISSUE — ENLARGEMENT BY EVIDENCE.

Evidence received without objection enlarges pleadings only when it would not have been admissible if objected to.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.]

Appeal from the First Judicial District Court, Parish of Caddo; John R. Land, Judge.

Separate suits by the City of Shreveport against A. G. Chatwin, Sam Chatwin, the Victoria Lumber Company, and W. E. Robbinette. Cases consolidated, and judgment for the plaintiff, and defendants appeal. Affirmed. Cases transferred to the Supreme Court of Louisiana by the Court of Appeal, Second Circuit.

Blanchard & Smith, of Shreveport, for appellants Chatwin and others. Lewell C. Butler, City Atty., of Shreveport, for appellee.

PROVOSTY, J. The defendants in these several consolidated cases are sued for their proportion of the cost of paving the street in front of their abutting lots.

[1] They resist the payment upon the ground that the work was not done according to contract, in that many of the wooden blocks which the pavement was made of were not properly creosoted, and were laid at right angles to the curb, instead of diagonally, as required by the specifications.

The work was accepted by the city authorities. This acceptance is binding upon the property owners in the absence of allegation of fraud or error (*Kelly v. Chadwick*, 104 La. 719, 29 South. 295; *Moody v. Spotorno*, 112 La. 1008, 36 South. 836); and no such allegation is made by defendants.

The learned counsel for defendants review in their brief the several decisions of this court in which that doctrine has been an-

nounced, and say that the announcement was unnecessary for the decision of the cases, and was therefore obiter dictum. But that doctrine is well settled in jurisprudence, and would have to be applied here as good law even if it had not been heretofore declared by this court to be such.

[2] Again, counsel say that this doctrine is based on estoppel, and estoppel was not pleaded by plaintiff. It did not need to be. *Keystone Life Ins. Co. v. Von Schlemmer*, 122 La. 280, 47 South. 606.

[3] Another ground is that the specifications call for a kind of concrete for the foundation under the roadbed of the street railway costing at least 30 cents per yard more than that under the rest of the street, and that this extra expense should have been charged to the railway company and not to the general cost of the pavement.

It seems that this better quality of concrete was thought to be necessary for that part of the street in view of the heavier traffic upon it.

We can see no reason why, if one part of a street need to be more solid than another, the city council should not have authority to adapt the specifications to this need. For illustration, if the greater part of the heavy hauling upon the street were known to go one way, and therefore to pass over a particular side of the street, there ought not to be any reason why that side should not be made stronger.

[4] Another ground sought to be relied on is that, the railroad having chosen to make its roadbed 19½ feet wide, instead of 16 feet as heretofore, its proportion of the cost of the paving should be increased accordingly.

This ground is not urged in the pleadings, and therefore cannot be considered.

[5, 6] Counsel say that the pleadings have been enlarged by evidence received without objection showing this increased width.

But evidence received without objection enlarges pleadings only when it would not have been admissible if objected to; whereas the evidence thus relied on as having enlarged the pleadings, which is the evidence as to the width of this roadbed, was admissible in support of the claim that 30 cents per yard of the cost of the concrete under this roadbed should be deducted from the general cost of the pavement and charged to the railroad company alone.

Judgment affirmed.

(139 La.)

No. 21795.

CARTER v. VEITH et al.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

MARRIAGE §54—VALIDITY—COLLATERAL ATTACK.

Marriage between persons of the white and colored races is prohibited in this state, as a

matter of public order and policy, and such a contract is absolutely null, requires no direct action to set it aside, and may be attacked by the party to whom it is opposed by way of exception or defense, whenever and wherever it is set up.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 93-103, 105, 106, 109; Dec. Dig. § 54.]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Mrs. Georgia Carter against Mrs. Phillip Veith and others. From a judgment for defendants, plaintiff appeals. Judgment annulled, and case remanded.

Florence Loeber, of New Orleans, for appellant. Johnston Armstrong, of New Orleans, for appellee Mrs. Veith. Legler & Gleason, of New Orleans, for appellee Mary Vivian Carter.

Statement of the Case.

MONROE, C. J. Plaintiff brought this suit as "Mistress Georgla Carter," and, being called on to declare whether she was married or unmarried, declared that she was unmarried. On the trial it was shown that a marriage had been celebrated between her and Charles F. Mermellion, in Covington, La., on July 15, 1912. She then offered evidence the purpose of which was to show that, though she is a white woman, Charles F. Mermellion is a man of color.

It was admitted:

"That at the time the marriage ceremony was performed by the minister under a license declaring both parties to be white persons, and also that the marriage at that time was in good faith, without knowledge of the defect subsequently discovered."

Defendants objected that the marriage could not be attacked collaterally. The trial court sustained the objection, and dismissed the suit "for want of authority in the plaintiff to stand in judgment." Plaintiff has appealed.

Opinion.

The ruling complained of was erroneous. Our law declares that:

"Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void." Act 54 of 1894.

Civil Code 1825, art. 95, contained a similar prohibition in which the word "nullity" was used, but which did not contain the words "and such celebration carries with it no effect and is null and void." This court nevertheless, in a case quite similar to this, said:

"The prohibition contained in this article is one eminently affecting the public order. Hence the nullity declared by the same is absolute, and cannot be cured by ratification. The law is of that rigorous nature that it will not permit a marriage to exist between persons of two different races for a moment. No suit is needed to declare the nullity of such an union. Either

party may disregard it, and neither can pretend to derive from it any of the consequences of a lawful marriage. Hence the defendant was at liberty to show the absolute nullity of the pretended marriage whenever it was opposed to her, without the necessity of having previously brought an action to annul that which our law declares can have no existence." Succession of Minvielle, 15 La. Ann. 342.

In *Summerlin v. Livingston*, 15 La. Ann. 519, there was involved mainly the settlement of the community which had existed between Aaron Livingston and his deceased wife. The court said:

"At the threshold of the investigation * * * our attention is arrested by two bills of exception taken by the counsel for the defendant Livingston. Both of these relate to a ruling of the district judge with regard to the right of the surviving spouse to assail the validity of his marriage to the deceased. Application was made on the defendant's behalf to amend the original answer, in order to enable him to * * * prove that at the time of his marriage with the deceased the latter was a married woman, and had on that occasion been guilty * * * of bigamy."

The court held that the amendment should have been allowed, even although the defendant knew of her previous marriage at the time of his marriage to his deceased wife (which was not shown to have been the case), saying (*inter alia*):

"Persons legally married are until a dissolution of the marriage incapable of contracting another, under the penalties established by the laws of this state." * * * The nullity of such a contract is absolute; as it contravenes the policy of the law, and, besides, subjects the guilty party to a criminal prosecution. Such nullities are not even susceptible of confirmation or ratification, whether express or implied. * * * Nor is it necessary that a direct action be instituted for the purpose of setting aside the contract; its nullity may be demanded by way of exception or defense. * * * No doubt, the parties entered into the bonds of matrimony; but, if one of them was at the time incapacitated by a previous marriage, the second contract, although clothed with the forms of law, was radically null and void. It is true that such a contract may produce civil effects; but this takes place by special provision of law, and only in favor of the party who acted in good faith, and in favor of the children born of the marriage. * * *

"But even then the contract itself has in other respects no vitality; and in legal parlance the parties have never been married."

See, also, *McCaffrey v. Benson*, 38 La. Ann. 198; *Dupre v. Ex'r of Boulard*, 10 La. Ann. 411; *Succession of Gabisso*, 119 La. 704, 44 South. 438, 11 L. R. A. (N. S.) 1082, 121 Am. St. Rep. 529, 12 Ann. Cas. 574.

The case entitled "*Succession of Francois Lacroix, on Question of Heirship*," No. 6357 of the docket of this court (not reported), has no immediate bearing upon the issues here presented; the question there considered being whether the child of a void marriage could take by inheritance from the father when the mother contracted the marriage in ignorance of the impediment.

It is therefore ordered that the judgment appealed from be annulled, and the case remanded to the trial court, to be there proceeded with according to law and to the view

hereinabove expressed; defendant to pay the costs of the appeal, and those of the district court to await the judgment on the merits.

O'NIELL, J. (dissenting). The majority opinion and decree rendered in this case is in direct conflict with the doctrine of the majority opinion and decree rendered in the case of *State v. Donzi*, 133 La. 925, 63 South. 405, and is not supported by the doctrine of any of the cases cited, viz.: *Succession of Minvielle*, 15 La. Ann. 342; *Summerlin v. Livingston*, 15 La. Ann. 520; *McCaffrey v. Benson*, 38 La. Ann. 198; *Dupre v. Executor of Boulard*, 10 La. Ann. 411; *Succession of Gabisso*, 119 La. 704, 44 South. 438, 11 L. R. A. (N. S.) 1082, 121 Am. St. Rep. 529, 12 Ann. Cas. 574.

In the case of *State v. Donzi*, the defendant was prosecuted for deserting and neglecting to support the prosecutrix, who claimed to be his wife. The statute under which he was prosecuted (Act No. 34 of 1902, p. 42) denounced as a crime a man's deserting his wife or minor children in destitute or necessitous circumstances, or willfully neglecting to provide for their support without just cause. The defendant offered to prove as a "just cause" for his not supporting the prosecutrix that she was not his wife, that she was married to another man when she and the defendant went through the ceremony of the marriage on which the prosecution was based, and that the alleged marriage was therefore null. He also offered in evidence the record of a suit which he had filed against the prosecutrix in the civil district court to have the bigamous marriage decreed null. The evidence was excluded by the criminal district court on the ground that the defendant could not show the nullity of his marriage in a collateral proceeding. The defendant applied to this court for writs of certiorari and prohibition directed to the criminal district judge and the district attorney. The writs were denied and the ruling of the trial judge was affirmed on the ground that the marriage had not been judicially decreed null, and that the only evidence of the nullity of the marriage that would be admissible as a defense in the criminal prosecution would be a decree of nullity rendered by a court of competent jurisdiction. The syllabus of the decision, in harmony with its text, is as follows:

"In a suit against the husband for wife desertion under Act No. 34 of 1902, p. 42, it is incompetent for the accused to offer evidence going to show the nullity of the marriage between him and his wife, except by the offer of the record and the final judgment of a court of competent jurisdiction decreeing said marriage to be null."

The provision of article 12 of the Civil Code that whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed, does not mean that either party to a contract apparently valid can arrogate to himself or herself

the province of pronouncing its nullity on his or her private knowledge of an extraneous fact rendering it null.

In each of the cases cited in the majority opinion in this case, *Succession of Minvielle*, *Summerlin v. Livingston*, *McCaffrey v. Benson*, *Dupre v. Executor of Boulard*, and *Succession of Gabisso*, the proper parties were before the court, and, by proper allegations, the nullity of the marriage in each case was urged as a defense to the suit on the null contract. All of these decisions therefore rest upon a doctrine embodied in our Code of Practice (article 20), viz.:

"He who has a right of action to claim what is due to him has a right yet more evident to use the same cause of action as an exception, in order to preserve his rights."

He who has a right of action to have a contract decreed null has a more evident right to rely upon the nullity as a defense to a suit on the null contract.

The suit in the *Succession of Minvielle* was entitled *R. Domec v. L. Barjac, Executor, and Cora Lalande, f. w. c.* The defendant *Cora Lalande, f. w. c.*, had a judgment against the succession of *M. Minvielle* for a sum of money. *R. Domec* proceeded by rule against *L. Barjac*, executor of the succession of *Minvielle*, to collect the money, alleging that he was the husband of *Cora Lalande* and was entitled to receive the money, as the head and master of the community. The executor answered, saying that he was only a stakeholder, and that *Cora Lalande* should be made a party defendant in the suit. She was cited to defend the suit, and in her answer she alleged that the plaintiff, *R. Domec*, was a white man, and that she was a mulattress, and that the alleged marriage was therefore null and did not produce a community of acquêts and gains. The plaintiff had caused to be published in a newspaper called the *Bee* a declaration that *Cora Lalande* was a colored woman, that the marriage was therefore null, and that she had no right to bear the name *Madame Domec*. Hence there was no dispute of the fact that caused the nullity of the marriage. The plaintiff relied upon the proposition that the other party to the contract of marriage could not assert its nullity as a defense to his suit on the contract.

Chief Justice Merrick, for the court, applied the doctrine of article 20 of the Code of Practice, saying:

"The defendant was at liberty to show the absolute nullity of the pretended marriage whenever it was opposed to her, without the necessity of having previously brought an action to annul that which our law declares can have no existence."

But that was far from saying that either party to the contract was at liberty to show its absolute nullity, as plaintiff in a suit having no relation whatever to the question of validity or invalidity of the marriage.

In the next case cited, *Mary Summerlin et al. v. A. Livingston et al.*, 15 La. Ann. 520,

after the marriage had been dissolved by the death of the wife, her heirs sued the surviving husband for a settlement of the community. It was held that he had the right, after having answered the suit, to amend his pleadings to allege and prove that the deceased spouse was married to another man when he and she went through the ceremony of the marriage on which the suit was founded, and that the marriage was therefore null from the beginning, and that there had been no community of acquêts and gains. As an estoppel to that defense the plaintiffs invoked the maxim, "*allegans suam turpitudinem non est audendus*." On these issues Mr. Justice Voorhies, for the court, said:

"Such nullities are not even susceptible of confirmation or ratification, whether express or implied. * * * Nor is it necessary that a direct action be instituted for the purpose of setting aside the contract. *Its nullity may be demanded by way of exception or defense.* See the case of *Domec v. Barjac and Lalande*, 15 La. Ann. 342. It is true that, if the defendant was at the time aware of the condition of the deceased, and of her incapacity to enter into the bonds of matrimony, his course in marrying her was highly immoral and reprehensible. The record does not give any information on this subject; but at all events, *although the party could not avail himself of his own turpitude as a basis for a demand, yet he is not estopped when he resorts to it for purposes of defense.*"

I have underscored the expressions showing the true doctrine on which the decision rests; that is, that the nullity of a marriage may be resorted to *as a defense* to a suit depending upon the validity of the contract, although it could not be used by either party to the contract for purposes of offense, or as a means of attack, except in a direct action against the other party to the contract to have it decreed null.

Both of the decisions cited above were referred to approvingly in *McCaffrey v. Benson*, 38 La. Ann. 198; but in that case also the nullity of the marriage was set up by one of the spouses *as a defense* to a suit by the other spouse on the null contract.

In the next case cited, *J. P. M. Dupre v. Executor of Succession of Marie Elizabeth Boulard et al.*, 10 La. Ann. 411, the right of the defendants to set up the nullity of the marriage as a defense to the suit on the null contract was not questioned. The printed report of the decision does not disclose the nature of the proceedings; but the original record No. 3743 in the archives of this court shows that Jean Pierre Michel Dupre, a white man, sued the heirs of the deceased colored woman, Marie Elizabeth Boulard, and the executor of her succession, on what purported to be a marriage contract executed in Paris, France. In defense of the suit the executor and heirs set up the nullity of the marriage, and their right to allege and prove the nullity was not questioned, as far as the record discloses.

In the next and last case cited, *Succession of Gabisso*, 119 La. 704, 44 South. 438, 11 L. R. A. (N. S.) 1082, 121 Am. St. Rep. 529, 12

Ann. Cas. 574, the nullity of the marriage was set up by the heirs of the deceased spouse, as a defense to the suit by the surviving spouse on the null contract. All parties at interest were parties to the suit. The plaintiff, Mrs. Louise Cuevas, on behalf of her two minor children, brought suit against the six brothers and sisters, heirs at law, of Louis Frigerio, predeceased son of Mrs. Catherine Gabisso Frigerio, alleging that she (the plaintiff) was the widow of Louis Frigerio, and that their children were entitled to one-seventh of the estate of their grandmother, by representation of their father. The defendants alleged in their answer, and proved on the trial, that the alleged marriage on which the suit was founded was absolutely null, for two reasons: First, because the plaintiff was a colored woman and the alleged husband was a white man; and, second, because she had been condemned as the accomplice in adultery in a judgment of divorce rendered against Louis Frigerio in favor of Emma Rochat, to whom Louis Frigerio was married before he commenced cohabiting with Louise Cuevas. The right of the defendants to assert the nullity of the alleged marriage as a defense to the suit founded upon it does not appear to have been questioned by the counsel for the plaintiff.

The dissenting opinion in the case first cited above, *State v. Donzi*, is also supported by the doctrine that, although the nullity of a contract of marriage *prima facie* valid cannot be invoked by either spouse for purposes of offense or attack except in a direct action of nullity against the other spouse, the nullity may be resorted to *in defense* of an action depending upon the validity of the contract. The majority opinion in *Donzi's Case*, however, cannot possibly be reconciled with the doctrine expressed in the majority opinion in the present case. In *Donzi's Case* the court would not permit the defendant to show the nullity of his marriage in defense of a prosecution depending absolutely upon the validity of the marriage. I do not concur in that opinion. In the present case one of the spouses is permitted to show the nullity of her marriage, as plaintiff in a suit, in which the question of validity or invalidity of her marriage was not a necessary issue; and she is permitted to present this collateral question for adjudication on the allegation merely that she is a single woman, without alleging that there was a null marriage, or the cause of nullity, and without making the other party to the contract a party to the suit.

In the case of *Virginia Knaps v. Auguste Graugnard*, 10 Rob. 22, the defendant had obtained a divorce from the plaintiff in a former suit on account of her adultery with one Henry Knaps, whom she afterwards married in Mississippi. Thereafter she sued her former husband, without the authorization of her second husband, to recover the money which she had brought into the first mar-

riage. The defendant excepted to the suit that she was not authorized to prosecute it or to stand in judgment. On the trial of the exception the defendant, exceptor, introduced in evidence the record of the marriage of the plaintiff to Henry Knaps. The plaintiff then offered in evidence the judgment of divorce rendered against her in favor of Auguste Graudnard, naming Henry Knaps as the correspondent, in order to show that her subsequent marriage was absolutely null, because it violated a prohibitory law (now section 1197 R. S.; article 161, R. O. C.) declaring that in case of divorce on account of adultery the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under penalty of nullity of the new marriage. The defendant's objection to the testimony was overruled by the district judge, and the evidence was admitted. On appeal the ruling was reversed, the defendant's exception was maintained, and the plaintiff's suit was dismissed because she was not authorized to prosecute the suit or stand in judgment. That decision is indeed an exact precedent for the ruling of the trial judge in the present case.

In the case before us it was admitted that the plaintiff was married to Charles F. Mer-million by a minister of the gospel, under a license declaring that both parties were of the white race, and it is admitted that both parties were in good faith. The ceremony was performed by an Episcopal clergyman at the residence of the bride's mother in Covington, La. There are two children issue of that marriage.

I cannot reconcile my mind to a doctrine that will permit the wife, as plaintiff in this suit, to which her husband is not a party, to disregard her marriage, merely because she believes that her husband has negro blood in his veins, and have the court judicially declare that her marriage is null, that the man whom she has solemnly acknowledged to be her husband has been only her colored paramour, and that their children are illegitimate colored children.

What may be the result if the court should conclude from the evidence in this case that the plaintiff's husband has an appreciable mixture of negro blood in his veins and should declare the marriage null? Would the question, so important to him and his children, be res judicata in an action hereafter by the wife against her husband, or vice versa, to have the marriage judicially decreed null? If not, and if the court should hereafter find that the husband is a white man and that the marriage is valid, what will be the effect on the judgment in the present suit? A judgment rendered against a married woman not authorized to stand in judgment, like a judgment rendered without citation, is as null and void as is a marriage between a

white woman and a man of color. *McInnis v. Wingate*, 138 La. 682, 70 South. 611. Therefore, if a judgment declaring the marriage null, or assuming it to be null, will not be final and conclusive on that collateral question in this case, neither will the judgment on the main issue be final or conclusive.

My understanding of the law that a marriage between a white person and a person of color is absolutely null is that, when the fact is legally established that one of the contracting parties is of the white race and that the other is of the colored race, the contract is not merely voidable, but void, and that a judicial decree of nullity will not merely annul the marriage, but will declare that it was null from the beginning. But the word "absolute," in that sense, does not mean *without proof*. The distinction between void contracts and voidable contracts, as absolute nullities and relative nullities, in the Spanish law, was made between those affecting the public, which were forbidden by statute, and those affecting only the parties to them. In that sense a marriage that is forbidden by statute is an absolute nullity, because it is a matter in which society has an interest.

The majority opinion and decree rendered in this case, in effect, treats the supposed absolute nullity of the marriage as a nullity apparent on the face of the instrument relied upon to prove the contract. *Corpus Juris*, vol. 1, p. 360, informs us that, although the word "absolute" has been given that meaning in a number of cases cited, it does not necessarily mean "independent of anything extraneous." In fact, it has no fixed or definite meaning. The author cites a long list of decisions showing that the word "absolute" generally means *complete, perfect, positive, unconditional, etc.*, but has been given such various and indefinite meanings that resort must always be had to the context of the sentence and its subject to ascertain the exact meaning of the word. *Cyc.* vol. 40, p. 214, defines the word "void" as absolutely null; without legal efficacy; ineffectual to bind parties or to convey or support a right; that which is incapable of enforcement and cannot be ratified or confirmed; of no legal force; of no effect whatever; null and incapable of confirmation or ratification. The author then defines the word "voidable" as *capable of being avoided or confirmed*, and adds that the words "void" and "voidable" have been used with so little discrimination or precision that much confusion has resulted. But the author does not define the word "void" or the term "absolutely null" as *null on its face*.

That a marriage between a white person and a person of color is an absolute nullity does not mean that the fact that gives rise to the nullity—the difference in the race of the contracting parties—need not be proven, or that the parties to the contract are not entitled to be heard on that question of fact.

The presumption is that the plaintiff's marriage is valid, although it was said in the case of *Sam Lee and Wife v. N. O. G. N. Railroad Co.*, 125 La. 240, 51 South. 184: "On the question of race there is no legal presumption either way." In that case the plaintiffs sued for damages because their children were compelled by the conductor in charge of the defendant's train to ride in the car assigned to colored people. The parents were both regarded as white persons; and the only question in the case was whether the children had inherited an appreciable admixture of negro blood from their maternal ancestry. This court adopted as the definition of a *person of color* one who has an appreciable mixture of negro blood, and held that the burden was on the plaintiffs to prove the allegation that their children were of the white race. It appears that there was a conflict in the testimony of those who remembered the maternal grandfather as to whether he was a white man or had had an appreciable mixture of negro blood in him. The jury could not agree; and the trial judge decided that the deceased grandfather had had an appreciable trace of negro blood in him. The definition of a *person of color* as one having an appreciable trace of negro blood was adopted in the case of *State v. Treadaway et al.*, 126 La. 300, 52 South. 500, 139 Am. St. Rep. 514, 20 Ann. Cas. 1297, where, after an exhaustive review of the authorities, it was held that, although all negroes are colored people, all colored people are not negroes.

The admission that Charles F. Mermillon was married as a white man to a white woman, by a white clergyman, at the residence of the bride's white parents, is an admission that the nullity now alleged is not patent on the face of the contract, nor on the face of the contracting parties. The circumstances suggest a serious doubt that the plaintiff's suspicion or belief that her husband has an appreciable trace of negro blood in him can be proven. And before she attempts to prove it, to have the prima facie valid marriage declared null, she should bring a direct action of nullity against the other party to the contract.

I respectfully dissent from the opinion and decree rendered in this case.

(139 La.)

No. 21043.

HILLS v. CITY OF NEW ORLEANS et al.
(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 816(2) — TORTS
— DEFECTS IN STREETS — PLEADING.

In an action against a municipal corporation and abutting property owners for damages for personal injuries sustained by plaintiff by reason of stepping into a hole in the sidewalk,

from which a brick had been removed, no cause of action is disclosed where plaintiff merely alleges that the injuries were caused solely by the negligent acts and omissions of the defendants, but fails to allege what the acts consisted of, and the petition contains no suggestion as to the time when, or the person by whom, the brick was removed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1712; Dec. Dig. 816(2).]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Mrs. Kate Stewart Hills against the City of New Orleans and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Callan, Blancand & Viosca, of New Orleans, for appellant. John J. Reilly, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellees.

Statement of the Case.

MONROE, C. J. Plaintiff has appealed from a judgment sustaining an exception of no cause of action and dismissing her suit, which is an action for damages sustained by reason of the following circumstances, as set forth in her petition, to wit: That the city of New Orleans and certain other defendants, whom she names, are the owners of the premises No. 926 Touro street, in the city of New Orleans:

"That on June 26, 1914, about 6 o'clock, p. m., petitioner was walking on Touro street * * * and was passing in front of the premises 926 Touro street, * * * and, as she was passing in front of the premises 926 Touro street, she stepped into a hole in the sidewalk, from which a brick had been removed; that petitioner's ankle was twisted when she stepped in said hole, and that, as petitioner is a very stout woman, she lost her balance, and, in struggling to break the fall, she fell to the sidewalk, injuring her left arm, left side and hip, and her back; that the hole in said sidewalk was unnoticeable to any passer-by, but could have been discovered by defendants if they had examined same for the purpose of keeping the sidewalk in proper condition; that the said injuries to petitioner were caused solely by the negligent acts and omissions of defendants whose duty it was to keep said sidewalk in proper condition, and were in no way contributed to by any negligence on the part of petitioner."

Opinion.

There is no suggestion in the petition as to the time when, or person by whom, the brick was removed, and non constat but that it had been used as ammunition, in a street shindy, within 10 minutes preceding the accident. The mere fact that it was not in its place at the moment of the accident is therefore insufficient to charge defendants with the responsibility therefor. True, plaintiff alleges that her injuries were attributable solely to defendant's negligent acts and omissions, but that is a mere conclusion of her own. She should have stated what the acts and omis-

sions consisted of, and the court would then have had some basis upon which to predicate an opinion as to whether they were negligent or not.

Judgment affirmed.

(139 La.)

No. 20751.

REEMS v. CHAVIGNY.

(Supreme Court of Louisiana. May 9, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — §705(10) — STREETS — USE FOR TRAVEL — LIABILITY FOR INJURIES.

Where the driver of a vehicle in the streets of a city disregards all the rules prescribed for vehicular traffic and is grossly negligent from the standpoint of common experience, and as the result of such negligence is brought into collision with another vehicle, he is not entitled to recover from the owner of the other the damages which he thereby sustains.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1517; Dec. Dig. §705(10).]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Augustus L. Reems against Dr. Charles Chavigny. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Brewer and H. W. Robinson, both of New Orleans, for appellant. Caffery, Quintero & Brumby, of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. Plaintiff prosecutes this appeal from a judgment rejecting his claim for damages for injuries to his person and property, and expenses, alleged to have been sustained and incurred by reason of a collision between a buggy of which he was the owner and driver and an automobile operated by defendant.

We find that plaintiff was driving his buggy up the right roadway on St. Charles avenue at about 6:20 o'clock p. m. on May 11, 1911, and that it was his intention to turn off and go out Cadiz street to the left (towards the river). He says in his testimony that he had stopped still, with his buggy standing on the right side of the roadway, within less than a foot of the curb of the banquette, waiting for two automobiles which were also going up St. Charles avenue to pass him, and that, when they had passed him to his left, his buggy was struck by defendant's automobile, which followed the other two. But his testimony is entirely at variance with that of all the other testimony in the case. Two witnesses as to the occurrence were called by him, and they both testified that in going up St. Charles avenue in an automobile they passed defendant's machine, and, finding plaintiff's buggy moving slowly ahead of them, rather nearer to the left than to the right side of the roadway, they sounded their horn repeatedly in order to induce the driver

to afford them a passage to his left, but that he paid no attention to the signals, and that they finally passed upon his right, the witness who was acting as chauffeur making a comment to his brother "about some people who drive all over the street." Defendant was following the automobile occupied by plaintiff's witnesses, and also sounded his horn repeatedly, but plaintiff says that he did not hear it, and in the meanwhile he appears to have driven his buggy nearer to the middle of the roadway, creating the impression upon the mind of a witness who was in the machine with defendant that he was going "zigzag," and, as defendant thought, affording him an opportunity to pass to the left, which he attempted to do.

About that time, however, they had nearly reached the corner of Cadiz street, and defendant, without giving any warning, made a turn to his left, in order to go out that street, as a result of which, he brought his buggy across the path of the machine, which was already practically against the curb on the left side of the roadway, and hence the collision, in which, fortunately, plaintiff was not much injured, and was subjected to but little expense; the defendant having liberally, as it appears to us, paid for the repairing of the buggy.

Opinion.

The city ordinance regulating traffic reads, in part, as follows:

"Vehicles overtaking shall keep to the left of the overtaken vehicle in passing."

"Vehicles moving slowly shall keep as close as possible to the curb on the right allowing more swiftly moving vehicles free passage on their left."

"Drivers of vehicles, before turning, stopping or changing their course, shall make sure that such movement can be made in safety, and shall extend and wave the right hand outside the carriage as a signal to persons driving vehicles behind them of their intention to make such turning movement. * * *

"Vehicles turning to the left into another street shall pass to the right of, and beyond, the street intersection before turning. * * *

"Vehicles going on a main thoroughfare shall have right of way over others going on intersecting streets."

Plaintiff observed none of the rules thus laid down, and, though there had been no such rules, appears to us to have been grossly negligent from the standpoint of common experience; and, as the accident was attributable to that negligence, he is not entitled to recover his damages from defendant.

Judgment affirmed.

(139 La.)

No. 20702.

CAROL v. MONTELEONE.

(Supreme Court of Louisiana. May 9, 1916.)

(Syllabus by the Court.)

INNKEEPERS — §11(1, 10) — LOSS OF GOODS — LIABILITY.

The relation of innkeeper and guest terminates when the guest pays his bill and leaves

the inn; and, whether he notifies the innkeeper that he is leaving his trunk, to be sent for at some future time, or fails to give such notice, the innkeeper, in the absence of any agreement or expectation with regard to compensation for storage, becomes merely a gratuitous bailee of the trunk and, as such, liable for loss or inconvenience respecting it only when occasioned by his fraud or gross negligence. If, therefore, a delay occurs, in the subsequent delivery of the trunk, which is attributable at least as much to the fault of the guest as of the innkeeper, the guest is not entitled to damages for the inconvenience resulting therefrom.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 17, 18, 21, 23, 31, 32; Dec. Dig. § 11(1, 10).]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Alfred N. Carol against Anthony Monteleone. From a judgment for plaintiff, defendant appeals. Reversed, and suit dismissed.

E. Howard McCaleb, of New Orleans, for appellant. Armand Romain, of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. Plaintiff claimed \$5,000, as damages alleged to have been sustained by reason of the failure of defendant to deliver his trunk, and he obtained a judgment for \$100, from which defendant's executor has appealed.

Defendant kept a hotel, and plaintiff stopped there for four days, in room 228, and left without taking his trunk. He says that he notified some one in the office that he would send for it, but the clerks deny that he did so, and he made no attempt to identify the person to whom he gave the notice. In the course of the same day, he sent a groceryman, with a wagon, for the trunk, and the man found a negro porter, to whom he gave a slip of paper that he had received from plaintiff, the contents of which were unknown to him, as he was unable to read, and he says that the porter went into the hotel, and, returning, told him to get the name of the person whose trunk he was seeking and the number of his room, whereupon he went back to plaintiff and obtained another slip of paper, with which he again presented himself to the negro, whom he followed into the office, where, after some conversation between the porter and a clerk, he was told that he must come back later. By that time, however, he concluded that he had done too much for 50 cents, so he gave the paper back to plaintiff and abandoned the enterprise. Whether he had ever allowed the paper to go out of his hands does not appear, nor can we be certain as to its contents, since it was not preserved, and the hotel people testify that no other paper was ever presented to them except one to which we will refer in a moment. It may be here stated that, when plaintiff vacated room 228, that room was almost immediately occupied by another guest,

and that plaintiff's trunk, which bore no name, was removed to the baggageroom and marked in chalk, with the number 228, for identification. A few days after the groceryman had ceased his endeavors, plaintiff put the matter of his trunk into the hands of a driver in the employ of the Transfer Company, who seems to have called at the hotel for the trunk, with a ticket or paper of some kind, which the hotel people say had nothing on it save "Baggage out of 228," though there is some conflict in the testimony upon the subject of its contents. It is quite certain, however, that it contained no order from the plaintiff, and it does not appear that the bearer even knew the plaintiff's name, and we take it that the only information conveyed to the hotel people was that the bearer wanted a trunk from room 228. That room was, however, then occupied by plaintiff's successor, who had not paid his bill, and hence the baggage in his room was not delivered, and a second visit by the transfer man resulted in the same way. Plaintiff then concluded to take the matter in hand himself, and he went to the hotel, and, making himself known, obtained a receipt, showing that he had paid his bill, and, identifying his trunk in the baggageroom, obtained his trunk. The uncontradicted testimony of the chief clerk in regard to that feature of the affair reads as follows, to wit:

"Q. He asked, 'Why didn't you give up my trunk?' I said, 'I had no order.' He said, 'You told my driver I had not paid my bill.' I said, 'No; nobody has ever asked yet for your trunk at all; I told the driver that called for a trunk out of 228 that the party who then occupied the room had not paid his bill, and I wouldn't give up the trunk.' He said, 'That's all right; give me a duplicate bill, marked paid.' Q. And you gave him an order on the head porter? A. Told the porter to deliver the trunk."

Opinion.

The relation of innkeeper and guest which had subsisted between plaintiff and defendant terminated when plaintiff paid his bill and left the inn, and, whether plaintiff notified defendant that he intended to leave his trunk or failed to give such notice, there was no agreement or expectation that he should pay for its storage; hence defendant became, at most, the gratuitous bailee of the trunk, and, as such, liable for a loss respecting it only if occasioned by his fraud or gross negligence. There is no suggestion of fraud in the matter, and the evidence fails to prove gross negligence, since it fails to show that any signed order for the trunk was ever presented on behalf of plaintiff, or that defendant, or his agents, were ever made to understand that it was plaintiff who was demanding it, until he himself called for it, when it was immediately delivered to him.

It is therefore ordered that the judgment appealed from be set aside, and that plaintiff's demand be rejected, and this suit dismissed at his cost in both courts.

(139 La.)

No. 20815.

PHILIP v. QUENQUI.(Supreme Court of Louisiana. April 24, 1918.
Rehearing Denied May 22, 1918.)*(Syllabus by the Court.)***LIBEL AND SLANDER — 63—ACTIONS—DAMAGES.**

Where plaintiff, in a suit for damages for slander, was in fault in bringing on the sudden quarrel, during which the defendant used the language charged, *held*, that the plaintiff's fault should be considered in mitigation of damages.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 164, 318; Dec. Dig. § 63.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Louise Ernestine Philip against Albert Quenqui. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Dart, Kernan & Dart, of New Orleans, for appellant. Callan, Blancand & Viosca, of New Orleans, for appellee.

LAND, J. Plaintiff, a young woman 21 years of age, sued the defendant for \$10,000 damages for slander.

The petition charges that the defendant, in the presence of a large crowd of persons, asserted and circulated the report that plaintiff was "no good," that she stays out all night with men, that if she went to court he would prove she was "crooked," and that everybody knew what he meant by the word "crooked."

The defendant, after filing a plea of res judicata, which was overruled, filed an answer, denying all the allegations of the petition charging slander, and, further answering, averred that, on the day referred to in the petition, plaintiff abused the children of the defendant, and defendant's family, that defendant remonstrated with the plaintiff, and she continued in her insults and abuse, and that plaintiff solely was at fault.

The case was tried before a jury, which by a vote of 10 to 2 found a verdict for the plaintiff in the sum of \$1,500. Judgment was entered pursuant to the verdict, and the defendant has appealed.

Plaintiff, her sister, and her mother resided in South Genois street. They made their living by peddling peanuts, sandwiches, etc., in the streets, and in the public parks of the city, and also in parks used for the purpose of sport and recreation. Their business sometimes required them to work at night.

The defendant, an Italian butcher, with his wife and several children, also resided

in South Genois street, opposite the house of the Philip family.

On July 31, 1918, about 6 p. m., the neighborhood was aroused by a loud and angry quarrel in the street between the three Philip women and the defendant. According to a defense witness, all four were speaking at the same time, the defendant in broken English, and it was almost impossible to understand what was said.

This public disturbance grew out of an alleged attempt of Josephine, the 11 year old daughter of the defendant, to kick a puppy belonging to the plaintiff. The testimony as to what followed is too confused, conflicting, and *dirty*, to be recapitulated. That there was an exchange of insults and abuse between the parties is clear enough from the evidence. There is a great conflict in the evidence as to what was said by the defendant, but he virtually admitted that he told the plaintiff that she was "no good." Several witnesses testified to remarks by the defendant, tending to show that he referred to plaintiff's character for virtue. On the other hand, plaintiff's version of the origin of the difficulty shows no reasonable cause for the violent altercation which immediately ensued. The little daughter of the defendant testified that the plaintiff called her a "dago," and threatened her, and told her she had "no pa," meaning that the child was born out of wedlock.

It is reasonable to suppose that some insulting remark was addressed to the child, which aroused the anger of the father. The evidence convinces us that plaintiff was not free of fault in bringing on the quarrel, and that the defendant was influenced to use the language with which he is charged by the actions of the plaintiff in the premises. While plaintiff's fault did not justify the slanderous charges, it certainly mitigated the offense. *Townsend on Slander & Libel*, § 414, p. 681. The slanderous words were not spoken with malice prepense, or with deliberation, but were the ebullitions of a sudden anger, for which the plaintiff was in a certain degree responsible.

Considering the circumstances of the defendant, we deem an award of \$250 a sufficient vindication of the plaintiff, and a sufficient punishment of the defendant.

It is therefore ordered that the judgment below be amended by reducing the amount from \$1,500 to \$250, and that, as thus amended, the judgment be affirmed; plaintiff to pay costs of appeal.

SOMMERVILLE, J., takes no part.

EDGINGTON v. MABRY et al. (No. 17873.)
(Supreme Court of Mississippi, Division B.
May 29, 1916.)

WILLS \Leftrightarrow 324(1)—ACTION TO DETERMINE VALIDITY—SUBMISSION OF ISSUES TO JURY.

Under Code 1906, § 1999, providing that on trial of an issue to determine the validity of a will which has been duly probated, such probate shall be prima facie evidence of the validity of the will, on the trial of an issue devisavit vel non, the decedent's will having been admitted to probate, and the entire probate proceedings being in the record, failure to submit them to the jury was reversible error.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 767; Dec. Dig. \Leftrightarrow 324(1).]

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Application by Mary Lee Edgington for the probate of the will of Mrs. M. J. McDurmitt, deceased. Upon admission of the will to probate W. A. Mabry and others appeared and objected. Upon judgment for objectors, upon trial of an issue devisavit vel non, proponent appeals. Reversed and remanded.

This is an appeal from the action of the chancellor in granting a peremptory instruction to the jury on an issue devisavit vel non to find in favor of the contestants of what purported to be the last will and testament of Mrs. M. J. McDurmitt, deceased. On July 2, 1891, Mrs. M. J. McDurmitt and Mrs. M. E. Smith, who were sisters and tenants in common of certain land in Holmes county, Miss., executed the following:

Last Will and Testament of M. E. Smith and M. J. McDurmitt.

Filed 3/21/1913, at 5 p. m., and recorded 3/21/1913. P. H. Murphey, Clerk.

"In the name of God Am. . . . we, M. E. Smith. . . . M. J. McDurmitt of the County of Holmes and State of Mississippi of the ages of M. E. Smith forty-tw. . . . and M. J. McDurmitt fifty-th. . . . of sound mind and memory do make and declare this my last will and testament. . . . in the manner of following we do give and bequeath to Pearl Griffith McDurmitt, Mary Lee McDurmitt and Mattie Ward McDurmitt E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ Section 21, Township 13, Range 4 East N. E. $\frac{1}{4}$; less 37 acres of N. end W. $\frac{1}{2}$ south corpor. . . . Section 20, Township 13 Range 4 E. E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ 8 acres in S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Section 19, Township 13, Range 4 E. E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ less 10 acres S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ Section 20 Township 13 Range 4 E. W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Section 21 Township 13 Range 4 E. Lots 2-3-41 & 4 a. in the Town of Goodman gin and mill boiler engine and saw mill and all fixtures there belonging to household and kitchen furniture twenty head of cattle to be equally divided between Pearl Griffen McDurmitt Mary Lee McDurmitt but in case of death the Property belonging to the deceased shal. belong to the living ones and their heirs & her by appoint L. S. McD. . . . our executor to carry out this our last will and testament we also appoint L. A. McDurmitt guardian of Pearl Griffen McDurmitt Mary Lee McDurmitt and Mattie Ward McDurmitt also do not require him to give bond nor security nor for the courts to require him to give bond nor security to carry out this my last will and testament while we are live. . . . or dead as the property now belongs to the three named children from the date

herein given In testimony whereof we hereunto set our hands and seal this the 2nd day of July A. D. 1891.

"M. E. Smith. [S.]

"M. J. McDurmitt. [S.]

"Witnesses: D. E. Unger.

"G. L. Cowser.

"State of Mississippi, Holmes County.

"This day personally came before me the undersigned Mayor of the town of Goodman, and Ex-Officio a Justice of the Peace in a. . . . for said County and State, the within named Mrs. M. E. Smith and M. J. McDurmitt whose name is subscribed to the within instrument of writing who severally acknowledged that they signed, sealed and delivered the same in the presants of D. E. Unger and G. L. Cowser witnesses as there. . . . and deed, and for the perp. . . . therein set forth on the d. . . . and year therein written. In testimony wh. . . . witness my hand and of office this the 11th day of J. . . . 1892.

"R. J. Moody,

"May. . . . of Goodman & Ex-Officio J. P."

Filed March 21st, 1913.

After this instrument had been acknowledged it was placed in a safe, to which Mrs. McDurmitt carried the key, which seems to have been lost, and several years after the death of Mrs. McDurmitt this will was discovered in this safe among other old papers. Before the death of Mrs. McDurmitt she and Mrs. Smith partitioned the property between themselves, and Mrs. Smith sold all of the property allotted to her. Mrs. Smith is still living and has moved to another county. Mrs. McDurmitt disposed of some of the property allotted to her and died leaving a portion of it undisposed of, and her son L. A. McDurmitt, as her heir at law, came into possession of it and sold it to the appellees before the discovery of this purported will. After the discovery of the will the appellant (formerly Mary Lee McDurmitt) one of the beneficiaries under said will, offered the same for probate, and G. L. Cowser, one of the subscribing witnesses, appeared before the chancery clerk and made affidavit that it was the last will of Mrs. M. J. McDurmitt, deceased, and that it was signed, published, and declared by her on the date of its execution, and that same was signed in his presence and in the presence of Unger, the other subscribing witness, and that the testatrix was then of sound and disposing mind, more than 21 years of age, and a resident of Holmes county, Miss., and that he and Unger—

"attested as witnesses to the signature and publication thereof at the special instance of said testatrix and in the presence of said testatrix and in the presence of each other on the day and year of the date of said instrument."

The will was thereupon admitted to probate, and the appellees as contestants appeared and objected, and the court thereupon summoned a jury, and an issue devisavit vel non was made up and evidence taken down by a stenographer, and the court examined certain witnesses offered by the proponents of the will, who were not represented by counsel. Appellees were represented by

counsel, and after the proof had been taken, the court instructed the jury to find for the objectors. Section 1999 of the Code of 1906 referred to in the opinion is as follows:

"On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such probate shall be prima facie evidence of the validity of the will."

Thos. S. Bratton and Geo. Butler, both of Jackson, for appellant. Boothe & Pepper, of Lexington, for appellees.

COOK, P. J. A careful examination of this record convinces us that two things happened on the trial of the issue *devisavit vel non*, i. e.: (a) The proponents were not adequately represented at the trial; (b) there was sufficient evidence before the jury to warrant a finding in favor of the will. The probate of the will by the clerk was alone prima facie evidence of the validity of the will, and this, together with the other evidence, should have been submitted to the jury, Code 1906, § 1999. We think that the instrument had many earmarks of a will, indeed, we are of opinion that the language of the instrument pretty clearly indicates that the signers intended to make a will. Of course, the objectors were entitled to whatever advantage the skill of their counsel gave them, but when the court undertakes to represent the proponents, as was done in this case, it seems to us that he should have seen to it that the formal evidence, the probate proceedings, were introduced in evidence. It is not entirely clear how much, if any, of the proceedings went to the jury. Counsel for the objectors insist that only the testimony of the witnesses delivered orally, and taken down by the stenographer, should be considered on this appeal. The entire probate proceedings are in this record, and should have been submitted to the jury.

Inasmuch as courts are organized to try controversies on their merits, and because, if appellees are to be believed, this case was not so tried, we will reverse this cause and remand for a trial *de novo* of the issue *devisavit vel non*.

Reversed and remanded.

ILLINOIS CENT. R. CO. v. MAHON LIVE STOCK CO. (No. 18021.)

(Supreme Court of Mississippi, Division A. May 22, 1916.)

1. CARRIERS §228(1)—CARRIAGE OF LIVE STOCK—PRESUMPTION AND BURDEN OF PROOF.

In an action for damages to a shipment of thoroughbred horses, where the evidence showed that the stock was in good condition when delivered to defendant railroad, a connecting carrier, and that it was badly damaged and bruised upon arrival, there was a presumption of negligence, and it devolved upon the defendant, in order to relieve itself from liability, to show,

not only the way in which the car was handled while in transit, but whether handled or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957, 958; Dec. Dig. §228(1).]

2. DAMAGES §208(1)—CARRIAGE OF LIVE STOCK—QUESTIONS FOR JURY.

In such case, defendant's motion, at the conclusion of plaintiff's evidence for a peremptory instruction, was properly overruled, since regardless of whether the testimony in the case had shown the correct measure of damages, the plaintiff, if any damages were shown, was entitled to recover at least nominal damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 533, 534; Dec. Dig. §208(1).]

3. APPEAL AND ERROR §882(13)—REVIEW—THEORY OF CASE BELOW.

In such case, where all the instructions for both of the parties were drawn with reference to the measure of damages stated by the court, and all the instructions asked by the carrier were given, the question whether such measure of damages was correct could not be raised by the carrier on appeal, as it was bound by the theory of the trial court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3608; Dec. Dig. §882(13).]

4. CARRIERS §219(5)—CARRIAGE OF LIVE STOCK—INJURY—RIGHT OF ACTION.

Where a carload of horses was delivered in good condition to defendant, a terminal carrier, at a point in another state, and was delivered to the consignee in Mississippi in a damaged condition, the shipper had a cause of action against such terminal carrier, as it was not the intent of the Carmack Amendment to the Interstate Commerce Law, making the initial carrier liable for damages on lines of connecting carriers, to deprive the shipper of his common-law action against such carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 950; Dec. Dig. §219(5).]

Appeal from Circuit Court, Marshall County; J. C. Totten, Special Judge.

Action by the Mahon Live Stock Company against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James Stone & Son, of Oxford, and Mayes, Wells, May & Sanders, of Jackson, for appellant. Lester G. Fant, of Holly Springs, for appellee.

SYKES, J. The appellee, plaintiff in the court below, sued the defendant railroad company in the circuit court of Marshall county for damages to a carload of thoroughbred horses which he had purchased and shipped from Lexington, Ky., to Holly Springs, Miss. The shipment first moved from Lexington over the Southern Railway Company, under a bill of lading of that railroad. The shipment consisted of 30 head of thoroughbred horses, which were loaded into one car by the appellee without any partitions being placed therein to separate young stallions, from one to two years old, from the mares. This shipment was accepted by the railroad company as loaded by the shipper. The car was turned over to and accepted by the appellant, the Illinois Central Railroad Company, at the city of Louisville, Ky., at 4:15 p. m., on the 12th of October,

1912, and did not leave on a train from that place until 7:30 p. m., a space of three hours and fifteen minutes, during which time it remained in the railroad yards of the defendant railroad company. Whether it was switched or not during this time, and the nature of the handling of the car in the yard, is not clear from the testimony. At the time the stock were delivered to the Illinois Central Railroad Company at the above point, the record shows they were in good condition. From this point, they were transported to Central City, Ky., arriving there at 2:30 a. m., and remaining there until 7 a. m. The record shows they were switched somewhere, but the nature and extent of it is not shown. From Central City they were transported to Paducah, arriving there at 1 p. m., where they were delivered to the feeding pens, unloaded, fed and watered, and reloaded at 8 p. m., and then remained in the car until 3:15 a. m., next morning. That the car was handled by a switch engine to and from the feeding pen is shown, yet the appellant fails to show the nature of this switching. They were next transported to Frogmore Yards, Tenn., arriving there at 1 p. m. of the 14th. They remained in these yards until 3:45 p. m. The record is here silent as to whether or not they were handled, and, if so, how, in this switchyard. The stock reached Holly Springs at 8:40 p. m. in a badly damaged condition. The consignee first declined to accept the stock, but upon an agreement with the agent of the defendant railroad company he accepted them and placed them in a separate stable until after examination was made of them by the veterinary of the defendant railroad company. The testimony shows that the plaintiff complied with the requirements of the bill of lading as to the making of his claim for damages within the proper way and within the proper time. An assignment of error is predicated on a failure to comply with this stipulation of the bill of lading, but the record shows that it was complied with.

[1] The testimony in the case shows that the stock were in good condition when delivered to the Illinois Central Railroad Company at Louisville, Ky., and that they were in a badly damaged and bruised condition upon their arrival at Holly Springs. It therefore devolved upon the railroad company, in order to exonerate itself from liability in the case, to show by testimony that the stock were carefully handled by them between Louisville and Holly Springs. This they attempted to do by showing only how the car of stock was handled while actually in transit upon the road, but utterly failed to show in what manner they were handled in the yards of the defendant company at Louisville, Central City, Paducah, and Frogmore Yards, where they remained for a number of hours in each yard. This court, as a matter of common knowledge, knows that they were switched or that the car was mov-

ed in these yards. On the arrival at each of these places, the car had to be uncoupled and disconnected from the train in which it moved to this point, and moved off the main track out of the way of passing trains, and it had to be coupled up to the train in which it moved out of this place. It was handled by an engine when transported to the stock pens at Central City and from thence back to the point where it was picked up by the train that transported it to Frogmore Yards.

In order to exonerate itself from liability in a case of this character, the railroad company must show, not only the way the car was handled while actually in transit, but also whether handled or not, and, if so, in what manner, while remaining in its yards at any stations. Failing to do so, the presumption is not rebutted that this car was negligently and roughly handled in one of these yards, thereby causing the injuries for which this suit is brought.

[2] The bill of lading contained a stipulation to the effect that, in case of injury, the proper measure of damages was the difference in price at the point of shipment, viz., Lexington, Ky., of the stock on the date of the shipment, before they were injured, and after they were injured. The testimony of the appellee showed the injuries to these horses and also the market value at the point of shipment on the day of shipment, and the day of the injury. At the conclusion of the testimony of the appellee, a motion was made for a peremptory instruction by the appellant, which motion was overruled by the court. This motion was properly overruled because the appellee was entitled to recover damages. Whether or not the testimony in the case showed the correct measure of damages at this time was not an issue on the motion for a peremptory instruction, because, if any damages are shown to have been sustained, then, certainly, nominal damages were recoverable, even granting for the sake of the argument that the correct measure of damages had not been proven.

[3] The court, in overruling the motion for a peremptory instruction at the conclusion of the appellee's testimony, announced that the measure of damages was the difference in the value of the stock at Lexington the day they were shipped, and their value at Lexington the day they reached Holly Springs, not to exceed the various amounts named in the bill of lading. To this ruling of the court, no exception appears in the record of counsel for appellant. The instructions, both for the appellant and the appellee, were drawn upon this theory. All the instructions asked by the appellant upon the measure of damages were given. Consequently, whether or not this was the correct measure of damages cannot be raised by the appellant in this court, because the appellant and appellee both without exception accepted and tried the case upon this theory. Complaint is also made by the appellant of the

instructions granted appellee to the effect that in this case it was the duty of the railroad company to show to the satisfaction of the jury that the damaged condition of the stock was not caused by negligence in the handling of the car by the engines or trains of the defendant. These instructions, however, correctly announce the rule of law in cases where shipments of stock are delivered in good condition to a railroad company, and are bruised and injured when the railroad company offers them for delivery at the point of destination to the consignee. *Railroad Co. v. Bigger*, 66 Miss. 319, 6 South. 234. The rule announced in the above case is in line with that announced in other cases in this state.

[4] It is also contended by the appellant that this suit is based upon the Carmack Amendment to the Interstate Commerce Law, and that, under this amendment, the initial carrier, and the initial carrier only, is liable for damages for injuries to shipments of stock. In this case, the testimony shows that the stock were delivered in good condition to the Illinois Central Railroad Company at Louisville; that they were delivered to the consignee at Holly Springs, their destination, by the Illinois Central Railroad Company, in a damaged condition; and that the damage to this shipment occurred while they were in the hands of the defendant railroad company. This being true, we do not understand the cases cited by counsel as sustaining this proposition to be applicable. There was an injury, a tort, committed by the appellant company to the appellee, for which a cause of action accrued to the appellee; and it was not the intention nor purpose of the Carmack Amendment to deprive the consignee of a cause of action which he had by common law against the railroad company in cases of this character. In fact, this act of Congress expressly negatives any such idea. The verdict of the jury was sustained by the testimony.

We find no errors in the other assignments of error not above especially discussed, and the case is therefore affirmed.

WHITE et ux. v. McREE. (No. 18031.)
(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. ANIMALS — 74(5) — PERSONAL INJURIES — SUFFICIENCY OF EVIDENCE.

In an action for damages for injuries sustained by being bitten by a bulldog owned and kept by defendants on their premises, evidence held to sustain a judgment against the defendants.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 264-268; Dec. Dig. 74(5).]

2. APPEAL AND ERROR — 1172(5) — DAMAGES — 132(15) — PERSONAL INJURIES — INADEQUATE DAMAGES — REVIEW.

In an action for damages from the bite of a dog owned by defendants, where it appeared that plaintiff underwent much physical suffering

and mental terror during the attack, that the flesh of the leg was scratched and disfigured and permanently injured, that plaintiff had been confined to her bed for over three weeks, and was only able to walk on one foot in a crippled condition, and that she was in fear that hydrophobia might follow, a verdict of \$100 was so grossly inadequate as to show prejudice or reckless disregard of the testimony, and, under rule 13 of the Supreme Court (59 South. ix), the judgment will be reversed, and the case remanded for new trial as to the amount of damages only.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4561; Dec. Dig. 1172(5); *Damages*, Cent. Dig. § 396; Dec. Dig. 132(15).]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by Miss Esma McRee, by her next friend, Mrs. Ella McRee, against H. C. White and wife. Judgment for plaintiff, and defendants appeal, and plaintiff takes a cross-appeal. Judgment on direct appeal affirmed; on cross-appeal, judgment reversed, and case remanded for new trial as to the amount of damages only.

W. J. Croom, of Jackson, for appellants.
W. C. Wells, of Jackson, for appellee.

HOLDEN, J. This is an action for damages, brought by the appellee, Miss Esma McRee, against the appellants, H. C. White and Mrs. White, for injuries sustained by the appellee by being bitten on both legs by a brindle bulldog owned and kept by the appellants on their premises. There was a jury verdict for \$100 in favor of the appellee, from which the appellants appeal, and the appellee cross-appeals, to this court.

[1] The facts in the case are that in July, 1914, the appellee, Miss Esma McRee, a young lady about 17 years of age, visited the residence of appellants one Sunday morning for the purpose of getting some eggs from appellants, which she had been accustomed to doing for some months before that time. She went into the back yard of the residence of appellants, through the gate, and after getting into the yard she was grabbed, thrown down, and bitten by a brindle bulldog owned and kept there by appellants. The dog first imbedded his teeth in her left leg, and after releasing his hold upon this leg he imbedded his teeth in appellee's right leg above the ankle, throwing her to the ground and retaining his hold for about five minutes, or until he was beaten and pulled off, when he tore out his hold, pulling the flesh from the bone with his teeth. The doctor who attended the young lady testified that:

"There were scratches on the calf of the right leg; there were two deep puncture wounds on the outside of the limb, and there were two lacerated wounds, which apparently protruded to the bone, just about the ankle; and there were other scratches on both sides of the lacerated wound, and there were two scratches on the lower left limb, all of which were made by the teeth of the dog. That on the outer side, just above the ankle, on the right limb, the injuries apparently were made by the teeth of the

dog; and the lacerated deep wounds on the opposite side of the leg looked as though a dog had grabbed the limb with his teeth and then tore them through the flesh. They were about 1½ inches long, and looked as though the dog got her with his teeth and tore his hold out; anyway, it was torn out. The wounds seemed to be almost to the bone. I cauterized the wounds with carbolic acid, because I was afraid it might be a mad dog. She seemed to be suffering intensely. She was very nervous and excited and alarmed. She was nervous and crying, and we could hardly keep her still so I could do anything for her."

It further appears, from the undisputed testimony in the record, that after the dog had let go his hold on appellee's left ankle, he took another hold on her right leg, throwing her down and keeping her down for about five minutes, all of which time the dog was biting her, and she was crying for help, screaming and trying to get loose, but did not get loose until the dog had pulled his hold out, tearing the flesh of the leg with it. Appellee testified that these wounds caused her great suffering, both mental and physical, and that the injuries had continued to hurt her at all times since they were inflicted. She was confined to her bed and to the house for over three weeks, and after that time she was able to walk on one foot in a crippled condition. Appellee also suffered mental pain and anguish in the fear that hydrophobia might follow the infliction of the wounds by the dog.

It appears from the testimony that this brindle bulldog had previously bitten other people, and that his vicious and ferocious character was well known to the appellants, and that he was kept on the premises, running loose, with the full knowledge of appellants that he would attack persons who might come within the yard. In fact, it seems from the testimony that the appellants had the dog there for the purpose of protecting the premises by his biting persons who might enter thereon. The question of liability of appellants, for the injuries inflicted in this case, was properly submitted to the jury, and the jury correctly determined the issue against the appellants. We find no error of the court below that would warrant us in disturbing the finding of the jury, as to the liability of appellants.

[2] Cross-appellant, Miss McRee, contends that the verdict of \$100 assessed as damages by the jury is so grossly inadequate as to show passion, prejudice, or corruption on the part of the jury; and we are asked, under rule 13 of this court (59 South. 1x), to send the case back to the lower court, where another jury may pass upon the amount of damages due the cross-appellant for the injuries received. The verdict for \$100 in this case is grossly inadequate, and evinces passion, prejudice, or a reckless disregard of the testimony, on the part of the jury. To say that the pain and suffering, both mental and physical, as well as the permanent in-

juries to this young lady, caused by this vicious and ferocious brute, is compensated by the sum of only \$100, is astounding to the senses and does violence to the law of compensation. We need not again narrate the injuries set out above, in order to justify our position that the verdict of \$100 is grossly inadequate; but it is sufficient to say that the physical suffering and mental terror experienced by this young lady, while she was lying upon the ground, for five minutes, with the iron jaws and sharp teeth of this dog gnawing in the flesh and muscles of her leg, with his teeth imbedded to the bone, which hold was brutally torn out, carrying with it the flesh of the leg, and disfiguring and permanently injuring this young lady, warrants an infliction of damages many times greater than the sum of \$100. But, in addition to this, the pain and suffering, and the fear and fright, and confinement and crippled condition, all of which was subsequently suffered by the cross-appellant, further fortifies us in the conclusion that the verdict in this case is grossly inadequate and should be reversed. *Scott v. Yazoo & M. V. R. Co.*, 103 Miss. 522, 60 South. 215; *Whitehead v. Newton Oil & Mfg. Co.*, 105 Miss. 711, 63 South. 219; *Murphy v. Town of Cleveland*, 106 Miss. 269, 63 South. 572.

The judgment on direct appeal is affirmed, and on cross-appeal the judgment of the lower court is reversed, and the case is remanded for a new trial as to the amount of damages only.

Affirmed and remanded.

GWALTNEY et al. v. STATE, to Use of MINCEY. (No. 18159.)

(Supreme Court of Mississippi, Division B.
May 29, 1916.)

MALICIOUS PROSECUTION \Leftrightarrow 18(3)—WANT OF PROBABLE CAUSE.

In an action for malicious prosecution, where the defendant town marshal was informed by a responsible citizen that a screen door had been recently stolen, that plaintiff had been seen, just after the door was missed, coming from the direction of the place where the door had been stolen, carrying a door and a door in the plaintiff's possession was identified as the door stolen, the defendant had reasonable cause to institute the prosecution complained of.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 31; Dec. Dig. \Leftrightarrow 18(3).]

Appeal from Circuit Court, Marshall County; H. K. Mahon, Judge.

Proceeding by the State of Mississippi for the use of R. P. Mincey against C. J. Gwaltney and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. G. Fant and S. C. Mims, Jr., both of Holly Springs, for appellants. W. J. Lamb, of Corinth, for appellee.

POTTER, J. This was a suit brought on the official bond of C. J. Gwaltney, town marshal of the town of Byhalla in Marshall county. The suit was brought in the name of the state for the benefit of R. P. Mincey, and the declaration charged the defendant Gwaltney with false imprisonment and malicious prosecution. A peremptory instruction was granted the defendant as to the count of the declaration charging false imprisonment, but the jury returned a verdict on the second count, that charging malicious prosecution in the sum of \$375, and from a judgment for this amount the defendants appeal to this court.

The record in this case shows that the plaintiff in this case was conducting a barber shop on the 16th day of April, 1914, in the town of Byhalla, and that the appellant Gwaltney was, at that time, serving the said town as marshal. At the same time N. M. Bowen (also one of the defendants in this case, as a bondsman of Gwaltney), notified Gwaltney that some one had stolen his (Bowen's) screen door, and that he wanted Gwaltney to look for it. The uncontradicted proof shows that a screen door was found by Gwaltney in appellee's possession, which Bowen identified as the door stolen from him, and also that, just after the complaint was made, and after the door was missed, two persons, Lyles and Hill, witnesses in this case, informed the appellant that Mincey had passed down the street a short while before the screen door in question was missed from the direction of Bowen's Drug Store, and went towards his shop (appellee's) with a screen door.

No peremptory instruction seems to have been requested by the defendant on the second count in the declaration. Had such instruction been asked, it should have been granted. A motion for a new trial was made, however, and should have been sustained. The testimony clearly shows that under the circumstances Gwaltney had reasonable cause to institute the prosecution complained of in this suit. He was an officer of the law, and charged with the enforcement of the law. Complaint had been made to him by a responsible citizen that a screen door had been recently stolen. A door in defendant's possession was identified as the door stolen, and he had been informed that just after the door was missed the appellee had been seen walking down the street from the direction of the place where the door was stolen with a door of the same description that he carried to his own shop. We do not think there is anything in the record to show that the defendant was doing anything more or less than what he conceived to be his duty, and his conduct was in keeping with a proper discharge of his duty exercised in a reasonable way.

Reversed and remanded.

NEW ORLEANS, M. & O. R. CO. v. GAS-SOWAY et al. (No. 17903.)

(Supreme Court of Mississippi, Division B. May 29, 1916.)

RAILROADS \S 348(2)—ACCIDENT—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE OF INJURY.

In action for death by being struck by switch engine, where evidence showed only that possibly the runaway horse of deceased scraped the wheel of the buggy from which deceased was thrown against a very slowly moving switch engine, and that the railroad company was using every precaution and obeying every law, a verdict against the railway company *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1139; Dec. Dig. \S 348(2).]

Appeal from Circuit Court, Union County; H. K. Mahon, Judge.

Action by Mary Gassoway and others against the New Orleans, Mobile & Chicago Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed and dismissed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. Stephens & Kenne-day, of New Albany, for appellees.

POTTER, J. This is an appeal from the circuit court of Union county. The plaintiffs in this suit, the next of kin of Dr. Gassoway, who died in New Albany, Miss., probably as the result of certain injuries received by him a few days before his death, recovered judgment for \$20,000 against the New Orleans, Mobile & Chicago Railroad Company, defendants in the court below and appellants here.

Dr. Gassoway was a gentleman of about 74 years of age, but was in the active practice of his profession—that of a physician. On the occasion of his injury, he had been out in his buggy making a professional call, and, while returning to the town of New Albany, his horse ran away. This occurred about 11 o'clock at night. The railroad of the defendant is in the heart of the business district of New Albany, and it was the custom at about the hour of 11 o'clock at night, the time when this accident occurred, for the night crew on the switch engine used in the company's yards at New Albany to take a lunch at a small restaurant near the railroad on a street crossing the railroad called "Mill street." And on this occasion, while the crew of the switch engine were backing the engine to some point near the restaurant mentioned, the runaway horse which Dr. Gassoway was driving ran directly in front of the defendant company's switch engine above mentioned. It was contended by the plaintiffs in the court below that the switch engine struck the buggy, and that Dr. Gassoway, himself, was either struck by the engine or the engine caused the buggy in which he was riding to be turned over, and

that he thereby received his injuries. At any rate, it was plaintiff's theory that Dr. Gassoway received the injuries from which he died through the negligent operation of the defendant company's engine.

There is circumstantial evidence in the record tending to show that a wheel of the buggy was struck by the train; there were marks on one of the wheels which indicated that it had been struck by the switch engine. However, very little damage was done to the wheel itself. There was also paint found on the drawhead of the engine, of the same color as the paint on the buggy wheel; and there was evidence, too, that the buggy wheel had skidded or scraped on the ground in front of the engine a distance of about eight inches. The positive testimony, however, of the eyewitnesses, is to the effect that the buggy was not even touched by the switch engine. There is evidence, also, that the shoulder of Dr. Gassoway on his side nearest the engine was injured. But there is abundant evidence that the buggy in which he was riding turned over some distance across the railroad tracks, and that he was thrown under this buggy; and it is certainly more probable that this injury was occasioned by the buggy turning over with him than from the switch engine.

The uncontradicted proof shows that the engine of the defendant company was running very slowly; the bell was being rung; a man was on the back end of the engine, which was backing up; and that the servants of the railroad company stopped the engine within a very short distance and very promptly after the danger of the accident was called to their attention. In fact, the testimony shows that the engineer stopped on a signal from a fellow employé before he knew or realized why he was signaled to stop.

Even if the circumstantial evidence in the case warrants the belief that the buggy was struck by the train, yet there is no evidence that the striking of the buggy by the train had anything to do with the buggy turning over. The horse was running away, and the proof shows conclusively that the road was in such a condition that a buggy drawn by a runaway horse would, in all probability, be turned over at the very place this buggy turned over.

Something is said in argument and in the briefs of the appellee about the buggy seat being found on the embankment of the railroad; but the evidence in the record shows that this seat was found, though on the embankment, about 20 feet from the track; and the eyewitnesses testify that the buggy was standing up after the track was crossed.

There is no satisfactory evidence in this case that Dr. Gassoway was injured by the running of the train. At the most, the evidence shows that possibly Dr. Gassoway's

runaway horse scraped the buggy wheel against a very slowly moving switch engine.

In addition to this, the railroad company has shown that at the time of the injury its servants were using every precaution, obeying every law, and exercising the utmost vigilance in the operation of the locomotive. There is absolutely no evidence, circumstantial or otherwise, to justify the verdict of the jury in this case. The peremptory instruction requested by the defendant should have been granted. The cause is therefore reversed, and the suit dismissed.

Reversed and dismissed.

LOGAN & CO. v. CHAPMAN. (No. 18065.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

SALES \S 411—ACTIONS FOR DAMAGES—DECLARATION—SUFFICIENCY.

In assumpsit a declaration alleging that plaintiff, as a lumber dealer without mills of its own by a duplicate acceptance contract, one part of which was signed by each party and accepted by the other, contracted with the defendant to furnish three kinds of lumber which the defendant had on hand at time for performance, but willfully and capriciously refused to deliver two of the kinds, without justification in law, to the great damage of the plaintiff, who was ready and willing to perform, and requesting stated actual damages and punitive damages, and attaching copies of contract and pertinent correspondence, was sufficient to state a cause of action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1161-1164; Dec. Dig. \S 411.]

Appeal from Circuit Court, Newton County; A. J. McLaurin, Judge.

Action by Logan & Co. against H. T. Chapman. From an order sustaining a demurrer to the declaration, plaintiffs appeal. Reversed and remanded.

The declaration filed is as follows:

Now comes the plaintiff, Logan & Co., a firm or copartnership composed of W. W. Logan, Jr., and J. B. Franklin, citizens of Lauderdale county, Miss., by attorneys, and files suit in assumpsit against the defendant, H. T. Chapman, a resident citizen of Newton county, Miss., and for cause therefor would assign the following facts, to wit:

On or about, to wit, September —, 1913, plaintiff aforesaid was a lumber dealer and broker, dealing in various kinds of lumber, especially dealing in hardwood lumber, of which gum, oak, and poplar lumbars were then and there being dealt with and in by said plaintiff, and in dealing with and in said lumbars and in filling plaintiff's orders for such said lumbars said plaintiff relied wholly and exclusively upon the persons with whom said plaintiff held contracts to furnish lumbars, as said plaintiff had no mills of its own.

That on or about, to wit, September —, 1913, defendant aforesaid was engaged in operating a sawmill at or near Bethel, Newton county, Miss., and in doing so had cut and was cutting gum, oak, and poplar lumbars for the purpose of selling same to such person or persons who would buy same at such prices as said de-

fendant and such purchasers might agree upon.

That on or about, to wit, September —, 1913, said plaintiff was in the market for and desired some gum, oak, and poplar lumbers, and began to negotiate with said defendant to supply said plaintiff with certain quantities of each sort or kind of lumber aforesaid, and said negotiations were consummated and a contract entered into by and between said defendant and said plaintiff on or about the 6th day of September, 1913, as appears more fully from copy of said contract of that date which is hereto attached, marked Exhibit A, and hereby made part hereof the same as if herein specifically set forth, wherein and whereby said defendant did agree and obligate himself to furnish gum, oak, and poplar lumbers in amounts and at the prices therein named; that said acceptance contract was executed in duplicate in this manner, to wit: The said H. T. Chapman, defendant hereto, signed one of the parts of said contract of acceptance of said orders from said plaintiff for lumber, and said plaintiff signed the other part or duplicate which was delivered to and accepted by said defendant, and each of which parts of said duplicate acceptance contract was duly and regularly accepted by each of the parties hereto; that said lumbers, to wit, gum, oak, and poplar, named in and covered by said acceptance contract, were then and there in the possession of said defendant, as is shown by copy of letter from said plaintiff to said defendant under date of September 4, 1913, and said defendant's answer thereto under date of September 6, 1913, copies of each of which letters are hereto attached, marked Exhibits B and C, respectively, and hereby made parts hereof, the same as if herein specifically set forth, each of which said letters were issued just prior to the acceptance of said contract, copy of which is made Exhibit A hereto, which contract was duly and legally accepted by each of the parties hereto, and which contract said plaintiff did rely upon.

That notwithstanding the contract aforesaid and the fact that said plaintiff did rely upon said contract for the purpose of filling orders procured on the strength thereof, notwithstanding the fact that plaintiff was ready, willing and anxious and able to perform plaintiff's part of the contract aforesaid, and notwithstanding said defendant had the said lumbers of the kinds and amounts specified in contract on his yards at his said sawmill, said defendant did deliver and furnish only the gum specified therein, but willfully, wantonly, capriciously, or maliciously refused to deliver the other kinds of lumber specified therein, as is shown more fully from defendant's letter to said plaintiff under date of November 14, 1913, a copy of which is hereto attached, marked Exhibit D, and hereby made part hereof the same as if herein specifically set forth; that said refusal of said defendant to comply with his said contract and to furnish to said plaintiff the said oak and poplar lumbers was willful, wanton, capricious, or malicious and without justification in law; that said plaintiff was then and there ready, willing, and anxious and able to perform and to do each and everything incumbent upon said plaintiff to do under the terms of said contract; that because of said wrongful breach of said contract by said defendant said plaintiff was greatly damaged in actual damages in the sum of \$4 per M feet of each kind, to wit, oak and poplar lumber.

Wherefore plaintiff brings suit and demands judgment against said defendant for the sum of \$800 actual damages, and punitive damages, because of the willful, wanton, capricious, or malicious breach of said contract, in the sum of \$1,500 making a total of \$2,300 damages, together with all costs of this suit.

Thos. L. Bailey, of Meridian, for appellants. Byrd & Byrd, of Newton, for appellee.

HOLDEN, J. This appeal is from the circuit court of Newton county, where Logan & Co., appellants, filed their declaration against H. T. Chapman, appellee, claiming that the appellee, Chapman, is indebted to appellants in the sum of \$2,300 in damages for breach of contract and failure to deliver to appellants certain amounts of lumber alleged to have been contracted for according to the terms of a written contract filed with the declaration in the suit. There was a demurrer filed to the declaration by the defendant in the court below, and was sustained, from which order of the court the appellants, Logan & Co., appeal here.

The declaration in question is so lengthy that we shall not burden this opinion by setting it out here, but will content ourselves with saying that it sufficiently states a cause of action which the defendant below should have been required to answer by pleading and proof; therefore the circuit court erred in sustaining the demurrer, and for such error the judgment of the lower court is reversed, and the cause remanded.

AMERICAN BANK & TRUST CO. v. JOHNSON. (No. 17968.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

EQUITY \S 446—BILL OF REVIEW—RELIEF.

The original bill averred that complainant was the owner of an undivided one-half interest in land; that the undivided one-half interest of her cotenant was subject to a mortgage; that the cotenant had collected the rents for two years, but had failed to account—and prayed partition and that on sale of the lands for partition complainant should be reimbursed for the rents not accounted for. The mortgagee joined in the prayer for sale of the property, but prayed that the proceeds of the interest of complainant's cotenant should not be subjected to the payment of rent. The decree showed that a larger sum was paid to the mortgagee than to complainant. Held that, as a bill in the nature of a bill of review is for error apparent on the face of the record, and as only the pleadings and the decree may be looked to, complainant's bill in the nature of a bill of review, which averred the above facts, is good as against demurrer; the fact that the mortgagee received a larger sum than complainant disclosing error apparent on the face of the record.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1079-1090; Dec. Dig. \S 446.]

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Bill in the nature of a bill of review by Mrs. E. E. Johnson against the American Bank & Trust Company and others. From a decree overruling a demurrer to the bill, the named defendant appeals. Affirmed and remanded.

McLaurin & Armistead, of Vicksburg, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

SYKES, J. The appellee here, Mrs. E. E. Johnson, filed her bill in the nature of a bill

of review, against Mrs. Mary Bell Platt, E. S. Platt, her husband, the American Bank & Trust Company, and A. M. Waggener, trustee, defendants, in the chancery court of Warren county, alleging that an error had been committed against her, and that it appeared on the face of the decree and record in the partition suit filed by her against these same defendants in this same court, and asking that this error be cured and corrected. The allegations of the original bill, the pleadings and decree in said cause, show the following facts, viz.: The appellee was the owner of an undivided one-half interest in certain real estate situated in Vicksburg, and Mrs. Mary Bell Platt was the owner of the other undivided one-half interest. The undivided one-half interest of Mrs. Platt was included, along with other property, in a deed of trust to the appellant American Banking Company, in the sum of \$4,000. A bill, praying for sale of these lands and partition of the proceeds, was filed by appellee, and no answer was filed by either of the Platts, and decrees pro confesso were taken against them. In her original bill, appellee also alleged that the Platts had collected the rents and profits from these lands for a period of two years, and had failed to account to her for her undivided one-half of this amount, and also asked that they be required to pay the same to her, or that she be paid this amount out of the proceeds of the sale of the undivided one-half interest of the Platts. The American Bank & Trust Company answered, joining in the prayer for petition for sale of the property, but prayed that the proceeds of the undivided one-half interest which belonged to the Platts be paid to them, and not subjected to any claim for rents due the appellee; that it would be necessary for this entire amount to be paid to them because the balance of the property included in their deed of trust would not be sufficient for them to realize the amount of said indebtedness. There was no claim for any other equities in the pleadings, except that equity claimed by the appellee, Mrs. Johnson, arising from the amount due her by the Platts because of the rents collected by them for two years and unaccounted for to her. A commissioner was appointed by decree of the court to sell the land, and the ruling on the equities was reserved until final decree. The commissioner, after the sale and after the payment of the costs and attorneys' fees, paid to the appellant bank the sum of \$1,004.62, and paid to the appellee the sum of \$556.48, which, the decree of the court shows, settled all the equities between the parties.

It is the contention of the appellant, who filed a demurrer to the bill of review, that, since the decree and pleadings in the case show that there were certain equities to be settled, and which were settled in the decrees, then it is to be presumed that the di-

vision above set forth was in settlement of these equities. This is a mistake, however, for the reason that the only equities mentioned in the pleadings are those mentioned in the bill of the appellee, in which she claims that she is not only entitled to one-half of the proceeds of the sale of the land, but is also entitled to be paid out of these proceeds whatever amount is due her by the Platts for rents collected and unaccounted for by them. It is well settled in this state that the court, for an error apparent in the decree and the pleadings, should look to all the pleadings and the decree, but not to the evidence in the case; as is shown by the following quotation:

"A bill of review for error apparent on the face of the decree is in the nature of an assignment of errors, on writ of error, and the error must appear on the face of the pleadings, proceedings, and decree, without reference to the evidence. The propriety of the decree, as not justified by the evidence, cannot be questioned by bill of review, which is not a substitute for an appeal from the decree. The question presented by a bill of review for error apparent is whether the decree rendered is supported, taking everything as stated by the record, excluding the evidence, to be true. Under our system, all the pleadings, proceedings of record, and decree may be looked to on a bill of review for error apparent. The evidence cannot be. The authorities to this effect are numerous, and need not be cited. They all agree." *Enochs v. Harrelson et al.*, 57 Miss. 465.

If the appellee had been paid the larger sum instead of the appellant bank, the court would not be able to say that an error appeared on the face of the record; but since the appellee received the smaller amount, it is apparent from the decree and pleadings that a mistake was made against her.

The moneys remaining in the hands of the special commissioner, after paying court costs, commissioner's fee, solicitors' fees and the bill of J. R. Andress, should have been equally divided between the appellee and the American Bank & Trust Company.

The decree of the court below is affirmed, and the cause remanded, with leave to appellant to answer within 60 days after the mandate of this court is filed in the court below.

Affirmed and remanded.

ILLINOIS CENT. R. CO. v. DILLON et al.
(No. 17957.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. RAILROADS ⚡300—CROSSING ACCIDENTS—
LICENSEES.

Where pedestrians continued to use a street, though it was discontinued and not used by vehicles, a plank having been placed so as to facilitate crossing the tracks of the defendant railroad company, the railroad company is charged with knowledge of the use of the crossing, and though one using it may be only a licensee, the company owing him the same duty it owes one crossing at a public crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 955; Dec. Dig. ⚡300.]

2. RAILROADS — 350(13) — CROSSING ACCIDENT—JURY QUESTION.

In an action for the death of one run down while crossing railroad tracks, the question of his contributory negligence held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. 350(13).]

3. RAILROADS — 312(7)—CROSSING—DUTY.

Where, after it had been discontinued, many persons used a street to cross railroad tracks, and the railroad company was charged with knowledge of that fact, warnings of the approach of trains should be given, though the company was under no statutory duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 904; Dec. Dig. 312(7).]

4. RAILROADS — 350(2) — CROSSING ACCIDENTS—JURY QUESTION.

In an action for the death of one run down while crossing railroad tracks by means of a street which had been discontinued, the question of the company's negligence in failing to give warning and in backing the engine at a high rate of speed held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1163; Dec. Dig. 350(2).]

5. RAILROADS — 300 — CROSSINGS—DUTY OF CARE.

Where a railroad company is charged with knowledge that a crossing is used by many persons, it is bound to keep a lookout for such persons, while persons crossing the tracks are bound to look out for trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 965; Dec. Dig. 300.]

6. NEGLIGENCE — 101—RAILROAD CROSSING ACCIDENT—COMPARATIVE NEGLIGENCE—EFFECT.

Where one crossing railroad tracks at a street which had been discontinued, but was used by many persons, was guilty of contributory negligence, such negligence would only diminish the amount of, but would not defeat, recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. 101.]

Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action by Mrs. Nannie N. Dillon and others against the Illinois Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, and J. M. Boone, of Corinth, for appellant. Thomas H. Johnston, of Corinth, for appellees.

SYKES, J. Suit was filed in the circuit court of Alcorn county by the appellees here against the Illinois Central Railroad Company, the appellant, for \$25,000 damages for the alleged negligent killing of J. D. Dillon, the husband of Mrs. Nannie N. Dillon. A verdict and judgment of the court below in favor of the plaintiffs for \$5,000 was entered, from which this appeal is prosecuted. The material facts in the case as found by the jury were the following: The defendant railroad company was operating a railroad as a common carrier through the eastern part of the city of Corinth and within the corporate limits, and that the said railroad track

involved in this controversy crosses what was once known as Foote street. That about the time the railroad was constructed, by city ordinance, this street was closed. Pedestrians, however, continued to use this old street across the railroad as a crossing, and a plank had been put over a ditch by employees of the railroad company at the point where the pedestrians crossed said railroad. That this crossing was used by 150 or 200 employees of certain factories in going to and coming from their work every morning and every afternoon. That the usual time of crossing in the morning was between 6 and 7 o'clock. That the accident in question occurred in the morning between 6 and 7 o'clock. The railroad track here runs practically north and south, and Foote street crossed the same diagonally in a southeasterly direction. That on the morning of the accident which resulted in the death of the husband of appellee, J. D. Dillon, the deceased, was going to his work, proceeding along Foote street until he reached a coal chute which was on the west side of the railroad track following the footpath used by pedestrians across said railroad track. The testimony shows that on account of a coal chute and certain houses the view of the deceased as well as that of the train crew was obstructed until the deceased came from under the coal chute and was within about 6 feet of the track, at which place he could see and be seen. That on the day in question, apparently without looking or listening, he walked upon the railroad track and was struck by a switch engine of the railroad company which was backing on said track at a rate of speed variously estimated from 20 to 40 miles an hour, and was instantly killed. The testimony of the plaintiffs' witnesses was that they heard no bell ringing nor whistle blown by the engineer. The testimony of the engineer and fireman was to the effect that the fireman was ringing the bell, but was silent as to whether or not any sort of whistle was sounded for this crossing. It is the theory of the appellant that the deceased was at best a bare licensee to whom the railroad company owed only the duty of not willfully or wantonly injuring or killing him; further, that they were under no obligation to be on the lookout for him on the track, and were under no statutory or common-law obligation to sound any signal for this crossing. It is the theory of the appellee that the defendant railroad company is liable in this case if they were guilty of any negligence, that they owed more of a duty to the deceased than simply that of not wantonly or willfully injuring him, and that under the circumstances it was their duty to have maintained a lookout for pedestrians upon this crossing. The record shows that the 6 mile an hour speed limit had been released by the railroad commission in the

interest of appellant at this particular place, consequently this statute is not involved.

[1, 2] In considering what duty was owed by the appellant to the deceased in this case it is necessary to view the facts and circumstances relating to the use of this crossing or footpath by pedestrians over the track. The testimony in the record shows that while Foote street was closed so far as vehicles were concerned, pedestrians continued to use the same just as they had used it before it was vacated or closed. That every morning between the hours of 6 and 7 o'clock employes of certain mills situated on the east side of the track crossed this railroad track at this particular place. This fact certainly must have been well known to the defendant railroad company, and by all the laws of justice and humanity they are charged with this knowledge. There was no protest of any kind by the defendant company of this use of the old street by pedestrians. In fact the record shows that a plank had been placed over a ditch on one side of this crossing and had been fastened down to hold the same for the convenience of pedestrians using the same. This being true, we regard this as a very different case from the Arnola Case in 78 Miss. 787, 29 South. 768, 84 Am. St. Rep. 645, relied upon by counsel for appellee. In fact, the deceased in this case was more than a bare licensee; he was an invited licensee, sometimes called an invitee or a favored licensee, and the railroad company owed him the same duty that it owes to one on its tracks at a public or other crossing, namely, the duty not to negligently kill or injure. The question of contributory negligence of the deceased was properly submitted to the jury.

[3-8] While the railroad company was under no statutory duty to sound alarms for this crossing, at the same time it is our opinion that its common-law duty required the engineer to give signals of his approach to this much-used crossing, especially is this true when the engineer knew that he was approaching this crossing at a rapid rate of speed with a backing engine at the hour when between 150 and 200 people crossed it. In fact, their failure to give these signals, coupled with the fact that the engine was backing at a rapid rate of speed and that the engineer could not see anything in front of his engine within two or three car lengths, in our opinion, makes out a case of negligence under the common law, which should have been submitted to the jury. In this case the conduct of the railroad company was an implied invitation to pedestrians to use this crossing. *Allen v. Y. & M. V. R. Co.*, 71 South. 386. This case is very different from one where only a few people are in the habit of crossing the railroad track at a certain point not at a public crossing, as was the case in that of the *McCoy Case* in 105 Miss.

737, 63 South. 221. On account of the obstructions, above set forth, to one approaching the railroad and to employes upon engines and trains of the railroad, it was the duty of both the pedestrians and of the railroad employes to be more careful to maintain a proper lookout when approaching this crossing. However, any contributory negligence on the part of the deceased would only diminish the amount of the verdict, and the amount of this verdict leads us to believe that the jury took into consideration the contributory negligence of the deceased. In fact, we are of the opinion that the railroad company has no cause whatever to complain of the verdict or of the amount of same. The instructions given on behalf of the appellant were most liberal. We find no errors in the other assignments of error of the appellant. The case is therefore affirmed.

Affirmed.

CHANDLER et al. v. CHANDLER et al.
(No. 17608.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. TRUSTS \Leftrightarrow 243 — TERMINATION—PERSONAL TRUSTS—DEATH OF TRUSTEE.

Where a will vested legal title in a trustee for the use of the children of certain named parties, with power to sell land "in his discretion"—that is, when it was for the best interests of cestuis que trust—the trust, in so far as the power to sell was concerned, was a purely personal trust, which could not be exercised by another so that on his death the power to sell was extinguished.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 350; Dec. Dig. \Leftrightarrow 243.]

2. PARTITION \Leftrightarrow 12(2) — LAND SUBJECT TO PARTITION—STATUTE.

Under Code 1906, § 3521, providing that partition of land held by joint tenants in common having an estate in possession, whether in a freehold or a term of years, may be made by the chancery court, beneficiaries under a testamentary trust, after death of the trustee had extinguished a power to sell when for the best interest of the beneficiaries, were entitled to a partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 40, 49, 50; Dec. Dig. \Leftrightarrow 12(2).]

Appeal from Chancery Court, Madison County; P. Z. Jones, Chancellor.

Bill for partition between J. P. Chandler and others and P. R. Chandler and others. Demurrer to bill sustained, and J. P. Chandler and others appeal. Reversed and remanded.

John F. Wilkerson, formerly a resident of Madison county, died in 1909, leaving a last will and testament, item 2 of which is as follows:

"I give, bequeath and devise unto R. C. Chandler in trust all of the remainder of my property, real, personal and mixed, of every nature and kind whatsoever, for the use and benefit of all of the children of Ann Chandler and Abe Chandler, of Halifax, Virginia. and the said R. C. Chandler is invested with the legal title to the same and is empowered to sell, assign,

transfer and convey any and all of it as in his discretion he may see fit, for the use and benefit of said children aforesaid, and the purchaser need not look to the application of the proceeds of said sale, or sales, but said R. C. Chandler shall not sell any of said lands until 20 years have elapsed, unless he can sooner sell it for as much as \$20.00 per acre—for that he may sell.”)

R. C. Chandler is named as the executor, and he qualified and proceeded to execute his trust. R. C. Chandler died in 1912, and thereafter appellants, who are the children of Ann and Abe Chandler, filed a bill for partition of the property bequeathed to them by the terms of said item of the will of said Wilkerson. The heirs at law of R. C. Chandler, deceased, are made defendants to the bill. It is alleged in the bill that since the death of R. C. Chandler the trust, which was personal to him, has failed, and that the land devised in said will descended upon the death of R. C. Chandler to these petitioners free from any trust or limitations, and that the petitioners are the owners in fee simple, and that said lands are now subject to be partitioned in kind among them. The prayer is for partition.

The defendants filed a demurrer, which alleged that under the clause in the will referred to the land must be held in trust for 20 years, and that the complainants are not entitled to a partition in kind until after the expiration of 20 years. The court sustained the demurrer, and this appeal is prosecuted.

Section 3521 of the Code of 1906, referred to in the opinion, is as follows:

“Partition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five, may be made by decree of the chancery court of that county in which the lands, or some part thereof, are situated; or if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.”

H. B. Greaves, of Canton, for appellants. Green & Green, of Jackson, and W. H. & R. H. Powell, of Canton, for appellees.

SMITH, C. J. The sole question presented to us on this record is whether or not the land here in question is subject to partition at the suit of the children of Ann and Abe Chandler before the expiration of 20 years from the death of the testator.

[1] By the will the legal title to the land was vested in R. C. Chandler and the equitable title thereto in the children of Ann and Abe Chandler. To R. C. Chandler was also given the power to sell the land “in his discretion,” from which we understand that he could sell or not as in his judgment was for the best interests of his cestui que trust. The trust reposed in him, therefore, in so far as the power to sell is concerned, is a purely personal one, and cannot be exercised

by another, from which it follows that upon his death the power to sell became extinct.

[2] We are not called upon now to determine in whom the legal title to the land is vested, for, conceding that it is vested in some person or persons other than the children of Ann and Abe Chandler, such person or persons hold the land in trust without any duties to discharge relative thereto, but merely for the benefit of the children of Ann and Abe Chandler, who are entitled to the possession thereof, and against whom the legal title cannot be set up (*Brown v. Doe ex dem. Weast*, 7 How. 181), so that under section 3521, Code of 1906, they are entitled to a partition. The decree of the court below will be reversed, and the cause remanded, with leave to appellee to answer within 30 days from the filing of the mandate in the court below.

Reversed and remanded.

WHEELER v. SOUTHERN RY. CO. (No. 18097.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. DEATH \Leftrightarrow 8—WHAT LAW GOVERNS.

The law of the state where the plaintiff's intestate was killed must govern in an action for his wrongful death, brought by the administrator in Mississippi.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. \Leftrightarrow 8.]

2. DEATH \Leftrightarrow 32 — ACTION FOR WRONGFUL DEATH—PARTIES PLAINTIFF—MOTHER OF ILLEGITIMATE CHILD—“NEXT OF KIN.”

Under Shannon's Code Tenn. § 4025, providing that the right of action of a person whose death is caused by the wrongful act of another shall pass to the widow, and if there is no widow, to his children or personal representatives for the benefit of his widow or “next of kin,” and section 4166, providing that on the death of an illegitimate child, intestate, his estate shall go to his mother, the mother of an illegitimate child was the “next of kin,” and might maintain an action by the administrator for his wrongful death.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 47, 48; Dec. Dig. \Leftrightarrow 32.

For other definitions, see *Words and Phrases*. First and Second Series, Next of Kin.]

3. RAILROADS \Leftrightarrow 400(6)—ACTIONS FOR DEATH—QUESTION FOR JURY.

In an action for the wrongful death of plaintiff's intestate, killed by defendant's train in Tennessee, governed by Shannon's Code, Tenn., § 1574, subsec. 4, requiring railroads to keep an engineer or some one on the locomotive always on the lookout ahead, and when any person appears on the road to employ every possible means to prevent the accident, section 1575, making every railroad failing to observe such precautions responsible for all damages to persons resulting from any accident, and section 1576, exonerating it from liability if it has observed such precautions, evidence held to make the defendant's negligence a question for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1373; Dec. Dig. \Leftrightarrow 400(6).]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by Dr. J. S. Wheeler, Administrator, against the Southern Railway Company. Judgment for defendant and plaintiff appeals. Reversed and remanded.

Cunningham & Cunningham and Julius E. Berry, all of Booneville, for appellant. W. J. Lamb, of Corinth, for appellee.

HOLDEN, J. This case is appealed from the circuit court of Tishomingo county, where the appellant, Dr. J. S. Wheeler, administrator of the estate of Fred Thomas, deceased, filed his declaration against the appellee, Southern Railway Company, claiming damages for the death of Freddie Thomas, caused by one of appellee's trains, about two miles east of Rossville, Tenn. The deceased, Freddie Thomas, was a bastard, about 16 years of age, and the suit was filed by the administrator for the benefit of the mother of this bastard son. The testimony in the case shows that one night in October, 1912, Freddie Thomas and Audie Gaines, both boys about 16 years of age, were traveling afoot east on the right of way of the appellee, about 2 miles east of Rossville, Tenn., on their way to Corinth, Miss. While walking along the track in the nighttime, they became tired and seated themselves for a temporary rest upon the appellee's main track at a place where the roadbed was level and the track clear and straight for a distance of 2 or 3 miles. While seated upon the track, they both fell asleep, and while they were sitting there asleep, the appellee's east-bound fast passenger train approached, running at a speed of 40 or 50 miles an hour. When the train got within about 200 feet of the boys, one of them, Audie Gaines, awoke, and, seeing his danger, sprang from the track just in time to escape being struck by the engine, while the deceased, Freddie Thomas, awoke and raised his head to look, and was struck by the train and killed.

[1] As the law of Tennessee, where the death occurred, must govern this action, we here set out the statutes of Tennessee upon which the cause of action is based: Section 1574, subsec. 4, Shannon's Code of Tennessee of 1896:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

Section 1575:

"*Failure to Observe Precautions.*—Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

Section 1576:

"*Observances of.*—No railroad company that observes, or causes to be observed, these precau-

tions shall be responsible for any damage done to persons or property on its road. The proof that it has observed said precautions shall be upon the company."

It will be observed that the Tennessee statutes require that every railroad company running locomotives keep an engineer, fireman, or some other competent person on the lookout ahead, and, when any person, animal, or other obstruction appears upon the road, to sound the alarm whistle, put down the brakes, and do everything possible to prevent an injury; and when any person appears upon the road as an obstruction and is injured or killed by a train, the railroad shall be liable for damages, unless it exonerates itself by proof that it observed all of the precautions required by the statutes, viz., a competent lookout ahead, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

The appellant made out his case by the proof required under the statute, and rested. The appellee railroad company then undertook to meet the burden imposed by the statutes, and introduced the engineer, Smith, who was in charge of the engine of the train that struck and killed the deceased, Freddie Thomas. Engineer Smith testified that he was at his place on the engine, was on the lookout ahead, and as soon as the obstruction appeared on the track, sounded the alarm whistle, put down the brakes, and did everything possible to stop the train and prevent the injury. The engineer further testified that the two boys on the track were not seen by him until his engine had approached within 150 to 200 feet of them. He also testified that the headlight on his engine was a high-power electric headlight, and was adjusted for "seeing far away," and that his electric headlight was "focused to shine something like 300 to 400 yards beyond the point of the angle." He also admitted that at the time of the killing, and while near the mangled body of the deceased, he said that he did not see these boys on the track until he was "right on them."

In rebuttal, the appellant introduced as a witness, Audie Gaines, the other boy who escaped death at the time the deceased was killed, and this witness testified that he was present, and was close to where the deceased was when struck, and was in close proximity to the train as it approached and passed, and that he heard no alarm whistle sounded. He also contradicted the testimony of the engineer, Smith, in that, he said that the train did not begin to stop until the engine had passed him. The appellant also introduced a witness by the name of W. T. Barnett, who testified that he was a passenger on the train at the time it struck the deceased, Freddie Thomas, and that he heard no whistle alarm sounded, and that he was in a position to hear it, and would have heard it if any had been sounded.

Other testimony in the record shows that the length of the train in question was 845 feet; and the engineer, Smith, testified that the brakes were put on 150 to 200 feet west of the scene of the injury, and that the train came to a stop within 800 feet from the place where the brakes were applied, and that the train ought to be stopped within 1,000 feet. The witness Barnett testified that the rear end of the train, when it stopped, must have been one-half mile east of the scene of the injury, thus contradicting Engineer Smith materially as to the point at which the brakes were applied.

Other testimony in the record discloses that with the same kind of straight, level track, and with the same kind of train, engine, and electric headlight, operated under similar conditions, a boy on the track could be observed from the engine for a distance of 350 steps. Other evidence in this connection shows that under the circumstances and conditions just named above, a boy lying on the track between the rails could be seen with this headlight at a distance of from 400 to 1,000 yards.

With all the above testimony before the court, the appellee requested, and was granted, a peremptory instruction, directing the jury to find for the defendant; and the appellant assigns as error this action of the lower court.

[2] The appellee raised the point in the lower court, and urges it here, that, as the deceased Freddie Thomas was a bastard, a recovery by the administrator for the benefit of the mother will not lie, for the reason that the mother of a bastard child is not, under the law, the "next of kin," and that consequently the action cannot be maintained. A suit, under the Tennessee statute (section 4025, Shannon's Code) may be brought for the benefit of the "next of kin," and under another statute of Tennessee, the mother of a bastard child may inherit his estate. Section 4168, Shannon's Code:

"Statute of Illegitimate, How Inherited.—When an illegitimate child dies intestate without child or children, husband or wife, his real and personal estate shall go to his mother; and if there be no mother living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters"

—and therefore it follows that the mother is the "next of kin," and may, under the statute (section 4025, Shannon's Code), maintain an action, by the administrator, for damages for the death of her bastard child. The harsh and unjust rule that has been applied to illegitimates by the common law is undoubtedly modified by the statute referred to above. This common-law rule was announced in an age when the thought and conditions then obtaining were different, and probably less humane, than at the present day. A bastard comes into the world on account of an immoral act for which he is in no way responsible. It is not because of his own conduct that he is discriminated against

by the law, but the discrimination is based upon acts committed by other persons, without his consent or knowledge, and long before he was born. The Legislature manifested a spirit of justice and fair play by modifying the common-law rule, the harshness of which had so long been obvious to all. In the case of *L. T. Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N. E. 411, an Indiana case, the subject is so ably discussed that we here quote at length from the opinion by Justice Laird:

"It is undoubtedly true that, by the common law, a bastard was looked upon as the child of nobody. 'He cannot be heir to any one, neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody, and he has no ancestor from whom any inheritable blood can be derived.' 1 Bl. Com. 459. Kent says: 'The rule that a bastard is nullius filius applies only to the case of inheritances. It has been held to be unlawful for him to marry within the Levitical degrees; and a bastard has been held to be within the marriage act of St. 28 Geo. II, which required the consent of the father, guardian, or mother to the validity of the marriage of a minor. He also takes and follows the settlement of his mother. With the exception of the right of inheritance and succession, bastards, by the English law, as well as by the law of France, Spain, and Italy, are put upon an equal footing with their fellow subjects; and in this country we have made very considerable advances toward giving them also the capacity to inherit by admitting them to possess inheritable blood.' 2 Kent, Com. (13th Ed.) 214. It will be seen that the chief incapacity of a bastard consisted in his want of inheritable blood. This want has been supplied in this state by statute, and the harsh rule of the common law, which forbade an illegitimate child inheriting from its mother or she from it, has been thereby abrogated. * * *

"This action is brought by the administrator of the deceased illegitimate child under the provisions of section 285, Burns' Rev. Stat. 1908, and the question is whether the mother of such child is its next of kin, or whether such child has no next of kin within the meaning of the provisions of that section. As we have seen, the statutes of this state give to such a child the right to inherit from its mother, and to the mother and her descendants and collateral kindred a right to inherit from such child. In this state there is no distinction between heirs at law and next of kin. 'At common law the chief practical difference between next of kin and heirs at law is that the former take the personal property by distribution, and the latter the real estate by descent. But under our statutes of descent, no such distinction is recognized, and the heirs at law are also the next of kin.' Henry's Probate Law, par. 819. In the case of *Rogers v. Weller*, the federal court construed the term, 'next of kin,' as applied to an illegitimate child, in connection with a statute of Illinois similar to our own. The court said: 'The effect of this statute is to give to the illegitimate children of the mother inheritable blood. So far as our state is concerned, they are vested by the operation of this statute with the qualities of inheritance. They can receive from the mother by descent and take real estate and other property to the same extent as legitimate children, and, taken in connection with the subsequent statute of 1853, which has first been discussed, it seems to me that the better interpretation is that the term "next of kin," used in the last clause of the act of 1853, includes illegitimate children, if such exist, of the mother, where the mother is heir.' *Rogers v. Weller*, 20 Fed. Cas. 1130, 1131. The statute of Illinois confers upon il-

legitimate children practically the same rights in reference to inheriting and transmitting property by inheritance as are given by our statute. The Supreme Court of that state held that these statutes so changed the status of a bastard at common law as to permit his administrator to maintain an action for his death for the benefit of his mother as his next of kin. The case is exactly in point, and holds that, under statutes such as ours, the mother of an illegitimate child is his next of kin and his heir, and that an action may be maintained by the administrator of such deceased illegitimate child for her benefit as its next of kin. *Security Title, etc., v. West Chicago, etc., R. Co.*, 91 Ill. App. 332. In the case of *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, the Supreme Court of Missouri held that the mother of an illegitimate child could maintain an action for the wrongful death of such child under a statute conferring upon a parent the right to maintain an action for the wrongful death of an unmarried minor child. The decision was based upon the statute of that state which provides: 'Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child or children in like manner as if they had been lawfully begotten of her.' Rev. St. 1889, § 4773. The court says: 'This section does not, it is true, legitimate a bastard, but it concedes to him inheritable blood on the mother's side. Instead of being the son of nobody, as at common law, he has a mother who is recognized as such by our laws. The duty of supporting him rests upon her, and she is entitled to his services during minority. As the chief and principal incapacity of a bastard has been removed so far as he and his mother are concerned, there seems to be no good reason why a statute that speaks of parents and children should not apply to a mother and her illegitimate child, unless there is something in the statute or subject about which it treats to show that it was not intended to apply to persons standing in that relation.'

'Our attention has been called to the cases of *Alabama, etc., Co. v. Williams*, 78 Miss. 200, 28 South. 853, 51 L. R. A. 838, 84 Am. St. Rep. 624, and *Illinois, etc., R. Co. v. Johnson*, 77 Miss. 727, 28 South. 753, 51 L. R. A. 837, both decided by the Supreme Court of Mississippi (in October, 1900). The first of these cases was an action by Susan Williams to recover from the appellant for the wrongful death of her illegitimate child. A recovery was denied, and, in the course of the opinion, the court says: 'Counsel cite *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, where the right of the mother of a bastard to sue for his death was sustained. It will be seen on page 282 of 120 Mo., page 181 of 25 S. W., that the opinion in fact rests on two statutes of the state of Missouri; the first declaring the mother to be the natural guardian of her illegitimate child. We have no such statute in Mississippi. The second declares that the mother may inherit from her bastard child. We have no such statute in Mississippi. Here the mother of a bastard cannot inherit from him.' * * * The phrase 'next of kin' includes such persons as are entitled to inherit the personal property of the deceased person. *Warren v. Englehart*, 13 Neb. 283, 13 N. W. 401. Under the statutes of our state, the mother of an illegitimate child and her descendants and collateral kindred are entitled to inherit the personal property of such deceased child, and are therefore its next of kin. We recognize the rule that a statute in derogation of the common law must be strictly construed, and we regard section 285, Burns' Rev.

Stat. 1908, as such a statute, but we do not think that a strict construction of this section will prevent the mother of an illegitimate child from being considered its next of kin within the meaning of this act."

[3] We will now discuss the question as to whether or not the lower court erred in granting a peremptory instruction for the appellee railroad company on the facts. Did the railroad company meet the burden imposed upon it by the statutes and exculpate itself by proof? Did the engineer sound the alarm whistle when the deceased appeared upon the track? The engineer says that he did sound the alarm whistle; but the witness, Barnett, who was a passenger on the train at the time of the injury, disputes the engineer as to this; and the witness Audie Gaines, who was the closest living person, at the place of the injury, testifies that he heard no alarm whistle sounded, which also disputes the testimony of the engineer as to this requirement of the statute. There is other evidence in the record which presents a conflict as to whether the "brakes were put down" and every possible means employed to stop the train and prevent the injury. It will be observed further in this testimony, that here was a straight, level, clear track for a distance of 2 miles, upon which a boy lying down could be seen by the engineer using an electric headlight for a distance of some 400 to 1,000 yards. The engineer testified that he did not see the boys until he was "right on them," or about 150 or 200 feet from them. Now, the statute requires that the railroad company shall keep the engineer always upon the lookout ahead. If the engineer was at the time "upon the lookout ahead," he should have seen the deceased boy upon the track in plenty of time to have stopped his train and avoided the killing. These facts and circumstances present a material conflict in the testimony. If the engineer did not stop the train within 800 feet after he passed the point of the injury, but ran on for half a mile farther, as testified to by the witness Barnett, then this fact would be a circumstance, raising a conflict in the proof, as to whether or not the engineer "employed every possible means to stop the train and prevent an accident."

We do not hesitate to say, after a careful review of all the testimony in this case, that there is a sharp conflict in the testimony of the appellant and appellee, and the lower court should have let this case go to the jury, so that they might pass upon the facts, and determine whether or not the appellee railroad company is liable for damages, under the law and facts, as they appear in this record.

Reversed and remanded.

J. K. ORR SHOE CO. v. EDWARDS et al.
(No. 18203.)

(Supreme Court of Mississippi, Division B.
May 29, 1916.)

**1. JUDGMENT — 589(2) — CONCLUSIVENESS —
DIFFERENT CLAIMS — MATTERS WHICH COULD
NOT HAVE BEEN ADJUDICATED.**

A judgment for defendant in a previous suit for shoes sold by plaintiff, in which defendant pleaded nonreceipt of same and release by plaintiff in consideration of assignment of the cause of action against the railway for nondelivery, does not bar a later suit by the same plaintiff, alleging a fraudulent conspiracy by defendant with another to defraud plaintiff of the value of these goods, discovered after first judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1101; Dec. Dig. — 589(2).]

**2. LIMITATION OF ACTIONS — 100(11) — FRAUD
— DISCOVERY.**

Where complainant exercises reasonable diligence, the statute of limitations does not run against a suit by him for fraud until his discovery of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 490; Dec. Dig. — 100(11).]

3. CONSPIRACY — 15 — EQUITABLE JURISDICTION.

A complaint for fraudulent conspiracy in obtaining goods belonging to plaintiff, with a prayer for discovery and for an accounting, shows a case coming within the jurisdiction of equity.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 15; Dec. Dig. — 15.]

Appeal from Chancery Court, Jones County; Sam Whitman, Jr., Chancellor.

Suit by the J. K. Orr Shoe Company against D. V. Edwards and another. Demurrer to bill of complaint sustained, and complainant appeals. Reversed and remanded.

On the 17th day of April, 1913, appellant filed its original bill of complaint in the chancery court of the Second district of Jones county against D. V. Edwards and J. C. McKinley. Appellant sets out in its original bill of complaint that it is a corporation domiciled in Atlanta, Ga., and the defendants are residents of the Second district of Jones county. Complainant sets out that it sold to D. V. Edwards at Gitano, Miss., 228 pairs of shoes for the sum of \$376.85, and that by the terms of contract of said sale said shoes were to be shipped to Gitano, Miss., a flag station on the branch line of the Gulf & Ship Island Railroad Company; that Gitano was a station where the railroad maintained no depot, but threw off freight at the risk of consignee, requiring, therefore, that the freight charges be paid in advance; that although the complainant had promptly filled the order for the shoes above mentioned and promptly delivered the same to the railroad company, through some fault of the railroad company said shoes were not delivered promptly at Gitano; that the said shoes were packed in

crates and boxes, and when they arrived at Gitano were thrown off the freight train and remained there for several days, when same disappeared. The bill further alleges that, defendant Edwards having declined to pay for the said shoes, complainant brought suit against him on open account, and that Edwards appeared and filed his plea, stating that after he had given appellants the order for said shoes and did not receive them, appellant's traveling salesman called on him at Summerland, Miss., where appellee was then in business, and on the condition that he be relieved of paying for the shoes, he gave appellant's traveling salesman the bill of lading for said shoes in order to make claim against the railroad company, and gave appellant's traveling salesman another order for goods to be shipped to him at Summerland. At the October, 1910, term of said court this case was tried before a jury and this issue submitted to the jury, and the jury decided in favor of the appellee Edwards. Appellant further alleged in his bill that on the 5th day of May, 1907, appellee D. V. Edwards sold his stock of goods at Gitano to J. W. McKinley, who was made a defendant to the original bill. It is alleged that McKinley took charge of said stock of goods at Gitano, and remained in charge for several months, and that then the said McKinley resold the said stock of goods to appellee. The bill further alleges that as soon as it was found out that Edwards had not received the 13 boxes containing said shoes, appellant diligently endeavored to locate same, and to ascertain who did get the shoes, but that its efforts were unsuccessful until within six months before the filing of its bill of complaint, when it learned for the first time that J. W. McKinley got the shoes, and learned at the same time that McKinley carried the shoes in question to his store at Gitano, Miss., and unpacked them and placed them with the stock of goods that he had, only a short time before, bought from Edwards, and that afterwards McKinley resold the said stock of shoes containing the identical shoes to appellee, and that when McKinley took the shoes that he knew the shoes had been consigned by appellant to appellee, and that when Edwards bought the stock of goods from McKinley he bought it with the full knowledge that it contained the said 228 pairs of shoes shipped by appellant to appellee. The bill further alleges that, even before the trial of the case in the circuit court, appellee knew that McKinley had taken possession of the shoes, and that when he rebought the stock of goods, he knew that the 228 pairs of shoes or a part of them, were in the said stock of goods, and fraudulently concealed this fact from appellant and his attorneys. And the bill further alleges that the appellee colluded and contrived with the codefendant J. W. McKinley to defraud appellant of the value

of the shoes, and that the number of pairs of shoes that reached the possession of Edwards when he repurchased the stock of goods is well known to both Edwards and McKinley, but is unknown to appellant and his attorneys. It further alleged that the shoes taken by McKinley from the depot at Gitano, Miss., were mingled with the stock of goods then owned by him and a short time afterwards sold to appellee. There was attached to the original bill of complaint certain interrogatories to be propounded to Edwards, seeking to discover facts that are known only to Edwards and the codefendant McKinley, and attached to the bill was an itemized statement of the bill of shoes shipped by appellant to Edwards, and which afterwards came into the possession of the defendants. The defendants demurred to said bill of complaint on the ground that the controversy in question had been settled in another suit, and that all matters contained therein were res adjudicata; that the bill showed on its face that the account in question was barred by the statutes of limitation; and that the complainant had a full, complete, and adequate remedy at law. The demurrer was sustained, and complainant, refusing to amend, appeals to this court.

Shannon & Schaubert, of Laurel, for appellant. Henry Hilbun, of Laurel, for appellees.

POTTER, J. (after stating the facts as above). [1, 2] While growing out of the same subject-matter, the facts involved in the suit presented by the bill of complaint in this case are entirely different from the facts relied upon by the appellant in its suit in the circuit court of Jones county against the appellee for the value of the shoes in question. The facts in controversy in the first suit grew out of the original contract of sale and the release pleaded by the defendant. This matter was resolved in favor of the defendant, and cannot be reopened. The suit at bar arises from another cause. The shoes in question were adjudged the property of appellant in the first suit, and it was for the conversion of this property that the second suit was brought. The bill of complaint charges a conspiracy between the two defendants in this suit, McKinley and Edwards, to defraud the complainant. The bill alleges that prior to the original suit the complainant in this case knew nothing about this fraudulent conspiracy, and did not know about same until within six months of the filing of the present suit. These matters were not in controversy in the first suit, and could not have been in controversy because the complainant knew nothing about them. The statute of limitations does not bar the complainant because it alleges that, although exercising reasonable diligence, it did not discover the fraud upon it until within six months previous to the filing of this suit.

The statute, therefore, did not begin to run until the discovery by the complainant of the fraud.

[3] This is a proper suit to invoke the jurisdiction of the chancery court. There were charges of fraud and prayer for discovery, and for an accounting, and the remedy at law is not "full and adequate and complete" as is the remedy afforded by the chancery court in this case.

Reversed and remanded.

TINSLEY v. LOVETT et al. (No. 17890.)
(Supreme Court of Mississippi, Division A.
April 24, 1916. Suggestion of Error
Overruled May 22, 1916.)

1. CHATTEL MORTGAGES \S 240—PAYMENT—VALUE OF PROPERTY DELIVERED—EVIDENCE.
Where the highest value placed upon the mules, etc., taken by defendant, who had a mortgage thereon, was \$450, the evidence did not support a finding that they were worth \$495, and that defendant should be charged with that amount.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 506, 508; Dec. Dig. \S 240.]

2. MORTGAGES \S 199(3) — CONVEYANCE IN SATISFACTION—RECONVEYANCE—RENT.

On a bill to set aside a conveyance of land to a mortgagee in satisfaction of the debt, defendant, agreeing to a reconveyance, was chargeable with \$25 for "pasture on farm," where he was also charged for the rent of the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 517-519, 522; Dec. Dig. \S 199(3).]

3. MORTGAGES \S 304—CONVEYANCE IN SATISFACTION—RECONVEYANCE—LIABILITY.

On such bill the defendant, if a saw and gristmill situated on the land was personal property, would be chargeable with the value thereof, but if it was a part of the realty he would only be chargeable with the value of the mill rocks removed and sold by him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 864, 872; Dec. Dig. \S 304.]

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Bill by M. T. Lovett and another against J. T. Tinsley. Decree for plaintiffs, and defendant appeals. Reversed and remanded.

Appellee and wife being indebted to appellant executed a deed of trust covering their homestead in Neshoba county and mules, wagon, and crop. Shortly after the execution of this deed of trust appellee left his wife and home and went to an adjoining county, where he remained for some time. Appellant and the trustee in the deed of trust followed him into the adjoining county and took possession of the mules and wagon and returned to Neshoba county with the property.

The legal title to the homestead was in Mrs. Lovett, and appellant went to her home and informed her that unless she was willing to make a voluntary conveyance of the property in settlement of the debt that he would foreclose the deed of trust. Thereupon she conveyed the property. After this convey-

ance was made appellant took possession of the property, gathered and sold the crop, and sold the mules and certain mill rocks found on the place. Thereafter appellee returned to his wife and filed a bill to cancel the conveyance made by Mrs. Lovett to appellant charging oppression and fraud. Appellant denied these charges and expressed a willingness to reconvey the land and redeliver the personal property which had not been disposed of upon payment to him of such balance as might be due on the debt. The parties not being able to agree on values the case was referred to a master, who stated an account, exceptions to which were duly filed and disallowed and a decree rendered by the chancery court based upon the finding of the master, from which this appeal is prosecuted.

In the master's report he charged the appellant \$495 for the mules, wagon, and harness, which had been disposed of. The proof showed that they had been purchased for \$450 two years before. Appellant is also charged with \$25 for the use of the pasture on the farm, and is charged with 118 bushels of corn, at \$1 a bushel, when it is shown that only 86 bushels of corn was produced, worth 90 cents a bushel, and appellant is charged with \$50 for hay, and \$200 for a gristmill and fixtures, when it is shown that the mill rocks which were removed by appellant were not worth more than \$100, and that the balance of the mill remained on the land, which was awarded by the decree of the court to the appellee.

E. S. Richardson, of Philadelphia, and Wells, May & Sanders, of Jackson, for appellant. Byrd & Byrd, of Newton, for appellees.

SMITH, C. J. [1] The highest value placed upon the mules, wagon, and harness by any witness was that of appellees themselves, which was \$450, so that the evidence does not support the finding that they were worth \$495. It is true that the gentleman who sold the mules and wagon to appellees testified that he took their notes therefor for \$495, payable about a year after date, but he also stated that the price at which they were sold to appellees was \$450, and that he charged them 10 per cent. interest thereon to the maturity of the note, amounting to \$45, which he added to the face thereof.

[2] No charge should have been made against appellant for \$25 "pasture on farm," for two reasons: First, the evidence does not clearly disclose that he pastured any cattle on the land; and, second, the chancellor, in addition to the items charged against appellant by the master, charged him for rent of the land. The evidence will not support a finding that the crop produced more than 86 bushels of corn.

[3] If the saw and grist mill situated upon the land is personal property, appellant

should be charged with the value thereof; and it may be that the evidence discloses, as found by the master, as to which we express no opinion, that it was worth \$200, and in that event the charge is a proper one. If, however, this mill was a part of the realty, appellant should have only been charged with the value of the mill rocks belonging thereto and which were appropriated and sold by him. Since the decree of the court below must be reversed on other grounds, we will not express an opinion at this time as to whether or not this mill was a part of the realty; the evidence relative thereto being of such character as not to enable us safely so to do.

We have not been referred to any evidence, and our investigation has disclosed none, from which the master was warranted in finding that the hay was worth \$50.

The evidence as to the other items complained of was in conflict.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. RAGSDALE. (No. 17976.)

(Supreme Court of Mississippi, Division A. May 22, 1916.)

1. TELEGRAPHS AND TELEPHONES 66 — DAMAGES—PUNITIVE DAMAGES.

In an action for damages against a telegraph company for false report on nondelivery of telegram, where it appeared that in no instance were the mistakes made by defendant's servants the result of willful or gross negligence, but that they acted in good faith, punitive damages were not recoverable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 71; Dec. Dig. 69.]

2. TELEGRAPHS AND TELEPHONES 68(1) — ACTIONS FOR DAMAGES—MENTAL SUFFERING.

In an action against a telegraph company, where defendant, in endeavoring to notify the sender of a telegram that plaintiff was out of town, and that the message sent could not be delivered, as a consequence of several blunders of its employés, finally notified the sender that his telegram was undelivered, and erroneously stated that plaintiff was "unknown at the courthouse," plaintiff could not recover compensatory damages for mental pain and suffering.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 69; Dec. Dig. 68(1).]

3. LIBEL AND SLANDER 9(1)—WORDS ACTIONABLE.

There was no "libel" on these facts.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 80, 90; Dec. Dig. 9(1).]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by Wm. A. Ragsdale against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. B. Harris, of Jackson, for appellant. Mayes & Mayes, of Jackson, for appellee.

HOLDEN, J. This is an appeal from the circuit court of Hinds county, First district, where the appellee, W. A. Ragsdale, recovered a judgment for \$1,000 damages against the Western Union Telegraph Company, and the telegraph company appeals to this court. The declaration filed by Ragsdale, plaintiff in the court below, contains two counts, and seems to be, in substance, an action for libel; but on the trial of the case, and on this appeal here, the appellee appears to have abandoned his contention of libel, and relies upon his right to recover in tort, which is based upon an alleged false report made in writing, and which false report is alleged to have been made through the gross negligence, maliciousness, and wantonness of the telegraph company. The facts, upon which this suit is based, may be briefly stated as follows: Judge A. K. Nippert, of Cincinnati, Ohio, was a stockholder in the American Delinting Company, in which the appellee, W. A. Ragsdale, was also a stockholder and manager. The American Delinting Company was a corporation, having its principal office in Jackson, Miss. On October 7, 1913, Judge Nippert sent the following message, a night letter, to the appellee Ragsdale:

"Cincinnati, Ohio, 7th, 1913.

"W. A. Ragsdale, Care American Delinting Co., Jackson, Miss.: Want to send a young man to Jackson and West Point prior to engaging him to assist in company's business. When and where can you meet him? Wire me immediately. [Signed] Nippert."

It appears from the evidence that the appellant telegraph company had a main office in Cincinnati and several branch offices there, the branch offices being located in different parts of the city, for the convenient handling and dispatch of business; that messages addressed to parties in Cincinnati would come to the main office, and from the main office be transmitted to a branch office most conveniently located to the place of delivery, and messages to be sent from Cincinnati were received at the branch offices and transmitted to the main office, and from the main office would be transmitted to the point of destination; that messages to and from Cincinnati were handled in this way, by various employes in the branch and main offices. The above message set forth was received at a branch office in Cincinnati, known as the "MK" branch office, by Mrs. J. Q. Dobel, the telegraph operator who had charge of that branch office. She was called up by some one at the Mohawk Bank, and asked to send a messenger boy for a message; she replied that she did not have a messenger boy convenient, and, shortly afterwards, the party came to the branch office in an automobile and filed a message. She asked the party to leave his address, but he stated that it would be unnecessary, as the party to whom the message was addressed would know the proper address to send the reply to. The message was promptly transmitted to Jackson, Miss.

The office of the American Delinting Company was very well known to the employees of the telegraph office at Jackson, it being only about two blocks from the telegraph office. Upon the receipt of this message at Jackson it was immediately given to a messenger boy, one John Pierce, who took it at once to the office of the American Delinting Company, where he found the office locked. He then made inquiry of a Mr. Dreyfus, occupying an office in the same building, and was informed by Mr. Dreyfus to inquire of Mr. Montgomery, who, it appears, was the secretary of the delinting company. The messenger boy did make inquiry of Mr. Montgomery, and was told by him that Mr. Ragsdale, the appellee, was out of town. The messenger boy thereupon put a notice under the door, stating that there was a telegram for Mr. Ragsdale. He then took the message back to the telegraph office and gave it to the clerk for attention there. The message was handled in this office by Mrs. J. N. Olsen. She then sent a service message to Cincinnati, reading as follows:

"MK Cincinnati Ohio Undelivered your night letter 7 Ragsdale signed Nippert Office locked Advised party out of city [Signed] Jackson, Miss., Oct. 8."

It is well to state here that the telegram in question was a night letter. It is also an undisputed fact that appellee, Ragsdale, was out of the city and did not return until the 13th of October, when he found the notice and went to the telegraph office and got the telegram. Mrs. Olsen, the employe in the office at Jackson, had also mailed a postal card, notifying Ragsdale of the message. The service message last set out above was promptly transmitted to Cincinnati. It went to the main office and from the main office was telegraphed to the branch office MK there at Cincinnati; and here is where the trouble began. When this service message reached the branch office MK, Mrs. Dobel, in charge, sent a service message to the main office, at 1:10 p. m., reading as follows:

"S. Y. S. No. 9 of to-day please deliver message to Judge A. K. Nippert at the courthouse."

She did not say "service" message, and this mistake started the trouble. Mrs. Dobel testifies that the reason she attempted to transmit the message through the main office instead of delivering it to Judge Nippert from her office was that the courthouse where Judge Nippert was presiding as judge was a great distance from office MK, and that it was more convenient to have the message delivered in the way that she undertook. This message was received at the main office by a Mr. Phelan, an employe there. Mr. Phelan testifies that when this service message was received, he sent it into the hands of Miss Loretta Fette, the service clerk on the fifteenth floor of the building, for attention, as ordinarily she ought to have looked up the original Cincinnati relay of the night letter filed by Judge Nippert and the service message addressed to the MK branch office, and

returned them to him; but she misunderstood the instructions, as explained by her in her testimony, and on account of the omission of the word "service," she thought that the original message was referred to, and she sent a service message to Jackson, Miss., instructing the Jackson office to deliver the original message to Judge Nippert at the courthouse, meaning the courthouse in Jackson. (It appears that "S. Y. S." means, see your service; and "N. L." means night letter; "MK" indicates the branch office handling the message.) When this service message was received at Jackson, an effort was made to deliver the original message to Judge Nippert at the Jackson courthouse. The service message which was received in the Jackson office by Mrs. Olsen was in these words:

"S. Y. S. to-day Deliver msg to Judge A. K. Nippert at the courthouse our N. L. 7th Ragsdale signed Nippert."

An effort was made to deliver this message to Judge Nippert at the courthouse in Jackson, but, of course, he could not be found there; and the following service message was sent to Cincinnati on the morning of the 8th: "S. Y. S. date re your N. L. 7th Ragsdale Judge Nippert unknown at courthouse"—which means:

"See your service date in the matter of night letter 7th, Ragsdale. Judge Nippert unknown at the courthouse."

When this service message from Jackson—which we will call service message No. 3—was received in Cincinnati, it was sent to Mrs. Dobel at the MK branch office from the main office. When Mrs. Dobel received it she discovered the mistake, and thereupon sent the following message to the main office in Cincinnati:

"S. Y. S. No. 37 to-day Party is in Cincinnati courthouse Judge [Signed] MK Cincinnati, O., Oct. 8, 1913."

And here another mistake came in. This service message No. 3, in the course of transmission, came into the hands of Chas. T. Roach, another employé, and he, supposing that the party unknown at the courthouse was Ragsdale, wrote out the following service message, which was delivered to Judge Nippert at the courthouse in Cincinnati:

"Your telegram dated Oct. 7 to W. A. Ragsdale, American Delinting Co., Jackson, Miss., is undelivered. Reason: Party unknown at the courthouse."

This message was signed R. C. Bliss by him, and sent to the branch office MR, which was located near the Cincinnati courthouse. Roach explains why he signed Bliss' name, and why he made the change in the service so as to read as delivered to Judge Nippert, in his testimony as follows: That as service clerk, he would handle on an average of 25 or 30 service messages per day; that from custom he would frequently use the word "party" instead of repeating the name, using it in conjunction with the name of the addressee; that his office would re-

ceive service messages from all over the United States, and this word was frequently used; that it was a matter of convenience and was used in this form instead of repeating the name of the addressee; that his attention was drawn to the use of this word when he first became connected with the company as service clerk; that he did not substitute the word "party" for "Nippert," as his notice clearly showed that he was under the impression that Mr. Ragsdale was unknown, and that the word "party" as used in said notice meant Ragsdale; that he was led to this conclusion by reason of the service message which he had before him, and that his belief as to the meaning of the message was based upon the form of the service message before him; that he thought the word "signed" had been omitted in error, and that Ragsdale, the addressee, was unknown at the courthouse in Jackson, Miss.; that this appeared to him from the reading of this service message; that from all of this he erroneously concluded that it was Ragsdale who was unknown at the courthouse; that he misunderstood the service message and made it read, "party (Ragsdale) unknown at the courthouse," which was a mistake, as he should have said, "Judge Nippert unknown at courthouse." This last service message was finally received by Judge Nippert, which stated, in short, "Party unknown at courthouse," meaning that the appellee, Ragsdale, was unknown at the courthouse at Jackson, Miss. Upon the above state of facts, the plaintiff in the court below recovered a judgment for \$1,000 as damages; and the appellant telegraph company asks a reversal of this case, and urges that the lower court erred, and assigns the following: First, that the proof did not show any actual damages; second, that there is no proof warranting the infliction of punitive damages; third, that no damages can be recovered in this case as compensation for mental pain and anguish.

As to the question of actual damages, the appellee claimed that, on account of the false report, he incurred considerable expense in going to West Point and Cincinnati, and that he also incurred other expenses on account of the false report in the message. But it appears from the evidence in this record that all these expenses were paid by the American Delinting Company, and that the appellee suffered no loss for that reason, and that the loss, if it could be successfully claimed, would be by the delinting company, who was not a party to this suit. It also appears from the testimony that these alleged damages, on account of the said expenses incurred, were not proximately caused by the erroneous and false report made by the appellant telegraph company, as the false report to Judge Nippert was straightened out and corrected by mail, and it was unnecessary for the appellee to incur the expenses complain-

ed of on account of the false report made by the telegraph company.

[1] As to the second proposition, of punitive damages, we have carefully considered all the testimony disclosed by this record, which tended to prove that the telegraph company was guilty of gross negligence or wantonness, which would justify the infliction of punitive damages. It is true that the appellant's agents and employes made several mistakes and blunders in handling the service messages in question; but it clearly appears to us that in no instance were any of the agents or employes of appellant guilty of willful or gross negligence, and the proof abundantly shows that they were acting in good faith, and with an honest purpose to promptly and properly carry out the business intrusted to their care. Therefore we are forced to the conclusion that no punitive damages were recoverable in this case.

As to the third contention, that compensatory damages for mental pain and anguish may be allowed in a case of this kind, we find from the record that we have here what appears to be, on its face, a harmless, false report, in which Judge Nippert is told that Mr. Ragsdale is "unknown at the courthouse." It is claimed that this false report was a reflection upon Mr. Ragsdale, and that it damaged him in the estimation of Judge Nippert. Ordinarily, in some instances, a report that one is "unknown at the courthouse" might be a recommendation instead of a reflection; but, in this particular case, if this false report did any harm, it was only temporary. No man with the high standing of appellee in Jackson should be seriously injured or materially damaged by such language as was used in this false report. Judge Nippert testifies, concerning this, as follows:

"I do not know whether Mr. Ragsdale was damaged in any way by reason of said telegram not reaching him or by reason of the notice to me by the Western Union Telegraph Company that party was unknown at the courthouse. I can only speak for myself, and I can state that taking the notice for a true and correct report, I was very much perturbed and Mr. Ragsdale necessarily was injured in my personal opinion of him, even though temporarily so, until I received his letter and telegram, above referred to, and the letter from Judge Mayes, which set matters right so far as Mr. Ragsdale and myself were concerned."

[2, 3] So, it will be seen that the mistakes, errors, and blunders, finally ending in the false report which reached Judge Nippert, were all straightened out and corrected in a very short time, and the former status quo was fully restored between Judge Nippert and Mr. Ragsdale. Judge Nippert sent the young man to Jackson, and all interruption in the business relations was ended. But it is contended by the appellee that Mr. Ragsdale suffered humiliation and embarrassment on account of this false report, and that he should be permitted to recover compensatory damages for this mental suffering, and coun-

sel cites the case of *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. We cannot agree with counsel that this case is in point here, for obvious reasons, and we are constrained to follow the rule announced in *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300, and *Duncan v. Telegraph Co.*, 93 Miss. 500, 47 South. 552, which is the settled law of this state. Consequently, there can be no recovery in the case at bar for mental pain and suffering of Mr. Ragsdale, as compensatory damages; nor can he recover for such mental pain and suffering in the instant case as a part of punitive damages, because the facts are not such as justify the infliction of punitive damages. There is no "libel" under the proof in this case. In the briefs and arguments of counsel on both sides in this cause, it appears that counsel for the appellee characterizes the conduct of the appellant telegraph company as a "Comedy of Errors"; and counsel for appellant replies and admits this to be true, but says that while it is a "Comedy of Errors," this case is also "Much Ado About Nothing." We agree with counsel on both sides, and will add in conclusion that "All's Well that Ends Well."

Reversed and remanded.

COVINGTON v. YAZOO & M. V. RY. CO. (No. 17702.)

(Supreme Court of Mississippi, Division B.
May 29, 1916.)

1. CARRIERS ⇐230(12) — CARRIAGE OF LIVE STOCK—INSTRUCTION.

In an action for injuries to a shipment of mules, where the animals were kept in a car with an open trapdoor on the top some 40 hours in winter without feed, water, or rest, snow and sleet coming through on them, an instruction that the jury could not consider any damages or injuries occasioned by the condition the car was in (the bill of lading reading that the car had been accepted by the shipper as in proper condition) was erroneous, as calculated to lead the jury away from the main issue of the case, as it might have been possible for the road to make prompt shipment in the defective car without damage, and, even though the shipper was bound by the selection of the car and the provisions of the bill of lading, he had the right to expect prompt shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 961; Dec. Dig. ⇐230(12).]

2. CARRIERS ⇐218(5) — CARRIAGE OF LIVE STOCK — CONTRACT AGAINST LIABILITY FOR NEGLIGENCE.

The provisions of a bill of lading covering a shipment of mules that the car or cars in which the animals were loaded had been examined and accepted by the shipper as being in proper condition, and that the road should not be liable except for loss resulting from its gross negligence, were void as an indirect effort of road to contract against liability for its own negligence, since a common carrier owes to the shipping public the duty to provide reasonably safe appliances and cars, and a common carrier may

not, by special contract, limit or evade liability for its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696; Dec. Dig. ¶218(5).]

3. CARRIERS ¶209—CARRIAGE OF LIVE STOCK—CHOICE BY SHIPPER.

A shipper of live stock may for a cheaper rate bind himself to accept a less commodious car, if full opportunity is given him to choose from a list of cars of different construction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 925; Dec. Dig. ¶209.]

4. CARRIERS ¶218(2) — CARRIAGE OF LIVE STOCK—LIMITATION OF VALUE.

For a cheaper rate extended to a shipper of live stock the road's liability as to the value of the stock can be limited.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 936, 937; Dec. Dig. ¶218(2).]

Appeal from Circuit Court, Quitman County; W. D. Outrer, Special Judge.

Suit by W. T. Covington against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

P. H. Lowrey, of Marks, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

STEVENS, J. Mr. Covington, the appellant, sued appellee railroad company for damages alleged to have been sustained by him as owner of a carload of mules shipped from Memphis, Tenn., to Marks, Miss. The mules were loaded by Hazel-Darnell Mule Company and shipped by the Memphis Union Stockyards, which owned a switch or spur track over which the loaded car was delivered to the Yazoo & Mississippi Valley Railroad Company for transportation. It appears that the railroad company turned over its blanks or bills of lading to one Mr. Berry, cashier and bookkeeper of the Hazel-Darnell Mule Company, with authority to sign contracts of shipment and to give switching orders for the cars. The bill of lading in this case was signed by Berry both for the railroad company and the Memphis Union Stockyards. The mules were loaded 6 o'clock p. m. Monday, February 10, 1913, and were delivered to the tracks of the railroad company about an hour later. Mr. Covington, the consignee and owner of the mules, was present when the stock was being loaded, and, according to his testimony, made objection to the car that was furnished and in which the mules were being placed. It appears that the car had a kind of a trapdoor at the top, and the door had been removed or was gone, leaving a large hole in the top of the car through which the rain and sleet of the winter weather freely fell. There is a provision in the bill of lading as follows:

"The car or cars in which the animals are loaded have been examined and accepted by the shipper as being in proper condition for the transportation of said stock."

And the further provision that:

"The railroad company shall not be liable * * * for any loss or damage, however caused, not resulting from gross negligence of the railroad company."

The mules remained in the car without feed, water, or rest or without being unloaded until 9 o'clock Wednesday morning, February 12th. There is evidence that the distance from Memphis to Marks is 67 miles, and that a freight train could make the run in 6 hours. There was a pencil notation or memoranda on the contract of shipment as follows: "36 Hr. release." But no written request for the 36-hour release was executed by any one in accordance with the federal statute regulating interstate shipments of live stock. There was evidence for the plaintiff that the weather was cold, and that rain and sleet descended through the open hole of the car upon the crowded mules, and that the bottom of the car became very wet and sloppy. There is further evidence for the plaintiff that the mules were suffering from colds or distemper, and that as a result of injuries inflicted by the railroad company one of the mules died, and all of them were damaged. The evidence with reference to the damage, if any, to the mules is conflicting. The case was submitted to the jury and resulted in a verdict for the defendant.

Appellant, as plaintiff in the court below, complains, among other things, of the following instruction granted the defendant:

"In this case the court instructs the jury for the defendant that they will not consider any damage or injury to the mules that was occasioned by the condition the car was in, in which the mules were shipped."

It is not altogether clear that the Yazoo & Mississippi Valley Railroad Company furnished the car in question, but there is evidence that the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company had some kind of a joint arrangement with the cashier of the Hazel-Darnell Mule Company by which contracts of shipment and switching orders were signed and given, and that the switch track led to the main lines of both railroad companies, and that both railroad companies have joint facilities in Memphis and the same agent.

[1-4] Regardless of any other question in the case, the granting of the instruction complained of was erroneous and calculated to lead the jury away from the main issue of the case, and was so prejudicial to plaintiff as to constitute reversible error. According to the evidence for the plaintiff, these mules were kept in the car some 40 hours without feed, water, or rest, and all this while in a car which the undisputed evidence shows was defective for the shipment of valuable mules during the inclement winter season. Notwithstanding this, the jury are directed by plain, express language of the court that they may not consider any damages or injury "occasioned by the condition the car was in."

There are two objections to this instruction on the facts of this particular case. In the first place, it might have been possible for the railroad company to make prompt shipment of these mules in the defective car without damage. Instead of doing this, according to the theory of complainant, the shipment was unreasonably delayed and the mules necessarily subjected for an unreasonable length of time in weather of the kind then existing in a car manifestly defective. Even if Mr. Covington is bound by the selection of the car and the provisions of the bill of lading referred to, he yet had a right to expect prompt shipment and delivery at Marks at a time when the consignee could himself take his stock from the exposure of the rain and sleet and the incident damp condition of the crowded car. In the second place, the provisions of the bill of lading relied on by the railroad company in this case, in our judgment, constitute an indirect effort on the part of the carrier to contract against its own negligence, and are therefore contrary to public policy and void. It was evidently the holding of the trial court that these provisions of the contract of shipment were binding on the shipper, and that, in fact, is the argument of counsel for appellee in this case. To this we cannot give our assent. The great weight of authority, and especially the more recent deliverances of the courts of the country, hold that a common carrier may not, by special contract, limit or evade its common-law liability for its own negligence. A railroad company in the very nature of its business is under the duty to furnish the shipper a reasonably safe car for the transportation of live stock or any other freight. The carrier owns and presents the cars for loading. The shipper has little, if any, option in selecting the equipment to be used. In the very nature of things he is powerless to register any effective protest. The carrier owes to the shipping public the duty of providing reasonably safe appliances and cars, and its duty in this regard cannot be evaded or its liability limited by a contract, the terms of which the shipper under all the circumstances of any particular case is bound to agree to. These provisions are written into a printed form of lading in common use by railroad companies and constitute a deliberate effort on the part of transportation companies to shift the consequences of their own negligence upon the shipper. Commerce is ever-increasing in a developing country, and carriers are being called upon more and more to furnish adequate facilities for the transportation of live stock. The very shipment here in question is an interstate shipment, and therefore subject to the provisions of the federal statute generally known as the 28-hour law. It appears from the evidence that the humane provisions of the federal statute were in this instance violated. While it may be true that the state courts have nothing to do with the

enforcement of this statute, and certainly not with the enforcement of the penalties prescribed by it, yet the fact that the stock in question was kept in the car a continuous period of 40 hours in violation of the statute in question is a circumstance showing probable cause for plaintiff's complaint. It is immaterial in this case as to who owns the car or who tendered it to the plaintiff in this case. The Yazoo & Mississippi Valley Railroad Company is the original or initial carrier, and the only carrier whose liability is called into question.

"A carrier undertaking to transport live stock for those who choose to employ it assumes the full obligation to furnish safe and suitable vehicles, an adequate road, and to exercise due care and foresight to guard against loss or injury from external sources." 4 R. C. L. par. 435.

It may be conceded that a shipper may, for a cheaper freight rate, bind himself to accept a less commodious car if full opportunity is at the time given him to choose from a list of cars of different construction, and it may also be conceded that for a cheaper rate liability as to the value of the live stock can be limited. In the case at bar, however, there is no effort even by the contract expressly to limit liability on account of the defective car. There is no provision for a cheaper rate on account of the car used, or on account of the shipper assuming any risk incident to defective cars. The bill of lading says that the shipper has examined and accepted the car, and from this it is contended that the shipper assumes all risks incident to the defective car in question. Liability in this regard cannot, however, be limited either by implication or by express stipulation. Neither can the railroad company limit its liability to so-called gross negligence. *Johnson v. Railroad Co.*, 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534. So far as any liability at all is concerned, it makes no difference whether the negligence is gross or simple.

On the inability of the carrier to limit or evade the consequences of its own negligence the authorities are too numerous to attempt here to enumerate, but we, however, refer to a few supporting the views here expressed. *Adams v. Colorado & S. R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412, and note; *John Schroeder Lumber Co. v. Chicago & N. W. R. Co.*, 135 Wis. 575, 116 N. W. 179, 128 Am. St. Rep. 1089, and note; 130 Am. St. Rep. 446, and authorities there listed; 4 R. C. L. pars. 156, 452, 453; *Railroad Company v. Dies*, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871; *Nevius v. Chicago, St. P., M. & O. R. Co.*, 124 Wis. 313, 102 N. W. 489, 109 Am. St. Rep. 935; *Houtz v. Union P. R. Co.*, 33 Utah, 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628; *B. & O. Express Co. v. Cooper*, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 586; *A. & V. R. R. Co. v. Sparks*, 71 Miss. 757, 16 South. 263; *Kime v. Southern R. Co.*, 160 N. C. 457, 76 S. E. 509, 43 L. R. A. (N. S.) 617. Reversed and remanded.

COON v. PATTERSON. (No. 18104.)

(Supreme Court of Mississippi, Division B.
May 22, 1916.)

CHattel MORTGAGES — 203 — TRANSFER.

Where a tenant of farm lands to secure advances gave a deed of trust on his crops and live stock, and the account not being paid in full, the balance due was by agreement paid by his landlord, and the security transferred to him, the deed of trust was enforceable in the hands of the landlord.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 450; Dec. Dig. —203.]

Appeal from Circuit Court, Wilkinson County; R. E. Jackson, Judge.

On suggestion of error. Former judgment set aside, and judgment of the trial court affirmed.

For former opinion, see 70 South. 885.

W. F. Tucker, of Woodville, for appellant.
A. H. Jones, of Woodville, for appellee.

COOK, P. J. A re-examination of the record of this appeal leads to the conclusion that we did not understand the facts presented to the trial court. In our former opinion reversing the trial court, we said:

"Why the deed of trust was transferred to the landlord is not entirely clear, unless it was for the purpose of affording the landlord a means by which he could collect that part of his rent which Robinson Mercantile Company had not paid."

We see now that this was a misconception of the facts. The deed of trust, according to appellee's evidence, was to secure the advancements made by the Robinson Mercantile Company. This account was not paid in full, and the balance due was, by agreement, charged to the landlord and the security transferred to him. Evidently, we confused the waiver of a part of the rent with the payment by the landlord of the balance of the account secured by the deed of trust.

Former judgment reversing this case is set aside, and the judgment of the trial court is affirmed.

HARVEY et al. v. JOHNSON et al.
(No. 17435.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. WILLS — 849 — DEATH OF LIFE TENANT — EFFECT.

Where a will devised realty to a husband for life and he died before the testatrix, there was at her death no life estate in the property so devised, and it vested at once in her legal heirs.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2165, 2166; Dec. Dig. —849.]

2. WILLS — 506(1) — CONSTRUCTION OF DEVISE — HEIRS.

Testatrix devised her home place to her husband for life, and at his death to be equally divided among her "legal heirs," who under Code 1906, § 1649, would be the children of her two sisters and a brother, each taking per stirpes an undivided one-third interest, and by

the following item devised real and personal property, one share to the children of a sister, one share to the children of another sister, and one share to be equally divided among her brother "and his children." Held, that the words "legal heirs," as used in the first item, having a fixed legal significance, should be so construed, unless it was manifest from the entire will that such was not the purpose of the testatrix, and that the items, considered both independently and as a whole, did not show any intent that the persons incorrectly named as heirs should take in place of the legal heirs as fixed by the statute.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1090; Dec. Dig. —506(1).]

3. WILLS — 470 — CONSTRUCTION — INTENTION OF TESTATOR.

The intention of the testator is to be gathered from the entire will considered as a whole.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 988; Dec. Dig. —470.]

4. WILLS — 469 — CONSTRUCTION — INDEPENDENT ITEMS.

An item which is incorrect and of doubtful construction should never be considered as governing the phrases of an independent item which is clear and unambiguous when considered alone.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 987; Dec. Dig. —469.]

5. WILLS — 469 — CONSTRUCTION — INDEPENDENT PROVISIONS.

Where the two items of a will dealt with different property and in a different manner, they were to be construed independently, unless such constructions, when considered together with all the provisions of the will, were contradictory, and showed that the construction of either one or the other item must be incorrect.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 987; Dec. Dig. —469.]

6. WILLS — 456 — CONSTRUCTION — USE OF LANGUAGE.

In seeking the intention of a testator, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, so that, where there is no ambiguity in the words, there is no room for interpretation; it being always the safest mode of construction to adhere to the words of the instrument, without considering circumstances arising aliunde.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 974; Dec. Dig. —456.]

7. WILLS — 471 — CONSTRUCTION — CUTTING DOWN — DEVISE.

Where an interest is created in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon the meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 989; Dec. Dig. —471.]

8. WILLS — 470 — CONSTRUCTION AS A WHOLE.

It is only in cases of ambiguous or doubtful meaning in the construction of one item that resort should be had to the whole will in order to ascertain the testator's intention.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 988; Dec. Dig. —470.]

Appeal from Chancery Court, Oktibbeha County; J. Q. Robins, Chancellor.

Petition by W. H. Reynolds, executor of the will of Mary Martha Wiggs, deceased, for a construction of the will, in which pro-

ceeding Margaret Johnson and others were parties. Decree construing the will, and Wm. Henry Harvey and others appeal. Reversed and remanded.

Green & Green, of Jackson, for appellants, cite the following cases: Rogers v. Brickhouse, 58 N. C. 301; Cummings v. Cummings, 146 Mass. 501, 507, 16 N. E. 401; Kelley v. Vidas, 112 Ill. 242, 54 Am. Rep. 235; Cook v. Catlin, 25 Conn. 387; Daggett v. Slack, 8 Metc. (Mass.) 450; Houghton v. Kendall, 7 Allen (89 Mass.) 72; Ramsey v. Stephenson, 34 Or. 408, 56 Pac. 520, 57 Pac. 195; Laisure v. Richards, 56 Ind. App. 301, 103 N. E. 683; In re Hoch's Estate, 154 Pa. 417, 26 Atl. 610.

W. W. Magruder, of Starkville, for appellees.

SYKES, J. This is an appeal from the decree of the chancery court of Oktibbeha county construing the last will and testament of Mrs. M. M. Wiggs. The will reads:

"Starkville, Miss., July 29th, 1910.

"I, Mary Martha Wiggs, being of sound and disposing mind, and having in view the uncertainty of life, do make, publish and declare this my last will and testament.

"1st. I give my husband, Capt. J. A. Wiggs, the land known as my home place upon which I now reside, to have and to hold for his natural lifetime, and at his death same to be equally divided among my legal heirs.

"2nd. I give to my heirs the following described property, to wit: The land known as my Chapel Hill place, the land known as my Outlaw place, and all my personal and mixed property to be divided as follows: One share to the children of my sister, Margaret Spencer, one share to the children of my sister Ella Harvey, and one share to be equally divided between my brother Dorsey Outlaw and his children.

"3rd. All cash on hand at the time of my death to be used to defray my funeral expenses and balance to be devoted to the purchase of a monument each for myself and my mother.

"4th. I appoint Mr. W. H. Reynolds the executor of my will, and direct that he be not required to give any bond or any kind of security.

"[Signed] Mary M. Wiggs.

"Signed in our presence and declared by signers as her will and we sign in her presence.

"[Signed] J. A. Carothers.

"C. E. Gay."

[1] This will was construed by the learned chancellor upon the petition of the executor, W. H. Reynolds, and this appeal is only from the construction of item 1. The will was made on July 29, 1910, and Mrs. Wiggs died on or about June 10, 1913, or about 2 years and 11 months after making the will. In item 1 of the will she devised the land known as her home place, which was decidedly the most valuable real estate owned by her, to her husband, Capt. J. A. Wiggs, for life. Capt. Wiggs departed this life before the testatrix; therefore at the time of her death there was no life estate in the property devised in this item, and it vested at once in her "legal heirs."

[2-6] The question relating to this item is whether or not, when considered independently of the other items of the will, the intention of the testatrix is perfectly plain from a con-

sideration of this item alone; and, second, whether or not, when considered with the other items of the will, the words "legal heirs," as used in item 1, is governed by those named as her heirs in item 2. In other words, the first question to be decided by this court is whether or not the legal heirs of Mrs. Wiggs mentioned in item 1 are her legal heirs, as is contemplated by section 1649 of the Code of 1906, or whether by the devises and bequests of item 2 those named as purporting to be her heirs in item 2 are decisive of and govern those who are her legal heirs in item 1. When considered alone, we have no hesitancy in saying that item 1 is perfectly plain and meant to devise the land known as her home place to her legal heirs as contemplated by said section of the Code above named, and that it was her intention clearly expressed in this item of the will that these heirs take according to the statute, namely, per stirpes, her living brother, Dorsey Outlaw, taking a one-third undivided interest in her home place, and the children of her sister Ella Harvey receiving an undivided one-third interest to be equally divided among them, and the children of her sister Margaret Spencer likewise receiving an undivided one-third interest to be equally divided among them.

In item 2, however, of this will she devises and bequeaths to her heirs certain real and personal property, and then names as her heirs the children of her sisters, Margaret Spencer and Ella Harvey, and her brother, Dorsey Outlaw, and his children. All of these are the heirs of Mrs. Wiggs, except the three children of Dorsey Outlaw, who, of course, are not heirs. The question then is: Shall the court construe item 1, which is perfectly plain and unambiguous when considered alone, and give to the meaning of "legal heirs" the same meaning as the testatrix apparently gives to the word "heirs" in item 2? The learned chancellor below in a very lucid and clear opinion so held, and it is only after a most careful consideration and examination of authorities that we are constrained to differ with him. The court recognizes that the testatrix was not learned in the law, and, while to those learned in the law the terms "heirs" and "legal heirs" have practically the same significance, at the same time, in gathering the intention of the testatrix from the entire will considered as a whole, we believe that she meant to use the term "legal heirs" in a different manner in item 1 than she used the term "heirs" in item 2. This contention is borne out by the fact that she was devising different plantations and also different estates therein, and in item 2 was devising both real and personal property to vest immediately, while in item 1 she was devising only real property, first a life estate therein, and then a remainder in fee in her "legal heirs." We believe that the true interpretation of item 2, when considered in connection with item 1, is that Mrs. Wiggs was rather doubtful as to who her heirs

might be, and that, in order to put the property devised in item 2 beyond all question, she expressly named those whom she wanted to have this property specifically. The word "heirs" in item 2 can very well be treated as surplusage.

By item 1, when considered either independently or together with the other items of the will, we think it perfectly manifest that she meant to devise this property according to the laws of descent of the state of Mississippi. The learned chancellor in his opinion, while holding that the intention of the testatrix as expressed in item 1, when considered alone, was perfectly manifest and free from doubt, yet held that item 2, which incorrectly named certain people as her heirs, should control and govern the term "legal heirs" in item 1. In this we cannot agree with him. We do not think that an item which incorrectly uses a term should control and govern an unambiguous and clear item which correctly uses legal phraseology. An item which is incorrect and of doubtful construction should never be considered as governing the phrases of an independent item which is perfectly clear and unambiguous when considered alone. However, since the testatrix was dealing with different property and altogether in a different manner in each one of these items, we think the proper construction of them is to construe them independently, unless these independent constructions, when considered together with all of the provisions of the will, are utterly contradictory, and show that the construction of either one or the other items must be incorrect. In considering these items first independently, as we have above, and then in connection with the entire will as a whole, we see nothing contradictory or ambiguous in our construction of the same and hold that it was the intention of Mrs. Wiggs, by the use of the words "legal heirs" in item 1, in connection with the entire clause of item 1, to devise this property as above stated according to the laws of descent of the state of Mississippi after the death of Capt. Wiggs.

We think the learned chancellor correctly construed item 2 and the rest of the items of the will.

The words "legal heirs," as used in item 1, have a fixed legal significance, and should be so construed, unless it is clearly manifest from an examination of the entire will that such was not the purpose of the testatrix. *Love v. Buchanan*, 40 Miss. 758; *Irvine v. Newlin*, 63 Miss. 192.

"In seeking for the intention, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected. * * * When there is no ambiguity in the words, there is no room for interpretation." *Vannerson v. Culbertson*, 10 Smedes & M. 150.

"It is always the safest mode of construction to adhere to the words of the instrument, without considering either circumstances arising aliunde, or calculations that may be made as to the amount of the property, or the consequences

which may flow from any particular construction." *Currie v. Murphy*, 35 Miss. 478.

In the case of *Dunlap v. Fant*, 74 Miss. 197, 20 South. 874, there was a devise of a life estate to the wife, and upon her death "to my lawful heirs share and share alike." These lawful heirs were determined by the statute of descent and distribution.

It is our opinion that the testatrix, as above stated, meant to devise this property according to the laws of descent and distribution, which necessarily would make these heirs inherit per stirpes, as above stated, and not per capita, as decided by the learned chancellor.

In the case of *Branton v. Buckley et al.*, 99 Miss. 116, 54 South. 850, the court held that a devise to the wife for life with remainder ("share and share alike to my brothers and sisters") gave the brothers and sisters and the representatives of those deceased brothers and sisters the property devised per stirpes. It is clear that a devise to the testatrix's legal heirs was intended by her to be a devise to those who would take according to the statute of descent in case she died intestate. In the case of *Irvine v. Newlin*, 63 Miss. 192, Judge Campbell in part says:

"The proposition deducible from the authorities is that prima facie the word 'heir' is to be taken in its technical sense, unless there is in the will a plain demonstration that the testator used it in a different sense, in which case effect will be given to his intention. * * * The third clause of the will is not helped by the preceding or any other. It is independent, and must be interpreted by its own terms alone."

[7, 8] In the case at bar we think that item 1 of Mrs. Wigg's will is independent, and, if perfectly plain and unambiguous, should be construed by itself. We think further that our construction of the same in no way conflicts with item 2; that it is perfectly manifest that the testatrix herself recognized that her legal heirs in item 1 might perhaps be different from those whom she incorrectly terms her heirs in item 2, and for this reason, in order to devise and bequeath the property in item 2 exactly according to her intentions, she specifically names the objects of her bounty in this item and the amount which they are to receive. Where two clauses of a will create an estate in several devises named, and they are not united grammatically by the expression of a common purpose, each clause must be considered and construed separately, and without relation to the other, even though the testator may have had the same intention in regard to both.

"Where an interest or estate is given in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest or estate." *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159; *U. S. Fidelity & Guaranty Co. v. Douglas*, 134 Ky. 375, 120 S. W. 328, 20 Ann. Cas. 993; *Wood v. Polk*, 12 Heisk. (Tenn.) 200.

In all wills the cardinal rule of construction is, of course, to ascertain the intention of the testator. Where, however, the terms of a will are expressed in words of clear and unambiguous meaning, there is no room to resort to other parts or items of it for construction. It is only in cases of ambiguous or doubtful meaning in the construction of one item of a will where resort should be had to the whole will in order to ascertain clearly the intention of the testator. The following authorities sustain the construction of the court that the property devised in item 1 was per stirpes, and not per capita. *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *Cook v. Catlin*, 25 Conn. 387. For other authorities sustaining this construction we refer to the able briefs of counsel both for appellants and appellees.

That part of the decree of the court below relating to item 1 is therefore reversed, and the case remanded to be proceeded with in accordance with this opinion.

Reversed and remanded.

BATESVILLE SOUTHWESTERN R. CO. v. MIMS. (No. 18099.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. PLEADING ¶214(1)—**DEMURRER—EFFECT.**
A demurrer to the declaration admits its allegations as true.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525, 529; Dec. Dig. ¶214(1).]

2. COMMERCE ¶34 — “**INTRASTATE COMMERCE.**”

Where logs were delivered by plaintiff to defendant carrier under a verbal contract of affreightment from M. to B., both points within the state, without intention on the part of either of shipping them without the state, title remaining in the consignor until they reached B., where they became the property of the consignee and were reshipped by the plaintiff as its agent by another railroad to a point without the state, the shipment from M. to B. was an intrastate shipment, though the freight charges were paid by the consignee at final destination, and hence rates fixed by the State Railroad Commission under Code 1906, §§ 4839, 4840, were applicable to the shipment.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 26, 82; Dec. Dig. ¶34.

For other definitions, see *Words and Phrases*, *Intrastate Commerce*.]

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Action by M. H. Mims against the Batesville Southwestern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery & Montgomery, of Tunica, for appellant. James Stone, of Oxford, and Woods & Kuykendall, of Charleston, for appellee.

SYKES, J. M. H. Mims, appellee, plaintiff in the court below, filed his declaration in

the second judicial district of Panola county against the Batesville Southwestern Railroad Company for actual and statutory damages, alleging therein the following material facts:

That the defendant, the Batesville Southwestern Railroad Company, is a domestic corporation of Mississippi, doing business wholly within this state, and was on the 27th day of April, 1912, and is now, a common carrier of freight for hire, operating a line of railway wholly within the second judicial district of Panola county, Miss. That under the laws of Mississippi, it was the duty of the defendant railroad company to submit tariffs of charges for the transportation of freight along and over its line, to the Mississippi Railroad Commission for revision, approval, or rejection before putting the said rates into effect. That said defendant failed to file these rates or tariffs of charges with the Mississippi Railroad Commission, but had on file with the Interstate Commerce Commission, rates approved by said commission. That on the 23d day of July, 1913, after having been cited by the State Railroad Commission, the defendant railroad company appeared before the Railroad Commission in answer to the complaint of the plaintiff in this case, and others, that its intrastate rates were unreasonable; and the said Railroad Commission, by order, declared the freight rate on logs in carload lots, per thousand feet, in force on said railroad excessive and disallowed and disapproved the same. Said order further fixed and established the legal rate allowed to be charged on oak logs, in carload lots, between Milepost 13 and Batesville, both being stations on the line of defendant railroad company, at \$1.75 per thousand feet; and said order further commanded and required said railroad to repay to such person or persons as have shipped logs over said railroad and paid the illegal and excessive tariff rate, the difference between the rate fixed under this order and that fixed under the tariff of said railroad of April 27, 1912, which was declared to be unreasonable. That the freight rate on logs declared to be unreasonable between the two above-named stations was \$3.35 per thousand feet. That the above order of the State Railroad Commission has been in force and effect from the time of its passage. That under the laws of the state of Mississippi it was the duty of the Railroad Commission to regulate and fix the freight charges of all railroads doing intrastate business in Mississippi which failed to furnish their tariff of charges to said commission as required by law. That under the laws of the state of Mississippi, sections 4839 and 4840, Code 1906, it is provided that any railroad corporation charging more than the rate allowed by the tariff of rates fixed by the commission is guilty of extortion, and the injured party can recover as actual and statutory damages, twice the amount of the damages sustained by such

overcharge. That the freight rate charged on oak logs in carload lots per thousand feet by the defendant under its tariff declared to be unlawful and extortionate was \$3.35 per thousand feet; that the legal rate fixed by the commission on July 23, 1913, between the above-named stations is \$1.75 per thousand feet on oak logs in carload lots; and that the difference or actual amount overpaid the railroad company was \$1.60 per thousand feet. That that plaintiff shipped over the said line of defendant railroad company, from the said Milepost 13 to the station of Batesville, between the 11th day of June, 1913, and the 23d day of July, 1913, 91 carloads of oak logs, on which it was compelled to pay the freight rate of \$3.35 per thousand feet. "That all of said logs so shipped were delivered to the defendant under a verbal contract of affreightment at Milepost 13 for transportation to the said station of Batesville, at which latter station said logs were, as per the verbal instructions of the plaintiff acting for the Memphis Band Mill Company, who became the owner of said logs on their arrival at said station of Batesville, turned over and delivered to the Illinois Central Railroad Company, and transported over the line of the last-named railroad company to the city of Memphis, state of Tennessee." That there was not, is not now, and never has been, any joint or through rate from said Milepost 13 to the city of Memphis. That when the said logs were delivered at Batesville to the Illinois Central Railroad Company, the defendant railroad company advised the said Illinois Central Railroad Company of the amount of freight charges claimed by it as advance charges, and that these advance charges were collected by the Illinois Central Railroad Company in Memphis from the consignee.

A detailed statement showing the respective dates of the shipments of logs in the manner above set out, the number of feet contained in each of said shipments, the amount of overcharges on each shipment, was filed as an exhibit to the declaration; and there is no controversy here as to the amount of these overcharges. There were two counts in the declaration, alleging in substance the same cause of action, with the exception that in the second count the claim is for damages on shipments made between the same points on the line of the defendant railroad company, but between July 23 and September 27, 1913.

There was a demurrer interposed to the declaration upon the ground that the declaration shows that the shipments of these logs were all interstate; and, for this reason, that the Mississippi Railroad Commission had no jurisdiction in the matter, and also that the plaintiff seeks to recover double damages or double the amount of actual damages for certain shipments before July 23, 1913, the date of the order establishing the rates of the Railroad Commission. The

demurrer was overruled, and upon the defendant's declining to plead further, upon the first count of the declaration, the court entered a judgment for the actual damages consisting of the overcharge in freight shipped before the order of the Mississippi Railroad Commission went into effect; on the second count of the declaration, which was for the damages sustained after the order of the Railroad Commission went into effect, the court entered judgment for plaintiff for double damages; the said judgment amounting in all to the sum of \$2,713.75, from which judgment this appeal is prosecuted.

We neglected to state that an attempt was made to remove the case by the defendant to the federal court, upon the ground that the shipments of logs involved in this controversy were interstate shipments. It is unnecessary to further refer to the petition for removal, for the reason that the decision of the court upon the question of whether or not this was an intrastate or an interstate shipment is decisive of the question of removal. This case has been ably presented to the court by counsel for both parties by oral argument as well as printed briefs.

[1, 2] It is the contention of the appellant that the declaration shows upon its face that it was an interstate shipment, basing this contention upon the following paragraph of the declaration, viz.:

"That all of said logs so shipped as aforesaid were delivered to the defendant under a verbal contract of affreightment at said Milepost 13 for transportation to the said station at Batesville, at which latter station said logs were, as per the verbal instructions of the plaintiff, acting for the Memphis Band Mill Company, who became the owner of the logs on their arrival at said station of Batesville, turned over and delivered to the Illinois Central Railroad Company and transported over the line of the said last-named railroad company into the city of Memphis, state of Tennessee. That the Memphis Band Mill Company did not have any mill at Batesville, Miss., but had one in the city of Memphis, in the state of Tennessee, and there was no mill of any kind belonging to anybody in Batesville, Miss., for the manufacture of logs into lumber and these shipments were typical of many others over the said railroad."

As sustaining his position, the appellant relies upon the case of the Texas & New Orleans R. Co. et al. v. Sabine Tram Company, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442. A careful examination of the above-cited case shows that at the time the lumber was shipped from Ruliff, Tex., to Sabine, Tex., it was intended for export, and this fact was known to the consignor, consignee, and the railroad company. That lumber destined for foreign shipments was allowed to remain in the cars at Sabine without any demurrage being charged therefor, whereas, domestic shipments were only allowed to remain in the cars for a period of 48 hours before demurrage charges were made. There is also shown to have been a difference in switching charges between foreign and domestic shipments. On the shipments in question, the switching charges were made for foreign shipments.

In fact, the statement of the facts in this case clearly shows that the shipment was recognized by all parties as being a foreign shipment. In the beginning of the statement of facts, by Mr. Justice McKenna, appears the following:

"The question in the case is whether shipments of lumber on local bills of lading from one point in Texas to another point in Texas, destined for export under the circumstances presently to be detailed, were intrastate or foreign commerce."

In the opinion he in part says:

"That there must be continuity of movement we may conceive, and to a foreign destination intended at the time of the shipment."

In the case at bar, however, the demurrer admits as true the allegations in the declaration. The clause above quoted from simply shows that these logs were shipped by verbal contract of affreightment from Milepost 13 to Batesville, both points within the state of Mississippi, at which latter point they were delivered to the Memphis Band Mill Company, who became the owners of these logs at Batesville. The plaintiff in the court below, appellee here, at Batesville, acting for the Memphis Band Mill Company, then delivered these logs to the Illinois Central Railroad Company, to be transported from Batesville to Memphis. There is no intimation whatever in the declaration that at the time the logs were delivered at Milepost 13 to the appellant railroad company they were intended for shipment to Memphis, Tenn. So far as this record is concerned, the Memphis Band Mill Company could have disposed of these logs at Batesville, or consigned them to any sawmills in the state of Mississippi or to any points without the state of Mississippi. The fact that the Memphis Band Mill Company did not have any mill at Batesville, but had one in the city of Memphis, does not in any way alter the case. The declaration in this case alleges that the first shipment between Milepost 13 and Batesville was made on a verbal contract of affreightment, and that the logs shipped continued to be the property of the consignor until they reached Batesville. It is therefore an inference that the logs were consigned to the appellee here at Batesville. The shipment, so far as he was concerned and so far as the defendant railroad company was concerned, ended here. And here the logs were delivered to the Memphis Band Mill Company, which company then requested the appellee to turn said shipments over to the Illinois Central Railroad Company to be transported to them in the city of Memphis. It is true that the freight was not paid by the appellee to the defendant or to the appellant railroad company, but said freight was collected in Memphis from the consignee as advance charges on the shipments. This, however, makes no difference and does not alter the nature of the shipments.

The case under consideration is more like the shipment involved in the case of the

Gulf, Colorado & Santa Fé Railway Co. v. State of Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. In that case, the corn was carried from Texarkana, Tex., to Goldthwaite, Tex., upon a bill of lading which, upon its face, showed only a local transportation. It was contended by the railroad company that this was a continuation of a shipment from Hudson, S. D., to Texarkana, Tex.; that the place from which the corn started was Hudson, S. D., and the place at which the transportation ended was Goldthwaite, Tex.; that such transportation was interstate commerce, and that its interstate character was not affected by the various changes of title or issues of various bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite. Further quoting, the opinion states:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment, of the place of delivery. The Hardin Company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned. * * * It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract."

In the case at bar, the shipment from Milepost 13 was intrastate, while in the above-quoted case the first shipment was interstate. In our case the last shipment was interstate, while in the above-quoted case

the last shipment was intrastate. The authorities cited in the above-named case sustain the contentions of the appellee here. See, also, *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615.

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715.

In the case at bar, the shipment did not become an interstate shipment until after its delivery to the Illinois Central Railroad Company at Batesville.

The case of the *Chicago, Milwaukee & St. Paul Railway Company v. State of Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 59 L. Ed. 988, was one brought by the state of Iowa to obtain a mandatory injunction requiring the defendant railroad company to comply with an order of the State Railroad Commission which was resisted by the defendant on the ground that it was an attempt to regulate interstate commerce, the state claiming the regulation to be one of intrastate commerce. The railway company had refused to accept shipments of coal in carload lots at Davenport, Iowa, for points in that state when tendered in cars of other railroad companies by which the coal had been brought to Davenport from points in Illinois. The railway company insisted that it was entitled to furnish its own cars. Complaint of this rule was made to the Railroad Commission. A hearing was had before the commission, and the commission decided that it was intrastate commerce, and therefore within its jurisdiction, and ordered the railway company to accept and haul said cars. "But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character [citing authorities]. The question is with respect to the nature of the actual movement in the particular case, and we are unable to say upon this record that the state court has improperly characterized the traffic in question here."

In the case of *Brunner v. Mobile-Gulfport Lumber Co.*, 188 Ala. 248, 66 South. 433, the authorities are cited and reviewed and the

court decides this question in line with our decision here. We therefore conclude that the shipments in question were purely intrastate ones; that there was not such a continuity in the movement of the shipments from Milepost 13 to Memphis, Tenn., as is necessary to an interstate shipment; that it was not the intention of the consignor, the appellee here, or of the railroad company, at the time the shipment was started, that it was an interstate shipment.

The judgment of the lower court is therefore affirmed.

CURRIE v. BENNETT. (No. 17807.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

EXECUTORS AND ADMINISTRATORS \Leftrightarrow 38—COLLECTING AND MANAGEMENT OF ESTATE—GIFT.

Where stock belonging to deceased was sold by private sale to the representative of a corporation, which sale was approved by the court, which corporation afterwards gave the defendant, widow of the deceased, \$1,100 in recognition of her moral claims upon the corporation by reason of her husband's former employment by them, it being a voluntary contribution and entirely independent of the corporation's purchase of her husband's stock, for which full value was paid, and no fraud or collusion was alleged or shown, it was error to charge defendant with the \$1,100 in favor of her husband's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 323; Dec. Dig. \Leftrightarrow 38.]

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

Action by J. F. Bennett, administrator of the estate of B. D. Currie, deceased, against Annette Currie. Decree for plaintiff, defendant appeals, and plaintiff cross-appeals. Decree on direct appeal reversed, and decree for defendant; decree on cross-appeal affirmed.

See, also, 71 South. 324.

T. M. Evans, of Gulfport, and L. Brame, of Jackson, for appellant. U. B. Parker, of Wiggins, and Bowers & Bowers, of Gulfport, for appellee.

HOLDEN, J. This appeal comes from the chancery court of Harrison county on direct appeal of the appellant, Mrs. Annette Currie, and cross-appeal by J. F. Bennett, administrator of the estate of B. D. Currie, deceased. From a careful examination of the record in this case we find that there is only one question which deserves our consideration and discussion, and that is whether or not the chancellor erred in requiring the appellant, Mrs. Annette Currie, to pay over to J. F. Bennett, administrator of the estate of her deceased husband, the sum of \$1,100, and this controversy arises out of the following facts:

When B. D. Currie, the deceased husband of appellant, died, he left 40 shares of stock

in the Wiggins Turpentine Company, a corporation engaged in the turpentine business, domiciled at Wiggins, Harrison county, Miss. In the administration of the estate of said B. D. Currie in the chancery court, the court ordered these 40 shares of stock to be sold at public auction after due notice, etc. The stock was sold in the manner prescribed by the decree of the court, and was purchased by one W. R. Barber, who paid the sum of \$3,000 for it. This sale was subsequently reported and confirmed by the chancery court; but afterwards the sale was set aside and the administrator, Bennett, authorized to resell this stock at private sale. Following this order of the court below, the administrator sold the stock at private sale to the said W. R. Barber for \$3,000, and this sale was subsequently reported to, and approved and confirmed by, the chancery court. At a subsequent hearing by the court, a petition and motion was heard asking the chancellor to set aside the said sale of this stock, and to require the appellant, Mrs. Annette Currie, to pay over to the administrator, Bennett, for the estate of her deceased husband, the sum of \$1,100 which she had received from the Union Naval Stores Company, a corporation domiciled at New Orleans, who was the owner of the other stock in the said Wiggins Turpentine Company; and the chancellor, on this hearing, decreed and ordered that the appellant, Mrs. Currie, should be charged by the estate with the said sum of \$1,100 and interest thereon, which the court stated in its decree was a part of the value of the stock sold to the said Barber, who, it seems, as a matter of fact, purchased the stock for the Union Naval Stores Company. It appears from the record that the \$1,100 in question was paid to the appellant, Mrs. Annette Currie, by the Union Naval Stores Company under the circumstances as set out by a letter in this record, which is as follows:

"New Orleans, June 6, 1912.

"Mrs. B. D. Currie, Bond, Mississippi—Dear Madam: Ever since the death of Mr. B. D. Currie, we have been striving to clear up the various and sundry entanglements into which the business of the Wiggins Turpentine Company fell, and have been trying hard to get it out of debt. You know all the entanglement that the stock held by your husband has gotten into, and you probably understand the difficulty we have had in trying to clear up the business. Through it all, Mr. W. L. Currie has many times presented to us in your behalf the possibility of our being able to do something for you, so that you might get something out of the business. This was in line with our own wishes, and we have a number of times stated to creditors that, if we were let alone, we would help the business and do the best we could by it. But it has been a difficult undertaking, and continues to be. Mr. Currie has again presented the matter to us, and asked us if we could not see our way to doing something for you now, and, after careful consideration of the subject, we have decided to say the following to you: As you doubtless know, there is absolutely no legal responsibility devolving up-

on us that would require us to pay you anything at all on account of this business. It is deeply in debt, and always has been, and there are several hundred dollars due it from your own good self, and several hundred from the estate of your husband, which last we don't suppose we will ever be able to collect. We recognize no liability, therefore, on account of this business, or your husband's interest in it, or that of your good self, or of your children; but, out of regard for your husband, who we believe did all he could for us when he had charge of the business, and out of a desire to have the people working for us feel that we will always do whatever we can for their families, if anything happens to them, we now suggest to you that we will give you in cash seven hundred dollars (\$700), and a receipt in full for the amount that you owe the Wiggins Turpentine Company, which is something over \$400. The stock held by your husband was sold recently for \$3,000. If, for instance, we had bought this stock, and added it to this \$1,100 which we are now proposing to turn over to you, it would make that stock cost us something over \$4,100, which would be making the stock worth more than par, while, as a matter of fact, it is worth very much less. If this suits you, let us know, and we will put it through. You have had a good friend in Mr. W. L. Currie, and we believe that we ourselves have some little claim on your consideration.

"Very truly yours,

"Union Naval Stores Company,
"WJL/E/EB W. J. L'Engle, President."

The evidence in the record clearly discloses that the sale of the stock and the purchase by Barber for the Union Naval Stores Company at \$3,000 was regularly and properly carried out as directed by the chancery court, and completely closed, reported to, and confirmed by the chancellor. We see no reason why the chancellor should have found fault with this completed and confirmed sale of the stock. There is no fraud, collusion, or corruption alleged or shown to have been perpetrated, to the injury or damage of the estate of B. D. Currie, deceased; but it conclusively appears that the \$1,100 paid by the Union Naval Stores Company to the widow, Mrs. Annette Currie, was in fact a gift, or a voluntary contribution to her, and was no part of the value of the stock sold, as it appears that the stock was worth even less than \$3,000. There being no evidence of collusion or fraud, and it appearing that the \$1,100 given to Mrs. Currie by the Union Naval Stores Company was a gift, entirely independent of the sale of the Wiggins Turpentine Company stock, and could not be a part of the value thereof, nor connected with the transaction of the sale in any way, it was error for the chancellor to order that Mrs. Currie, the appellant, should be charged with the said \$1,100 in favor of the administrator, Bennett, for the estate of the deceased, B. D. Currie.

Therefore the decree of the chancery court on direct appeal of Mrs. Annette Currie as to the said item of \$1,100 is reversed, and decree here for her for said item, and the decree of the chancellor, on the cross-appeal as to the other items, is affirmed.

YAZOO & M. V. R. CO. v. SETARO.
(No. 18150.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Warren County;
E. L. Brien, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Marion Setaro. From the judgment, the Railroad Company appeals. Affirmed.

Hirsh, Dent & Landau, of Vicksburg, and Mayes & Mayes, of Jackson, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. BERRYHILL.
(No. 17606.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Lafayette County; H. K. Mahon, Judge.

Action between the Illinois Central Railroad Company and W. R. Berryhill. From the judgment, the Railroad Company appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Falkner, Russell & Falkner, of Oxford, for appellee.

PER CURIAM. Affirmed.

HENSON v. SOUTHERN PAVING CONST. CO. (No. 17699.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Action between W. A. Henson, receiver of the Vicksburg Waterworks Company and the Southern Paving Construction Company. From the judgment, the receiver appeals. Affirmed.

J. O. Bryson, of Vicksburg, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. BARHAM.
(No. 17905.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action by L. L. Barham against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 66 South. 814; 67 South. 163.

Mayes, Wells, May & Sanders, of Jackson, for appellant. P. H. Lowrey, of Marks, for appellee.

PER CURIAM. Affirmed.

MOBILE & O. R. CO. v. DUNKIN.
(No. 17905.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Lauderdale County; John L. Buckley, Judge.

Action between the Mobile & Ohio Railroad Company and Lon Dunkin. From the judgment, the Railroad Company appeals. Affirmed.

C. M. Wright, of Meridian, for appellant. S. M. Graham, of Meridian, for appellee.

PER CURIAM. Affirmed.

JOHNSTON, Revenue Agent, v. GREEN RIVER LUMBER CO. (No. 18283.)

(Supreme Court of Mississippi. May 29, 1916.)
Appeal from Circuit Court, Harrison County; J. H. Neville, Judge.

Action between J. C. Johnston, Revenue Agent, and the Green River Lumber Company. From the judgment, Johnston appeals. Dismissed.

PER CURIAM. Dismissed.

MISSISSIPPI & A. R. CO. v. HUFF.
(No. 17956.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Action between the Mississippi & Alabama Railroad Company and A. M. Huff. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

LOUISVILLE & N. R. CO. v. BAYOU DE LISLE LUMBER CO. (No. 18195.)

(Supreme Court of Mississippi. May 29, 1916.)
Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action between the Louisville & Nashville Railroad Company and the Bayou De Lisle Lumber Company. From the judgment, the Railroad Company appeals. Affirmed.

Gregory L. Smith and Joel W. Goldsby, both of Mobile, Ala., for appellant. Mize & Mize, of Gulfport, for appellee.

PER CURIAM. Affirmed.

SOULE v. MULLINS. (No. 17541.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Lafayette County; H. K. Mahon, Judge.

Action between E. C. Soule and W. H. Mullins. From the judgment, Soule appeals. Affirmed.

Falkner, Russell & Falkner, of Oxford, for appellant. Edgar Webster, of Oxford, for appellee.

PER CURIAM. Affirmed.

WILDER et al. v. DOWE. (No. 17910.)

(Supreme Court of Mississippi. May 29, 1916.)
Appeal from Chancery Court, Grenada County; J. G. McGowen, Chancellor.

Action between Mrs. E. A. Wilder and others and Mrs. Adela Dowe. From the judgment, Mrs. Wilder and others appeal. Affirmed.

S. A. Morrison, of Grenada, for appellants. McLean & Carothers, of Grenada, for appellee.

PER CURIAM. Affirmed.

SETER v. BURDINE. (No. 17768.)

(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Chancery Court, Itawamba County; T. L. Lamb, Chancellor.

Action between T. A. Seter, guardian ad litem for Ruth Young, and J. S. Burdine. From

the judgment, the guardian ad litem appeals. Affirmed.

S. P. Clayton, of Tupelo, for appellant. J. E. Rankin and J. M. Thomas, both of Tupelo, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. EMBRY.
(No. 18347.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Grenada County; H. H. Rodgers, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and B. W. Embry. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

LOUISVILLE & N. R. CO. v. BACKOUS.
(No. 18202.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Jackson County; J. I. Ballenger, Judge.

Action between the Louisville & Nashville Railroad Company and Mary A. Backous. From the judgment, the Railroad Company appeals. Affirmed.

Gregory L. Smith and Joel W. Goldsby, both of Mobile, Ala., and Horace Bloomfield, of Gulfport, for appellant. W. M. Denny, of Pascagoula, for appellee.

PER CURIAM. Affirmed.

HARTFORD FIRE INS. CO. v. SMITH BROS. (No. 18255.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Chickasaw County.

Action between the Hartford Fire Insurance Company and Smith Bros. From the judgment, the Insurance Company appeals. Dismissed.

McLaurin & Armistead, of Vicksburg, for appellant. Joe H. Ford, of Houston, for appellees.

PER CURIAM. Dismissed.

JEFFERSON v. MYERS. (No. 18270.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Issaquena County; E. L. Brien, Judge.

Action between Louis Jefferson and Joel Myers. From the judgment, Jefferson appeals. Dismissed.

PER CURIAM. Dismissed.

TOWN OF POPLARVILLE v. STEWART et al. (No. 19054.)

(Supreme Court of Mississippi. May 8, 1916.)

Appeal from Circuit Court, Pearl River County.

Action between the Town of Poplarville and Thomas Stewart and others. From the judgment, the Town of Poplarville appeals. Motion to docket and dismiss sustained.

71 SO.—53

W. A. Shipman, of Poplarville, for appellant. Parker & Shivers, of Poplarville, for appellees.

PER CURIAM. Motion to docket and dismiss sustained.

GRAND LODGE COLORED K. P. v. WYNN et al. (No. 17706.)

(Supreme Court of Mississippi. May 8, 1916. Suggestion of Error Overruled May 22, 1916.)

Appeal from Chancery Court, Attala County; J. F. McCool, Chancellor.

Action between the Grand Lodge Colored Knights of Pythias and Nancy Wynn and others. From the judgment, the Grand Lodge appeals. Affirmed.

W. J. Latham, of Jackson, for appellant. T. P. Guyton and Dodd & Allen, all of Kosciusko, for appellees.

PER CURIAM. Affirmed.

ANDERSON v. OWEN. (No. 18182.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action between R. H. Anderson and A. El. Owen. From the judgment, Anderson appeals. Affirmed.

Jas. A. Cunningham, of Booneville, for appellant. T. A. Clark, of Belmont, for appellee.

PER CURIAM. Affirmed.

MIDLAND CHEMICAL CO. v. HARRISON COUNTY. (No. 18190.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action between the Midland Chemical Company and Harrison County. From the judgment, the Chemical Company appeals. Affirmed.

Rucks Yerger, of Gulfport, for appellant. Lamar F. Easterling, Asst. Atty. Gen., and W. G. Evans, of Gulfport, for appellee.

PER CURIAM. Affirmed.

PICKETT v. LEIGH. (No. 18047.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between J. D. Pickett and Dr. B. M. Leigh. From the judgment, Pickett appeals. Affirmed.

F. V. Brahan, of Meridian, for appellant. W. L. Scott and W. C. Sams, both of Meridian, for appellee.

PER CURIAM. Affirmed.

SOUTHERN RY. CO. v. GEORGE.
(No. 18050.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Southern Railway Company and A. H. George. From the judgment, the Railway Company appeals. Affirmed.

A. S. Bozeman, of Meridian and Catchings & Catchings, of Vicksburg, for appellant. Fewell & Cameron, of Meridian, for appellee.

PER CURIAM. Affirmed.

MOODY v. McDANIEL. (No. 18157.)
(Supreme Court of Mississippi. May 22, 1916.)
Appeal from Circuit Court, Pontotoc County; Claude Clayton, Judge.
Action between Mrs. P. E. Moody and W. B. McDaniel. From the judgment, Mrs. Moody appeals. Affirmed.

Fontaine & Fontaine, of Pontotoc, for appellant. Mitchell & Mitchell and Mitchell & Roberson, all of Pontotoc, for appellee.

PER CURIAM. Affirmed.

PETTI v. MOBILE & O. R. CO. (No. 18087.)
(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between Frank Petti and the Mobile & Ohio Railroad Company. From the judgment, Petti appeals. Affirmed.

Fewell & Cameron, of Meridian, for appellant. Baskin & Wilbourn, of Meridian, for appellee.

PER CURIAM. Affirmed.

NEW ORLEANS & N. E. R. CO. v. McDAVID. (No. 18197.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action between the New Orleans & North-eastern Railroad Company and D. A. McDavid. From the judgment, the Railroad Company appeals. Affirmed.

R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, and A. S. Bozeman, of Meridian, for appellant. Mize & Mize, of Gulfport, for appellee.

PER CURIAM. Affirmed.

EAST TENNESSEE NURSERY CO. v. ROBINS. (No. 17906.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Union County; H. K. Mahon, Judge.

Action between the East Tennessee Nursery Company and E. D. Robbins. From the judgment, the Nursery Company appeals. Affirmed.

C. Lee Crum, of New Albany, for appellant. Stephens & Kenneday, of New Albany, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. JAMES et al. (No. 17979.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Chancery Court, Tallahatchie County; Joe A. May, Chancellor.

Action between the Yazoo & Mississippi Valley Railroad Company and Thomas G. James and others. From the judgment, the Railroad Company appeals. Affirmed and remanded.

See, also, 67 South. 152.

Mayes, Wells, May & Sanders, of Jackson, James Stone, of Oxford, Chas. N. Burch, of Memphis, Tenn., and Mayes & Mayes, of Jackson, for appellant. Gary & Rice, of Charleston, for appellees.

PER CURIAM. Affirmed and remanded.

WELLS LUMBER CO. v. SAUCIER. (No. 18066.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action between the Wells Lumber Company and William Saucier. From the judgment, the Lumber Company appeals. Affirmed.

Bilbo & Shipman, of Poplarville, for appellant. Salter & Hathorn, of Purvis, for appellee.

PER CURIAM. Affirmed.

BRADFORD v. STEELE. (No. 17555.)
(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Chancery Court, Scott County; Sam Whitman, Jr., Chancellor.

Action between T. B. Bradford and T. M. Steele. From the judgment, Bradford appeals. Affirmed.

Frank F. Mize, of Forest, for appellant. W. C. Eastland, of Forest, for appellee.

PER CURIAM. Affirmed.

MOBILE & O. R. CO. v. PICKLE. (No. 18209.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Clarke County; J. L. Buckley, Judge.

Action between the Mobile & Ohio Railroad Company and Ben Pickle. From the judgment, the Railroad Company appeals. Affirmed.

J. M. Boone, of Corinth, for appellant. Fewell & Cameron, of Meridian, for appellee.

PER CURIAM. Affirmed.

ELIXSON v. ANDERSON. (No. 17671.)
(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

Action between J. B. Elixson and O. F. Anderson. From the judgment, Elixson appeals. Affirmed.

Paine & Paine, of Aberdeen, for appellant. Leftwich & Tubb, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

WESTERN UNION TELEGRAPH CO. v. WILDER. (No. 18064.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Western Union Telegraph Company and B. F. Wilder. From the judgment, the Telegraph Company appeals. Affirmed.

J. B. Harris, of Jackson, for appellant. Sams & McCall, of Meridian, for appellee.

PER CURIAM. Affirmed.

SOUTHERN RY. CO. v. WILLIAMS.
(No. 17950.)(Supreme Court of Mississippi. May 29, 1916.)
Appeal from Circuit Court, Alcorn County;
Claude Clayton, Judge.

Action between the Southern Railway Company and W. A. Williams. From the judgment, the Railway Company appeals. Affirmed.

W. J. Lamb, of Corinth, for appellant. Thos. H. Johnston, of Corinth, and E. C. Sharp, of Booneville, for appellee.

PER CURIAM. Affirmed.

MOHLENBROCK MILLING CO. v. GIBSON GROCERY CO. (No. 18365.)(Supreme Court of Mississippi. June 5, 1916.)
Appeal from Circuit Court, Clay County;
T. B. Carroll, Judge.

Action between the Mohlenbrock Milling Company and the Gibson Grocery Company. From the judgment the milling company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HARRIS v. SOVEREIGN CAMP, WOODMEN OF THE WORLD. (No. 18164.)(Supreme Court of Mississippi. May 29, 1916.)
Appeal from Circuit Court, Tallahatchie County.

Action between Mrs. Virginia Harris and the Sovereign Camp of the Woodmen of the World. From the judgment, Mrs. Harris appeals. Affirmed.

Gary & Rice, of Charleston, for appellant. J. H. Caldwell, of Charleston, for appellee.

PER CURIAM. Affirmed.

WARD v. FURR. (No. 18205.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Lincoln County;
J. B. Holden, Judge.

Action between Jasper Ward and Winnie Furr. From the judgment, Ward appeals. Affirmed.

Patterson & McGehee, of Monticello, for appellant. J. H. Sumrall, of Brookhaven, for appellee.

PER CURIAM. Affirmed.

BOARD OF LEVEE COM'RS FOR YAZOO-MISSISSIPPI DELTA v. MARY MAC PLANTATION CO. et al. (No. 17898.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Chancery Court, Tunica County;
M. E. Denton, Chancellor.

Action between the Board of Levee Commissioners for the Yazoo-Mississippi Delta and the Mary Mac Plantation Company and others. From the judgment, the Board of Levee Commissioners appeal. Affirmed.

Gary & Rice, of Charleston, and Maynard & Fitz-Gerald, of Clarksdale, for appellant. Montgomery & Montgomery, of Tunica, for appellees.

PER CURIAM. Affirmed.

HENDERSON v. HARPER. (No. 18102.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Chickasaw County;
H. H. Creekmore, Special Judge.

Action between Lee Henderson and W. W. Harper. From the judgment, Henderson appeals. Affirmed.

J. H. Ford, of Houston, for appellant. Leftwich & Tubb, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

HICKS v. MERIDIAN COCA-COLA BOTTLING CO. (No. 17765.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County;
J. L. Buckley, Judge.

Action between J. M. Hicks and the Meridian Coca-Cola Bottling Company. From the judgment, Hicks appeals. Affirmed.

Estes & Estes, of Enterprise, for appellant. McBeath & Miller, of Meridian, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. McCLANNAHAN. (No. 17878.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Circuit Court, Coahoma County;
W. A. Alcorn, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Mrs. N. K. McClannahan. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes and Mayes, Wells, May & Sanders, all of Jackson, for appellant. Outrer & Johnston, of Clarksdale, for appellee.

PER CURIAM. Affirmed.

HARPER v. BANK OF NEWTON. (No. 18046.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Newton County;
C. L. Dobbs, Judge.

Action between T. H. Harper and the Bank of Newton. From the judgment, Harper appeals. Affirmed.

Street & Street, of Laurel, for appellant. Watkins & Watkins, of Jackson, for appellee.

PER CURIAM. Affirmed.

HART v. KIMBALL PIANO CO. (No. 18278.)

(Supreme Court of Mississippi. May 29, 1916.)

Appeal from Chancery Court, Hinds County;
O. B. Taylor, Chancellor.

Action between Brit Hart and the Kimball Piano Company. From the judgment, Hart appeals. Dismissed.

PER CURIAM. Appeal dismissed.

MERIDIAN LIGHT & RY. CO. v. BAYER STEAM SOOT BLOWER CO.

(No. 18062.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, Lauderdale County;
Jno. L. Buckley, Judge.

Action between the Meridian Light & Rail-

way Company and the Bayer Steam Soot Blower Company. From the judgment, the Light & Railway Company appeals. Affirmed.

Baskin & Wilbourn, of Meridian, for appellant. S. M. Graham, of Meridian, for appellee.

PER CURIAM. Affirmed.

NATHAN FURNITURE CO. v. WALLACE.
(No. 18061.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Chancery Court, Rankin County; Sam Whitman, Chancellor.

Action between the Nathan Furniture Company and Ione Wallace. From the judgment, the furniture company appeals. Affirmed.

F. V. Brahan, of Meridian, for appellant. S. L. McLaurin, of Brandon, for appellee.

PER CURIAM. Affirmed.

MCGILL et al. v. CHAPPELLE et al.

(Supreme Court of Florida. April 11 1916.
Rehearing Denied May 31, 1916.)

(Syllabus by the Court.)

1. TRUSTS — §89(5)—RESULTING TRUSTS—ENFORCEMENT—EVIDENCE.

Where a resulting trust is sought to be established by parol evidence, the burden rests upon the person asserting the existence of the trust to remove every reasonable doubt as to its existence by clear, strong, and unequivocal evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 137; Dec. Dig. §89(5).]

2. APPEAL AND ERROR — §1022(4)—PARTNERSHIP — §53—TRUSTS — §89(1)—ESTABLISHMENT OF TRUST—EVIDENCE—REVIEW.

The finding of a chancellor on the testimony taken before an examiner will not be given the same effect as the verdict of a jury, because not based upon testimony of witnesses sworn and testifying before him, and if the evidence so taken before the examiner clearly shows that the conclusions of the chancellor were incorrect, his conclusions will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4018; Dec. Dig. §1022(4); Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. §53; Trusts, Cent. Dig. § 134; Dec. Dig. §89(1).]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Bill in equity by Lewis W. Chappelle and another against Rosa Chappelle McGill and another. From a decree for plaintiffs, defendants appeal. Reversed, and bill of complaint dismissed.

Cockrell & Cockrell, of Jacksonville, for appellants. John W. Dodge and J. W. Holland, both of Jacksonville, for appellees.

ELLIS, J. On the 12th day of January, 1912, Lewis W. Chappelle and James E. Chappelle exhibited their bill in equity in the circuit court for Duval county against Rosa Brooks Chappelle, in which it was alleged in substance that the orators were brothers of Pat Chappelle, who died intestate in Jacksonville, Fla., on the 21st day of October,

1911, leaving surviving him his widow, Rosa Brooks Chappelle, and no children; that the father and mother of orators and Pat Chappelle were named Lewis Chappelle and Annie Chappelle; that the father died about five years and the mother died about three years before the filing of the bill; that the said Lewis and Annie Chappelle were the parents of the orators, Pat Chappelle, and their two sisters, Hattie Chappelle Jackson and Annie Chappelle, who were the sole heirs of their deceased parents, Lewis and Annie Chappelle; that Pat Chappelle and orators, Lewis W. and James E. Chappelle, in the year 1900 entered into a copartnership for conducting a saloon and theatrical business; that by the terms of the copartnership Pat Chappelle was to receive two-thirds of the net profits of the business and the orators were to receive jointly one-third; that pursuant to this agreement of copartnership a saloon was opened in Tampa, Fla., and a theater known as the Buckingham Theater was located adjacent to the saloon and was operated as a theater and opera house; that the expenses of both businesses were paid out of one common fund, which was made up out of the receipts of both businesses; that for several months the partners gave their personal attention to the two businesses; that in a short while Pat Chappelle, on behalf of the partnership, started a troupe of colored actors on the road, presenting various theatrical performances, but principally two performances, known as the "Funny Folks" and "Rabbit's Foot"; that Pat Chappelle managed the theatrical business of the partnership while on the road, and the orators remained in charge of the local business in Tampa, namely, the "saloon and the Buckingham Theater"; that the theatrical business often met with reverses, and became in need of funds for transporting the outfit from town to town, which funds were furnished by the partnership derived from the saloon business in Tampa; that in 1902 James E. Chappelle began to travel with Pat Chappelle in the theatrical troupe, and Lewis continued the saloon business in Tampa until 1904, when this part of the partnership business was by agreement closed, and in 1905 Lewis Chappelle joined the theatrical troupe and continued on the road with his brothers Pat and James Chappelle "all the seasons thereafter that the partnership kept this theatrical troupe on the road, until, to wit, 1910."

The bill also alleges that the copartnership was never dissolved during all these years and was financially successful; that Pat Chappelle invested the profits of the business, which were partnership funds, in the real and personal property described in the bill; that there was never any division of the profits among the alleged partners, and that Pat Chappelle applied all the funds arising from the business over its expenses

to his personal extravagances and the purchase of real and personal property, the title to which he took in his own name. The following is the description of the real and personal property which it is alleged was purchased with partnership funds by Pat Chappelle, and which it is alleged belongs to the said copartnership: First, lot 1 and east 16 feet of lot 2, block 22, division E, La Villa; second, lot 4 of block 6, Burbridge addition to La Villa; third, lots 21 and 22, block 106, Hull's subdivision of Hart's Map of La Villa; fourth, lot 12, L'Engle's subdivision of lots 182 and 187, Wilder's subdivision; fifth, east half of lot 1, block 35, division E of La Villa; sixth, lot 3 of block 5 of Harris, L'Engle & Brady's subdivision; seventh, southerly 70 feet of lot 29 of block 5, Burbridge's addition to La Villa; eighth, north 70 feet of west 30 feet of lot 363 of De Cotte's subdivision of Hansontown; ninth, east 42 feet of the west 84 feet of lot 4, block 23, division E, La Villa; and, tenth, west 43 feet of lot 4, block 15, McIntosh's addition to La Villa—all the above-described property being within the corporate limits of the city of Jacksonville. The personal property is alleged to consist of one Pullman car named "Wyevale," one named "Rosa," and all theatrical paraphernalia now stored in a barn located on the east 42 feet of the west 84 feet of lot 4, block 23, division E, La Villa, known as 1054 West Church street.

The bill also alleges that Pat Chappelle lived extravagantly, used large amounts of money in travel and other luxuries expended for his personal wants and desires, that he purchased various articles now claimed as part of his personal estate, and paid out of said funds the premiums upon the life insurance policies held by him upon his own life, which policies, amounting to \$10,000, have been collected by the defendant. It is also alleged that the title to the properties described under Nos. 7, 8, 9, and 10 was taken in the name of Pat Chappelle as trustee for his mother, Annie Chappelle, and by various conveyances in fraud of the rights of his mother and brother the title was transferred from the mother to Pat Chappelle individually; that much of the property was improved at the time of its purchase, and much has been improved since by the erection of buildings under the supervision of Pat Chappelle and his brothers; that Pat Chappelle collected the rents from the property and has never accounted to the orators for their portion. It is also alleged that the family relations existing between the orators, Pat Chappelle, their parents, and sisters, were very close and intimate; that the orators, relying upon Pat Chappelle as their elder brother and custodian of the partnership funds, believing that he was preparing for their future welfare in the handling of the funds of the alleged partnership, did not press during Pat Chappelle's lifetime their demand for a division of the property;

that Pat Chappelle imposed upon his mother's confidence in him, and by reason of her age and infirmities induced her to transfer to him the title to the properties described under Nos. 7, 8, 9, and 10, the purchase money of which was paid out of the partnership funds.

The orators claimed that by reason of the facts alleged they were tenants in common with Pat Chappelle of the real estate described to the extent of a one-third undivided interest in the same, and as surviving partners are entitled to the possession of the personal property belonging to the partnership; that the weekly rental from the real estate averages \$140; that the defendant receives it and expends it extravagantly for her personal use; that she refuses to account to the orators therefor; that she is insolvent, inexperienced in business matters, and will permit the property to deteriorate and go to waste. The bill prays that the title and interest of the orators be declared in the real estate, and that they be given the possession of all the personal property described as surviving partners, that an accounting be taken between the orators and defendants as to the matters alleged, that she be decreed to hold the real estate in trust for the orators and herself, that the interests of the orators under the partnership be declared, and for a partition of the real estate and dissolution of the trust, and for a receiver to take charge of the property and rentals therefrom, for an injunction against the defendant from disposing of or transferring any of the property, for the appointment of a special master to take the testimony, and for general relief.

The defendant answered the bill, denying all the material allegations which it contained, from which it was alleged the trusts resulted, and admitted that as sole heir of Pat Chappelle she had the title to and possession of all the real property of her deceased husband. The answer admitted that the complainants and Pat Chappelle were brothers; that their father, Lewis, died in February, 1906, and their mother died in February, 1910; that the mother left surviving her three sons, Pat, Lewis, and James Chappelle, and two daughters, Annie and Hattie, but the latter, called Hattie Chappelle Jackson, was not the daughter of the decedent Lewis Chappelle. The answer denies the terms and provisions of the copartnership alleged to have been formed between the complainants and Pat Chappelle in Tampa during the year 1900, and denies that the traveling theatrical troupe or troupes taken out by Pat Chappelle upon the road and performing at different places throughout the country under the names of the "Funny Folks Comedy Company" and "A Rabbit's Foot Comedy Company" were managed and conducted by him in behalf of the alleged copartnership, but averred that such enterprise was the separate and individual property and undertaking of Pat Chappelle solely, and in

no wise carried on or conducted by him as part of the alleged "saloon and Buckingham Theater" partnership and business at Tampa; that the connection of the complainants with the said traveling troupes was in the capacity of employés of Pat Chappelle on a salary basis, for which services rendered by them they were paid in full; that they never owned any interest whatsoever in said business, nor did they ever exercise or claim any right as partners therein, nor did they ever have such right; that the alleged partnership in Tampa, effected in 1900 and conducted under the name of Chappelle Bros., was dissolved and ceased to exist when the business became a failure, and was abandoned; that the complainants never asserted nor claimed any interest in the show business of Pat Chappelle during his lifetime, nor demanded of him any share in the profits thereof, but that such claim was asserted for the first time after his death.

The answer denies the investment by Pat Chappelle of any partnership funds in the property, real or personal, described in the bill, and avers that the money so invested by him was his exclusive property, that all the property, real and personal, mentioned or referred to in the bill, was his sole property, and was his at the time of his death, and the premiums paid by him for the life insurance mentioned were paid from funds of his own, in which the complainant had no interest of any character whatsoever; that all improvements placed upon the property were placed there with funds that belonged exclusively to Pat Chappelle, and complainants have no interest in the same, nor in the income therefrom; that although the title to some of the property described in the bill was taken by Pat Chappelle in his name as trustee for his mother, she did not contribute any of the funds towards such purchase, nor did any consideration therefor come from her, but the purchase price therefor was paid by him from his own funds, and the conveyances back to him from his mother were not fraudulent; that, even if there was a partnership existing between complainants and Pat Chappelle at Tampa, or elsewhere, in 1900, or since then, the complainants by their laches, and by the lapse of time, and by their conduct, have long since estopped themselves from making any just claim in their behalf such as a court of equity, after the death of Pat Chappelle, could entertain.

A replication to the answer was filed, and a special master was appointed to take the evidence.

After the pleadings were filed, Rosa Brooks Chappelle married S. D. McGill, and by order of the court, upon consent of the parties, the cause proceeded in all respects as if S. D. McGill was duly impleaded therein and the pleadings and proceedings amended, to the end that the court should have jurisdiction of the person of the said Mc-

Gill, as well as of his wife Rosa. Between the time when the taking of testimony was closed and the hearing, James E. Chappelle, one of the complainants, died, leaving surviving him a widow, but no children, and Damon G. Yerkes was appointed administrator ad litem of the estate of James E. Chappelle by order of the court, and the cause proceeded in the name of Lewis W. Chappelle and Damon G. Yerkes, as administrator ad litem of the estate of James E. Chappelle, deceased, against Rosa Chappelle McGill, formerly Rosa Brooks Chappelle, and her husband, S. D. McGill.

On the 31st day of December, 1914, the chancellor made an order, which was duly entered, finding the equities to be with the complainants, and that they were entitled to the relief prayed in the bill of complaint, and that a decree in conformity with such finding would be signed, when prepared and presented by counsel.

On the 10th day of February, 1915, a final decree was signed by the chancellor and duly entered, adjudging the equities to be with the complainants, and that they were entitled to the relief prayed; that a copartnership between Pat Chappelle and Lewis W. and James E. Chappelle was established in 1900, in which Pat Chappelle owned a two-thirds interest, and L. N. and James E. Chappelle owned jointly a one-third interest, for the purpose of engaging in the saloon, theatrical, and other business, which partnership was not dissolved and was in existence at the time of the death of Pat Chappelle; that the profits of such partnership were invested in various items of personal property and real estate, and that the partner or other person in whose name the title thereto was taken, or other person holding under and through such holder, whether as heir or successor, held such property subject to a resulting trust in favor of the individual parties in their respective rights as partners; that the complainants were jointly entitled to a one-third undivided interest in all the real and personal property of which Pat Chappelle, deceased, died seised and possessed, which was purchased with partnership funds derived from the saloon, theatrical, or other business as set out in the bill; that complainants were entitled to an accounting for one-third of the income therefrom, both as against the defendant as heir of Pat Chappelle, and personally as having received the income therefrom since the death of Pat Chappelle; that all the property, real and personal, purchased by Pat Chappelle individually or as trustee, and of which he died seised, and which was purchased since the formation of the said partnership in the year 1900, and particularly the property described in the bill, was purchased with partnership funds; and that at the time of Pat Chappelle's death he held the same as trustee for himself and complainants, and the defendant holds the prop-

erty as trustee for herself to the extent of two-thirds undivided interest, and as trustee for the complainants to the extent of a one-third undivided interest, subject to the defendant's showing upon an accounting whether any of the funds which went into the purchase or improvement of the properties of which Pat Chappelle died seised arose from any other source than the theatrical, saloon, and other business as set forth in the bill, in which theatrical, saloon, and other business the court decreed the complainants to have been interested as partners.

A receiver was appointed to collect the rents and account for the same upon the order of the court, and a special master was appointed to take and state an account between the complainants and defendant, and the parties, for a better discovery of the matters and dealings between the complainants and defendant, were ordered to produce before and leave with the master all books, papers, and writings in their custody or control relating thereto, and the master was ordered to report to the court as to the partnership real estate and personality of which the said Pat Chappelle died seised, what income therefrom he used in the purchase of other property, what disposition has been made of such income since his death, what partnership property the defendant has disposed of since the death of Pat Chappelle, what the expense of the upkeep of the property has been, and what liens or incumbrances exist upon the property.

From this decree the defendant Rosa Chappelle McGill appealed to this court on the 16th day of February, 1915.

The appeal was dismissed upon motion of the appellant, and on the 19th day of April, 1915, the chancellor made a final decree, which was duly entered, setting aside the decree of February 10, 1915, because of a clerical error in not correctly naming the parties and setting forth the conclusions of the court as hereinbefore substantially stated with reference to the parties then before the court.

On the same day the defendants Rosa Chappelle McGill and S. D. McGill entered their appeal to this court from the decrees rendered on the 10th day of February, 1915, and on the 19th day of April, 1915, and assigned as error the making and entry of said decrees.

A voluminous amount of evidence was taken in this case, and reported to the court, in the effort on the part of the complainants to establish the resulting trust shown by the bill of complaint, and on the part of the defendants to refute the allegations of fact from which it was alleged the trust arose.

The existence of the alleged trust depends upon the question whether the Chapelle brothers formed a copartnership in Tampa during the year 1900 for the purpose of engaging in the saloon, theatrical, and other businesses, whether such copartnership con-

templated the business of conducting and operating a traveling comedy or other theatrical entertainment, and whether the purpose of the copartnership, if such was its purpose, was abandoned, and the copartnership dissolved, before the properties described in the bill were acquired, or whether any funds of the copartnership of 1900 were invested in such properties.

The evidence shows that the Chappelle brothers did form a copartnership in Tampa, Fla., about October, 1900, for the purpose of conducting a whisky saloon in a building located in Ft. Brook, which was rented from one Robert Mugge at a rental of \$43.33 per month, and that in connection with the whisky business they conducted under the same roof, in an adjoining room connected with the saloon by an open doorway, a dance hall and theatrical entertainments.

Prior to this time Pat Chappelle had been engaged in selling whisky in the city of Jacksonville, in connection with which he operated a negro vaudeville show, or dance hall, until about the 1st of the year 1899, when he moved to Tampa and formed a copartnership with one Pierce Hamilton in the saloon business, which copartnership lasted for several months. While engaged in business in Jacksonville, Pat Chappelle became involved in a dispute with his landlord as to the amount of the former's indebtedness for rent, which dispute was not settled for many years, if at all. This circumstance is mentioned here, because Pat Chappelle in later years referred to this fact as a reason why the title to some of his property was taken in his name as trustee for Annie Chappelle, in order, as he thought, to make it difficult for his creditor to reach this property in the event judgment should be obtained against him. The copartnership between Pat Chappelle and Pierce Hamilton coming to an end, Chappelle formed another copartnership with one R. S. Donaldson. These two obtained a lease upon the same property from Robert Mugge on September 30, 1899, which Chappelle Bros. later occupied, upon which to conduct their business, and for the same rental. In this building the copartnership consisting of Pat Chappelle and R. S. Donaldson conducted a whisky saloon, and in the adjoining room a theatrical entertainment. This place during the existence of the copartnership was known as the "Buckingham Theater," the same name by which it was known when occupied later by Chappelle Bros. During the copartnership between Chappelle and Donaldson, Pat Chappelle carried a theatrical troupe upon the road, known as the "Imperial Minstrels," which seemed to have failed at Memphis, Tenn., in 1899, in which neither Hamilton nor Donaldson, his partners of that year in the saloon business at Tampa, appears to have been interested. During the year 1900 Pat Chappelle obtained a copyright for his musical comedy, entitled "A Rabbit Foot," and

thereupon organized a troupe, and employed actors and musicians, preparatory to exhibiting the show in different cities in the United States and Canada. He traveled with this show, exhibiting in New York City, among other places; but in this traveling show business his partner in the saloon and theater business at Tampa, R. S. Donaldson, had no interest. Pat again failed, and returned to Tampa in the fall of 1900. During this time L. W. Chappelle and James E. Chappelle were living in Tampa; one of them clerking for Chappelle and Donaldson, and the other working at times for Donaldson and at other times for a man by the name of Stevens. Both, however, knew of the existence of the copartnership of Chappelle & Donaldson, and the character of business carried on at the "Buckingham Theater and Saloon," and of the separate and independent enterprise conducted and owned by Pat Chappelle, which came to grief on two occasions at least.

Upon the return of Pat Chappelle to Tampa, he and Donaldson became involved in a dispute between themselves as to the settlement of accounts between them, which was finally settled in a lawyer's office. Chappelle was shown to be in debt to Donaldson, who moved out of the building, carrying whatever of stock and fixtures there were, and Pat Chappelle and his brothers, Lewis and Jim, moved in. The new firm was called Chappelle Bros., and they carried on the same business at the same stand. There is no evidence whatsoever that the new copartnership contemplated the carrying on of any other business than that of a whisky saloon, dance hall, and theatrical entertainment in the building known as the "Buckingham Theater." This business was carried on until, some time during the year 1901, a small passenger car was purchased. The evidence is not at all clear as to whose funds went into the purchase of this car. Complainants, witnesses in their own behalf, say it cost \$300 and was paid for in two checks for \$150 each, one payable to Billy Lehr, and the other to Miss Agnes Manning. Both of these checks were certified, but the last one appears to have been taken back to the bank and the cash obtained by Chappelle Bros. All the witnesses agree, however, that the money which was used to pay for the car was realized in a game at cards, in which Pat Chappelle won heavily, and the evidence is not at all clear nor satisfactory that either one of the other brothers participated in the game or were financially interested, except in the very small commission usually paid to the "house" in such cases, according to the witnesses. With the money thus realized from the game the small car was bought and named the "Little Anne," after the mother of these brothers, and used in the traveling show business, which seemed to be Pat Chappelle's ambition to organize and carry to suc-

cess. According to one witness, who during the years from 1899 to 1901, inclusive, was employed by the Seaboard Air Line Railway at Tampa as ticket agent and traveling passenger agent, and who had much dealing with Pat Chappelle and Chappelle Bros., the "vaudeville show ran as Chappelle Bros.," while the name of the road show was "Pat Chappelle's Rabbit Foot Comedy Company."

During the year 1901 Pat Chappelle in his own name made contracts with certain persons for their services in connection with the "Rabbit's Foot Comedy Company," whose names do not appear in the "managerial staff" of Chappelle Bros., nor among the list of performers, "vocalists, soubrettes," and other attachés of the "Buckingham Theater" during the season of 1901. For a short while during that year one of the original complainants, James E. Chappelle, claimed to have traveled with Pat, his brother, and the show, but upon cross-examination he was uncertain whether it was during the year 1901 or 1903. In any case it does not appear that he was connected with the show in the capacity of part owner, or in any other capacity than as employé, and, growing tired of his employment, he returned to Tampa and spent his time gambling, according to his testimony. It was during this year that Lewis Chappelle and not Chappelle Bros., according to complainants' exhibits, forwarded to Pat Chappelle money for transporting the "Rabbit Foot" show from place to place. Money was sent by Lewis Chappelle for this purpose four times, and aggregated the sum of \$92.35. During the year 1902 the sum of \$179.20 was spent as it is claimed for traveling expenses of certain actors employed by Chappelle Bros. Of this amount \$96.80 appears to have been paid by Pat Chappelle for the traveling expenses of three actors, who it does not affirmatively appear were employes of Chappelle Bros.' vaudeville entertainment or show at Tampa. Seventy-three dollars of the amount appears to have been paid by Chappelle Bros. for the traveling expenses of a person, who later and while under contract with Pat Chappelle individually as proprietor of the "Rabbit Foot Comedy Company" for services to be rendered the traveling show, permitted himself to be employed by a rival concern, which resulted in a suit by Pat Chappelle individually against his rivals, which was carried to a successful issue in favor of the plaintiff. This litigation was known to Lewis and James Chappelle. Pat, becoming a witness in his own behalf in that case, swore he was the sole owner of the "Rabbit Foot Company." His affairs he frequently discussed with his attorney at that time, in the presence of his brothers, and the attorney who conducted the litigation had no intimation whatever that Lewis and James were interested in the "Rabbit Foot Company." It was contended that at this time "Chappelle Bros." were the owners of the traveling show, and

their name appeared upon the car called "Little Annie," and that there were no silent copartners in this business. It is very significant that the attorneys for neither plaintiff nor defendant discovered this fact, and that both of the alleged partners should have permitted the action to continue in the name of one as sole owner and hear him testify to that exclusive ownership without the slightest protest.

During the year 1903 Pat Chappelle continued to travel with his show from place to place, wrote letters, made contracts, entered into an agreement for the purchase of another car, rented buildings in which to exhibit his show, and pushed claims against railroads for damages to his property, all in his own name as sole owner, while one of the alleged copartners was with him part of the time in the capacity of employé, while the other was conducting the "Buckingham Theater Saloon" at Tampa and advertising on the letter heads that the theater was open all the year. It was during this year that the "saloon and theater" business at Tampa came to a disreputable close by the arrest and conviction of one of the partners for attempting to evade the law by conducting the business without first obtaining a license therefor. The business was terminated, the doors of the "Buckingham Theater and Saloon" were closed, and the proprietor in charge sent to jail. In the meantime it does not appear that remittances had been duly made to Pat Chappelle on account of his two-thirds interest in that business. Pat Chappelle, however, went to Tampa, employed counsel, obtained the release of his brother, and rejoined his troupe. Lewis Chappelle, however, did not go with the show at once, but went to Jacksonville, where he remained for several months, and did not become connected with the traveling show until the year 1904. His business relation to his brother Pat from 1905 is conclusively shown by the record to be that of employé and employer. It is shown by his letters to his brother, in which he disclaims any interest in the show or its properties, by his written receipts for the weekly salaries of himself and wife, by his arrest for undertaking to sell for his own use some of the property of the show, by his effort to obtain a lease on one of the shows, which was organized by Pat Chappelle in 1905 or 1906 and called the "Funny Folks," and by his disclaimer on several occasions, and once in a judicial proceeding, of any interest in the business, and an acknowledgment of Pat Chappelle's sole proprietorship. The same is true as to the complainant James E. Chappelle, so far as the acknowledgment of his position with the show to be that of employé and Pat Chappelle's sole ownership of the property, real and personal, during the latter's lifetime, is concerned.

James at one time became the lessee of some part or portion of the real estate from

his brother Pat, and was ejected for the non-payment of rent. During his connection with the show his brother Pat frequently complained of his conduct as dishonest, and that of his brother Lewis as inefficient. Pat's complaints became so frequent and severe as to the incompetency and dishonesty of his two brothers as employés that they quit the services of their brother and for a time abandoned the show. They knew of the investments that their brother Pat Chappelle was making in real estate in Jacksonville, his improvement of the same, the collection of rents, the title to the property being taken in himself, the advertisement of the show as "Pat Chappelle, Sole Owner," and his open and avowed ownership and exclusive control of the show, its properties, and the proceeds from the exhibitions, without ever making any effort to secure from their brother a division of the profits, or an accounting therefor, or an acknowledgment from him of their alleged interest as partners in this enterprise, for which they had so frequently shown their unfitness by reason of their incompetency and dishonesty.

[1] The law upon the subject of the establishment of resulting trusts by parol evidence has been frequently declared by this court. The "evidence to establish [such] trusts must be so clear, strong and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of the trust." *Geter v. Simmons*, 57 Fla. 423, 49 South. 131; *Johnston v. Sherehouse*, 61 Fla. 647, 54 South. 892; *Lofton v. Sterrett*, 23 Fla. 565, 2 South. 837.

[2] The complainants, many years after the forming of the copartnership in Tampa and the complete abandonment of the business at that place, seek now, after the death of their partner of 12 years before, for the first time during that period, to establish their business relation to him as copartner. When during the years of trial, when the business by carelessness, inefficiency, and dishonest methods might at any time have gone to pieces and become a failure and liability, they acknowledged their brother to be its sole owner and proprietor, accepted from him good salaries for themselves and their wives, were content to accept pay for their inefficient service, and cast upon their brother the entire responsibility for financial failure, to which their services so much tended, and wait until death removes him from the scenes, and prevents his denial of their statements, to claim an interest in the property, real and personal, the accumulation of which was due to the energies, business acumen, prudence, business integrity, and unswerving purpose of their brother.

The evidence convinces us that the copartnership formed in Tampa, Fla., between Pat Chappelle, and Lewis and James Chappelle, did not contemplate the carrying on of any other business than that of a local whisky

saloon and playhouse; that the "Rabbit Foot Comedy Company" formed no part of the enterprise, but was the separate, distinct, and independent business and enterprise of Pat Chappelle, and was so recognized by the complainants for a period of nearly 12 years; and that all the property, real and personal, described in the bill of complaint, was purchased with funds which belonged to and were the exclusive property of Pat Chappelle, in which his brothers, the complainants, had no interest whatsoever.

The chancellor, however, found differently, and it is urged that, as the fact of the copartnership in 1900 was clearly established by the evidence, and the chancellor so found, this court will not disturb the decree, because the burden of showing a dissolution of the copartnership rested upon the defendant, and the evidence is not sufficiently strong in that regard to clearly show that the chancellor erred. There is no fault to be found with the principle, but its application to the facts of this case is denied, and we think correctly. The chancellor's conclusions should be reversed on the finding of fact that the copartnership of 1900 between the Chappelle brothers contemplated the business of carrying on a traveling show in connection with the business of selling whisky and maintaining a playhouse in connection with the saloon. In this we think that the chancellor clearly erred, and his conclusions should be reversed. *City of Jacksonville v. Huff*, 39 Fla. 8, 21 South. 774; *Waterman v. Higgins*, 28 Fla. 660, 10 South. 97; *Perez v. Bank of Key West*, 38 Fla. 467, 18 South. 590.

The chancellor's conclusions were not on a par with the verdict of a jury, because they were not based upon the testimony of witnesses sworn and testifying before him. *Lucas v. Wade*, 43 Fla. 419, 31 South. 231. It is therefore ordered that the decrees be and the same are hereby reversed, and the bill of complaint is dismissed; the costs to be taxed against the appellees.

TAYLOR, C. J., and SHACKLEFORD and WHITFIELD, JJ., concur.

COCKRELL, J., takes no part.

CHARLOTTE HARBOR & N. RY. CO. v. BUCHAN.

(Supreme Court of Florida. April 28, 1916.
On Petition for Rehearing, May 18, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL — 155—MOTION—POWERS OF JUDGE IN VACATION—MOTION FOR NEW TRIAL.

A motion for a new trial duly made during term time may be disposed of in vacation.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 315; Dec. Dig. ¶ 155.]

2. APPEAL AND ERROR — 1003—CARRIERS — 94(3)—TRANSPORTATION OF GOODS—ACTIONS—EVIDENCE—REVIEW.

Where the evidence is legally insufficient to support the verdict, the judgment entered upon the verdict will be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. ¶ 1003; *Carriers*, Cent. Dig. §§ 878-885; Dec. Dig. ¶ 94(3).]

Error to Circuit Court, De Soto County; F. A. Whitney, Judge.

Action by C. Roy Buchan against the Charlotte Harbor & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

McKay, Withers & Phipps, of Tampa, for plaintiff in error. Leitner & Leitner, of Arcadia, for defendant in error.

PER CURIAM. Buchan recovered a judgment against the carrier for a carload of watermelons which the carrier did not on June 8, 1912, "take and deliver."

[1] A motion is made here to strike the bill of exceptions on the ground that the motion for new trial, though made during the term of court, was disposed of in vacation. The motion is made upon the theory that the court is without jurisdiction to pass upon a motion for new trial except in term time.

Sections 2 and 3, c. 5403, Acts of 1905, are as follows:

"Sec. 2. The judge shall have the power to hear and determine any motion for new trial in vacation and any such adjudication thereof in vacation shall be entered in the minutes of the court and shall have the like force and effect as if made during term time.

"Sec. 3. The provisions of this act shall not apply to criminal causes."

Sec. 1843a, Compiled Laws of 1914.

The motion for new trial having been, as contemplated by the statute, "made within four days after the rendition of the verdict and during the same term," and, not having been disposed of during term time, the motion was properly disposed of during vacation. The motion to strike is denied.

[2] The plaintiff testified that:

"I live at McCall, Fla. During June, 1912, I requested the Charlotte Harbor & Northern Railway Company to place a car for me on the siding at McCall to be loaded with watermelons. McCall is a nonagency station; that is, there is no agent kept at the station house, but patrons of the railway company are accustomed to receiving goods from the conductors on freight trains or from the platform at the station where they are deposited by the conductors, and in making shipments the goods are tendered to the conductors on the freight train, and he issues a waybill or bill of lading therefor. This was the practice followed by the railway company in June, 1912. At that time the Charlotte Harbor & Northern Railway Company was maintaining a triweekly north-bound freight service according to schedule; that is, a freight train going north through McCall was due on Saturday morning, Tuesday morning, and Thursday morning each week. On the morning of Saturday, June 8, 1912, the regular freight train came through according to schedule, and the conduc-

tor asked me if my car of melons was ready to move, and I told him it was not loaded, and he thereupon proceeded with his train. At that time the defendant railway company was operating a passenger train each way daily. The south-bound passenger train was due to pass through to Boca Grande, the southern terminus of the company, in the morning, and the north-bound passenger train was due to pass through McCall going to Mulberry, in Polk county, the northern terminus of the company, in the afternoon. At times these passenger trains have hauled perishable freight for me. The south-bound passenger train did not come through McCall on June 8, 1912, and about 4 o'clock in the afternoon a locomotive with a freight box car attached to it came through going north. This train was running about on the schedule of the regular north-bound passenger train due on that date, and which passenger train did not run. This train stopped at McCall, and I found Mr. N. H. Goucher, superintendent of transportation of the defendant railway company, and Mr. L. Barwick, chief clerk to the general manager of the defendant railway company, in charge of it. Mr. Goucher asked me if I had anything to go north, stating he could carry it to Arcadia, which is an intermediate point on the line of the Charlotte Harbor & Northern Railway Company, and that there had been a washout beyond Arcadia which prevented operation of trains any further north than Arcadia and had stopped the south-bound passenger train that morning, for which reason he was running this emergency train on the north-bound passenger train schedule to take care of any emergency local business between Boca Grande and Arcadia. I gave him the mail from the post office, as I was postmaster, and also some small packages of freight, and I told him I had a car of watermelons to move. I had the bill of lading made out and in my pocket. He asked me where it was, and I pointed to it on the siding, and he said he did not have time to take it then, but would get it on Monday. I was willing to pay the freight on the car, but it was not demanded of me. No bill of lading was made out or delivered to me. After that train left there was no other train passing McCall on the line of the defendant company except construction trains for several weeks, with the exception of two passenger trains, one each way, which ran the next day, Sunday, 9th. Sunday night, June 9th, the big bridge across Peace river between McCall and Arcadia was washed out, and traffic in the usual course of business was suspended on the Charlotte Harbor & Northern Railway for about three weeks. There is no point between the southern terminus of the Charlotte Harbor & Northern Railway Company at Boca Grande and the point where the bridge over Peace River washed out at which the Charlotte Harbor & Northern Railway Company has a physical connection with any other railroad line. During the time while traffic was suspended, as before stated, the watermelons in the car rotted, and when traffic was resumed employees of the defendant railway company threw the melons out of the car."

A witness for the defendant testified:

"I am superintendent of the Charlotte Harbor & Northern Railway Company, and held that position on June 8, 1912. At that time the said railroad was opening a triweekly freight service each way. North-bound freight trains, according to schedule, were due to go north from Boca Grande, in Lee county, through McCall and Arcadia, in De Soto county, to Mulberry, in Polk county, on the morning of Saturday, Tuesday, and Thursday of each week. McCall is a nonagency station between Boca Grande and Arcadia. There is no physical connection between the Charlotte Harbor & Northern Railway and any other railroad at any point between Boca Grande and Arcadia. On the morning of June 8, 1912, the regular freight train

went north from the southern terminus of our line at South Boca Grande to the northern terminus at Mulberry, in Polk county, but the south-bound passenger train was held up at a point a few miles above Arcadia because of a washout that had occurred. During May and June, 1912, there was an unusual amount of rain, and the creeks and rivers had risen so that we were having a large amount of trouble in keeping our track in such condition that trains could be operated over it. This washout that occurred above Arcadia on June 8, 1912, prevented the south-bound passenger train from coming into Arcadia on that day, and therefore left us without a passenger train running north from Boca Grande on the afternoon's schedule. To meet this emergency and take care of the mail service, express, and passengers who were willing to put up with such accommodation, I took a locomotive and attached a freight box car to it and came north from Boca Grande on or about the schedule of the afternoon north-bound passenger train on June 8, 1912. Mr. L. Barwick, chief clerk to the general manager of our company, was with me on the train. About 4 o'clock in the afternoon we reached McCall. I stopped the train at that point, and saw Mr. Buchan, the plaintiff in this case, who keeps a store at McCall, and who was postmaster. I asked him if he had anything to go north, and told him there had been a washout above Arcadia which had held up the regular passenger train, and that I was running this emergency train into Arcadia in place of the afternoon's north-bound passenger train. He gave me the mail, and, I think, a few packages of vegetables to go by express. I asked him if he had anything else to go, and he said he had a car of watermelons. I asked him where it was, and he pointed to a car which was located on the siding about 300 feet from where the train had stopped. At that time a wagon was up against the car, and I could plainly see that they were loading melons from the wagon into the car. I asked him if he had his bill of lading made out for the car, and he said the car was not ready to move. I then gave orders for the train to proceed, and we left McCall station. I would have taken the car on that train if it had been ready. The next day, Sunday, June 9, 1912, the morning passenger train came through to Boca Grande and came back north that afternoon, but that night, Sunday, June 9, 1912, the big bridge across Peace river between Boca Grande and Arcadia was washed out by the rapid rising of the river, due to the heavy rains that had occurred, and it was from that time on about three weeks before we were able to operate any trains except construction trains engaged in repairing the roadway over any point passing through McCall to any point where we had a physical or interchange connection with the line of any other railroad company. This is the reason why the carload of melons which Mr. Buchan was loading on Saturday, June 8, 1912, was not hauled by our company."

Another witness for the defendant testified:

"I was in the car with Mr. Goucher on the afternoon of Saturday, June 8, 1912. I saw the car that was being loaded with watermelons by Mr. Buchan. That car was on the siding about 300 feet from where the train stopped. I saw melons being loaded from a wagon into the car as the train stopped at McCall. Mr. Goucher asked Mr. Buchan if he had anything to go north and told him of the washout that had occurred above Arcadia. Mr. Buchan gave Mr. Goucher the mail and some packages of express, and Mr. Goucher asked him if he had anything else to go, and Mr. Buchan said he had a car of melons. Mr. Goucher then asked him where the car was, and Mr. Buchan pointed to the car that was being loaded. Mr. Goucher asked Mr. Buchan if he had his bill of lading made out, and Mr. Buchan said that the car was not ready

and upon orders from Mr. Goucher the train proceeded north. With the exception of two passenger trains, one each way, which operated the following day, Sunday, June 9, 1912, all traffic except work trains was suspended on the Charlotte Harbor & Northern Railway between Arcadia and Boca Grande from that time for about three weeks on account of the bridge over Peace river between McCall and Arcadia having been washed out by the rising of the river on the night of Sunday, June 9, 1912."

It appears that the plaintiff did not have his car loaded when the regular freight train passed McCall on the morning of June 8th. The plaintiff testified that when the emergency train passed McCall he told the person in charge of such train that he "had a car of watermelons to move." "No bill of lading was made out or delivered to me." This is not testimony that the car of melons was loaded and ready for shipment when the emergency train passed McCall. Witnesses for the defendant testified:

That the plaintiff "said he had a car of watermelons. I asked him where it was, and he pointed to a car which was located on the siding about 300 feet from where the train had stopped. At that time a wagon was up against the car, and I could plainly see that they were loading melons from the wagon into the car. I asked him if he had his bill of lading made out for the car, and he said the car was not ready to move. I then gave orders for the train to proceed, and we left McCall station. I would have taken the car on that train if it had been ready." "I saw the car that was being loaded with watermelons by Mr. Buchan. That car was on the siding about 300 feet from where the train stopped. I saw melons being loaded from a wagon into the car as the train stopped at McCall. Mr. Goucher asked Mr. Buchan if he had anything to go north, and told him of the washout that had occurred above Arcadia. Mr. Buchan gave Mr. Goucher the mail and some packages of express, and Mr. Goucher asked him if he had anything else to go, and Mr. Buchan said he had a car of melons. Mr. Goucher then asked him where the car was, and Mr. Buchan pointed to the car that was being loaded. Mr. Goucher asked Mr. Buchan if he had his bill of lading made out, and Mr. Buchan said that the car was not ready, and upon orders from Mr. Goucher the train proceeded north."

This evidence shows the car of watermelons was not ready for shipment when the emergency train passed McCall, and no right by custom or otherwise is shown by the plaintiff to have the carload of watermelons carried by a passenger train. After the emergency train passed McCall the defendant could not because of the washouts reasonably have been required to move the loaded car of melons before the melons rotted.

The judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

On Petition for Rehearing.

PER CURIAM. In a petition for rehearing it is suggested that the court misconstrued the contention of the defendant in error on the motion to strike the bill of exceptions. The contention is:

"That a trial court has no jurisdiction to pass upon a motion in vacation, unless during the term time the court made an order that the said cause be heard in vacation."

The statute provides that:

"Motions for new trials in civil cases shall be made within four days after the rendition of the verdict and during the same term, but the judge upon cause shown may within such four days and during the same term by order extend the time for the making and presentation of such motions, not to exceed fifteen days from the rendition of the verdict. In * * * cases of extension of * * * time for making such motions, a copy of the motion to be presented to the judge shall be served on the opposite party, or his attorney, with three days' notice of the time and place that the same will be presented and heard. It shall not be necessary to incorporate in any motion for a new trial any matter in pais previously excepted to, for the purpose of having the same reviewed by an appellate court." Section 1, c. 5403, Acts of 1905; section 1608a, Compiled Laws of 1914.

A bill of exceptions may present for review other matters than a motion for new trial; and, even if a motion for new trial is not duly made and passed upon, and such proceedings properly included in a bill of exceptions, a motion to strike the bill of exceptions will not be granted if other matters than the motion for new trial are properly presented in the bill of exceptions.

The statute above quoted requires an order to be duly made for extending the time for making a motion for a new trial, but does not require an order to be made during term time that a motion for new trial when duly made may be heard in vacation. Before the enactment of section 2, c. 5403, Acts of 1905, set out in the main opinion, it was held under section 1343, General Statutes, that a motion for new trial duly made in term time and continued to a day in vacation may be heard in vacation. See *McGee v. Ancrum*, 33 Fla. 499, 15 South. 231; section 1343, Compiled Laws of 1914.

The act of 1905 clearly authorizes the trial court to pass upon a motion for new trial in a civil action in vacation when such motion had been duly made, but not disposed of, in term time, though no order was made that the motion may be heard in vacation.

Rehearing denied.

(139 La.)

No. 21903.

KELLY et al. v. MILLSAPS, Secretary of State.

(Supreme Court of Louisiana. May 9, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 781(4) — DISMISSAL — GROUNDS—WANT OF ACTUAL CONTROVERSY.

An appeal from a judgment dismissing an application to compel the secretary of state to place the name of the applicant on the official ballot, to be used at an approaching general election, will be dismissed where the appellant makes no appearance in this court to set the case for hearing or otherwise and the attention of the

court is not called to it until after the election has been held.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. ¶781(4).]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Proceedings by J. L. Kelly and others against William F. Millsaps, Secretary of State. From a judgment denying the demand of petitioners, they appeal. Dismissed.

George Wear, Jr., of Jena, for appellants. R. G. Pleasant, Atty. Gen., and Harry Gamble, Asst. Atty. Gen., for appellee.

On Motion to Dismiss Appeal.

MONROE, C. J. This proceeding was instituted on March 6, 1916, by a number of electors of the parish of Caldwell, who prayed that the secretary of state be ordered to place the name of one of their number, to wit, J. L. Kelly, on the official ballot to be used at the general election to be held on April 16th as independent candidate for the office of sheriff. The matter was heard and the demand of the petitioner denied on March 13th. An appeal was applied for on behalf of all the plaintiffs, granted, and made returnable on March 29th, and was returned to this court on March 31st. On April 3d appellee moved that it be dismissed, on the grounds that the bond does not identify the judgment appealed from, and that, being prepared on behalf of "J. L. Kelly and all other plaintiffs," it is signed (through his attorney) by J. L. Kelly alone. On April 22d by supplemental motion the further ground was added that the general election, having taken place on April 18th left nothing for decision but a moot question. No appearance has been made in this court by or on behalf of petitioners, or either of them, whether to set the case for an early hearing or for any other purpose, and, it being obviously impossible for any judgment that may now be rendered to overtake the general election which was held a week ago.

It is ordered that this appeal be dismissed.

(139 La.)

No. 20856.

PRIMEAUX v. COMEAUX.

(Supreme Court of Louisiana. May 9, 1916.)

(Syllabus by the Court.)

1. DIVORCE ¶30 — SEPARATION FROM BED AND BOARD — GROUNDS — PUBLIC DEFAMATION.

Confidential statements made by the husband to relatives and friends of himself and wife as to the relations existing between them, when made in good faith, will not be considered as public defamation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 93; Dec. Dig. ¶30.]

2. DIVORCE ¶27(2) — SEPARATION FROM BED AND BOARD — GROUNDS — SUFFICIENCY.

Reciprocal wrongs or a solitary instance of ill treatment during a long cohabitation will

not warrant a judgment of separation from bed and board.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 63; Dec. Dig. ¶27(2).]

Appeal from Eighteenth Judicial District Court, Parish of Lafayette; William Campbell, Judge.

Action by Evia Primeaux against Jules Comeaux. From a judgment for defendant, plaintiff appeals. Affirmed.

John L. Kennedy, of Lafayette, for appellant. Jerome Mouton, of Lafayette, for appellee.

LAND, J. Plaintiff sued defendant for a separation from bed and board on the grounds of public defamation, abuse, and cruel treatment. Defendant for answer denied the charges. Judgment was rendered in favor of the defendant, and the plaintiff has appealed, but has made no appearance by counsel in this court.

[1] We have carefully considered the evidence in the case. The alleged public defamation by the husband consisted of utterances by him to the wife's brother, his own brother, and to a friend of the family, from whom he sought advice in his domestic troubles. As we read the evidence, the husband made no direct charge of infidelity against his wife, but strenuously objected to the attentions paid to her by a certain man residing in the vicinity, whose continuous visits to the family home had caused the husband to fear an encroachment on his marital rights.

In a similar case where the wife was charged with defamation this court said:

"In the first place, whatever statements were made by the defendant in respect to the relations which she asserted existed between her and her husband and her rival were not, in our opinion, either wantonly or maliciously made, nor made with the intention of injuring her husband. They were made to Gillen, the brother-in-law of the plaintiff, and to Mrs. Smith and her son, who seemed to have been friends of both parties, and in the course of conversation such as parties holding close relations with each other are apt to have in discussing mutually their family affairs."

See Ashton v. Grucker, 48 La. Ann. 1194, 20 South. 738.

The court held that such confidential communications did not constitute public defamation.

[2] As to the alleged assault and battery the evidence shows that the wife struck the husband with a poker, and in the scuffle he slapped her lightly.

A solitary instance of ill treatment during a long cohabitation does not authorize a judgment of separation from bed and board. Fleytas v. Pigneguy, 9 La. 419.

We see no sufficient reasons for reversing the judgment on the law or the facts of the case.

Judgment affirmed.

(139 La.)

No. 21667.

Succession of DEUBLER.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied. May 22, 1916.)*(Syllabus by the Court.)*1. WILLS ~~688~~—TRUSTS—FAILURE—PLEADING.

There is no law or jurisprudence to the effect that a donation, whether inter vivos or mortis causa, made in fraud of the law and of the rights of third persons, is any the less invalid, or any the less open to attack, when made through an interposed person than when made directly; and, when a petitioner alleges that he is the sole heir of a deceased testatrix, and that she has made donations of her property which are void because of the incapacity of the donee to receive them, and has disguised, or attempted to disguise, the same, by apparently valid donations, in the form of a special and a universal legacy, to a person selected and agreed upon as the intermediary for the conveyance of the property to such incapable donee, the petition discloses a cause of action for the nullity of such prohibited donations.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1644-1649; Dec. Dig. ~~688~~.]

2. WILLS ~~282~~—VALIDITY—PLEADING.

An allegation that a testatrix was insane for about six months preceding her death, and was consequently unable to revoke the dispositions of her will in favor of a certain legatee "for acts of ingratitude, cruel treatment and grievous injury on her part towards the testatrix," does not amount to an allegation that such acts were committed by the legatee, and discloses no cause of action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. ~~282~~.]

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

In the matter of succession of Mary A. Deubler. Suit by Henry Deubler against Anna M. Deubler and another. From a judgment sustaining exceptions to the petition, plaintiff appeals. Affirmed in part, and reversed in part, and remanded.

James Barkley Rosser, Jr., and H. W. Robinson, both of New Orleans, for appellant. Legler & Gleason and Woodville & Woodville, all of New Orleans, for appellees.

Statement of the Case.

MONROE, C. J. Mary A. Deubler died in New Orleans on February 14, 1914, leaving an olographic will, dated June 29, 1903, and containing the following, among other, bequests, to wit:

"I give and bequeath unto my niece, Miss Anna M. Deubler, my lot of ground, together with all the buildings and improvements thereon, in the square comprised within Basin, Customhouse, Bienville and Franklin streets, and everything it may then contain of movables, useful and ornamental, including my personal effects, jewelry, diamonds, etc.; the premises are known as 225 Basin street.

"I give and bequeath unto my brother, Henry Deubler, three vacant lots of ground, of four that I own, in square comprised within Canal, Murat, Olympia and Cleveland sts—the three nearest to Murat st; also, the sum of \$1,500,

cash. * * * I give and bequeath unto my said niece, Miss Anna M. Deubler, the residue of my estate, hereby constituting her my residuary legatee. * * *

"I hereby nominate Mr. John Thomas Brady * * * to be my sole testamentary executor and detainer of my estate, with seisin, and without bond from the furnishing of which he is hereby dispensed."

The will was proved and ordered to be executed. An inventory was ordered and taken. John T. Hearn, known as John T. Brady, was confirmed as executor, and Anna Maria Deubler (who had become Brady's wife) was sent into possession as universal legatee, upon her petition, and upon her showing the payment of the special legacies (with the exception of those to Henry Deubler and his minor children, for which, upon his refusal to accept the same, deposits were made in court) and with the consent of the creditors; and, on March 16, 1914 (the day upon which the judgment sending into possession was rendered), Henry Deubler instituted this suit, attacking the dispositions of the will in favor of Anna Deubler, in her capacity of universal legatee, substantially as follows:

That Brady and the deceased lived in open concubinage and were so living when the will was made, in 1903, and up to the death of the decedent: "that Anna M. Deubler is a mere intermediary, interposed and selected by said Mary A. Deubler for the express purpose of illegally and fraudulently transmitting her property, through said Anna M. Deubler, to said J. T. Brady, who is incapable of receiving the property of said Mary A. Deubler, by either donation inter vivos or mortis causa, except to the extent of one-tenth of the whole value of the movable property belonging to her estate"; that on January 25, 1913, the decedent executed an act under private signature, acknowledged before a notary public, purporting to transfer to said Brady, in the form of an onerous donation, for the purported reimbursement and remuneration, "for services of the alleged value of \$25,000, her residence on Esplanade street, with the contents thereof, of the value of \$50,000; that said Brady, knowing the same to be void because of his incapacity, suppressed said act during the life of the decedent," but after her death, "in pursuance of the understanding and agreement existing between him, said Mary A. Deubler, and said Anna M. Deubler (and a few hours preceding his marriage to her, on February 21, 1914), by which he * * * was to have said property and all other property owned by said Mary A. Deubler (save the small special legacies), induced the said Anna M. Deubler to sign an act * * * wherein she declares that, 'as the universal legatee of said Miss Mary A. Deubler, she, said Anna M. Deubler, hereby, approves, ratifies and confirms the said sale in its entirety.' Petitioner specially, denies that there was any valid consideration for said pretended sale by said Mary A. Deubler to said J. T. Brady, and [alleges] that the attempted ratification and return of said property to said incapable person by said interposed person is in violation of a prohibitory law, and null and void in its entirety.

"Petitioner avers * * * that said Mary A. Deubler was insane for about six months preceding her death, * * * and consequently unable to revoke the dispositions of said will in favor of said Anna M. Deubler, for acts of ingratitude, cruel treatment, and grievous injuries on her part towards the testatrix, who was

the benefactress of the said Anna M. Deubler. "Petitioner avers that the interposition, by said Mary A. Deubler, of said Anna M. Deubler, to receive and transmit her said estate to said J. T. Brady, who is incapable in law of receiving it, constitutes a fraudulent *fidel commissum* in law, and an imposition on petitioner, who is entitled to uncover and annul such disposition by such alleged will, and that such fraudulent *fidel commissa* are absolutely void, and the property covered by them returns to petitioner, as the brother and nearest heir at law of said Mary A. Deubler."

It is alleged that Brady was incapable of receiving the appointment as executor, and that petitioner desires to have the same rescinded and to be, himself, appointed to that position; that said Brady and Anna M. Deubler, now his wife, concealed and omitted from the inventory certain real and personal property left by the decedent, and thereby lost whatever rights they may have had as testamentary heirs. The prayer is that Anna M. Deubler, now the wife of J. T. Brady, and J. T. Brady, to authorize her, and also on his own account, be cited, and that there be judgment annulling the judgment probating the will of Mary A. Deubler and the dispositions thereof which purport to constitute Anna M. Deubler the special legatee of the house on Basin street, with its contents, and residuary legatee, and decreeing her to be an intermediary, interposed for the purpose of receiving and transmitting to Brady property which he is incapable of receiving, further decreeing the said dispositions "to be fraudulent *fidel commissa*, designed and intended to circumvent and evade a prohibitory law, and decreeing them * * * as not written; or, in the alternative, decreeing the annulment of such dispositions * * * for acts of ingratitude, grievous injuries, and cruel treatment by her [Anna M. Deubler] towards the said Mary A. Deubler"; that the appointment of Brady as executor be annulled, and that petitioner be appointed; and that there be judgment annulling the act of conveyance from Mary A. Deubler to Brady of January 13, 1913, and the act of ratification by Anna M. Deubler of February 21, 1914, and decreeing the property described therein to belong to the succession.

Defendants excepted to the petition for vagueness, misjoinder of parties and of causes of action, and for failure to disclose a legal cause of action. The exception last mentioned was sustained, and plaintiff prosecutes the appeal.

Opinion.

[2] The allegation "that said Mary A. Deubler was insane, for about six months preceding her death, * * * and was consequently unable to revoke the dispositions of said will in favor of said Anna M. Deubler, for acts of ingratitude, cruel treatment, and grievous injuries on her part towards the testatrix" does not amount to an allegation that the acts referred to were committed by Anna M. Deubler.

[1] We are therefore of opinion that, in so

far as it may be considered that this suit is predicated upon acts of ingratitude, etc., the exception of no cause of action was properly sustained.

The learned counsel for the defendant have directed their argument mainly to the support of the proposition that (quoting from the syllabus of their brief):

"Where an aunt, by last will and testament, valid in form and duly probated, leaves to her niece a special legacy and constitutes her residuary legatee, a petition, filed by the father of the residuary legatee, claiming that the will contains a *fidel commissum*, because the residuary legatee is charged to deliver the property to a third person, incapable of receiving, discloses no cause of action, because the direction to deliver, whether express or tacit, constitutes a simple *fidel commissum*. The will stands, quoad the residuary legatee. It is only in substitutions that the will is null as to the donee, instituted heir, or legatee."

This court has not unfrequently construed article 1620 of the Civil Code to mean that substitutions and *fidel commissa* are thereby alike prohibited and null, "even with regard to the donee, the instituted heir or the legatee," and that the property covered by *fidel commissa* returns to the heirs at law. *Badillo v. Tio*, 6 La. Ann. 134; *Tournoir v. Tournoir et al.*, 12 La. 23; *Liautaud v. Baptiste*, 8 Rob. 441; *Compton v. Prescott*, 12 Rob. 74. But the later, with some of the earlier, jurisprudence has established the doctrine, applicable to cases in which the *fidel commissum* is attached to a donation otherwise valid, that although the *fidel commissum*, being in violation of a prohibitory law, is null that nullity does not carry with it the nullity of the donation, "and that the entire disposition is null in cases of substitution only." *Beaulieu v. Tornoir*, 5 La. Ann. 481; *Succession of Yancey*, 20 La. Ann. 164; *Succession of Beauregard*, 49 La. Ann. 1176, 22 South. 348; *Dufour v. Derscheld*, 110 La. 344, 34 South. 469; *Succession of Reilly*, 136 La. 347, 67 South. 27; *Succession of Percival*, 137 La. 203, 68 South. 409.

There is however, no jurisprudence to the effect that a donation made in fraud of the law and of the rights of third persons is any the less invalid, or any the less open to attack, when made through an interposed person than when made directly; and the grounds of action here relied on are that donations have been made to Brady which are sought to be disguised, or partly disguised, by apparently valid, donations to Anna M. Deubler, but which are void because, by reason of the relations which subsisted between Brady and the donor, and from considerations of public order and good morals, the law has declared Brady incapable of receiving them.

The provisions of the Civil Code, and the jurisprudence upon which the action is based, may be stated, in substance, as follows:

"Art. 1481. * * * Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of

movables, it cannot exceed one-tenth part of the whole value of the estate. Those who afterwards marry are excepted from this rule."

"Art. 1491. * * * Every disposition in favor of a person incapable of receiving, shall be null, whether it be disguised under the form of an onerous contract, or be made under the name of persons interposed. The father and mother, the children and descendants and the husband or wife of the incapable person, shall be reputed persons interposed."

"Art. 1710. * * * The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation inter vivos, are sufficient to ground an action for the revocation of testamentary dispositions [and then follows a proviso relating to forced heirs]."

In *Badillo v. Tio*, 6 La. Ann. 133, 134, it appeared that, by an apparently valid will, the testator had made the defendant his universal legatee, but the will was attacked on the ground that the purpose, and effect, was, through the defendant, as an interposed person, to convey the estate to persons who, from considerations of good order and morals, were declared incapable of receiving the same. In sustaining the attack, the court said (among other things):

"The fact of interposition involving a question of fraud, there is no doubt that it may be proved by simple presumptions. But there must be several presumptions leading to the same conclusion; and, in order to make proof, they must all be graves, précises, et concordantes (citing C. C. 1842, 2267, now 1848, 2288). * * * When interposition is made probable, if the party alleging it shows the return of the property to the incapable person, he has nothing else to show."

"When the return has been made in the form of a sale, the legatee must prove the reality and good faith of the transfer."

In *Dupree v. Uzee*, 6 La. Ann. 280, it was held (quoting from the syllabus):

"A party will not be allowed to do that indirectly which cannot be done directly; and where a person, wishing to evade the prohibition of the law against donations to a concubine, has the title to a slave purchased by him made out as though the purchase had been made by the concubine, her title is no better than if it had been a donation in form. C. C. 1468 [now 1431]. The concealment of a donation to a person incapable of receiving, under the form of an onerous contract evidenced by a notarial act, is in law a fraud upon the heir; and to establish that fraud he may contradict the notarial act by parol proof or any other legal evidence."

In *Insurance Co. v. Harbor Protection Co.*, 37 La. Ann. 236, it was said:

"An acknowledgment can never be invoked to maintain a condition or state of things created in violation of a prohibitory law."

And the statement is quoted as authority, with other cases to sustain it, in *Ackerman v. Larner*, 116 La. 115, 40 South. 581.

Our conclusion is that, with respect to the matters thus considered, the petition states a cause of action, and that the judgment appealed from must therefore be, in part, reversed. The other exceptions were not ruled upon by the trial court.

It is therefore ordered that the judgment

appealed from be affirmed, in so far as it maintains the exception of no cause of action, as addressed to the allegations concerning the ingratitude, cruel treatment, and grievous injuries on the part of Anna M. Deubler towards the testatrix, and reversed in so far as it otherwise maintains that exception. It is further ordered that the case be remanded to the trial court to be there proceeded with according to law and to the views hereinabove expressed, the costs of the appeal to be paid by the appellees, John T. Brady and Anna M. Deubler, now the wife of said Brady, and the costs of the trial court to await the final judgment to be rendered in the case.

O'NIELL, J. (dissenting). A testamentary disposition in favor of a person incapable of receiving is null, even though it was attempted to be made through a person interposed. R. C. C. 1491. Therefore, if there was an agreement or a stipulation between the testatrix, Mary A. Deubler, and her niece, Anna Maria Deubler, that the latter would transfer to a person incapable of receiving from the testatrix the property bequeathed to Anna Maria Deubler, the agreement or stipulation was null, and could not be enforced by the person incapable of receiving from Mary A. Deubler. A verbal request or stipulation that the legatee convey the legacy to a certain person incapable of receiving it from the testatrix could not have any more effect than if such a request or stipulation had been written in the will. And if such a request or stipulation had been written in the testament which otherwise conveyed the legacy in full ownership to Anna Maria Deubler, it would be a *fidel commissum*, and would be reputed not written; but it would not invalidate the disposition conveying the property to Anna Maria Deubler. This doctrine is settled by a long line of jurisprudence reviewed in the two recent decisions cited in the majority opinion in this case.

The expression in the syllabus of the decision in *Badillo et al. v. Tio*, 6 La. Ann. 129, that *fidel commissa* are absolutely null, and that the property covered by them returns to the heirs at law, does not appear to have been met by the defense with the doctrine announced in later decisions. The principle on which that case was decided was that those who lend their names to carry out *fidel commissa* are spoliators, and must restore the property intrusted to them in *fraudum legis* to the heirs at law. In so far as that decision conflicts with later jurisprudence, it has been, in effect, and ought to be expressly, overruled.

I respectfully dissent from the opinion and decree rendered in this case because I cannot see how a judgment in favor of the plaintiff, on the allegations of his petition, could be reconciled with our recent jurisprudence on the subject of *fidel commissa*.

(139 La.)

No. 20408.

SWIFT & CO., Limited, v. BONVILLAIN et al.
(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

*(Syllabus by the Court.)*1. FRAUDULENT CONVEYANCES \S 188—PROPERTY SUBJECT—EFFECT OF PLEDGE.

Save in cases especially provided by law, a contract purporting to pledge movables is ineffective unless the property is actually delivered to the pledgee, and leaves such property subject to seizure for the debts of the pledgor, whose creditors may, in cases otherwise authorized, proceed by attachment, and without resorting to the revocatory action.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 438, 448, 448-452; Dec. Dig. \S 138.]

2. AGRICULTURE \S 12—PLEDGES—LIEN—VALIDITY—TIME OF TAKING EFFECT—STATUTES.

Section 1 of Act No. 66 of 1874 authorizes a planter to pledge his growing crop as security for the debt contracted by him for advances of money and supplies required for its production, and such contract, duly recorded, vests in the factor who makes the advances constructive (equivalent to actual) possession of the crop; and sections 2 and 3 of that act declare that the pledge shall be perfect in certain cases where agricultural products are consigned, by ship or rail, etc., from the time the bill of lading is mailed or delivered to the carrier for transmission to the consignee.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 40, 41; Dec. Dig. \S 12.]

3. AGRICULTURE \S 11—PLEDGES—LIEN—VALIDITY—GROWING CROPS.

Under section 1 of Act No. 66 of 1874 a growing crop may be pledged for and to the extent of the debt contracted by the planter for the money and supplies advanced for its production, but no further; and, under such contract, the factor acquires no right to appropriate the proceeds of the crop, or any part of it, to the payment of any debt other than that for which it is thereby pledged, nor can the law authorizing such special contract of pledge be disregarded or circumvented, to the prejudice of the other creditors of the planter, by stipulations under cover of such contract requiring the planter to ship his entire crop to the factor, authorizing the factor to appropriate or "impute" the proceeds to the payment of any debt that may be due or may become due him, and declaring that such appropriation or "imputation" shall not impair his rights of pledge, thereby putting him in a position to appropriate the surplus of such proceeds over and above those to which his pledge extends to the payment of all debts due him, to the exclusion of debts of equal standing due to other creditors of the planter; for it is a fundamental principle of our law that the property of the debtor is the common pledge of his creditors, from which it follows that the surplus of a planter's crop (over and above the interest or proportion which may be said to be alienated by the special pledge for advances of money and supplies), being still his property, remains as part of such common pledge, in which one creditor has the same interest as another, and which cannot lawfully be appropriated to the payment of one of them when the debtor is unable to make like provision for the others.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 15-30; Dec. Dig. \S 11.]

4. FRAUDULENT CONVEYANCES \S 121 — TRANSACTIONS INVALID—PREFERENCE.

When a planter has shipped, or is about to ship, to his factor, a greater proportion of his

crop than is, or will be, required to pay the debt (secured by pledge) for money and supplies advanced for its production, under a contract which authorizes the factor to appropriate or "impute" the proceeds to the payment of other debts due or that may become due him, and the planter is unable to make like provision for the debts due to his other creditors, he must be held to be disposing or about to dispose of his property, with intent to give an unfair preference to one of his creditors; and another creditor complaining thereof may proceed by the attachment of the surplus of the crop (to be found in so much of his crop as remains in the planter's possession) over and above that required to satisfy the pledge of the factor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 385-391; Dec. Dig. \S 121.]

5. ATTACHMENT \S 114 — AFFIDAVITS — SUFFICIENCY.

Paragraph 4 of article 240 of the Code of Practice furnishes two cases disjunctively and distinct from each other in which the property of the debtor may be attached; the one where the debtor "has mortgaged, assigned or disposed of, * * * his property, rights or credits, or some part thereof with intent to defraud his creditors"; the other where the debtor has so acted "with intent * * * to give an unfair preference to some of them [meaning some of his creditors]"; and, as it is unnecessary, if not improper, when the affidavit charges the intent to defraud, to add the intent to give an unfair preference, so it is unnecessary, if not improper, when the affidavit charges the intent to give an unfair preference, to add the intent to defraud, and in neither case is it necessary to charge the insolvency of the debtor.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 312-314; Dec. Dig. \S 114.]

6. ATTACHMENT \S 249—PROCEEDINGS—EVIDENCE.

It is only where the evidence adduced by the defendant in attachment is sufficient to rebut the prima facie case made out by the affidavit of the plaintiff that plaintiff is required to support the affidavit by evidence.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 861-876; Dec. Dig. \S 249.]

(Additional Syllabus by Editorial Staff.)

7. WORDS AND PHRASES—"OR."

"Or" is defined as a co-ordinating particle making an alternative, indicating a choice of one of different things, but not of all.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, Or.]

O'Niell, J., dissenting.

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Thomas M. Milling, Judge.

Action by Swift & Co., Limited, against A. A. Bonvillain, wherein Leon Cahn & Co. claimed a privilege. From a judgment dissolving an attachment, plaintiff appeals. Reversed, and attachment maintained.

L. A. Morphy, of New Orleans, and Charles J. Boatner, of Franklin, for appellant. Borah, Himel, Bloch & Borah, of Franklin, for appellees.

Statement of the Case.

MONROE, C. J. Plaintiff brought this suit on a promissory note for \$3,056.11, of which defendant was the maker, and which, when sued on, was past due by nearly a year. De-

defendant filed an exception of prematurity of action, alleging that an extension of time had been granted, but on the trial offered no evidence to support his allegation, and the exception was overruled. Thereupon, on the same day, plaintiff filed a supplemental petition making the following allegations, upon the basis of which it obtained a writ of attachment, to wit (quoting only those which are material to the issues here involved):

"That defendant is manufacturing sugar and molasses, * * * and that, as so, and when, manufactured, * * * ships, and is regularly shipping, the sugar and molasses to * * * Leon Cahn & Co., of New Orleans, La.; * * * that the said firm of Leon Cahn & Co. is also a creditor of the said A. A. Bonvillain in a sum the exact amount of which petitioner does not know; that the said shipments of sugar and molasses are being made * * * to give, and * * * do, in fact, give, to the said Leon Cahn & Co., an unfair preference over other creditors of defendant, including petitioner. Petitioner shows that its remedy herein is by attachment, and * * * that, unless such attachment issues, * * * the said A. A. Bonvillain will continue to ship the aforesaid sugar and molasses to the said Leon Cahn & Co., so as to prefer the said Leon Cahn & Co., and in fact prefer the said Leon Cahn & Co., over defendant's other creditors, including petitioner, and petitioner fears and believes and avers that by such shipments it will be left without means of recovering from said A. A. Bonvillain the aforesaid indebtedness, due by him to petitioner."

The writ of attachment was issued as prayed for, and the sheriff seized a quantity of sugar, part of it in defendant's sugar house and part loaded on cars for shipment; and thereafter Leon Cahn & Co. (upon whom plaintiff had prayed that its petitions be served) appeared in the case by motions, and alleged that they had a privilege and right of pledge on the sugar under recorded acts of pawn and pledge, and, moreover, were subrogated to the actions and privileges of the vendors of cane, and that, under their contract with Bonvillain, they had the right to have all sugar manufactured by him shipped to them, and they reserved their right to intervene, and in the meantime desired that the sugar should be released to them on forthcoming bonds, and it was so released.

Defendant then moved to dissolve the attachment on the following grounds:

That plaintiff has obtained a writ of attachment on the allegation "that mover is shipping his sugar to Leon Cahn & Co., * * * a creditor of A. A. Bonvillain, and is thereby giving said Leon Cahn & Co., an unfair preference over other creditors of mover, including plaintiff herein, and that the allegation is false; that the writ should be dissolved, for the following reasons, to wit: That mover is shipping his sugar to Leon Cahn & Co., under agreements which are duly recorded in the records for the parish of St. Mary, * * * and which is therefore notice to plaintiff herein; that, under said agreements, mover is compelled legally to ship his sugar to Leon Cahn & Co., and that he could be compelled by injunction by Leon Cahn & Co. to ship said sugar to it; that said agreements are dated December 13, 1912; * * * that, in addition thereto, the said sugar is pawned and pledged to Leon Cahn & Co. under an agreement duly recorded; that the sugar in the S. P. car, when seized, had already been consigned to Leon Cahn & Co.; that, in addition there-

to, the said Leon Cahn & Co., has paid for all cane purchased by A. A. Bonvillain from outside parties, and has been subrogated to the actions and privileges of the vendors of the cane, both by conventional and legal subrogation; that plaintiff herein had actual notice of the agreement between A. A. Bonvillain * * * and Leon Cahn & Co. and of the fact that Leon Cahn & Co. had a privilege, pawn, and pledge on said sugar, and was entitled, under its contract, to have said sugar shipped to it, and that therefore the affidavit upon which the writ of attachment herein issued was made in bad faith; that for the past two months mover herein has been negotiating with all of his creditors, including Swift & Co., with a view of paying a certain percentage on his claims and to have the balance extended for one and two years, and that this was conditioned upon all of his creditors accepting the proposition; that this settlement contemplated the shipment of all sugar to Leon Cahn & Co.; that under the agreement such shipment was necessary, and that the proposed cash payment would only be made after sugar was shipped and Leon Cahn & Co. settled with; that the plaintiff herein was cognizant of all this, and knew, when it made this affidavit, that no effort was being made to dispose of the sugar out of due course, or for the purpose of defrauding any one, but to carry out a proposition which it had accepted."

Some days later defendant filed an exception to the effect that the supplemental petition disclosed no right or cause of action for the issuance of an attachment, which exception was overruled, but which, by answer to the appeal, defendant now urges.

On the trial of the motion to dissolve there were filed in evidence several contracts between defendant and Cahn & Co., and considerable oral testimony was admitted, and other such testimony excluded. The contracts are as follows:

January 11, 1911, defendant gave his notes for \$100,000, and Cahn & Co. agreed to advance that amount, including balance then due, for the making and manufacturing of the crop of 1911-12, the growing crop being pledged to them and defendant agreeing to ship the products to them when ready for market.

January 10, 1912, defendant gave his notes for \$60,000, secured by mortgage and confession of judgment, in reimbursement of moneys loaned and advanced, with the agreement that no portion of the (proceeds of) crops and produce shipped by the mortgagor should be imputed to the payment of said notes.

March 27, 1912, Cahn & Co. agreed to advance \$50,000 for the making and manufacturing of the crop of 1912-13, and defendant gave his two notes of \$25,000 each, secured by mortgage importing confession of judgment, and by pledge and pawn of said crop, as authorized by Act 66 of 1874, and it was further agreed (quoting the language of the contract):

"That said Leon Cahn & Co. shall have the exclusive right to apply the net proceeds of sales of all products shipped and all payments of money made to them by said party of the first part to the payment of any indebtedness which may now be due or which may hereafter become due to them by said party, * * * whether on open account or otherwise, according to said Leon Cahn & Co.'s view of the exigency of the

case; that such application may be made at such time and in such manner as said Leon Cahn & Co. may elect; that no application of such proceeds of sale or of money to the payment of any debt due on open account or otherwise which may at any time be due to said Leon Cahn & Co. by said party of the first part shall impair, lessen, or prejudice the indebtedness secured by these presents; and that said Leon Cahn & Co. shall have the undisputed right to impute payment, as they determine, to whatever debts may be due them by said party of the first part," etc.

December 12, 1912, Bonvillain declared that he needed \$10,000 more "to complete the operation of harvesting and manufacturing his cane into sugar and syrups, as well as the cane purchased from tenants and others and manufactured at his said factory," and Cahn & Co. agreed to advance that amount, in order to secure which Bonvillain, in addition to the privilege accorded by law to Cahn & Co. as advancers of supplies, specially pledged and pawned in their favor all sugars manufactured "at the factory of said A. A. Bonvillain on his home place plantation * * * in Cypremort, * * * and especially all the third sugars, masse-cuite and molasses manufactured from said crop," said Cahn & Co. being authorized to "sell said products in due course and credit the proceeds * * * to the payment of the sums advanced under the agreement after having deducted the usual commission and brokerage."

December 30, 1912, Cahn & Co. agreed to make advances to the extent of \$75,000 for the making and manufacturing of the crop of 1913, for which amount they received the note of A. A. Bonvillain and certain of his major children, secured by mortgage on the real estate and pledge of the crop; it being further agreed (as in the contract of March 27, 1912) that Cahn & Co. should have the right to impute all moneys and proceeds received by them to the payment of any debt due to them, whether on open account or otherwise, as they might elect.

October 13, 1913, the firm of Leon Cahn & Co., composed of Leon Cahn and Leon Pfeiffer, agreed to make advances to A. A. Bonvillain to the extent of \$75,000 for the harvesting and manufacturing of the crop of 1913, for which amount Bonvillain gave his note, secured by the privilege for advances accorded by law, and by the pledge and pawn; it being further agreed, as in the previous contracts, that imputations of payment should be left entirely to the election and discretion of Cahn & Co.

Concerning his indebtedness to, and the state of his account with, Cahn & Co., Mr. Bonvillain gave the following, with other, testimony:

"Q. Do you recall, in round figures, the amount of your indebtedness to Leon Cahn & Co. prior to the execution of the contract of December 12, 1912? * * * A. No, sir; I don't. * * * Yes; I recollect that I was indebted to them to a certain extent. Q. But you don't recall, even in round numbers the amount? A. No, sir. Q. Do you recall for how

long a time, prior to December 12, 1913, you had been indebted unto Leon Cahn & Co.? A. I got somewhat indebted to him in the crop of 1911 by losing the best part of the crop. * * * Q. If I understand you correctly, you first began to be more heavily involved with Leon Cahn & Co. about the 1st of January, 1911? A. No, sir. Q. 1912? A. Yes, sir. * * * Q. I understood you to say the crop of 1912 was a losing crop? A. Yes; it was short. Q. That is you lost money in 1912? A. Yes, sir. Q. But you don't recall how much? (Objection and ruling.) A. No, sir. * * * Q. In other words, you lost money on the crop running from January 1, 1911, to January 1, 1912, and also lost money on the crop running from January 1, 1912, to January 1, 1913? A. I didn't state that sir; I don't think we will lose any money this year. [He was testifying on December 15, 1913.] Yes, sir; we lost money in 1911 and 1912. Q. You don't recall, though, what the loss was in either of those years? A. No, sir. Q. Cahn & Co. were your factors during those years? A. Yes, sir. * * * Q. You stated, Mr. Bonvillain, that you did not know in what sum you were indebted to Leon Cahn & Co.; therefore I presume you are not in a position to state whether or not the shipments that have been made to Leon Cahn & Co. from your place during the year 1913 have either extinguished any privilege indebtedness * * * or whether they have extinguished the total indebtedness? (Objection and ruling. Question read by stenographer.) A. They have not extinguished the total privilege indebtedness. Q. In your answer as to the privilege indebtedness what do you mean when you say that they have not extinguished the privilege indebtedness? A. I mean to say the privilege indebtedness is usually drawn up for an amount that Mr. Cahn would be called on to pay for my account, and that I have not repaid him the full amount of that indebtedness. Q. In other words, your answer means that you state that you have not extinguished your total account with Leon Cahn & Co.? A. Yes, sir; exactly. Q. And by privilege indebtedness you mean total indebtedness? A. Yes, sir. Q. I don't, Mr. Bonvillain, desire to seem to ask you any unfair or suggestive questions, but I do ask how you find that you are able to state that your total account with Leon Cahn & Co. has not been extinguished, when you have previously stated that you didn't know and couldn't tell how the account stood? A. I mean, in a general way, I couldn't tell how it stands, now, but I know I have not finished paying Mr. Cahn. Q. You mean, when you say you haven't finished paying him, that you still owe him on the account that you have been owing Leon Cahn during these years he has represented you, and which indebtedness begins with your indebtedness in 1911? A. No, sir; I am not talking about that; I am talking about the 1913 indebtedness. Q. You mean to say that you have not yet shipped, or that your crop of 1911 [1913] will not more than defray all advances, or all sums lent you by Leon Cahn during the year 1913? A. I didn't state that. We are not finished grinding yet. We are still making sugar; and you must understand that we bought a whole lot of cane, and Leon Cahn & Co. furnished the money and paid for this cane, and that took considerable money. (Objection by defendant's counsel. No ruling.) Q. Is there any one, Mr. Bonvillain, in your employ or on your place who would be able to tell us exactly how your account stands with Leon Cahn & Co.? A. No, sir; I don't believe."

Plaintiff obtained an order for a subpoena duces tecum directing defendant to produce certain books of account, papers, etc., showing the total indebtedness due to Leon Cahn & Co. for advances in 1913, the quantity of sugar shipped to that firm; the amount realized

therefrom, and the balance, if any, then due; the number of tons of cane ground at the home place factory; the number produced on the defendant's plantations; the number bought elsewhere; the dates of purchases and shipments, and the receipts of the sellers for the price; the daily tonnage ground, and the daily yield of sugar. It was alleged in the application for the writ that plaintiff would be able to show by the books, papers, etc., thus called for that the shipments to Cahn & Co. had been more than sufficient to reimburse the advances made for harvesting and manufacturing the crop of 1913, that defendant had bought at least 40 per cent. of the cane ground by him, and had ground it confusedly with that raised by him, and that the proportion of sugar to tonnage is not constant.

Defendant made a return declining to produce the books, papers, etc., on the ground that the facts which it was alleged could be established were immaterial, and could not be inquired into on the trial of the motion to dissolve the attachment; the only matter put at issue by the motion (as he alleged) being "the fraudulent intent of mover herein in shipping his sugar to Leon Cahn & Co. so as to give an unfair preference over the other creditors of mover."

Counsel for plaintiff made a verbal request that the facts sought to be proved be taken for confessed, but it does not seem to have attracted the attention of the court, and no action was taken on it or exception reserved.

Counsel offered to prove by defendant's bookkeeper, his sugar maker, and his shed foreman: (1) That defendant had already shipped 4,500,000 pounds of sugar to Cahn & Co., and that the total crop would exceed 6,000,000 pounds, exclusive of third sugars and molasses; (2) that about 40 per cent. of those products was produced from cane which had been purchased, and not raised, by defendant; (3) that the 40 per cent. of cane so purchased was ground confusedly with that raised by defendant; (4) that in the sugar attached it would be impossible to say how much was made from the purchased cane and how much from that which had been raised by defendant; (5) that the shipments already made to Cahn & Co. at the date of the attachment more than discharged any privileged indebtedness to them; (6) that the shipments made and to be made would more than discharge the total indebtedness of Bonvillain; (7) that Cahn & Co. loaned or agreed to loan Bonvillain money wherewith to buy the 40 per cent. of cane referred to and are pretending to assert a privilege therefor, under the contracts of December 12 (30), 1912, and December (October) 13, 1913, and that they have no such privilege. The court ruled that he would be permitted to prove the facts stated under Nos. 1, 5, and 6, but with reference to the others said:

"The court's reasons for refusing this tender are: * * * That going into the question of whether or not 40 per cent. of the cane was purchased and ground confusedly with the cane grown by Mr. Bonvillain, and attempting to determine whether or not Leon Cahn & Co. lost any privilege that they might have had for that reason, would be determining the rights of parties not before the court and investigating a question upon which the court could render no valid judgment, and, in the court's opinion, would be considering matters not relevant to the issues of this motion. The allegations of the petition are that A. A. Bonvillain is shipping sugar to Leon Cahn & Co.; that this shipment is for the purpose of and does in fact give Leon Cahn & Co. an unfair preference over other creditors. There is no allegation that the giving of a lien and privilege to Leon Cahn & Co. was giving an unfair preference to them as creditors, nor is there any allegation in the petition with reference to the confused grinding and shipment of cane, and such giving of liens and privileges on grinding of purchased and grown cane are not alleged as the basis of an unfair preference. While it is true that the supplemental petition, asking for the attachment asks for service on Leon Cahn & Co., yet there was no prayer for any kind of judgment against Leon Cahn & Co. or any relief prayed for against them, and, as they have not answered nor made any appearance in this matter, the court cannot consider them parties to the motion."

Counsel for plaintiff then asked for a continuance in order to give him an opportunity to obtain the testimony of the members or employes of Cahn & Co., which request, on the objection of defendant, was denied. It was developed on the trial of the motion that in February, 1913, defendant, through counsel, had requested plaintiff to extend the time for the payment of the note sued on for another year, and that his request had been refused, that he thereafter endeavored to prevail upon his creditors to grant him an extension or respite, his proposition to them being that he would pay on or before February 1, 1914, 40 per cent. in cash, and the balance of his indebtedness in one and two years, and that, not succeeding in obtaining the consent of all his creditors, the attempt failed. According to a letter written by his counsel, he owed \$15,000 or \$20,000 on open account, and "it would have required the closest economy in figuring to raise the 40 per cent." and the proposition, as made, was the best that he was able to make.

Plaintiff was one of the creditors whose consent to the extension was withheld, and, as Cahn & Co. were taking some part in the matter, it offered to sell its claim to them, which offer was considered, but not accepted. There was judgment dissolving the attachment, and plaintiff has appealed.

Opinion.

The contentions upon which the learned counsel for defendant rely in support of their view that there was no warrant for the issuance of the attachment are interpreted by us as follows (stating them in somewhat different order from that in which they have been argued):

That the contract between defendant and Cahn & Co. was valid, was the law between the parties thereto, and, until abrogated, demanded and was entitled to execution, and hence that defendant was bound thereunder to ship his entire crop to Cahn & Co., and Cahn & Co. were entitled thereunder to impute the proceeds to the payment of any debt that might be due them.

That, if any unlawful preference was given, it was given by the contract, and not by the shipment, or proposed shipment, of sugar in execution thereof, and hence that such execution could not be obstructed without a direct attack upon the contract.

That no attack is made upon the contract, and could not be made, save upon allegations of fraud and of the insolvency of the defendant, and that plaintiff makes no such allegations.

That an attachment cannot be issued under paragraph 4 of article 240 of the Code of Practice, upon a charge of an intent to give an unfair preference, without also alleging an intent to defraud and the insolvency of the debtor, and that plaintiff's petition does not so allege.

That, upon the trial of the motion to dissolve the attachment, the burden of proof was thrown upon plaintiff, and was not sustained.

[1] The view that we take of those contentions is as follows: Plaintiff was not a party to the contract between defendant and Cahn & Co., is not bound by it, makes no attack upon it, and was under no obligation to do so. Its action is founded in the principle of our law that the property of the debtor is the common pledge of his creditors, and the remedy that it seeks is provided by the Code of Practice, which declares that:

"Art. 240. A creditor may obtain such attachment of the property of his debtor, in the following cases: * * *

"4. When he has mortgaged, assigned or disposed of, or is about to mortgage, assign or dispose of his property, rights or credits, or some part thereof with intent to * * * give an unfair preference to some of them [some of his creditors]."

Proceeding under the law thus quoted, plaintiff procured the attachment of a portion of certain movable property which belonged to its debtor, was in his possession, and of which (as plaintiff alleged) he was in the act of disposing in order to give an unfair preference to some other of his creditors. If the facts be as thus stated and alleged, the case is clearly within the terms of the law, which declares the case thus stated to be one of those in which an attachment may issue, and it is immaterial whether defendant was acting, and was about to act, as alleged, by reason of, and in conformity to, a previous understanding or contract, or upon the impulse of the moment, and without such understanding; for, if an attachment cannot issue in any case where the debtor is disposing or is about to dispose of his property with intent to de-

fraud or give an unfair preference, provided there was a previous understanding to that effect, the law, which declares that an attachment may issue in such cases, is practically a dead letter, since transfers of property are seldom made *inter vivos* to those who have not been previously informed and have not previously acquiesced in the intention to make them. Defendant's counsel call attention to our jurisprudence to the effect that, where one has acquired the ownership and possession of property, whether movable or immovable, by a real contract, even though fraudulent, the title cannot be attacked collaterally by attachment, but that the attack must be made through a direct action for the revocation of the contract, and that it is only where the contract is merely simulated that the person complaining can proceed by attachment; and we concede that there is such a jurisprudence, though we do not find it necessary at this time to enter into any extended discussion of the law or reasoning upon which it is founded. It is enough to say that neither has any application to a case in which, as between a debtor and his creditor, the title to the property attached is vested in no other person than the debtor, and the debtor is in possession, even though, as between the debtor and another person, there may be a contract which vests the title in the latter, or to a case in which there is a contract between the debtor and one creditor, whereby the latter has acquired a right with respect to the property of the former as security for a particular debt, and another creditor proceeds merely with reference to the surplus that may be found after the payment of the debt. Thus immovable property may be attached by the creditors of the vendor so long as the sale has not been recorded. *First National Bank v. Ft. Wayne Ice Co.*, 105 La. 133, 29 South. 379.

"The sale or assignment of movable property without delivery is void as to third persons." 2 Hen. Dig. 1341, B; *Hill v. Hanney*, 15 La. Ann. 654; C. C. arts. 1892, 2247.

"A consignee's claim for advances is superior to that of an attaching creditor, where the former has received the bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter who will be entitled to any surplus after payment of the advances and necessary expense." 1 Hen. Dig. p. 136, (b) No. 2.

"Factors * * * cannot claim a lien on * * * moneys or property for a general balance of account against the owner over an attaching creditor." *Gray v. Bledso*, 13 La. 491.

A pledge is, under all systems of law, a real contract; a delivery of the thing is not a consequence, but the very essence of the contract. *Lee v. Bradlee*, 8 Mart. (O. S.) 57; C. C. art. 3158.

An unexecuted promise to deliver a certain collateral as security gives no privilege or pledge to the creditor. *Succession of D'Meza*, 26 La. Ann. 35.

The fact that a thing is held in pledge by one creditor, who is empowered to sell it,

does not prevent other creditors of the pledgor from seizing the thing in the hands of the pledgee and having it sold, subject to the pledgee's claim. *Augé v. Variol*, 31 La. Ann. 865; *Renshaw v. His Creditors*, 40 La. Ann. 41, 3 South. 403.

It requires no citation of authority to sustain the proposition that an ordinary creditor may cause the property of his debtor, standing in his name and being in his possession, to be seized under either mesne or final process, though it be covered with registered privileges and mortgages, and is entitled, by virtue of such seizure, to whatever surplus the property may yield after the privileges and mortgages are satisfied; the rights of the holders thereof being usually asserted by them, and not by the debtor.

[2] The defendant debtor now before the court sets up his contract with Cahn & Co. as furnishing the reason why the attachment should be dissolved and yet his counsel assert that plaintiff should not be permitted to question the contract, because (it is said) Cahn & Co. (whom the counsel also represent) have not thus far thought proper to make themselves parties to the proceeding. Cahn & Co. have obtained the release of the seized property by filing two motions, in which they set up rights of privilege, pledge, and pawn under the contract in question, and the property has been released to them on forthcoming bonds given by them, which could only have been done upon the theory that they had intervened (by their motions) under the authority of Act 51 of 1876. We have no doubt, therefore, that they have made themselves parties to the proceeding, and, while they would have no standing to object to the attachment for matters that concerned the defendant alone, they were not, and could not have been, denied the privilege of asserting upon the hearing of the motion to dissolve any rights affected by the attachment which were peculiar to themselves. Pretermittting, however, the question, whether Cahn & Co. are before the court for the purposes of the issues here presented and the decision to be herein rendered, it seems quite certain that defendant, as plaintiff in the rule to dissolve, is before the court, and equally certain that the court is bound to inquire into the sufficiency of the reasons which he assigns for the dissolution of the attachment, and which are said to be (in part at least) furnished by his contract with Cahn & Co. The contract in question purports to pledge defendant's crop of the year 1913 for advances to be made by Cahn & Co. for its production, and to bind defendant to ship the entire crop to Cahn & Co., to be sold by them upon the usual commission, and it contains a stipulation (quoted in the preceding statement of the case) authorizing Cahn & Co. to impute the proceeds at any time to any debt, whether on open account or otherwise, that defendant owed or might thereafter owe them; and

the contention now is that, as defendant has thus bound himself, so also, quoad the crop, every one else who may have an interest in it as part of his assets is bound. We take it, however, that the mere existence of an ordinary contract between a debtor and one of his creditors to the effect that the former will turn his assets or any given part of them over to the latter, to be imputed to the payment of any debt that the creditor may choose to select, would hardly be sufficient (and particularly if the assets forming the subject of the contract consist of movable property) to prevent other creditors from seizing them. If, therefore, the contract invoked by defendant is to be given the effect attributed to it, it must be something out of the ordinary; that is to say, it must be founded in some special law, as well as in the consent of the parties. And defendant's counsel, appreciating that view of the matter, invoke also Act 66 of 1874 as the special law upon which they rely. That law, so far as it need be here quoted, reads as follows (*italics by the court*):

"Section 1. * * * That in addition to the privilege now conferred by law, any planter or farmer may pledge or pawn his growing crop * * * for advances in money, goods and necessary supplies that he may require for the production of the same, by entering into a written agreement to pledge the same and having the agreement recorded in the office of the recorder of mortgages of the parish where said * * * product is produced, which recorded contract shall give and confer on the merchant or other person advancing money, goods and necessary supplies for the production of said agricultural product, a right of pledge upon the said crop, the same as if the said crop had been in the possession of the pledges. * * *

"Sec. 2. * * * That when any merchant * * * has advanced money, property, or supplies on cotton, sugar or other agricultural products, and the same has been consigned to him by ship, * * * railroad or other carrier, the said agricultural products shall be pledged to the consignor thereof from the time the bill of lading thereof shall be put in the mail, or put into the possession of the carrier for transmission to the consignee. * * *

"Sec. 3. * * * That all merchants * * * who may have a general balance of account, or any sum of money due them by any consignee [consignor] or other person sending them cotton, sugar * * * for sale * * * shall have a pledge upon all such property * * * from the time the bill of lading or receipt therefor by the carrier is deposited in the mail or given to the carrier for transmission. * * *

The privilege "now conferred by law" to which reference is made in the above-quoted section 1 is that conferred by article 3217 of the Civil Code, which declares that:

"The debts which are privileged on certain movables are the following:

"1. The appointments or salaries of the overseer for the current year, on the crops of the year and the proceeds thereof; debts due for necessary supplies furnished to any farm or plantation, and debts for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year. * * * 4. The debt on the pledge which is in the creditor's possession."

Construing the article thus quoted with section 1 of the act, it will be seen that the article confers a privilege upon the crop of the debtor for debts incurred for necessary supplies furnished and money actually advanced and used for paying for such supplies and in payment of necessary expenses of the plantation upon which the crop is produced and while being produced; but, as the article is by its terms confined in its application to "debts which are privileged on movables," and as "standing crops" are immovables, it would seem to follow that the privilege so conferred is intended to take effect only upon the severance of the crop from the soil.

[3] Section 1 of the act therefore provides as a further security to the furnisher of the money and supplies required and used for the production of the crop that the planter may pledge his "growing crop" for such money and supplies by written contract duly recorded, and that the recorded contract shall have the effect of actual delivery of the property to the pledgee, which actual delivery would otherwise be indispensable to the completion of the contract, whether it be regarded as in the nature of an antichresis or a pawn. But the section does not give to a mere convention inter partes (whether recorded or not) purporting to secure an ordinary debt by pledge of a crop, whether growing or otherwise, when unaccompanied by actual delivery, the effect of a pledge; hence, in so far as it may be so intended, it falls under the general law governing the contract of pledge and requiring actual delivery of the property (C. C. arts. 8158, 3181), and is void upon its face, and hence, also, the contract here set up by defendant would be void upon its face if and to the extent that, under cover of a pledge for money and supplies for the making of the crop of 1913, it attempted to secure by pledge of that crop a debt contracted by defendant for any other purpose, and is void as to all other creditors of defendant in so far as it purports or is construed to give Cahn & Co. any right or privilege on the crop by authorizing them to impute the proceeds thereof to the payment of any other debt. In other words, Cahn & Co. were pledgees of the crop under section 1 of the act of 1874 to the extent of their advances for its production, and no farther, and the surplus of the crop over and above the proportion required to reimburse those advances remained and was bound to remain the common pledge of all the creditors of Bonvillain, and its status could not be so changed as the result of any contract between Bonvillain and Cahn & Co. authorizing Cahn & Co. to appropriate it to the payment of ordinary debts due to them as to prevent plaintiff, or any other creditor of Bonvillain, from proceeding against it by attachment so long as it remained in the possession of Bonvillain and so long as he was

shipping or about to ship it to Cahn & Co. to be so appropriated by them.

As a matter of fact, Cahn & Co. were better advised than to make any direct attempt to subject the crop to a pledge for the security of any debts due or to become due them by Bonvillain, other than those represented by the notes of December 30, 1912, and October 13, 1913, both of which are declared in the contracts to have been given for advances to be made for the making, harvesting, and manufacturing of the crop, and the stipulation in each contract for the pledge of the crop is confined in its application to the advances thus mentioned. There is therefore nothing in the contract or contracts set up by defendant (the contract of December 30, 1912, being more particularly referred to in the argument) to sustain the contention that Cahn & Co. had any special interest in the seized sugar beyond the pledge for the reimbursement of their advances for the making of the crop, except the bare stipulation concerning the imputation of payment from the proceeds of the sale of the crop which purports to give them the right to appropriate those proceeds to the payment of the ordinary debts due or to become due to them, as well as to the reimbursement of their advances, either or both, at their discretion.

[4] Whatever surplus, however, over and above the amount required the crop may have yielded at the time of the attachment, or was about to yield, was the common pledge of Bonvillain's creditors, and it was with reference to that surplus that plaintiff caused the attachment to issue; his complaint being, in effect, that the common debtor was disposing of it in shipping his entire crop to Cahn & Co. under a contract which was intended to authorize Cahn & Co. to appropriate the entire proceeds, including whatever surplus there might be, to the payment of the debts due to themselves, including ordinary debts as well as the debt for which the crop and proceeds were pledged, and that in so doing defendant was disposing, and was about to dispose, of his property with the intent to give an unfair preference to Cahn & Co.

In his motion to dissolve the attachment defendant, as we have stated, alleges:

"That mover herein is shipping his sugar to Leon Cahn & Co. under agreements duly recorded; * * * that under said agreements mover herein is compelled legally to ship his sugar to Leon Cahn & Co., and that he could be compelled by injunction by Leon Cahn & Co. to ship said sugar to it; * * * that, in addition thereto, the said sugar is pawned and pledged to Leon Cahn & Co. under an agreement duly recorded; that the said sugar in the S. P. car, when seized, had already been consigned to Leon Cahn & Co.; that, in addition thereto, the said Leon Cahn & Co. has paid for all cane purchased by A. A. Bonvillain from outside parties, and has been subrogated to the actions and privileges of the vendors of cane by both conventional and legal subrogation."

The contract (of December 30, 1912) recites that Cahn & Co. agree to make ad-

vances for the crop of 1913 to the extent of \$75,000 for which Bonvillain and others give their note, and that, in order to secure the payment of the note, they do—

"specially pledge * * * the entire crop * * * grown and manufactured during the said current year, * * * which crop the said parties * * * bind themselves to ship * * * to said Leon Cahn & Co., who shall dispose of the same in the regular course of business; * * * the said parties of the second part * * * recognizing in favor of Leon Cahn & Co. and all future holder or holders of said note all the liens and privileges granted by law to furnishers of money, provisions, and supplies, and particularly by Act No. 66 of 1874, and consenting and agreeing that said laws be especially applied to these presents, and all benefits thereof conferred on and employed by said firm of Leon Cahn & Co. * * * It is furthermore agreed," etc.

And then follows the stipulation concerning the imputation of payments, copied in the preceding "statement of the case."

Mr. Bonvillain, having been called as a witness in support of the motion to dissolve the attachment, was subsequently recalled for cross-examination under Act 126 of 1908, and gave the following, with other, testimony, to wit:

"Q. In your answer as to the privilege indebtedness what do you mean when you say that they [his previous shipments of sugar to Leon Cahn & Co.] have not extinguished the privilege indebtedness? A. I mean to say the privilege indebtedness is usually drawn up for the amount that Mr. Cahn would be called on to pay for my account, and that I have not repaid him to the full amount of that indebtedness. Q. In other words, your answer means that you state that you have not extinguished your total account with Leon Cahn & Co.? A. Yes, sir; exactly. Q. And by the privilege indebtedness you mean the total indebtedness? A. Yes, sir."

Defendant's counsel in their briefs urge the contract between defendant and Cahn & Co. as an insuperable obstacle to the proceeding by attachment, saying that it pledged defendant's entire crop to Cahn & Co. and bound defendant to ship it to them, and that they were to dispose of it and be entitled for those services to the usual brokerage and commission, and that:

"It is further provided that Leon Cahn & Co. shall have the exclusive right to impute the net proceeds from the sale of said sugar and molasses to the payment of any debt or open account which the said Bonvillain might owe when said sugars were sold. Now, it was under this contract that Bonvillain was shipping and disposing of the sugar at the time the attachment was run."

There can be no manner of doubt, therefore, that, although the crop was pledged to Cahn & Co. only for the reimbursement of their advances for the crop of 1913, it was shipped, being shipped, and to be shipped to them under an agreement and with the intention that upon selling it they should be at liberty to appropriate the proceeds either to the payment of the debt due for advances or to the payment of any ordinary debt due or to become due them, and that, in the event of their first paying themselves such ordinary debts as they might select,

the pledge securing the debt for advances should remain intact as to the balance of the proceeds. And yet the best offer that defendant could at that time make to his other ordinary creditors was 40 per cent. on the dollar cash, and the balance in one and two years. If, therefore, there was or was to be, a surplus from the proceeds of the crop beyond the amount for which the crop was pledged, it was placed at the disposal of Cahn & Co., not as pledgees, but, as ordinary creditors, from which it seems clear enough that Cahn & Co. were intended to be given a preference over defendant's other ordinary creditors with respect thereto. We make the following excerpts from the opinion in the case of *Minge v. Barbre*, 51 La. Ann. 1290, 1295, 26 South. 182, 184, as to some extent applicable to the situation as thus presented, to wit:

"It may with truth be said that for a debtor to give a preference to one creditor over another is not in itself wrong, and is not a fraud in a moral sense, since it is permitted in many of the states of the Union, but that does not help the matter so far as this case is concerned. With us the property of the debtor is the common pledge of his creditors, and any arrangement, whether through the machinery of the courts or otherwise, whereby the debtor unites with one creditor to give such creditor an advantage over others, is in violation of the prohibitions of the law, and will not be [tolerated]. *Newman v. Baer & Levy*, 50 La. Ann. 323 [23 South. 279]; *Block v. Marks*, 47 La. Ann. 107 [16 South. 649]; *Simon & Co. v. Newman*, 50 La. Ann. 338 [23 South. 329]; *Haas v. Haas*, 85 La. Ann. 885; *Muse, Syndic. v. Yarbrough*, 11 La. 521; *Civil Code, arts. 1969, 1970, 1977, 1983, 1984, 2053.* * * *

"We think it a reasonable proposition that privileges should be restricted within the limits fixed by the law and by the parties themselves. If *Barbre* had intended to secure a greater sum than \$2,500, or if *Minge & Co.* had intended to advance more than that amount, and wanted the additional advances to be secured by the privilege by which the \$2,500 was secured, it is fair to suppose that such intentions would have been expressed in the contract into which they entered. As it is, *Minge & Co.* were secured to the amount expressed in the contract, to wit, \$2,500, and the whole crop to make which the money advanced was used remained pledged to them up to the time that it yielded them that amount, when their right of pledge was exhausted. *Gay & Co. v. Pike*, 80 La. Ann. 1332."

See, also, *Bank of Patterson v. Urban Co., La.*, 114 La. 788, 38 South. 561; *Levert v. Berthelot*, 127 La. 1018, 1019, 54 South. 334.

In the case last above cited it was said:

"The company intervening claimed in its petition of intervention the sum of \$14,000, secured by pledge duly inscribed. The company is entitled to the whole of the advances made by it which were used in cultivating and gathering the crop. A part of the advances we will see later, was not so used. * * *

"Although it was the agreement that this sum would be advanced as before stated, the defendant, with the consent of the interveners, used an amount of \$4,729.19, with which defendant paid another debt; that is, interveners, instead of paying themselves and satisfying their claim, permitted the defendant to pay another debt not secured by pledge or privilege on the crop. Having received the crop to an amount suffi-

cient to pay their claim, they must be charged in this settlement with the amount received, which went to the payment of an unsecured claim."

Defendant alleges in his motion to dissolve that the sugar seized on the S. P. cars had already been consigned to Cahn & Co. He does not allege, nor did he attempt to prove, that any bills of lading for the sugar so seized had been mailed or delivered to the carrier for transmission to Cahn & Co., and it is only under such conditions that any right of pledge would arise from the consignment. Act 66 of 1874, §§ 2, 3.

Defendant also alleges, in his motion that Cahn & Co. paid for all the cane purchased by him from outside parties, and that they have been subrogated to the rights of the sellers with respect to the price; but neither he nor Cahn & Co. made any attempt to prove the subrogation.

If, then, movables which have been sold, but not delivered may be attached by a creditor of the vendor, because as to him there was no sale, so movables which have been pledged without delivery may be attached by a creditor of the pledgor, because as to him there was no pledge; and a fortiori, where movables, constituting the surplus of a mass pledged only to a certain extent over and above the requirements of the pledge remain in the possession of the pledgor, they may be attached by a creditor of the pledgor.

Finally (upon the point under consideration), Act 46 of 1886, amending and reenacting C. P. art. 398 declares;

"That, in all cases where personal property is seized upon mesne or final process, and is claimed by a third opponent, the seizing creditor may be allowed in his answer to the third opposition to allege and prove his title fraudulent, and the court shall try and decide the issue thus made."

[5] In the original brief of the learned counsel for defendant we find the following, referring to C. P. art. 240, to wit:

"Section 4 of the article provides that a disposition of the property which is intended to give an unfair preference to some of the creditors must be made with intent to defraud; in other words, that the mere shipping and selling of sugars in due course to one who happens to be a creditor in itself, under the statute, though it give to that person an advantage or preference, does not justify an attachment, unless the intent to defraud by the transaction is alleged and shown."

The article in question, as we have seen, reads (so far as here applicable) as follows:

"Art. 240. A creditor may obtain such attachment of the property of his debtor in the following cases:

"4. When he has mortgaged, assigned or disposed of, or is about to mortgage, assign or dispose of, his property, rights or credits, or some part thereof with intent to defraud his creditors or give an unfair preference to some of them."

The pertinent allegations of plaintiff's supplemental petition are:

"That the said shipments * * * are being made to the said Leon Cahn & Co. by defendant to give, and petitioner alleges that such shipments do, in fact, give, to the said Leon Cahn & Co., an unfair preference over other creditors of the defendant, including petitioner; * * * that the said A. A. Bonvillain will continue to ship the aforesaid sugar and molasses to the said Leon Cahn & Co. so as to prefer the said Leon Cahn & Co., and, in fact by such shipments prefers the said Leon Cahn & Co., over defendant's other creditors, including petitioner, and petitioner fears and believes and avers that by such shipments it will be left without means of recovering from the said A. A. Bonvillain the aforesaid indebtedness due by him to petitioner."

It would appear from the language of the statute that the lawmaker was of opinion that the intent of the creditor to defraud all his creditors might be disclosed in some cases, whereas in others there might be found only an intent to give an unfair preference to some of them, and, as in, perhaps, most of our sister states, one or more creditors may lawfully be preferred, it appears to us that the framers of the Code of Practice intended to deal with it merely as a thing to be regarded the giving of such preference merely discountenanced by our law, but not necessarily implying any fraudulent purpose, and that they therefore connected it with the intent to defraud disjunctively, and in a manner to distinguish them the one from the other.

[7] The lexicon informs us that the word "or" is a co-ordinating particle—

"that makes an alternative; as, you may read or write, that is, you may do one of those things, at your pleasure, but not both. It often connects a series of words or propositions presenting a choice of either; as, he may study law or medicine or he may go into trade," etc. Web. New Inter. Dic.

And it is familiar doctrine in criminal jurisprudence that offenses denounced disjunctively must be charged either separately or conjunctively, since the disjunctive charge is bad for uncertainty, meaning that the offenses are distinct and cannot be charged in the alternative. If, then, the allegation of the intent to defraud his creditors is sufficient under the article here in question, why is not the allegation of the intent to give an unfair preference to some of them equally so, since the first paragraph of the article declares that an attachment may be obtained "in the following cases," and the disposing of property with intent to give an unfair preference is a case which follows, just as the disposing of property with intent to defraud is such a case, though not the same case.

The authorities to which we have been referred as supporting the view of defendants' counsel as to the question under consideration do not perform that function, but are inapplicable.

In *Ferguson v. Chastant*, 35 La. Ann. 339, the intent to defraud was charged, but the court held that it was not sustained.

Bloch v. Creditors, 46 La. Ann. 1334, 16 South. 267, was to the same effect; i. e., that fraud, having been charged, must be established.

In *Poltevent & Co. v. Standard, etc., Co.*, 49 La. Ann. 72, 21 South. 194, defendant was charged with disposing of its property "with intent to defraud its creditors or give an unfair preference to some of them." The court held that no fraud was established and the question of unfair preference was apparently neither presented nor considered.

In *Abel & Bach v. Duffy*, 106 La. 262, 30 South. 834, it was held that no intent was shown "to defraud * * * or give an unfair preference."

Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 South. 357, is equally irrelevant.

In their supplemental brief the learned counsel say:

"Premitting for the sake of argument the question, whether or not it is necessary to allege that this was done with intention to defraud, it is necessary to allege that the debtor was insolvent and had no other property out of which this debt could be satisfied. C. C. arts. 1970, 1971."

The two articles thus cited are the first under the title "Of the Action of the Creditors in Avoidance of Contracts, and Its Incidents." Article 1970 declares that the law gives to every creditor and to the representative of all the creditors "an action to annul any contract made in fraud of their rights." And article 1971 declares that "this action" can only be exercised where the debtor has not property sufficient to pay the debt of the complaining creditor, or of all his creditors, where there has been a cession or analogous proceeding. The inability of the debtor to pay is therefore a condition precedent to the exercise of the particular right of action thus conferred.

In the case under consideration, on the other hand, the plaintiff is not seeking to annul any contract, and the law under which he is proceeding no more requires him to allege that the debtor, whom he charges with the intent to give an unfair preference, is unable to pay his debts, than it requires such an allegation concerning a debtor charged with intent to defraud, or with being about to leave the state, or with residing out of the state, or with concealing himself to avoid being cited.

[8] It is insisted that upon the trial of the motion to dissolve the attachment the burden of proof was thrown upon the plaintiff, and was not sustained.

Article 258 of the Code of Practice reads (italics by the court):

"If the defendant * * * prove * * * that the allegations on which the order for attachment had been obtained were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defense in the ordinary way."

Defendants' counsel refer to one or two cases (in which the Code of Practice was not

alluded to), and which seem to hold that it is enough for the defendant in attachment to make a prima facie showing negating the averments of the affidavit of the plaintiff to throw upon the latter the burden of proving their verity. *Offutt v. Edwards*, 9 Rob. 90; *Bloch v. Creditors*, 46 La. Ann. 1342, 16 South. 267. We are of opinion that a more correct interpretation of the law, as above quoted, is to be found in *Herrmann & Vignes v. Amédée*, 30 La. Ann. 395, where it is said (italics by the writer):

"We do not understand the district judge to mean that in all cases of motions to dissolve attachments the plaintiff is obliged to prove the truth of the allegations which he has sworn to in order to obtain the writ. *It is only where the allegations so sworn to by him are denied, and the prima facie case made by his affidavit is rebutted, that he must support his affidavit by proof,*" etc.

In *Hardie & Co. v. Colvin*, 43 La. Ann. 852, 9 South. 745, the conclusion of the court, as stated in the syllabus, was:

"A defendant who alleges in his answer the untruthfulness of plaintiff's affidavit for attachment must make out the charge by a fair preponderance of proof."

In *Simons v. Jacobs*, 15 La. Ann. 428, the court, after referring to the ruling in *Brumgard v. Anderson*, 16 La. 341, and the circumstances of the case under consideration, said:

"In the case at bar the testimony [of the defendant in attachment] by no means destroys the presumption arising from the affidavit."

And so we find here. Defendant testified that he was shipping his sugar under a contract, and that he had no intention of giving an unfair preference to Cahn & Co., but the fact is that, if his crop of 1913 yielded, or promised when defendant testified to yield, a surplus beyond the amount required to satisfy Cahn & Co.'s pledge (and the evidence strongly indicates that it would, and did, yield such surplus), then for defendant to continue to ship under the contract, such as it was, was to give Cahn & Co. an unfair preference, within the meaning of the law, and defendant must be presumed to have intended the necessary consequence of his acts. In that connection it appears to us that even defendant's proposed settlement with his creditors contemplated a preference in favor of Cahn & Co. as part of the idea (with which defendant and counsel are apparently possessed) that the stipulation in regard to the imputation of payments is as binding, not only on him, but on his creditors, as any other in his contract with that firm, and that it gives them, in effect, the same rights with regard to the debt due for advances. Thus in the motion to dissolve we find the following allegations concerning the proposed settlement, to wit (italics by the court):

"That for the past two months mover herein has been negotiating with all of his creditors

with a view of paying a certain percentage on his claims and to have the balance extended for one and two years, and that this was conditioned upon all of the creditors accepting this proposition; that his settlement contemplated the shipment of all sugar to Leon Cahn & Co.; that under the agreement such shipment was necessary; and that the proposed cash payment would only be made *after the sugar was shipped and Leon Cahn & Co. settled with.*"

And the impression created by those allegations (especially the last) is strengthened by the circumstance that, although counsel say in their brief that all the creditors, except two, agreed to the settlement, we fail to find among the signatures to the written proposition filed in evidence that of Cahn & Co.

Concerning the question whether at the date of the attachment there was a surplus in the hands of Cahn & Co. beyond the amount required to satisfy their claim for advances, and, if not, whether it was reasonably certain that there would be such a surplus, and that it would inevitably be appropriated, so far as needed, to the payment of debts due that firm other than the debt for advances to make the crop, the evidence disclosed the following condition of affairs: Mr. Bonvillain testified that he was unable to state, even in round figures, the condition of his account with Cahn & Co., and that no one in the place would know, "either accurately or in round figures," the amount that Cahn & Co. had advanced in 1913.

"The only things we can go by," he said, "are the liens and privileges that have been executed, and they must have advanced that amount, or they would not have called for them."

He afterwards said:

"I don't believe we have sufficient money to my credit to finish paying the labor bills, grinding expenses, in Leon Cahn & Co.'s hands."

He did not say that he had not shipped enough sugar to reimburse the advances made and to be made for the entire crop, and we rather doubt whether he would have made such a statement. As we understand him, he considered that Cahn & Co. had the right to appropriate the proceeds of the crop to the payment of any debt that he owed them, and he was probably not altogether informed as to the manner or extent in and to which they had exercised that right, but had some reason to believe that they had appropriated part, at least, of the proceeds to the payment of some past-due indebtedness, open account, or for money loaned or furnished for the purchase of cane, and had left part, perhaps, of the debt due for advances on the crop to be paid from the proceeds of future shipments. He further testified that prior to the attachment he had shipped (to Cahn & Co.) 11,775 bags of sugar, of the average net weight of 825 pounds, and that sugar was at that time selling at 3.75 to 3.8 cents a pound. Taking 3½ cents as

the average price, Cahn & Co. would have realized (on 3,826,875 pounds of sugar) \$127,563.50. The attachment issued on December 6th, and plaintiff offered to prove that the total shipments would have amounted to 6,000,000 of pounds without, as we understand, including third sugars and molasses. However that may be, 6,000,000 pounds, at 3½ cents would have brought, and probably did bring, not less than \$200,000. On the other hand, it is not pretended that the advances exceeded \$150,000, and we are not convinced that as much as that was received or expended in that way.

Concerning defendant's pre-existing indebtedness, we have found that, beginning with the contract of January, 1911, under which defendant had given his notes for \$100,000 for money to be advanced for the crop of that year "and balance then due," and ending with the contract of October 13, 1913, he had contracted for a total of \$220,000. How much of that amount he had actually received and how much he had repaid up to the date of the trial we have no means of knowing, as he was unable or unwilling to throw any light upon the subject, and refused to produce his books. He did say, however, that he had lost the best part of his crop in 1911, and had also lost in 1912, from which we conclude that he started the year 1913 considerably in debt to Cahn & Co., and to that ordinary debt or mortgage debt, as it probably became, for which Cahn & Co. had no privilege on the crop of 1913, they were authorized to attribute the surplus proceeds of that crop, amounting, as it seems likely, to not less than \$50,000; whilst the plaintiff, who appears to have furnished the fertilizer, which went, remotely at least (as we assume), to the making of the crop, as yet gets nothing.

Our brother of the district court predicated his judgment dissolving the attachment mainly, as we understand, upon the ruling of this court in *Bank v. Martin*, 52 La. Ann. 1623, 28 South. 130, of which he says:

"The court considers this case a practical duplicate of the case of the *Bank of New Iberia v. Martin*," etc.

But in that case the bank seized sugar, part of defendant's crop, which, as in this case, was pledged to a factor for the advances made for its production, and which defendant was engaged in shipping in satisfaction of the debt thus incurred to the pledgee.

It does not appear that he owed the pledgee any other debt, or that his contract with the pledgee authorized the latter to appropriate the proceeds of the sugar to the payment of any other debt, which are the distinguishing features of the present case, by reason of which it is decided differently from the case cited.

Our conclusion is that the judgment appealed from should be reversed, without

prejudice to the rights of Cahn & Co., who, not having intervened in, or been made parties to, the rule to dissolve the attachment, are entitled to assert their rights by way of intervention in the main case.

It is accordingly adjudged and decreed that the judgment appealed from be annulled and reversed, and that the attachment herein issued be maintained without prejudice to the right of Leon Cahn & Co. to assert their claim by way of intervention in the main case, the defendant to pay the costs of the appeal and, in the district court, of the rule to dissolve the attachment, all other costs to await the judgment on the merits.

O'NIELL, J. (dissenting). The contract of pledge by A. A. Bonvillain in favor of Leon Cahn & Co. was not null, nor does the plaintiff pretend it was. If it was voidable in so far as it gave the pledgee an unfair preference over other creditors, to the extent of any indebtedness due by the pledgor to the pledgee, the plaintiff could have set it aside only by a revocatory action against both parties. As long as it was not set aside, the pledgor was bound to carry it out. In fact, there is a recent criminal statute prohibiting the pledgor of a crop of sugar or other agricultural products from disposing of it otherwise than to the pledgee, with intent to deprive him of his pledge. There was no fraud in carrying out the contract of pledge unless there was fraud in the contract itself; and, if there was fraud in it, the pledgee should have been cited as a party defendant in an action to annul it. For these reasons, I respectfully dissent from the opinion and decree rendered in this case.

(189 La.)

No. 21533.

STATE v. ASHWORTH et al.

(Supreme Court of Louisiana. Nov. 2, 1915.
On Rehearing, April 3, 1916. Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

1. SELECTION OF TALES JURORS—STATUTORY PROVISION.

The purpose of the Act No. 182 of 1914, amending section 11 of Act No. 135 of 1898, was to relieve the sheriff of authority to select the tales jurors necessary for the trial of a criminal case.

2. SELECTION OF TALES JURORS—STATUTORY PROVISION.

In the impaneling of a jury or completing the panel from the tales jurors, the slips drawn from the tales jury box according to the provisions of the Act No. 182 of 1914 should be drawn by the clerk of court (after the tales jurors have been summoned by the sheriff) in the same manner that the regular jurors are impaneled and as tales jurors were drawn after being summoned under section 11 of Act No. 135 of 1898.

Land, J., dissenting.

(Additional Syllabus by Editorial Staff.)

On Rehearing.

3. JURY \S 72(3)—IMPANELING JURY—PROCEDURE.

Since Act No. 182 of 1914, amending Act No. 135 of 1898, \S 11, prescribing the manner of drawing juries, does not require that for calling the tales jurors to be sworn on their voir dire after they have been summoned and appeared the names shall be drawn from a box, there was no irregularity in the sheriff's calling the jurors from the list which had been made of their names as they were drawn from the tales box.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 340-342, 347; Dec. Dig. \S 72(3).]

4. JURY \S 72(3)—IMPANELING JURY—POWER OF DEPUTY CLERK.

Under Act No. 43 of 1882 and Act No. 220 of 1902, authorizing deputy clerk to exercise all the powers granted to clerks of courts, a deputy clerk may act for the clerk in drawing a tales venire from the tales jury box, there being no restriction on the general power granted to deputy clerks except as to the general venire, in the drawing of which Act No. 135 of 1898, \S 3, prescribes that the chief deputy alone may replace the clerk.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 340-342, 347; Dec. Dig. \S 72(3).]

5. CRIMINAL LAW \S 1144(9)—APPEAL—REVIEW—PRESUMPTIONS.

Under Rev. St. \S 667, authorizing the appointment of a deputy coroner in case the coroner is sick or necessarily absent, the sickness or necessary absence of the coroner will be presumed where the deputy coroner has acted in holding inquest, unless the bill of exceptions shows the contrary.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. \S 1144(9).]

6. WITNESSES \S 398(3)—IMPEACHMENT—INCONSISTENT STATEMENTS — FORMER TESTIMONY.

The sworn testimony of a witness at a coroner's inquest may be read on the trial to discredit the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1254; Dec. Dig. \S 398(3).]

7. WITNESSES \S 380(5)—EXAMINATION—REFERENCE TO FORMER TESTIMONY.

A district attorney may on the trial read to his own witness from his sworn testimony taken down at the coroner's inquest and ask whether he is not now making a different statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1214, 1219; Dec. Dig. \S 380(5).]

8. CRIMINAL LAW \S 80—PARTIES—PRINCIPAL.

One aiding and abetting may be separately indicted as principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 103-111, 1884; Dec. Dig. \S 80.]

9. CRIMINAL LAW \S 1124(1)—APPEAL—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Grounds for a new trial based on facts which are not brought up cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2939, 2947; Dec. Dig. \S 1124(1).]

O'Niell, J., dissenting.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Camillus Ashworth and another were convicted of manslaughter, and appeal. Affirmed.

Perrin & Perrin, of Jena, for appellants. R. G. Pleasant, Atty. Gen., and John R. Hunter, Dist. Atty., of Alexandria (G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendants, Camillus Ashworth and Valentine Ashworth, were indicted and tried for murder, were convicted of manslaughter, sentenced to imprisonment in the penitentiary for the terms of 15 years and 21 years, respectively, and have appealed.

The first bill of exceptions recites that, after the regular venire of jurors was exhausted, the court ordered that the names of 30 tales jurors be drawn from the tales jury box, and that, before all of the tales jurors whose names were drawn came into court, the judge ordered the impaneling of the jury to be proceeded with, and the sheriff called jurors from the audience, whose names were not drawn from the envelope or from the tales jury box.

It is not true that the names of the tales jurors who were called from the audience by the sheriff had not been drawn from the tales jury box. The counsel who drafted this bill of exceptions evidently meant to say that the 30 slips drawn from the tales jury box, or the slips bearing the names of those who appeared in response to the sheriff's summons, were not thereafter placed into a box and again drawn by the clerk, but that the sheriff called from the list made by him of the names that had been drawn from the tales jury box the tales jurors who were impaneled on the jury. The statement per curiam explains this, viz.:

"I ordered the deputy clerk to draw from the jury box the names of the tales jurors in the presence of the court. The sheriff made a list of said jurors as they were drawn. When seven or eight of the jurors reported, I ordered the trial to be proceeded with. The sheriff called names of the tales jurors from the list of those present, and the trial was proceeded with."

To which the defendants' counsel objected, and reserved a bill of exceptions.

[1, 2] It has been observed by this court that the manifest purpose of the Act No. 182 of 1914, amending section 11 of Act No. 135 of 1898, was to relieve the sheriff of his authority to select the tales jurors for the trial of a criminal case. And it has been said that the sheriff is not to determine who or how many of the tales jurors whose names have been drawn he will summon from the list handed to him. See *State v. Anderson*, 136 La. 285, 286, 66 South. 966. Hence it seems that after the clerk has drawn from

the tales jury box the number of names ordered by the judge, and when a sufficient number of those drawn, in the discretion of the judge, have appeared in response to the sheriff's summons, their names should be put into a box and drawn out by the clerk in the same manner in which tales jurors were drawn for service on the jury before section 11 of the Act No. 135 of 1898 was amended by the Act No. 182 of 1914, and as the regular jurors are impaneled. We cannot assume that the Legislature intended, by the Act No. 182 of 1914, to do away with the drawing by the clerk of court of the names necessary to complete the jury from the names of those summoned as tales jurors, and permit the sheriff to select or call them from his list.

It is unnecessary to consider the other bills of exception reserved by the defendants.

The verdict and sentence appealed from are annulled, and it is ordered that this case be remanded to the district court for a new trial.

LAND, J., dissents.

On Rehearing.

PROVOSTY, J. [3] On reconsideration the court has concluded that, inasmuch as the statute prescribing the manner of drawing juries does not require that for calling the tales jurors to be sworn on their voir dire after they have been summoned and have appeared their names shall be drawn from a box, there was no irregularity in the sheriff's calling said jurors from the list which had been made of their names as the same were drawn from the tales box.

[4] Bill of exception No. 2 presents the point whether a deputy clerk may act for the clerk in drawing a tales venire from the tales jury box. Act 43, p. 54, of 1882, and Act 220, p. 450, of 1902, authorize deputy clerks to "exercise all the powers granted to clerks." This general authority necessarily includes that of drawing juries; and we know of no restriction upon it except as to the general venire, in the drawing of which the chief deputy alone may replace the clerk. Section 3 of Act 135, p. 216, of 1898.

Bill No. 3 involves the two questions whether a deputy coroner may act in place of the coroner in holding an inquest, and whether the sworn testimony of a witness taken down at the coroner's inquest may be read to the jury on the trial of the case for the purpose of impeaching the witness.

[5] Section 687, R. S., authorizes the appointment of a deputy coroner, in case the coroner is sick or necessarily absent. In *State v. Duffy*, 39 La. Ann. 422, 2 South. 184, it was held that the sickness or necessary absence of the coroner will be presumed unless the bill of exception shows the contrary;

and the bill of exception in the instant case does not make this contrary showing.

[6] The second question is answered by the decision in *State v. Munholland*, 16 La. Ann. 376, where it was held that:

"The testimony of a witness before an inquest may be admitted to discredit his testimony at the time of trial."

[7] Bill No. 4 presents the question whether the district attorney may, on the trial, read to his own witness from the sworn testimony of the witness as taken down at the coroner's inquest and ask the witness whether he is not now making a different statement.

The answer is that he may. *Marr's Crim. Juris.* § 446, p. 758.

Bill No. 5 contents itself with the bare and naked recital that the following charge:

"That a verdict of guilty in this case would act as acquittal of another person charged in a separate indictment with the same crime"

—was asked to be given, and was refused. This court, not being informed of the pertinency of the charge, is not in a position to say whether the refusal to give it was error. *State v. Haywood*, 121 La. 862, 46 South. 889.

[8] Bill No. 6 raises the question whether one present aiding and abetting may be separately indicted as a principal.

Being a principal (*State v. Littell*, 45 La. Ann. 655, 12 South. 750), he may, of course, be indicted as such.

[9] The motion for a new trial as to its first, second, and third grounds is based upon facts which are not brought up, and which therefore cannot be considered. And the fourth ground is the same presented by bill of exceptions No. 1, and already passed on.

The objection to the sufficiency of the bills is without merit, in view of the very full and satisfactory per curiams.

On all points, except as to the drawing of the jury, the right to apply for a rehearing is reserved.

Judgment affirmed.

O'NIELL, J., dissents.

(139 La.)

No. 20513.

JONES v. TREMONT LUMBER CO.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by the Court.)

1. RAILROADS — 95(1)—CONSTRUCTION—OBSTRUCTION OF HIGHWAY.

In crossing public roads it is the statutory duty of railroads and tramways to construct their roads so as not to hinder, impede, or obstruct the safe and convenient use of the highway. Act No. 157 of 1910.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 274; Dec. Dig. — 95(1).]

(Additional Syllabus by Editorial Staff.)

2. RAILROADS — 348(2)—CONSTRUCTION—LIABILITY FOR INJURIES.

In an action against a lumber company for injuries from a fall of plaintiff's horse, which he was riding, into a pit dug by defendant in constructing a tramroad, evidence held to show that the pit was dug in the highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1139; Dec. Dig. — 348(2).]

3. DAMAGES — 182(1)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

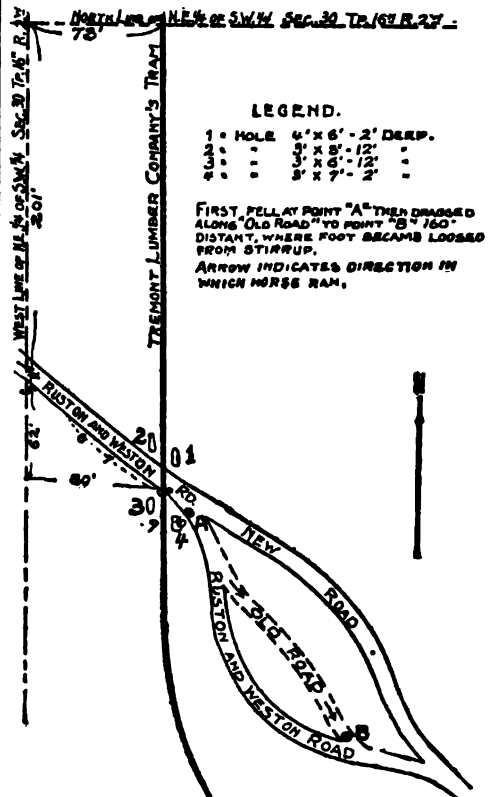
An award of \$1,500 damages for a dislocated shoulder and subsequent pain and suffering to a man in the prime of life is excessive, and will be reduced to \$1,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372; Dec. Dig. — 182(1).]

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Action by A. D. Jones against the Tremont Lumber Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

The following is the plat referred to in opinion:



Grisham & Oglesby, of Winnfield, and Stubbs & Theus, of Monroe, for appellant. Wimberly & Dormon, of Shreveport, for appellee.

LAND, J. Plaintiff sued defendant for \$5,000 damages for personal injuries, alleg-

ed to have been sustained under the following circumstances:

Defendant constructed a dump or embankment upon a certain public road in the parish of Jackson for the purpose of building a log tramroad, and in so doing dug a deep hole in said road, in such a way and place that it could not readily be seen by the traveling public. The work was done carelessly and without proper consideration for the safety of the traveling public.

On or about August 5, 1913, plaintiff, while riding horseback on said road, suddenly came upon said dump, and in crossing same came upon said hole, too late to guide his horse away from it, and the horse and the rider fell into said hole, and in so falling plaintiff was thrown against the ground, and his shoulder fractured and dislocated, and his back and spine injured, causing him to lose three months' time, and inflicting on him injuries from which he will never permanently recover.

Plaintiff also sued for the additional sum of \$750 for loss of time, and the further sum of \$1,000 as exemplary or punitive damages for defendant's alleged willful, malicious, and wanton disregard of public rights and trespass and interference with said public road.

Defendant for answer admits the construction of a tramroad over certain lands in the parish of Jackson, and that said tramroad crosses the Ruston and Western road; for want of sufficient information to justify a belief, defendant denies that said road is a public road, but says that in order to carry on its business it was necessary to construct said tramroad across said road; at the place of the alleged injury the ground is level, and defendant there constructed a dump 1 $\frac{1}{2}$ feet high with perfect approaches to said dump, the width of the alleged public road.

Further answering defendant denied that it dug a deep hole or any other kind of hole in the said road, and averred that what holes were dug were on either side of the road not in close proximity to the dirt road and plainly visible to the traveling public; denied that the construction of the tramroad at that place was an interference with the public road, or in violation of any law; and averred that defendant left the road in as good condition as it found it.

The case was taken up before the judge alone, and after the examination of a score or more of witnesses was submitted, and judgment was rendered in favor of the plaintiff for \$1,500, with 5 per cent. interest thereon from the date of its rendition, and all costs of suit. Defendant has appealed.

The objection of defendant to testimony to support the demand for permanent injuries, or injuries of any kind, or for pain and suffering, for want of sufficient allegations, was

properly overruled. The petition sets forth the nature of the injuries received, and the resulting pain and suffering, and loss of time, and alleges that plaintiff will never permanently recover therefrom.

Defendant's counsel in their brief say that the issues as made up present two questions for determination:

"(1) Was the crossing made in such a way that the defendant would be liable, provided the plaintiff was not at fault and did not contribute to his injury?

"(2) Was not the injury to plaintiff contributed to and caused by his own fault, negligence, and carelessness?"

[1] It was the duty of the defendant to construct its works so as not to hinder, impede, or obstruct the safe and convenient use of the highway. Act No. 157 of 1910, amending section 691 of the Revised Statutes of 1870.

Defendant contends that it had constructed a good and safe crossing over its tramroad, but that plaintiff elected not to make use of it, and turning to the right attempted to cross the tramroad at a point beyond the crossing as filled and graded for public travel, and in so doing his horse stepped into one of the barrow pits and fell; and that said pit, some four feet wide and two feet deep, was an open and visible obstruction, which should have been seen and avoided by the plaintiff in the exercise of ordinary care.

Plaintiff contends that the hole or pit was in the public road or the "old road," as it is called by the witnesses, to distinguish it from the road opened after the accident, and that it was dug in such a way that it could not be seen by a person coming from the west or north, going toward the east or south before it was too late to avoid going into it.

We attach hereto, for the sake of illustration, a plat of the locus in quo, as printed in defendant's brief. The accuracy of the plat in some particulars is disputed by the plaintiff.

[2] After an attentive consideration of all the evidence in the record, we think that it is fairly proven that the hole into which plaintiff's horse stepped was a barrow pit dug by the defendant's employes, in the Ruston & Western road, which was the only one in public use at the time of the accident. The "old road" had been abandoned, and the "new road" was opened after the accident. As shown by the plat the railroad dump or roadbed crossed the public road diagonally, at a point where the latter commenced to curve to the right. The roadbed was constructed with earth taken from barrow pits on each side of the tramway. There is positive testimony in the record that the incline or approach on the east or south did not follow the curve of the Ruston & Western road. The result was that a portion of said road was excluded from the approach; and in

this portion, witnesses for the plaintiff locate the hole or pit, which caused the accident in question. The witness Cline Ford, quoted in defendant's brief, and overseer of the road in question at the time of the accident, testified that the hole or pit was in the public road. The situation just before and after the accident seems to have been, as described by several witnesses, such as to compel the traveler to cross, or go around this barrow pit in order to continue his journey along the Ruston & Western road.

The case on the plea of contributory negligence is more doubtful, but we are not prepared to say that the trial judge, on the evidence before him, erred in finding the plaintiff not guilty.

[3] We, however, consider the award as excessive. A dislocated shoulder is a minor injury, and the consequent pain and suffer-

ing to a man in the prime of life is of no great severity. The testimony of the surgeons show no permanent injury to the shoulder. One of them found an efficiency of 85 per cent., and another an efficiency of 95 per cent. Considering the elements of pain, suffering, and loss of time claimed in the petition, we are of opinion that an award of \$1,000 is sufficient compensation. In *Smith v. Minden Lumber Co.*, 114 La. 1035, 38 South. 821, this court refused to increase an award of \$1,500 for a broken arm and dislocated shoulder. While there is no standard for the measurement of damages in a case like this, there should be some regard for uniformity.

It is therefore ordered that the amount of the judgment below be reduced from \$1,500 to \$1,000, and that as thus amended be affirmed; plaintiff to pay costs of appeal.

WILLIS v. SEMMES et al. (No. 18250.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

1. MUNICIPAL CORPORATIONS — 706(3)—USE OF STREETS — RUNAWAY TEAMS — PRESUMPTIONS.

From the fact that a team is running away on a city street, unattended by any person, the presumption of negligence arises as against the owner, under the maxim *res ipsa loquitur*, but no presumption arises if the team is accompanied by the driver.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. 706(3).]

2. MUNICIPAL CORPORATIONS — 706(3)—USE OF STREETS — RUNAWAY TEAMS — PRESUMPTIONS—"ACCOMPANY."

Where plaintiff was injured by a runaway team, when the small boy driver was running along behind the team shouting and trying to overtake it, he was not "accompanying" the team, so as to rebut the presumption of negligence arising in the case of an unattended runaway team, but it must appear that the person in charge was in the vehicle, or had the reins at the time the runaway started.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. 706(3).]

For other definitions, see *Words and Phrases*, *Accompany*.]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by Mrs. N. B. Willis against John H. Semmes, Jr., and others. From a judgment on peremptory instruction for defendants, plaintiff appeals. Reversed and remanded.

Fewell & Cameron, of Meridian, for appellant. Cochran & McCants, of Meridian, for appellees.

SYKES, J. The appellant here, plaintiff in the court below, filed suit in the circuit court of Lauderdale county for damages against the appellees for the sum of \$10,000 for personal injuries alleged to have been sustained by her on or about the 15th day of February, 1913, in the city of Meridian.

The testimony for the plaintiff in the court below showed that in the early part of the night of the above-mentioned date the plaintiff, in company with her daughter-in-law, alighted from a West End street car at Fifth street and Twenty-Third avenue, and started toward the sidewalk, when some one hollered, "Look out for a runaway horse!" The appellant's daughter-in-law arrived at the sidewalk in safety, but the appellant, who was an old lady of about 69 years of age, in the confusion of the moment was unable to escape, and was struck and run over by a runaway horse hitched to a wagon, in which wagon there was no one whatever. The wagon was the delivery wagon of the defendants. It appears from the testimony that while the horse was running away in the street a small boy, who evidently must

have been driving the wagon at some period before the horse ran away, was running along on the sidewalk hollering to people to look out for the runaway horse, and apparently was trying to overtake the horse. The plaintiff sustained severe personal injuries, which it is unnecessary for us to discuss in this opinion.

After the introduction of the testimony for the plaintiff, upon a motion by the defendants, the testimony was excluded, and the jury peremptorily instructed to return a verdict for the defendant. This was done, and judgment was rendered thereupon, from which judgment this appeal is prosecuted.

[1] The only question presented to the court for decision is whether or not the proof of the fact that the horse was running away with no driver or no one else in the wagon or on the ground holding the reins was sufficient to make out a *prima facie* case of negligence against the defendants. This is the first time that this question has been presented to this court for decision. It is a well-known fact that by virtue of their training horses are not in the habit of running away when there is some one in charge of the vehicle to which they are harnessed. The weight of authority seems to be that, when some one is occupying the vehicle to which runaway horses are attached, then no presumption of negligence arises from the fact that the horses are running away. But the contrary rule seems to prevail when a runaway team is unaccompanied by one in charge of the same. This rule is well stated in R. C. L. vol. 1, par. 52, p. 1108, as follows:

"Much has been said as to the presumption of negligence arising from the mere fact that a horse ran away, some authorities holding that, in the absence of a suitable explanation, neglect on the part of the owner or driver is fairly inferable from such a circumstance alone, while other courts maintain that from such an occurrence want of care cannot be presumed, but that, as the burden of proof of negligence rests on the plaintiff, he must show something more clearly and positively negligent in character before he can sustain an action. An analysis of the cases, however, tends to the conclusion, which is apparently supported by the weight of authority, that negligence is *prima facie* imputable to the owner when a team is found running away unattended on a public highway, and damage results to one lawfully thereon, but that no such inference is legitimately deducible where a horse is running away with his driver. In the former case the maxim *res ipsa loquitur* is applied; as the common experience of mankind proves that horses which are well broken and kept under control will not, save in exceptional cases, break away from the one in charge of them and inflict injury. Therefore the fact that a horse is running away unattended would seem to afford some evidence that it was not properly cared for, or had been left unfastened or improperly and negligently secured, none of which inferences can be reasonably drawn as to a horse running away with its driver. But in cases of this character it is well to bear in mind that, whether in the particular jurisdiction the bare fact that a horse ran away is, or is not, sufficient *prima facie* evidence of negligence, very little in the way of attending circumstances may in any

given case be ample to repel or give foundation for the inference."

In many cases it would be impossible for the plaintiffs to prove the negligence of the defendants unless the doctrine of *res ipsa loquitur* was applied. Yet it is quite an easy matter for the owner of a runaway team to rebut this testimony by showing that the runaway was not the result of negligence. This testimony is peculiarly within the knowledge of the owner of the team and his employes. *Gorsuch v. Swan*, 109 Tenn. 38, 69 S. W. 1113, 97 Am. St. Rep. 836.

[2] It cannot be said that the fact that the small boy who appears to have been the driver of the runaway team was running upon the sidewalk was in charge of or accompanying the team in such sense as to rebut the presumption of negligence. In order to accompany the team in the sense meant by the authorities upon this subject, the fact should appear that the driver or person was in the wagon or in such position as to show that when the runaway started he was actually in control of the team or had hold of the reins.

Reversed and remanded.

HATTIESBURG GROCERY CO. v. TOMPKINS. (No. 18237.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

1. TIME \Leftrightarrow 9(2) — COMPUTATION — DAYS EXCLUDED — LIMITATIONS — "NEXT."

Under Code 1906, § 3103, providing that all actions on judgments of courts of record shall be brought within seven years "next" after rendition thereof, and not after, and section 1606, providing that in all cases not specifically mentioned, when any specific number of days shall be prescribed, one day shall be excluded and the other included, where judgment was rendered on October 31, 1907, suit thereon, begun October 31, 1914, was not barred, the first day being excluded by the use of the word "next" in section 3103.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 17, 32; Dec. Dig. \Leftrightarrow 9(2).]

For other definitions, see Words and Phrases, First and Second Series, Next.]

2. TIME \Leftrightarrow 11 — FRACTIONS OF DAYS — LIMITATIONS.

In computing the period for bar of an action by lapse of time, fractions of days will not be considered.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. \Leftrightarrow 11.]

Appeal from Circuit Court, Forrest County; J. M. Arnold, Judge.

Action by the Hattiesburg Grocery Company against J. C. Tompkins. From an order overruling plaintiff's demurrer to the plea, plaintiff appeals. Reversed and remanded.

Sullivan, Conner & Sullivan, of Hattiesburg, for appellant. John T. Haney, of Hattiesburg, for appellee.

SYKES, J. On the 31st day of October, 1907, the appellant, the Hattiesburg Grocery Company, recovered a judgment in the circuit court of Forrest county against J. C. Tompkins, the appellee, in the sum of \$334.64. On the 31st day of October, 1914, the appellant filed this suit on the judgment in the circuit court of Forrest county, the declaration being filed on that day and process issued and served upon the defendant, J. C. Tompkins, on that day. The defendant, the appellee here, pleaded the statute of limitation of seven years. Plaintiff demurred to the plea, and the lower court overruled the demurrer, from which judgment appellant prosecutes this appeal.

Section 3103 of the Code of 1906 is as follows:

"All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after the rendition of such judgment or decree, and not after; and an execution shall not issue on any judgment or decree after seven years from the date of the judgment or decree."

It is the contention of the appellant that the seven-year statute of limitations did not begin to run against this judgment until the day after its rendition. In other words, that in counting the seven years, the court should exclude the first day from the count. It is admitted by the appellee that the judgment was not barred, provided this first day should be excluded. The appellee, however, contends that a proper construction of the statute is to include the day the judgment was rendered.

[1, 2] Section 1606 of the Code of 1906 states how time is computed in certain instances, but not in the one under consideration, and further states:

"And in all other cases when any number of days shall be prescribed, one day shall be excluded and the other included."

While a number of states have statutory enactments providing for the inclusion or exclusion of certain days, we find that Mississippi has none governing this cause. The authorities are somewhat divided on the proposition, but the weight of authority is to the effect that the first day should be excluded from the count. The theory of the law is that the entire time of seven years should elapse before the claim is barred by the statute of limitations. This law should be most favorably construed in favor of keeping the judgment alive for the full period. While the law, as a general rule, recognizes no fraction of a day, at the same time, as a matter of common knowledge, we know that courts do not convene before 8 or 9 o'clock in the day. Therefore, in this case, the judgment certainly could not have been taken until eight or nine hours after October 31, 1907, had begun, and to hold that this day should be counted would be in effect to deprive the appellant here of at least a fractional part of a day to which he is entitled under the law. Since

the law knows nor recognizes any fractional part of a day in a case of this kind, and since the statute of limitations should be most liberally construed to keep the judgment alive as long as possible, it is our conclusion that justice demands that the court hold that the first day should be excluded. This may perhaps keep the judgment alive for a few hours longer than it would be if the court recognized fractions of a day. Here we are compelled to hold that the judgment was alive for the entire day of October 31, 1914, thereby perhaps giving it validity for a few hours longer than a period of seven years from the time of its actual rendition; or to hold that the entire day of October 31, 1907, should be counted, in which event we would be actually shortening the period of seven years by at least eight or nine hours. Section 3103 of the Code above quoted says that:

"All actions * * * shall be brought within seven years *next* after the rendition of such judgment," etc.

We think the use of the word "next" in the above section precludes the idea that the day on which the judgment is rendered should be counted. As was well said in the case of *Menges v. Frick*, 73 Pa. 137, 13 Am. Rep. 731, in construing a statute of limitations:

"The act provides that actions for account shall be commenced and sued 'within six years next after the cause of such actions or suit, and not after.' There can be no doubt that the 'cause of action in this case arose on the day the timber was delivered. If that day is to be excluded from the reckoning, the six years had not expired when the suit was commenced. But why, even if the words of the act are to receive a strict and literal construction, should it not be excluded? 'Within six years next after the cause of action or suit,' as applied to the facts of this case, must necessarily mean within six years next after the day on which the timber was delivered."

A careful examination of the authorities shows that the great weight of authority is in line with this decision. *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Blackman v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634.

Reversed and remanded.

STATE ex rel. ATTORNEY GENERAL v. McDOWELL. (No. 18924.)

(Supreme Court of Mississippi, Division B.
May 29, 1916.)

1. HEALTH §7(1) — FACTORY INSPECTOR — TERM OF OFFICE.

Under Laws 1914, c. 163, providing for a state factory inspector and fixing his salary and prescribing his duties, but not fixing his term of office, construed with Code 1906, § 3456, providing that the term of office of all officers not otherwise provided by law shall be four years and until their successors shall be duly qualified, the term of office is for four years.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 6; Dec. Dig. §7(1).]

2. HEALTH §7(1)—FACTORY INSPECTOR—REMOVAL.

Authority of the state board of health to remove the state factory inspector for cause gives the board power to remove him only for a good cause, and not upon a mere arbitrary exercise of such authority, and then only upon charges, notice, and an opportunity to be heard.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 6; Dec. Dig. §7(1).]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Quo warranto by the State, on relation of the Attorney General, against David McDowell. Judgment for defendant, and relation appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. A. H. Longino and J. R. McDowell, both of Jackson, for appellee.

POTTER, J. [1] David McDowell, the appellee in this case, was appointed state factory inspector under chapter 163, Laws of 1914, and his term of office began May 1, 1914, and according to his contention ends May 1, 1918, unless vacated by death, resignation, or removal for cause. On the 26th day of January, 1916, the state board of health, acting, as it believed, within rights and powers conferred by chapter 163 of the Laws of 1914, passed an order declaring the office of factory inspector vacant, and elected A. B. Hobbs to fill the vacancy so declared. Mr. Hobbs, having been commissioned by virtue of said election, demanded of Mr. McDowell that the office, paraphernalia, records, etc., of the office in question be turned over to him. This Mr. McDowell refused to do, maintaining that the board of health had no legal authority to declare the office vacant, and that Mr. Hobbs had not been legally elected to the office, as no vacancy existed. Chapter 163 of the Laws of 1914 does not provide the term of office of the factory inspector, therefore section 3456 of the Code of 1906, providing "that the term of office of all officers, not otherwise provided by law, shall be four years and until their successors shall be duly qualified," applies; and Mr. McDowell's term of office, therefore, had not expired at the time the board of health attempted to remove him and elect his successor. This suit was brought by the Attorney General to determine whether or not Mr. McDowell is rightfully entitled to the office in question.

[2] It is conceded by counsel for appellant, and it is too clear for argument that the office in question is a public office. The position of state factory inspector is denominated an office by the act creating the office, his salary is fixed by statute, his duties are prescribed by statute, and he is not subject to the direction of any authority in the performance of his duties. In fact, he is made a public officer in every possible way that the Legislature can make an officer a public

officer. The question therefore, to determine is whether or not, under a statute giving the board of health authority to remove the state factory inspector "for cause," the said board has the authority to remove such officer without specifying any cause satisfactory or otherwise and to remove him without a hearing. In our opinion the authority conferred on the board of health to remove the factory inspector can be exercised only upon "charges, notice, and an opportunity to be heard." While the board of health under the statute in question has the authority to remove the factory inspector for cause, this cause must be a good cause, and not a mere arbitrary exercise of the authority thus conferred. The factory inspector must be informed of the nature of the charges preferred against him, and an opportunity must be afforded him to be heard; in other words, he is entitled to his day in court.

"A conditional or limited power of removal, as for cause may, however, be exercised only after charges have been made against and a hearing accorded the person to be removed. But if the power to remove is for a specified cause or other cause satisfactory to the removing authority no hearing need be given." 29 Cyc. 1409.

A well-considered case holding to this effect is *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 797, from the Supreme Court of Wisconsin, and also the case of *Reid v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663.

The judgment of the circuit court is therefore affirmed.

Affirmed.

WARE v. STATE ex rel. POOLE (No. 18993.)

(Supreme Court of Mississippi, Division B.
May 29, 1916.)

HEALTH §7(1)—OFFICERS—REMOVAL—STATUTES—"PUBLIC OFFICER."

Code 1906, § 2491, provides that a competent physician shall be appointed county health officer for and from each county by the state board of health, for a term of two years. Section 2494 defines his duties and places him under the joint supervision of the state board of health and the board of county supervisors. Section 2509 provides for his salary. Sections 2516 and 2516a define his authority in certain matters, and section 2490 provides that the state board of health may remove any county health officer and fill the vacancy thereby occasioned. *Held*, that the county health officer was a "public officer," who could not be removed by the state board of health at any meeting without reason, notice, or hearing, and who was removable only for good and reasonable cause.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 6; Dec. Dig. §7(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Officer*.]

Appeal from Circuit Court, Hinds County;
W. H. Potter, Judge.

Quo warranto by the State, on relation of

E. B. Poole, against J. M. Ware. Judgment for relator on overruling demurrer to the petition, and defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. A. H. Longino, of Jackson, for appellee.

STEVENS, J. The state, on relation of E. B. Poole, instituted this quo warranto proceeding in the circuit court of the First district of Hinds county, making known to the court that on the 19th day of June, 1915, E. B. Poole was duly and regularly selected county health officer of Hinds county by the state board of health for the term and period of two years from June 19, 1915; that his appointment was duly certified by the secretary of the board of health to the board of supervisors of said county; that the annual salary of relator was fixed by the board of supervisors at \$1,200; that relator accepted his appointment and qualified and entered upon the duties of his office, and has been receiving the emoluments thereof, and now asserts with confidence his right to discharge the duties and functions of the office and to receive the compensation incident to and provided therefor. The petition further avers that the state board of health, at a meeting held on the ——— day of ———, 1916, and at a time when the personnel of the board had changed, undertook unlawfully to terminate the tenure of relator in his said office of county health officer by attempting to declare the office vacant, in the face of the fact that nearly a year and a half of the two years term for which relator was appointed had not expired, and that the action of the board was without notice to, or any hearing accorded to, relator, and was illegal and void. It is averred, further, that, after undertaking to declare the office vacant, the board then proceeded to name Dr. J. M. Ware to fill the vacancy thus attempted to be created; that Dr. Ware now claims to be the county health officer of the county, and is assuming the right to hold the office, to perform the functions thereof, and to demand and receive the compensation awarded. It is the contention of the petition that relator is entitled to hold and retain his said office until the expiration of his term, and to have the court guarantee him in this right and to bar or prevent the said Ware from holding, or attempting to hold, the same, or in any way from interfering with the rights of the relator in the discharge of his duties as a public officer of the county. The petition assumes to make as an exhibit a true copy of the order of the state board of health in reference to this business. The exhibit reads as follows:

"Dr. Gilleylen moved to vacate the office of county health officer of Hinds county, seconded by Dr. Hall. Dr. Eason moved to require the reason for removal be given, and same be spread on the minutes, seconded by Dr. Johnson. Dr. Garrison moved to table the amendment of Dr.

Eason, seconded by Dr. Hall. Carried. Dr. Gilleylen's motion carried, and Dr. J. M. Ware was nominated and elected as county health officer."

The writ of quo warranto was issued and executed upon Dr. Ware, who appeared and interposed a demurrer to the petition, the material portion of which is as follows:

"First. The petition shows on its face that no cause of action exists against this defendant. Second. The petition further shows on its face that the said E. B. Poole was removed by the state board of health under section 2490, Code of 1906, giving the state board of health full authority to remove any county health officer at any meeting, and that for this reason this petition should be dismissed. Third. The petition further shows that the said E. B. Poole was county health officer and removed by the health board; full authority being given under the law for the health board to take this action and when taken by them, as it was in this case, is in strict conformity to the law, and not in violation of any section of the Constitution of the state."

The case was by agreement of the parties submitted to the circuit judge on petition and demurrer thereto. The demurrer was overruled, the defendant declined to plead further, and brings before us for review the action of the lower court in overruling the demurrer and granting the relief prayed for.

The petition and exhibit thereto show, and the demurrer admits, that Dr. Poole was the legally constituted health officer of the county, in the midst of his term, and in the active discharge of the duties of his office when the state board of health, composed largely of new members, undertook to remove the relator without cause and to substitute in his place Dr. J. M. Ware. The record further discloses that, not only was no reason or cause assigned by the board for its action, but that the board deliberately declined and refused to assign a reason for its action, and declined to record on the minutes of the board any expression of its reasons or motives. It appears that one member of the board moved to require the reason to be given and spread on the minutes, and that this motion was tabled. It manifestly and affirmatively appears, therefore, that if any reason exists, it is yet lodged within the breasts of those members of the board making and carrying the motion to declare the office vacant and thereby to oust relator from his job. It affirmatively shows that this action was taken without any notice to Dr. Poole, without informing him of any charges or accusations of any kind, and of course without affording him an opportunity to be heard in defense. Without elaboration, therefore, the case is ruled by the principle this day announced in the case of *State ex rel. v. McDowell*, 71 South. 867 (No. 18924), which was argued and submitted rather as a companion case.

It is the contention of counsel for appellant that section 2490, Code of 1906, expressly provides that "the state board of health may at any meeting remove any county health officer,

* * * and fill the vacancy thereby occasioned;" that every appointee to this office takes it with the implied agreement and understanding that the state board of health may remove him at any meeting, and that any incumbent, therefore, has no vested right to the full term of two years expressly provided by section 2490. In determining the status, duties, and tenure of office of the county health officer the several provisions or sections of chapter 64 of the Code on "Health and Quarantine" must be read and construed together. Section 2491 provides that:

"A competent physician shall be appointed county health officer for and from each county by the state board of health, whose term of office shall be for two years, and said board shall cause the appointment to be certified by its secretary to the board of supervisors of the county for which the appointment was made."

Section 2494 defines his duties and places this official in a general way under the joint supervision of the state board of health and the board of supervisors of his county. Section 2500 provides:

"The county health officer shall receive for his services an annual salary, to be fixed in advance by the board of supervisors, which may be payable monthly out of the county treasury."

Section 2516 authorizes the board of supervisors to make provisions for screening cisterns and fumigating and disinfecting houses upon the recommendation of the county health officer, and section 2516a arms this officer with the authority to enter the premises of any person for purposes of fumigating and disinfecting or oiling, and makes it a misdemeanor for any person to refuse to allow the health officer to enter for such purpose. It is true the county health officer is charged with the duty of enforcing the rules and regulations of the state board of health. It is also true that the duty is devolved upon him to carry out the instructions of the board of supervisors in investigating and examining into the sanitary condition of schools, prisons, meat shops, and other places of public resort, and of reporting his actions and opinion to the board of supervisors, as well as to the state board of health; and it is the board of supervisors who are required to defray the expense incurred by the county health officer in dealing with infectious and contagious diseases. It is interesting to note that under the Code of 1880 the Governor of the state was authorized to appoint and to remove a county health officer in each county. Section 790 Code of 1880. The position is therefore one provided by the Legislature many years ago, and the incumbent is beyond question a servant of the public, and responsible to the people of his county for the manner in which he discharges the large and important duties imposed upon him by statute. Matters affecting the public health and quarantine are intrusted to him. The statute contemplates that if he is faithful to the trust

imposed, he will serve at least a term of two years, and it is to be noted that his salary is fixed by the year. His status as a public officer was conceded by this court in the case of *De Soto County v. Westbrook*, 64 Miss. 312, 1 South. 352. It is shown in that case that the board of supervisors undertook to pass an order fixing the salary of the county health officer at \$1 per month, and the court held that the Board of Supervisors could not place the salary "so low as to virtually abolish the office" and:

"The laws for the protection of the public health, under which appellee was appointed are of general application, and cannot be nullified in any county by the failure of the board of supervisors to fix the salary of the general health officer of the county, after he has been duly appointed, or by their fixing it at a rate so far below the maximum that no competent physician will accept the office."

The Legislature, therefore, never contemplated or intended that the state board of health should have or exercise the power of removal "at any meeting" without reason, notice, or hearing. The proper construction of the statute simply means that the state

board may exercise the power of removal for good or reasonable cause. What is or is not reasonable cause may well be a matter largely within the discretion of the board, but certain it is that the Legislature never intended that one of our public officers should be thrust out of office without any reason whatever. The humblest employé in the private walks of life, with a definite contract of employment for a stated period of time, could not thus summarily be discharged from service without good cause. This interpretation of the statute does no violence to the language employed by the Legislature. If this is not the meaning of that section giving the board the right to remove, then the other provision of the statute fixing the term of office at two years would mean nothing. The law is the soul or spirit of reason and justice, and never an instrument of oppression.

The views here expressed render it unnecessary for us to harmonize the statute in question or the statutory method of removal with section 175 of our state Constitution.

Affirmed.

GRENADA COUNTY v. LITTLE
(No. 18165.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

FINES —21—RIGHTS OF INFORMERS.

Under Laws 1912, c. 124, authorizing the county supervisors to appropriate money not exceeding one-third of the fines collected from unlawful sale or keeping for sale of intoxicating liquors to procure evidence of the violation of such laws, a county is not liable for a reward of one-third the fine imposed upon two persons convicted of unlawful liquor selling until the fine has been collected.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. § 25; Dec. Dig. —21.]

Appeal from Circuit Court, Grenada County; H. H. Rodgers, Judge.

J. A. Little presented a claim against Grenada County, and on its being disallowed, appealed to the circuit court. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Morrison & Brewer, of Grenada, for appellant. Cowles Horton, of Grenada, for appellee.

SMITH, C. J. The appellee presented an account to the board of supervisors for \$83.34, being one-third of the amount of fines

imposed upon two persons, Walton and Sanders, convicted by the courts of the county of the unlawful sale of intoxicating liquor.

Chapter 124 of the Laws of 1912 provides as follows:

"The board of supervisors of any county in this state and board of aldermen, or board of aldermen and councilmen, as the case may be, of any municipality in this state, are hereby authorized and empowered to appropriate, from time to time, sums of money, not exceeding one-third of the fines which have been collected by them respectively, from the unlawful sale or keeping for sale of intoxicating liquors, for the purpose of procuring evidence of the violations of the statutes or ordinances, as the case may be, against the unlawful sale or keeping of intoxicating liquors."

The board of supervisors disallowed the claim. The order recited that the reward would not be paid because these convicts while serving a sentence had escaped and the fines imposed had not actually been collected, nor had the prisoners worked out their fines on the county roads. The appellee appealed to the circuit court, and there recovered a judgment against the county for the amount of his claim, and the county appeals.

We are of the opinion that under chapter 124, Laws 1912, appellant is not liable to appellee for the one-third of the fines imposed upon Walton and Sanders until the same shall have been collected.

Reversed, and judgment here for appellant.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ARTHUR DELAPIERRE CO., Inc., v.
CHICKASAW LUMBER CO.
(No. 17982.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

1. SALES — 71(3) — CONTRACTS — CONSTRUCTION — QUANTITIES.

In an action for failure to deliver contracted timber, where plaintiffs' testimony was that defendant orally contracted to deliver between 2,000,000 and 3,000,000 feet of timber, plaintiffs could not recover for more than the smaller amount.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 191; Dec. Dig. 71(3).]

2. SALES — 418(14) — CONTRACT — ACTION BY BUYER — DAMAGES — LOSS OF PROFITS AND SUSPENSION OF BUSINESS.

In an action for failure to deliver contracted timber for manufacture in plaintiffs' sawmill, the evidence not showing that plaintiffs were unable, on breach of the contract, to purchase similar timber in the market, but showing that they did buy some timber, but not how much, and that the mill was shut down only a few weeks on account of the breach, *held* plaintiffs were not entitled to recover more than the difference between the contract price and the price actually paid for timber to take the place of that contracted for, but, if unable to purchase in the market a sufficient amount to take the place of that contracted for, they were entitled to recover as damages the profits they would have made on the remainder of logs they were unable to buy in the market, and any other proximate damages growing out of the breach, but could not recover all the profits they would have made on all the timber if delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1195; Dec. Dig. 418(14).]

Appeal from Circuit Court, Chickasaw County.

Action by the Chickasaw Lumber Company against Arthur Delapierre Company, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes & Mayes, of Jackson, for appellant. Flowers, Brown, Chambers & Cooper, of Jackson, for appellee.

SYKES, J. This is an appeal from a judgment of the circuit court of the First district of Chickasaw county for \$7,500, damages for profits claimed to have been lost by the appellees because of the failure of the appellant to deliver to them at their mill certain logs claimed to have been purchased by appellees from appellant. The material allegations of the declaration necessary to an understanding of the case are about as follows, viz.: That on or about the 7th day of April, 1909, the defendant entered into a contract with the plaintiffs, whereby it sold the plaintiffs the amount of 2,200,000 feet of timber in logs, 200,000 feet of which was poplar, and 2,000,000 feet of red oak and white oak; said defendant was to cut said timber and haul the same to Pyland, and there yard it for inspection, measurement, and delivery to the plaintiffs at that point, at certain specified prices. That the defendant, under

this contract, delivered a certain number of logs to the plaintiffs, and then failed and refused, without just cause, to deliver the balance. Plaintiffs alleged that they were making a profit of \$23.50 per thousand feet on all poplar logs received from the defendant under this contract; that upon the oak logs they were to have made a profit of \$6.90 per thousand feet if the contract had been complied with, claiming in all, as their damages, the profits they would have made on the logs after they were manufactured and sold of over \$16,000. They further claim that, owing to the refusal of the defendant to deliver logs according to this contract, they were greatly damaged by not being able to secure timber, and were compelled to stop running their sawmill and shut down; that under the contract, if the defendant had fulfilled the same, plaintiffs would have had sufficient timber to have kept their mill running for 12 months; that in view of their contract with the defendant, they refused and failed to make contracts with other people for logs; and that they were greatly damaged because they had to pay the labor and running expenses of the mill while the same was shut down, which damage amounted to the sum of \$5,000, wherefore they sued, claiming as damages over \$21,000.

[1] The testimony of the plaintiffs in this case is that their agent and an agent of the defendant made an oral contract for the purchase and sale of these logs; the testimony of the plaintiffs as to the exact amount being rather indefinite. Mr. A. F. Smith, who claims to have made the contract on behalf of the plaintiffs, when asked to tell the jury all about the contract, stated as follows:

"In the spring of 1909, Mr. Shepardson came up to our mill on the M. & O. branch out here and wanted to sell us some logs. He said he had between 2,000,000 and 3,000,000 feet of red and white oak, and between 200,000 and 300,000 feet of poplar; and we contracted with him for between 2,000,000 or 3,000,000 feet of oak and between 200,000 and 300,000 feet of poplar."

It will therefore be seen that the contract, as alleged by the plaintiffs, was for between 2,000,000 and 3,000,000 feet of red and white oak, and between 200,000 and 300,000 feet of poplar. If recovery can be had at all upon this contract, it will have to be for the smaller amount as testified to by this witness. We might say, in passing, that the agent of the defendant denied absolutely the making of the contract. The testimony for the plaintiffs also shows that the mill was shut down for several weeks, because of the failure of the defendant to deliver this timber, and that at other times they were not able to saw their full capacity of timber because of the breach of said contract. It does not show expressly what efforts were made by the plaintiffs to buy other logs of like kind and character after said breach. It was con-

tended by the appellant that Mr. Shepardson had no authority to sell over \$500 worth of timber for the appellant at a time; that he exceeded his authority if he made the contract in suit here. The testimony in this case shows, however, that this party was the manager of the timber and of the mill of the appellant, in Chickasaw county, and that he had the apparent authority, at least, and was so held out to the world by the appellant, to make this contract. We, therefore, see no merit in this contention of the appellant.

[2] It is contended by the appellant that the instructions as to the measure of damages given the plaintiffs are absolutely erroneous. The first instruction told the jury, in effect, that if they found for the plaintiffs, they should—

“assess the damages at that amount that the jury reasonably believe from the evidence in the case would have been a reasonable profit that would have been made by the plaintiffs on the undelivered logs.”

The second instruction, in effect, told them that, in assessing these damages—

“you are to take into consideration the contract price of said logs and what the evidence shows that they would have been worth to the plaintiffs had they been furnished according to the contract, deducting therefrom the cost of preparing the lumber from said logs, and the cost of marketing the same including the freight and all expenses.”

From a consideration of the declaration and these instructions, it will be seen that it was the theory of the plaintiffs that because of the breach of the contract, the plaintiffs had to shut down their sawmill, and were thereby prevented from sawing the logs into lumber and making the profit they would have made from the sale of this lumber. If the testimony in this case had shown that the plaintiffs had a regularly established business for the sale of this lumber, which was known to the defendant at the time the contract was made, and that because of a failure of the defendant to deliver the logs, the plaintiffs were unable to have gotten more logs out of which to manufacture the lumber, thereby causing the mill to shut down and preventing them from selling the lumber, then the rule above announced would have been correct, under the case of *White v. Leatherberry*, 82 Miss. 103, 34 South. 358. In this case, however, the testimony does not show that the plaintiffs were unable, by the exercise of reasonable care and diligence, to have gone into the market and purchased other logs of like kind and character. It shows that the plaintiffs bought some timber as a matter of fact, but not how much. The testimony does not show that because of this breach, the mill was shut down for the period of time during which it would have taken to have sawed up this number of feet of timber; in fact, the testimony shows that the mill was only shut down for a short time. It

is the contention of the appellees in this case that they are entitled to recover these profits regardless of the fact that during the greater portion of this time their mill was running and manufacturing logs into lumber which was being sold by them at a profit. In other words, it is the contention of the appellees that they are entitled to keep, as profits, the profits they made out of other timber bought by them and manufactured into lumber during the time they would have been sawing the timber delivered to them by the appellant, had the appellant carried out its contract. The testimony shows that the appellees did make a profit out of the timber purchased by them after the breach of contract and manufactured by them into lumber. In other words, if the contention in this case of the appellees be sound, then the appellees would be making double profits, that is to say, the profits that they made out of the timber purchased by them after a breach of this contract, and the profits that they would have made out of the manufacture of the logs purchased by them from the appellant. This is not the law. The mill of the plaintiffs was one of limited capacity, ranging between 17,000 and 25,000 feet of timber a day. It would have taken in the neighborhood of 10 or 12 months to have sawn all the timber under this contract; while, as a matter of fact according to the testimony, the mill was only shut down for a few weeks because of the breach of said contract. The true measure of damages in this case is as follows:

When the defendant failed to deliver these logs, it was then the duty of the plaintiffs to use reasonable care and diligence to purchase other logs of like kind and character to manufacture into lumber. They are entitled to recover as damages the difference between the contract price and the price actually paid for logs to take the place of the others contracted for. If they were unable to purchase in the open market a sufficient number of logs to take the place of those contracted for, then they are entitled to recover as damages the profits they would have made on the manufactured lumber of this remainder of logs they were unable to buy in the market. If there were any other proximate damages growing out of the breach of this contract, then these damages could also be recovered by the plaintiffs. As to the item of \$5,000 expenses because of the mill being shut down, we are unable to see how that could be a proper item of damages, because this item is necessarily included in the profits they would have made on the logs had they been delivered. Counsel for appellees, in his able presentation of the case, makes the contention that, regardless of whether or not other logs could have been bought in the market, and regardless of the fact that a part of them were bought, and that the mill was run-

ning nearly all the time, this court should not take this into consideration, and that plaintiffs can recover the profits they would have made on the logs when manufactured into lumber. Learned counsel misconceive the case of *White v. Leatherberry* and the other decisions of this court and the authorities cited in the *White Case*. He absolutely overlooks the rule that it is always the duty of the injured party to use reasonable care and diligence to minimize his damages; and, in this case, this duty was to attempt to purchase, in the open market, other logs to take the place of those the defendant failed to deliver. And the defendant is liable only for the difference between the profits actually made and those plaintiffs would have made had not the contract been breached. Since the mill was one of limited capacity, it is obvious that the plaintiffs could not have sawed but a certain amount of lumber a day, and that, in this case, it would have taken them in the neighborhood of 10 or 12 months to have sawn the lumber contracted for. Consequently, if this timber had been delivered, they certainly could not have made any other profit out of any other timber while they were engaged in sawing this into lumber. Appellees contend that they could have put the timber away and kept it and sawed it whenever they got ready, and, for this reason, can claim these profits in this case. This, however, is not the law. If it were, a party who had sold a number of bales of cotton, say for 15 cents per pound under an unusually good contract, when cotton was worth only 10 cents per pound in the market, and who buys this cotton from another party in the open market for 10 cents per pound, explaining to his vendor that he is buying it for delivery to another party at 15 cents per pound, upon a failure of his vendor to deliver the cotton, then, instead of purchasing the cotton in the open market to replace that not delivered to him, he could, simply without any effort on his part, recover of his vendor the 5 cents per pound profits he would have made from the sale of the cotton, when, as a matter of fact, he could have bought the cotton in the market for the same price the party had agreed to sell it to him for, thereby not being damaged one cent. The controlling features in the recovery of loss of profits for the breach of contracts of this character are: First, that when the contract was made, the seller knew for what the commodity was being sold, consequently that he contracted with this idea; second, that the purchaser is unable to buy this commodity in the market with which to fill his contracts. This is the rule laid down in the case of *White v. Leatherberry*, and is the general rule.

Reversed and remanded.

MYERS v. DRAGO GRAIN CO. et al.
(No. 18217.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

EXECUTION §290—SALES—POWER TO PURCHASE.

The sale of property at execution sale by a sheriff in his official capacity does not prevent his purchasing it thereafter as an individual from the purchaser at such sale, where such purchase is not in pursuance of fraud, collusion, or prearrangement.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 827; Dec. Dig. § 290.]

Appeal from Chancery Court, Perry County; C. G. Mayson, Special Chancellor.

Suit by the Drago Grain Company and others against Walter Myers. From a decree for complainants, defendant appeals. Reversed, and judgment rendered for defendant.

This is an appeal from the chancery court of Perry county, where the Drago Grain Company and others filed their bill against the appellant, Walter Myers, and obtained a decree granting the relief prayed for in the bill, from which decree this appeal is taken.

The Drago Grain Company, appellees here, complainants in the court below, filed their original bill in this cause in January, 1913, alleging that they were creditors of W. A. Mills with enrolled judgments against him; that Bush Grocery Company recovered a judgment against W. A. Mills and had same enrolled prior to their judgments and caused an execution to be issued upon its judgment and sale of lot 4 in Richton, Miss., owned by W. A. Mills, to be made under execution, appellant, Walter Myers, being then sheriff; that at said sale, hereinafter denominated the first sale, Smith and Boyd became the purchasers of the property for \$380, an amount sufficient to pay the Bush judgment, the oldest judgment on the judgment roll. (They do not charge in their original bill nor in their amended bill that payment of the bid at said first sale was made, and the record shows that the bid was not paid.) They further charged in their original bill that by reason of said first sale and execution of the sheriff's deed to the property by appellant to Smith and Boyd, the Bush judgment was satisfied; that subsequently to the first sale and by collusive and fraudulent arrangements the judgment creditor, Bush Grocery Company, Myers, Mills and wife, and Smith and Boyd and Welch caused another execution to wrongfully issue upon the judgment of Bush Grocery Company, and caused a levy and sale to be made of all the property of W. A. Mills, including lot 4 sold under the first execution; that with intent to hinder, delay, and defraud creditors of Mills the said parties not only caused said second sale to be made, but executed necessary deeds to

that end. And appellees charged, further, that deeds executed by Mills and wife to Myers were executed subject to a written agreement between Mills and wife and Myers, whereby Myers was to reconvey the property to Mills and wife after payment by Mills and wife to Myers of money advanced by Myers to pay off Bush Grocery Company debt; that all of said parties were parties in the general scheme to hinder, delay, and defraud the creditors of the said W. A. Mills for the collection of their just and honest debts; that the second sale at which W. S. Welch became purchaser was null and void and passed no title because the judgment under which it was made was satisfied by the first sale, and that the deeds from Welch to Myers, from Mills and wife to Myers, and from Smith and Boyd to Myers were all null and void and should be canceled, because tainted and inspired by fraud to assist Mills in cheating and defrauding his creditors. And appellees prayed that the court cancel and hold for naught the deed from Myers, sheriff, under the second execution sale to Welch, deed from Welch to Myers quitclaiming his interest, and deed from Mills and wife, M. E. Mills, to Myers, and written agreement between Myers and Mills and wife, and subject all the property to payment of appellee's debts. To this original bill Myers filed a demurrer.

An amended bill was filed in October, 1913. In this amended bill it is charged that in order to hinder, delay, and defeat the other judgment creditors of Mills, Mills and Myers entered into a fraudulent agreement whereby it was arranged that a new execution would be issued on the Bush judgment and all the Mills property, except his exempt property, and including lot 4, would be sold and bought in by some one and transferred later to Myers and later to Mills and wife; that the property was so sold to W. S. Welch and transfer made by Myers, as sheriff, in furtherance of the prearranged fraudulent scheme; that it was the ultimate purpose of the parties to get the property into the ownership of Mills and wife. The other allegations of the amended bill follow somewhat or adopt the allegations of the original bill.

The appellant demurred to this bill and filed an answer denying fraud, but later answered the amended bill, reserving the legal questions raised by his demurrer, and denying the allegations of the amended bill as to fraud and making his answer a cross-bill against Mills and wife and asserting absolute ownership of the property involved in the suit.

It indisputably appeared on the trial of the case that no arrangement between any of the parties interested had been made prior to the execution sale to Welch whereby Myers was to buy, or contemplated buying, the property. Likewise it appeared that the bid made by Welch and Boyd when the land

was attempted to be sold at the first execution sale was never paid. Welch, Smith, and Boyd were attorneys for Bush Grocery Company at the sale, and Boyd had Smith bid lot 4 in for \$253.43, about the amount of the Bush judgment; but when they discovered that there was an outstanding incumbrance in favor of Mrs. M. E. Mills on the property, and that the title to the property was otherwise questionable and beclouded, Smith, Welch and Boyd failed or refused to pay their bid to Myers. After much insistence on the part of all the parties, and with the consent of Mills, his wife, Mrs. M. E. Mills, Bush Grocery Company, Welch, Smith and Boyd, and after having been advised by several lawyers that he was authorized to do so by law, Myers agreed to undertake to resell the property originally sold, along with the other property in controversy. An execution issued and a levy was made, and after due advertisement the property was struck off and sold to W. S. Welch. Up to the time of the second sale, Myers was not interested one way or the other, except to discharge his duties as sheriff. This second execution sale was regular; and, furthermore, it chanced to be made at an opportune time to attract bidders. No complaint is made in the pleadings about this second sale, other than that the Bush judgment under which it was made had been satisfied by the first sale, and that the second sale was a part of an alleged fraudulent scheme to defraud the other creditors of Mills.

In his answer and cross-bill Myers shows purchase of the property in question from Welch, after the second execution sale for \$547, but with the understanding that Mills and wife and Smith and Boyd quitclaim any interest they might have, and the further understanding that Mrs. Mills cancel her trust deed on the property. He further shows the written contract entered into by himself and Mills and wife whereby he gave to the latter a written option to repurchase the property under the conditions specified in the contract. It appears from the evidence that this agreement was had after the second execution sale, and after Myers had conferred with a lawyer as to the legality of his purchasing the property under the circumstances and the sort of agreement which would protect him.

The chancellor expressly found that the first execution sale was abortive and void, because the bid at the sale was not paid to the sheriff, and all parties consented to a resale; that Myers was guilty of no fraud, and that there was no intentional or actual fraud in Myers' transactions with Mills and wife, and that Myers was not guilty of any intent to injure or defraud the creditors of W. A. Mills and M. E. Mills before or at the time when he took the deed from M. E. Mills, and when he executed the contract in

evidence. He further found that a large portion of the property sold under the second execution sale was, at the time of the execution sale thereof and at the time of the execution of the contract to repurchase, exempt from levy or sale under execution, and that the second execution sale was valid and binding, but that on account of the fact that Myers was sheriff of the county when the said execution sales were made, he was not in a position to make any profit out of the purchase of the property. The chancellor further found that the contract of repurchase was a mortgage and secured Myers for the money expended by him, and that Mills and wife having not elected to claim the exempt property as freed from liability for their debts, as they had a right to do, but having permitted a decree pro confesso to be entered against them, and the exempt property being of sufficient value to reimburse Myers for the money he had paid out, that Myers was entitled to the exempt property. The court therefore ordered the unexempt property sold for the benefit of appellees and decreed that the exempt property should go to Myers without the formality of a judicial sale thereof, and authorized the necessary proceedings to place Myers in possession of the exempt property.

It is thus seen that the chancellor has settled most of the questions of fact controverted in the pleadings.

Stevens & Cook, of Hattiesburg, for appellant. T. C. Hannah and John T. Haney, both of Hattiesburg, and E. C. Fishel and Q. S. Heidelberg, both of Richton, for appellees.

HOLDEN, J. (after stating the facts as above). It appears from the record here that this controversy has narrowed down to one question, which deserves our consideration, and that is, whether or not the sale of the property in question by W. S. Welch and W. A. Mills and wife to the appellant, Walter Myers, was a legal and valid sale. If this sale was valid, then the controversy must be settled in favor of the appellant here; but if it was a void sale then the decree of the chancellor may be correct. We here quote the finding of the chancellor in his decree on this subject:

"* * * And finding further that the execution sale made of the property in question on the 4th day of September, 1911, to W. S. Welch was, at the time it was made, valid and binding, but finding further that the said Walter Myers, on account of the fact that he was sheriff of the county when the said execution sales were made, was not in position to make any profit out of the purchase of the said property from W. A. Mills and wife in the manner in which the same was consummated and evidenced by the deed of W. A. Mills and M. E. Mills to him and by the contract executed simultaneously therewith; and finding that the said deed to Walter Myers and the said contract between him and the said W. A. Mills and M. E. Mills constitute a mortgage and security to Walter Myers for the repayment of the money expended by him; and

finding that the full measure of the relief to which the said Walter Myers as against complainants is entitled is indemnity for the amount of money expended by him at the time of his contract with W. A. and M. E. Mills," etc.

It will be observed in the finding of the chancellor that the sale from Welch and Mills and wife to appellant, Walter Myers, was decreed to be void "on account of the fact that he was sheriff of the county when the said execution sale was made"; that is to say, that because the appellant, Myers, acting as sheriff of the county, sold the property under execution to the said W. S. Welch, and then some time afterwards purchased the same property from the said Welch, the sale by Welch to appellant was void. In plain language, the chancellor held that on account of the appellant having previously sold the property under execution while sheriff, that he could not legally purchase the said property individually at any time thereafter. The record in this case shows that the complainant in the court below failed to prove any collusion, fraud, or deception on the part of (Sheriff) Myers, appellant, and Welch and Mills and wife; and the chancellor in his decree specially finds that there was no collusion, fraud, or deception on the part of the appellant, nor did appellant have any understanding or agreement whatever regarding the purchase of the property before or at the time of the execution sale made by him as sheriff. The chancellor also found that the sale made by the sheriff to the said Welch of the property here involved was a valid sale; and, in fact, the chancellor found in his decree that there was no fraud, collusion, or prearrangement by appellant with any person connected with the sale or purchase of the property; but he decreed in effect that the appellant, Myers, could not legally purchase the title to the property from the said W. S. Welch and Mills and wife because the appellant had sold the property to the said Welch under a writ of execution prior to that time while acting in his official capacity as sheriff. The evidence in this record and the decree of the chancellor showing that the appellant was entirely free from fraud or collusion, or even the suspicion of it, in making the sale as sheriff, and in afterwards purchasing the property as an individual, leads us to conclude that the chancellor erred in holding that the appellant, Myers, did not obtain a legal and valid title to the property here involved. The contention of appellee, which was sustained by the chancellor, that the appellant, Walter Myers, was legally incapable of individually purchasing this property from Welch and Mills and wife, because he (appellant) had previously sold it as sheriff under the writ of execution, is untenable; and as we see nothing in this record that vitiates the title of appellant to the property in question, we hold that his title is legal and valid. There-

fore the decree of the lower court is reversed, and a decree entered here for the appellant.
Reversed, and judgment here for appellant.

HOPKINS v. BUCKLEY, TERRY & CO.
(No. 18048.)

(Supreme Court of Mississippi, Division A.
May 22, 1916.)

PRINCIPAL AND AGENT — 107(1)—APPARENT AUTHORITY—PURCHASE ON CREDIT.

Where the purchaser of a bankrupt stock of goods placed the bankrupt as agent in charge to sell it at retail, depositing the money taken each day in a bank to the principal's credit, the agent, with his principal's assent, erecting a sign over the door with the principal's name thereon, it was not within the apparent scope of the agent's authority to pledge the principal's credit for goods to replenish the stock, his authority being merely to sell the stock of goods and account for the proceeds.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 313, 314; Dec. Dig. ¶ 107(1).]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by Buckley, Terry & Company against W. E. Hopkins. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for defendant.

Appellant purchased at the trustee's sale a stock of goods formerly belonging to T. J. Fisher, a bankrupt, and placed Fisher in charge thereof, with directions to sell it out at retail, depositing the money taken each day in a bank to appellant's credit. He further agreed with Fisher that when he (Fisher) should turn over to him an amount of money sufficient to reimburse him for the expense incurred by him in purchasing the stock of merchandise and also the account due him, or rather his firm, by Fisher, that Fisher should have whatever remained of the stock. Pursuant to this arrangement

Fisher took charge of and commenced to sell the stock of merchandise, erecting with Hopkins' knowledge and consent over the door of the house in which the business was conducted a sign on which was printed in large letters the name, "W. E. Hopkins." Fisher bought and placed in this stock of merchandise several bills of groceries from various parties, including appellee, paying therefor out of the proceeds of sales made by him of merchandise turned over to him by appellant. Appellant was advised that Fisher had made these purchases, and seems to have protested against his continuing so to do. A part of the goods purchased by Fisher from appellee were not paid for, but were charged by his direction to appellant, but without appellant's knowledge or consent. After Fisher had sold off a part of this stock of merchandise appellant sold and delivered the remainder thereof to him, the consideration therefor being Fisher's promissory note for the balance of the money appellant was to receive from the proceeds of the sale of the stock under the agreement hereinbefore set forth. Fisher failed to pay appellee for the goods purchased from it, whereupon this suit was instituted to collect it from appellant. A jury was waived, and the cause was submitted to the judge below, who gave judgment in favor of appellee.

Amis & Dunn, of Meridian, for appellant.
Baskin & Wilbourn, of Meridian, for appellee.

SMITH, C. J. (after stating the facts as above). Authority to purchase goods on the credit of appellant was not within the apparent scope of the authority conferred by him upon Fisher, which was simply to sell the stock of goods and account to him for the proceeds thereof. *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808.

Reversed, and judgment here for appellant.

HARRIS v. ILLINOIS CENT. R. CO.
(No. 18246.)

(Supreme Court of Mississippi, Division A.
June 5, 1918.)

**DEATH — 27 — RIGHT OF ACTION — FORMER
RECOVERY BY DECEASED IN LIFETIME.**

Under the wrongful death statute (Code 1906, § 721), providing that whenever death is caused by wrongful or negligent act which, if death had not resulted, would "have entitled the party injured to maintain an action and recover damages in respect thereof," his next of kin or representative may sue therefor, there can be no recovery for death caused by injuries for which deceased recovered judgment while living.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 29; Dec. Dig. — 27.]

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Action by Addie M. Harris against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

H. B. Greaves, of Canton, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

HOLDEN, J. This case is appealed from the circuit court of Madison county where Mrs. Addie M. Harris, plaintiff below and appellant here, filed her suit against the appellee railroad company for damages for the death of her husband, under section 721, Code 1906. About one year prior to the filing of the present suit Mr. Harris, the deceased husband of appellant, while in the employ of appellee railroad company, was injured in the yards of the appellee, having his leg crushed and otherwise injured, for which injuries Mr. Harris filed suit against the appellee for damages, and during his lifetime prosecuted this suit to a final judgment in the circuit court, obtaining a verdict and judgment for \$5,000, which, on appeal to the Supreme Court, was affirmed. Pending this appeal in the Supreme Court, Mr. Harris died and his widow, the appellant here, appeared as administratrix of his estate and revived the case in the Supreme Court in her name as such. This case is reported in 67 South. 55. After the affirmance of the judgment in that case, the appellant here, Mrs. Addie M. Harris, widow of deceased, filed this suit in the circuit court of Madison county, asking only for such damages as she and her minor children had sustained by reason of the death of the husband and father. A special plea was interposed there by the defendant to this declaration, presenting the contention that Mr. Harris himself had recovered a final judgment in his lifetime on the same cause of action, and that this final judgment obtained during the lifetime of the injured party, Mr. Harris, was a settlement of, and an extinguishment of, the cause of action. A demurrer by the plaintiff to this special

plea was overruled by the lower court, and from that judgment this appeal was taken.

The appellant very ably contends that the lower court erred in overruling the demurrer, and argues that:

"There are two elements of damages which are easily perceptible arising out of an injury causing death, where the death is not instantaneous, and the party injured has a wife and children dependent upon him for support; and they are, first, such injury as the deceased suffered, mental and physical, occasioned to him by the injury up to the time of his death; and, second, such injury as the widow and children have sustained independent of those suffered by the deceased, by being deprived of their means of support, which are within the contemplation of section 721, Code 1906."

Counsel further contends that:

"Section 721 can never apply until there is a death, because it is a suit for damages for the death, which is given to the next of kin of the deceased."

And the case of *Hamel v. Southern Railway Co.*, 66 South. 426, 809, a recent decision of this court, is cited and relied upon as authority to sustain the contention of appellant here. There is a marked difference in the *Hamel* Case and the case before us now. The distinguishing feature between the two cases is this: In the *Hamel* Case the deceased had not prosecuted his claim to final judgment in his lifetime. In the case before us now, the deceased husband had prosecuted his cause of action to final judgment in his lifetime. Therefore, at the time of the filing of the instant suit, the claim for damages for the personal injuries to Mr. Harris had been extinguished and settled by a final judgment prosecuted and obtained during the lifetime of Mr. Harris. The fact that Mr. Harris died while this final judgment of the circuit court was pending on appeal in the Supreme Court cannot alter the situation, for the reason that the judgment of the circuit court was a final judgment, and was pending in the Supreme Court only for the purpose of review, and which was, as a matter of fact, subsequently affirmed by this court. In the *Hamel* Case, supra, suit had been filed by *Hamel* in his lifetime for the injuries received by him, but he died before a final judgment was rendered in the case. Consequently *Hamel* had an unsettled claim for his injuries then pending at the time of his death. This court held in that case that under those circumstances damages might be recovered in the two separate suits. But in the case before us now the claim for damages for the personal injuries received by Mr. Harris was settled and extinguished before his death by a final judgment for \$5,000. Therefore there can be no recovery in the instant case for the reasons set out above. In *Hamel v. Railway Co.*, supra, 66 South. 809, in delivering the opinion on suggestion of error, the court said:

"It seems clear to us that under our statutes no suit could have been maintained by the widow had the deceased settled his claim for dam-

ages in his lifetime, nor could this suit be maintained if the record showed that the suit brought by the deceased had been prosecuted to final judgment by the deceased. The reason for this conclusion is written into the statute itself. Section 721, Code of 1906. If the deceased had released the railway company in his lifetime, or if he had prosecuted his suit to final judgment before his death, he would not have been entitled 'to maintain an action and recover in respect thereof,' nor would his next of kin have had a right of action under such circumstances, because the right in the decedent to maintain the action is made a condition precedent for that given by the statute to the next of kin."

We agree with the views expressed above by Justice Cook, and adopt them as the law governing this case. It would be unsound to hold that a person cannot in his lifetime make a complete and full settlement for injuries received by him, which settlement might include all future as well as all present damages. Therefore, when the deceased in his lifetime, by a final judgment of his cause of action, settled his claim for all damages on account of his injuries, he thereby exhausted his right of action, which is a condition precedent to the recovery under section 721, Code 1906. The weight of authority is that a release or recovery by the injured party in his lifetime will bar a suit by the next of kin for the death. *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1017. The judgment of the lower court is affirmed.

Affirmed.

RAGLAND v. ROSS. (No. 17965.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

ACCOUNT STATED §20(1)—TRIAL.

Where, in an action on account stated, it appeared that the goods covered thereby were ordered, delivered, and received by defendant or his agent, and it was not disputed that the items were correct, peremptory instruction for defendant at close of plaintiff's evidence was error.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 9, 98; Dec. Dig. §20(1).]

Appeal from Circuit Court, Winston County; F. E. Everett, Judge.

Action by D. L. Ragland, receiver of the Newton Lumber & Manufacturing Company, against W. J. Ross. From a judgment on peremptory instruction for defendant, plaintiff appeals. Reversed and remanded.

Mayes, Wells, May & Sanders, of Jackson, for appellant. L. H. Hopkins, of Louisville, for appellee.

HOLDEN, J. The appellant, as receiver of the Newton Lumber & Manufacturing Company, an insolvent corporation, sued the appellee in the circuit of Winston county in an action of assumpsit, exhibiting with the declaration on itemized account, properly sworn to, showing an indebtedness of \$541.79. The itemized account included various items of merchandise, and included also one item of an automobile. The defendant in the court below, W. J. Ross, pleaded the general issue, and gave notice of special matter as an affirmative defense. After the plaintiff below had introduced all of his evidence, the court, upon request of the defendant, excluded the plaintiff's evidence and granted a peremptory instruction for the defendant, and Ragland, the receiver, appeals here.

The plaintiff below proved by competent testimony, in addition to his sworn itemized account, that the account was correct, due, and owing by the party against whom it was charged; that the item of \$480 for the automobile was due and unpaid; that the automobile was ordered through a letter signed by the defendant, W. J. Ross, and was shipped to him as requested, by delivering the automobile to the railroad company at Newton to be transported to W. J. Ross, according to the bill of lading, at Ross Spur. also appears from the testimony in the record that the automobile was delivered to W. J. Ross or his agent, W. I. Ross, and the correspondence between the parties thereafter shows that the automobile was accepted and used by the defendant, W. J. Ross, or his agent W. I. Ross, who appears to be the son and business agent of W. J. Ross. There was no dispute as to the account being correct and due as to the items amounting to \$61.79, and the automobile at \$480. With this state of facts before the lower court a peremptory instruction was granted for the defendant. According to this record the error of the circuit judge in granting this peremptory instruction is so obvious that we will not enter into a discussion of it.

Reversed and remanded.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BANK OF HAZLEHURST v. McCARDLE.
(No. 18395.)

(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.

Action between the Bank of Hazlehurst and C. C. McCordle. From the judgment, the bank appeals. Dismissed.

PER CURIAM. Appeal dismissed.

YAZOO & M. V. R. CO. v. DAMPEER.
(No. 17904.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Carrie Dampier. From the judgment, the Railroad Company appeals. Affirmed.

See, also, 67 South. 150.

Mayes, Wells, May & Sanders, of Jackson, for appellant. P. H. Lowrey, of Marks, for appellee.

PER CURIAM. Affirmed.

WESTERN UNION TEL. CO. v. HUMPHREY & CO. (No. 18110.)

(Supreme Court of Mississippi, Division A. June 5, 1916.)

Appeal from Circuit Court, Bolivar County; W. A. Alcorn, Judge.

Action by Humphrey & Co. against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Affirmed, if remittitur is filed; otherwise, reversed as to amount of damages received, and remanded for trial upon that issue only.

Appellees were plaintiffs in the court below, and appellant was defendant. Appellees had submitted to them an offer of a consignment of cotton from a planting company in Arkansas, and, desiring to accept the offer of the cotton at the price quoted before the option expired, sent a telegram to the manager of the planting company accepting the offer. The telegram was delivered to the agent of the appellant and relayed to a point in Arkansas, where the custom of the company was to repeat telegrams over the telephone to the domicile of the planting company; there being no telegraph station at the point where the planting company was domiciled. The telegram was never delivered to the planting company, and the appellees were compelled to buy cotton at an advanced price to fill their orders, and thereby sustained a loss of \$2,200. They brought suit for \$2,999.50 actual and punitive damages. The court gave an instruction to the jury, which permitted them to find punitive as well as actual damages. The jury returned a verdict for \$2,393.63, and from a judgment for that amount the telegraph company appeals.

J. B. Harris, of Jackson, for appellant. Sillers & Sillers, of Rosedale, and Mayes, Wells, May & Sanders, of Jackson, for appellees.

SMITH, C. J. Conceding that the instruction permitting the jury to award punitive damages against appellant should not have been given, it seems clear to us no punitive damages were intended by the jury to be included in this verdict. The amount of actual damages awarded, however, is slightly in excess of that which appellee is definitely proven by the evidence to have sus-

tained; and for that reason the judgment of the court below must be reversed, unless a remittitur shall be entered reducing the amount of the judgment to \$2,200, with interest at 6 per cent. from January 14, 1914, to the date of the trial in the court below. Should this remittitur be entered, the judgment of the court below will be affirmed; otherwise, it will be reversed, in so far as it fixes the amount of damages to be recovered, and remanded for trial upon that issue only, there being no other reversible error in the record.

YAZOO & M. V. R. CO. v. HUBBARD et al.
(No. 18067.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and C. P. Hubbard and others. From the judgment, the Railroad Company appeals. Affirmed.

F. M. West and Mayes, Wells, May & Sanders, all of Jackson, for appellant. Watkins & Watkins, of Jackson, for appellees.

PER CURIAM. Affirmed.

NEW ORLEANS, M. & O. R. CO. v. McCARDLE et al. (No. 18200.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Action between the New Orleans, Mobile & Chicago Railroad Company and J. A. McCordle and others. From the judgment, the Railroad Company appeals. Affirmed.

Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. Stokes V. Robertson, of Jackson, for appellees.

PER CURIAM. Affirmed.

DOTY v. MOREHEAD. (No. 18220.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action between Mrs. M. J. Doty and Miss C. B. Morehead. From the judgment, Mrs. Doty appeals. Affirmed.

J. L. Taylor, of Gulfport, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

FRANKLIN v. FRANKLIN. (No. 18142.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Action between Ed Franklin and Stella Franklin. From the judgment, Ed Franklin appeals. Affirmed.

See, also, 68 South. 74.

Watkins & Watkins, of Jackson, for appellant. Howie & Howie, of Jackson, for appellee.

PER CURIAM. Affirmed.

FRANKLIN v. FRANKLIN et al.
(No. 18419.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Hinds County;
O. B. Taylor, Chancellor.Action between Stella Franklin and Ed
Franklin and others. From the judgment, Stel-
la Franklin appeals. Affirmed.

See, also, 71 South. 880.

Howie & Howie, of Jackson, for appellant.
Watkins & Watkins, of Jackson, for appellees.**PER CURIAM.** Affirmed.**KENNEDY & CO. v. BOND.** (No. 17587.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Harrison Coun-
ty; J. M. Stevens, Chancellor.Action between Kennedy & Company and A.
W. Bond. From the judgment, Kennedy & Com-
pany appeal. Affirmed.Bowers & Griffith, of Gulfport, for appellant.
Gex & Waller, of Bay St. Louis, for appellee.**PER CURIAM.** Affirmed.**J. L. ROSS & CO. v. STEGALL.** (No. 18273.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Rankin County;
J. D. Carr, Judge.Action between J. L. Ross & Co. and J. B.
Stegall. From the judgment, J. L. Ross & Co.
appeal. Affirmed.Mayes, Wells, May & Sanders, of Jackson,
and Stingily & McIntyre, of Brandon, for ap-
pellants. Eugene Palmer, of Jackson, for ap-
pellee.**PER CURIAM.** Affirmed.**J. L. ROSS & CO. v. MOORE.** (No. 18272.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Rankin County;
J. D. Carr, Judge.Action between J. L. Ross & Co. and Charlie
Moore. From the judgment, J. L. Ross & Co.
appeal. Affirmed.Stingily & McIntyre, of Brandon, for appel-
lant. Eugene Palmer, of Jackson, for appellee.**PER CURIAM.** Affirmed.**YAZOO & M. V. R. CO. v. LYNCHARD.**
(No. 18059.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Sunflower Coun-
ty; F. E. Everett, Judge.Action between the Yazoo & Mississippi Valley
Railroad Company and Mrs. Eva Lynchard.
From the judgment, the Railroad Company ap-
peals. Affirmed.Mayes, Wells, May & Sanders, of Jackson,
for appellant. Whitfield & Whitfield, of Jack-
son, and J. L. Williams and W. S. Chapman,
both of Indianola, for appellee.**PER CURIAM.** Affirmed.

71 SO.—56

JONES v. WALLS. (No. 17983.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Chickasaw
County; J. Q. Robbins, Chancellor.Action between S. C. Jones and Taylor Walls.
From the judgment, Jones appeals. Affirmed.Leftwich & Tubbs, of Aberdeen, for appellant.
R. J. West, of Okolona, for appellee.**PER CURIAM.** Affirmed.**ECRU MERCANTILE CO. v. GRAOE.**
(No. 18307.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Union County;
J. L. Bates, Judge.Action between the Ecrú Mercantile Company
and T. L. Grace, claimant. From the judgment,
the Mercantile Company appeals. Affirmed.C. Lee Crum, of New Albany, for appellant.
J. A. Lauderdale, of New Albany, for appellee.**PER CURIAM.** Affirmed.**NEW ORLEANS & N. E. R. CO. v. McNEILL**
et al. (No. 18367.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Lamar County;
A. E. Weathersby, Judge.Action between the New Orleans & North-
eastern Railroad Company and J. M. McNeill
and others. From the judgment, the Railroad
Company appeals. Dismissed.A. S. Bozeman, of Meridian, and R. H. &
J. H. Thompson, of Jackson, for appellant.**PER CURIAM.** Appeal dismissed.**INMAN v. ILLINOIS CENT. R. CO. et al.**
(No. 17599.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Grenada County;
J. A. Teat, Judge.Action between Mrs. A. T. Inman and the
Illinois Central Railroad Company and others.
From the judgment, Mrs. Inman appeals. Af-
firmed.S. A. Morrison, of Grenada, for appellant.
Mayes, Wells, May & Sanders, of Jackson, for
appellees.**PER CURIAM.** Affirmed.**STEWART v. STATE.** (No. 18684.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Sunflower Coun-
ty; F. E. Everett, Judge.John Stewart was convicted of murder, and
sentence of death imposed, and he appeals. Af-
firmed.W. E. Hobbs, of Moorehead, for appellant.
Ross A. Collins, Atty. Gen., for the State.**PER CURIAM.** Affirmed; execution set for
July 21, 1916.

BASS v. VAN HORN. (No. 18399.)
(Supreme Court of Mississippi. June 12, 1916.)
Appeal from Circuit Court, Copiah County;
J. B. Holden, Judge.
Action between John Bass and Oliver H. Van
Horn. From the judgment, John Bass appeals.
Dismissed.

Appeal dismissed.

THREEFOOT BROS. & CO. v. McCORMICK. (No. 18269.)

(Supreme Court of Mississippi. June 5, 1916.)
Appeal from Chancery Court, Scott County;
Sam Whitman, Chancellor.

Action between Threefoot Bros. & Co. and M.
W. McCormick. From the judgment, Threefoot
Bros. & Co. appeal. Affirmed.

R. D. Cooper and W. W. Venable, both of
Meridian, for appellant. Jeff Kent, of Forest,
for appellee.

PER CURIAM. Affirmed.

**BOARD OF MAYOR AND ALDERMEN OF
TOWN OF PORT GIBSON v. ANDERSON.** (No. 18229.)

(Supreme Court of Mississippi. June 5, 1916.)
Appeal from Circuit Court, Claiborne County;
E. L. Brien, Judge.

Action between the Board of Mayor and Aldermen of the Town of Port Gibson and John Anderson. From the judgment, the board appeals. Affirmed.

J. T. Drake, of Port Gibson, for appellant.
C. A. French, of Port Gibson, for appellee.

PER CURIAM. Affirmed.

**SOUTHERN SEATING & CABINET CO. v.
VICTOR HUBER MARBLE &
GRANITE CO.** (No. 18223.)

(Supreme Court of Mississippi. June 5, 1916.)
Appeal from Circuit Court, Harrison County;
J. I. Ballenger, Judge.

Action between the Southern Seating & Cabinet Company and the Victor Huber Marble & Granite Company. From the judgment, the Southern Seating & Cabinet Company appeals. Affirmed.

Ford & White, of Gulfport, for appellant.
Gex & Waller, of Bay St. Louis, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. BROWNE. (No. 18240.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Tallahatchie County;
B. D. Dinkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and J. S. Browne. From the judgment, the Railroad Company appeals. Affirmed.

Jas. Stone & Son, of Oxford, for appellant.
A. H. Stephen, of Sumner, for appellee.

PER CURIAM. Affirmed.

LAKE v. LAKE et al. (No. 18025.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Holmes County;
F. E. Everett, Judge.

Action between Caroline Lake and Elliot Lake and others. From the judgment, Caroline Lake appeals. Affirmed.

Boothe & Pepper of Lexington, for appellant.
Barbour & Henry, of Yazoo City, for appellee.

PER CURIAM. Affirmed.

BLOCKER v. BAKER. (No. 17944.)

(Supreme Court of Mississippi. May 22, 1916.)

Appeal from Circuit Court, De Soto County;
N. A. Taylor, Judge.

Action between Milton Blocker, Jr., and J. D. Baker. From the judgment, Blocker appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant.
Holmes & Logan, of Hernando, for appellee.

PER CURIAM. Affirmed.

NECAISE v. SELLERS. (No. 18238.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Hancock County;
J. M. Stevens, Chancellor.

Action between Zeno Necaise and W. W. Sellers. From the judgment, both parties appeal. Affirmed on both direct appeal and cross-appeal.

O. J. Dedeaux, of Gulfport, for appellant.
Gex & Waller, of Bay St. Louis, and F. C. Hathorn, of Hattiesburg, for appellee.

PER CURIAM. Affirmed on both direct appeal and cross-appeal.

(139 La.)

No. 21857.

CITY OF NEW ORLEANS v. BECK.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)*(Syllabus by the Court.)*HEALTH \Leftrightarrow 32—VALIDITY OF ORDINANCE.

Ordinance No. 2512, Commission Council Series, of the city of New Orleans, providing for the rat-proofing of all buildings and structures, etc., in said city, for the purpose of better preventing the introduction and spread of bubonic plague, *held*, to be a constitutional and valid exercise of the police power of the state in the interest of the health of the people.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 32; Dec. Dig. \Leftrightarrow 32.]

Appeal from Second Recorder's Court of New Orleans; B. T. Tiller, Recorder.

F. G. T. Beck was convicted of violating an ordinance of the City of New Orleans, and appeals. Affirmed.

Dart, Kernan & Dart, of New Orleans, for appellant. W. L. Hughes, of New Orleans, for appellee.

LAND, J. The defendant was prosecuted for failing to have his premises and grocery rat-proofed, as required by City Ordinance No. 2512, C. C. S.

Defendant moved to quash the charge for the reason that there is no second recorder's court in the city of New Orleans, and, if there is, there is no judge therefor. This motion was overruled, and the defendant excepted.

(The motion to quash is not pressed in this court.)

The defendant then entered a demurrer to the affidavit and charge as follows:

"Now comes defendant, through undersigned counsel, and for demurrer to the affidavit and charge herein made against him says:

"(1) That Ordinance 2512, Commission Council Series, of the city of New Orleans, upon which this prosecution is based, is unconstitutional, null, and void, and ultra vires of Act 159 of 1912; divests defendant of vested rights; is harsh, unjust, unreasonable, and oppressive and burdensome to defendant and defendant's property; that it is discriminatory and unreasonable; that defendant's property heretofore lawfully existing has been transferred into a particular class, and has thereby been created an unlawful structure, and there is no power in the city of New Orleans to pass an ordinance requiring the inhabitants of the city of New Orleans to alter, change, or reconstruct the buildings they lived in and owned prior to and up to the adoption of said ordinance, under penalty of being prosecuted every day for failure to comply with the conditions of said ordinance; that such authority has been attempted to be exercised in the present instance, and that defendant is called upon to alter and virtually reconstruct the entire building constructed, used, and occupied by him in the manner pointed out by the laws and ordinances of the state of Louisiana and of the city of New Orleans, and for the further reason that it is violative of article 166 of the Constitution of Louisiana, prohibiting the passage of any law divesting vested rights or of any ex post facto

law, and that it is violative of article 1, § 10, of the Constitution of the United States.

"(2) That said ordinance, and particularly section 1 thereof, is unconstitutional, null, and void because it contravenes article 166 of the Constitution of Louisiana, relative to divesting vested rights and the passage of ex post facto laws, and article 1, § 10, of the Constitution of the United States, relative to the same matter.

"(3) That said ordinance, and particularly section 2 thereof, is unconstitutional, null, and void because it contravenes article 166 of the Constitution of Louisiana, relative to divesting vested rights and the passage of ex post facto laws, and article 1, § 10, of the Constitution of the United States, relative to the same matter.

"(4) That said ordinance, and particularly section 3 thereof, is unconstitutional, null, and void because the city of New Orleans has no power, right, or authority to indiscriminately place defendant's building and premises in either one of the classes designated in said section, and particularly class A and class B thereof.

"That said section is unconstitutional for the further reason that defendant's premises and dwelling heretofore erected under the direction and supervision of the officers of the city of New Orleans is a lawful structure, and cannot lawfully by said section be converted into an unlawful structure. That said section is further unconstitutional because it recognizes but one mode of complying with its terms, and virtually declares any other mode of complying with the purpose for which this ordinance is claimed to have been enacted punishable in the manner provided therein. That said section is further unconstitutional for the reason that defendant is required to destroy and do away with all wooden floors, joists, and sills covering the entire ground area of his building, and to substitute in the place thereof a composition of concrete as described in said section, or to separate that side of the building which your defendant uses for dwelling purposes from the store by erecting a solid wall so as to form a complete barrier between the living rooms and the room or rooms used for the business purposes.

"That a compliance with the above provisions will result in a virtual reconstruction of defendant's building, and will prove burdensome to defendant and defendant's property. That your defendant's property is neither a menace to the community nor a nuisance, and cannot, in this indirect manner, be suppressed. That said section is discriminatory and unconstitutional for the further reason that it recognizes and permits in section 4 thereof the reconstruction of a class A building as a class B building under the circumstances named.

"That said section, and particularly class B thereof, is unconstitutional, null, and void for the reason that defendant's premises and dwelling heretofore erected under the direction and supervision of the officers of the city of New Orleans is a lawful structure, and cannot lawfully by said section be converted into an unlawful structure. That said section is further unconstitutional because it recognizes but one mode of complying with its terms, and virtually declares any other mode of complying with the purpose for which the ordinance is claimed to have been enacted punishable in the manner provided therein. That class B of said section 3 of said ordinance is harsh, oppressive, and unreasonable, and divests defendant of vested rights acquired under the laws and ordinances of the state of Louisiana and city of New Orleans and of the United States.

"(5) That section 4, and particularly the last clause thereof, is unconstitutional, null, and

void, there being no power or authority in the city of New Orleans to order the closing of one or more communicating doors or openings which happen to exist between the rooms of the defendant's building; that such action is in violation of article 166 of the Constitution of Louisiana, and article 1, § 10, of the Constitution of the United States; nor to declare it unlawful for your defendant to maintain such openings between said rooms; nor is there any power in the city of New Orleans to declare that two rooms under the same roof of your defendant's building shall be considered a separate house when segregated from the remaining rooms of said building.

"(6) That section 6 of said ordinance is unconstitutional, null, and void. That the city of New Orleans has no right, power, or authority to divest vested rights, to pass ex post facto laws, to order the destruction of the interior walls and ceilings existing in your defendant's premises, nor the manner and materials to be used in the closing of any unnecessary spaces, holes, ventilators, and other openings which might exist in your defendant's property.

"(7) That sections 10 and 11 thereof are unconstitutional, null, and void, there being no power in the city of New Orleans to declare and provide that the building erected in accordance with the rules and regulations and city ordinances heretofore existing shall now be an unlawful structure, and shall subject every owner, agent, and occupant to prosecution and fine for each and every day's failure to alter, reconstruct, or rebuild or otherwise bring the dwelling or property within the strict compliance thereof. That said section is an ex post facto provision, and is a provision divesting vested rights of the defendant, and acts retroactively on defendant and defendant's rights and property. That it is in violation of the articles of the Constitution of the United States and of the state of Louisiana.

"(8) That said ordinance, and particularly section 12 thereof, is unconstitutional, null, and void, there being no power or authority in the city of New Orleans to declare and provide that the building erected in accordance with the rules and regulations and city ordinances heretofore existing shall now be an unlawful structure, and shall subject every owner, agent, and occupant to prosecution and fine for each and every day's failure to alter, reconstruct or rebuild or otherwise bring the dwelling or property within the strict compliance thereof. That said section is an ex post facto provision, and is a provision divesting the vested rights of defendant, and acts retroactively on defendant and defendant's property rights and property. That it is in violation of the articles of the Constitution of the United States and of the state of Louisiana."

The demurrer was overruled, and defendant excepted.

The defendant then entered a plea of not guilty, and the case was tried on the merits.

Defendant was found guilty, and was sentenced to pay a fine of \$10 or to suffer 11 days imprisonment in the parish prison. Defendant has appealed.

The defendant is prosecuted under a new ordinance adopted after the decision of this court in Sanford's Case, 137 La. 628, 69 South. 35, L. R. A. 1916A, 1228, and intended to conform to the views expressed in the opinion in that case. An analysis of said opinion discloses that this court found the health ordinance of 1914 unreasonable in not providing for notice to property owners, and

in delegating certain powers to the health officer of such a nature as to enable him to discriminate between individuals, as to work to be done and materials to be used.

The opinion concludes as follows:

"Other grounds of nullity are argued by the accused, which we deem it unnecessary to notice, further than to say that we have found them to be without merit."

The city ordinance of 1915 provides for special previous notice of 30 days to property owners, and confers on health officers no authority whatever to except or exempt persons or property from the equal operation of the regulations provided by the ordinance.

The trials of the first rat-proofing cases disclosed that there were many houses in this city that were used as grocery and feed shops, and also as residences.

To meet this condition, the new city ordinance provided that a building so used might, for the purpose of rat-proofing, be treated as two structures, the part used as a grocery falling in class A, and the part used as a residence falling in class B, the two parts to be separated by the closing of all openings between them above or below the ground, or by constructing a new wall.

The ordinance might have required the rat-proofing of the premises as a whole, but the commission council, in the interest of economy, provided for the separation of the premises as above stated.

Defendant's building elevated above the ground, is used both as a grocery and as a residence. Groceries furnish free board and lodging to rats, and a nidus for their propagation. That defendant's premises are not now infested with the vermin is no excuse for his noncompliance with the provisions of the ordinance, which must be enforced against all groceries or none of them.

Some of the objections urged by the defendant to the city ordinance in question challenge the power of the commission council to enact and enforce the rat-proofing ordinance.

The Constitution provides that the General Assembly shall create state, parish, and municipal boards of health, and shall define the duties and prescribe the powers thereof. Article 296, § 2, of Act No. 173 of 1912, amending section 7 of Act 192 of 1898, empowers parish and municipal boards of health to pass health and sanitary ordinances for defining and abating nuisances dangerous to the public health—

"to regulate the carrying on of trade and business injurious to public health; * * * to regulate the erection of buildings with due regard to the filling of lots and the grading thereof, and the arrangements of said buildings; for the vacation or demolishing of buildings when necessary for the protection of public health," etc.

The same section provides that any person violating any provision of any ordinance of said parish and municipal board of health

shall, on conviction, be fined not less than \$10 nor more than \$25, or suffer imprisonment in the parish prison for not more than 30 days or both. Section 7 of Act 192 of 1898, conferred the same powers on parish and municipal boards of health.

If a board of health has the power to order the vacation or demolition of any building, when necessary for the protection of the public health, it surely possesses the lesser power to order any building to be put in such a condition as to prevent its becoming a focus of plague infection.

The law makes the board of health the judge of the necessity for the protection of the public health, and of the means to be adopted for that purpose. That the bubonic plague prevailed in this city during the summer and fall of the year 1914 cannot be disputed. The best medical experts of the nation were called in to advise and assist our state and local boards in their fight against the pestilence, which was stalking in our midst. These experts advised the boards and the public that the rat-proofing of all buildings and structures, in which rats might find food or shelter, or both, was absolutely necessary to check the spread of the bubonic plague and to finally eradicate the dread disease by the extirpation of rats within the limits of the city of New Orleans.

Pursuant to this advice, the board of health of the city of New Orleans, on July 25, 1914, passed an ordinance to better protect the public health, and particularly to prevent the introduction and spread of bubonic plague, by providing for the rat-proofing of all premises and buildings in the city of New Orleans. The validity of this ordinance, as amended by ordinance adopted September 8, 1914, was passed upon by this court in the consolidated cases of the city of New Orleans v. Ricker and Beck, reported in 137 La. 843, 69 South. 273. In those cases this court held that the health ordinance was a valid and constitutional exercise of the police power of the state, in the interest of the safety of the people; that every possible presumption is in favor of the validity of such an ordinance, until the contrary be shown beyond a reasonable doubt; and that whether the existence of bubonic plague in the city of New Orleans involved such a danger to the public health as to require the rat-proofing of all the buildings and structures in said city was one of fact and of public policy which belongs to the legislative department of the government.

In the Sanford Case, reported in 137 La. 628, 69 South. 35, L. R. A. 1916A, 1228, but decided several months after the cases of Ricker and Beck, no reference is made to those cases, but the decision was based on the invalidity of certain provisions of the health ordinance. This court did not hold, and would not have held, that the board of

health of the city of New Orleans was without power to pass a rat-proofing ordinance, free of the special defects pointed out in the opinion in the Sanford Case. The decision in the Sanford Case was construed by the profession, the boards of health, and the public as holding that the city board of health had the power to pass a rat-proofing ordinance, uniform in its provisions and not discriminating in favor of or against any class of property owners. The city ordinance, now in question, was most carefully drafted by the able attorney for the board of health of the city of New Orleans, to meet not only the ruling of this court in the Sanford Case, but other objections to the ordinance urged by counsel for the defendant.

The very able and ingenious counsel for the defendant in the present case has been driven to the necessity of assailing the ordinance as invalid, because it interferes with his client's property rights, in that it forces him to reconstruct his building, erected about 12 years ago, in accordance with the building ordinances of the city of New Orleans.

As the city board of health since 1898 has had the power to pass health and sanitary ordinances to regulate the erection and arrangement of buildings, and for their vacation or demolition when necessary for the protection of the public health, it follows that defendant constructed his building subject to the right of the board of health to exercise its powers over the structure to the point of demolition.

The necessity for and the extent of the rat-proofing required by the ordinance was one of fact and of public policy which belongs to the legislative department of the government. *City of New Orleans v. Ricker*, 137 La. 843, 69 South. 273; *Health Department of the City of New York v. Rector of Trinity Church*, 145 N. Y. 32, 39 N. E. 883, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

The parish of Orleans and the city of New Orleans embrace the same territory, and the commission council of the city is both a state and municipal agency for all purposes of local government.

In the Sanford Case, 137 La. 641-642, 69 South. 35, L. R. A. 1916A, 1228, the power of the commission council to enact health ordinances and to enforce the same in the municipal courts having jurisdiction was affirmed. Counsel for defendants in those cases contended that:

"The proper authority to have legislated upon the subject-matter of this ordinance was the commission council of the city of New Orleans; that the board of health was without authority to do so." 137 La. 639, 69 South. 39, L. R. A. 1916A, 1228.

Act No. 159 of 1912, p. 264, § 6, empowered the commission council—
"to adopt such ordinances and regulations as shall be necessary or expedient for the protec-

tion of health and to prevent the spread of disease, and to maintain a good sanitary condition in the streets, public places and buildings, and on all private premises."

The same act (page 271, § 25) provides that:

"Recorders shall have the power to enforce all valid city ordinances, and to try, sentence and punish all persons who violate same."

Article 141 of the Constitution provides that recorder's courts in the city of New Orleans—

"shall have no jurisdiction except for the trial of offenses against city ordinances."

The state law provides that any person violating any provision of any ordinance of a parish or municipal board of health shall, on conviction, suffer fine or imprisonment, or both. Act 173 of 1912, p. 315, § 2.

Hence the contention of the defendant that he cannot be prosecuted criminally for refusing to rat-proof his premises is without merit.

The complaints that the ordinance divests the vested rights of the defendant, and deprives of his property without due process of law are wholly unfounded.

"Salus populi est suprema lex." A maxim meaning: "The health of the people is the first law." 35 Cyc. 714.

The objection to the ordinance on the ground of the expense of rat-proofing, not manifestly excessive, is without merit.

Judgment affirmed.

SOMMERVILLE, J., takes no part.

O'NIELL, J., concurs in the decree.

(139 La.)

No. 21879.

CITY OF NEW ORLEANS v. MANGIARISINA.

(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)

(Syllabus by Editorial Staff.)

1. EVIDENCE — 32 — JUDICIAL NOTICE — CITY ORDINANCES.

In the absence of proof, the Supreme Court has no knowledge that a recorder's court of the city of New Orleans was created by the commission council, and not by the Legislature, since it cannot take judicial notice of ordinances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. — 32.]

2. EVIDENCE — 83(1) — PRESUMPTIONS — ORGANIZATION OF COURT.

Under Const. art. 141, requiring the Legislature to provide for recorder's court in the city of New Orleans, and New Orleans City Charter (Act No. 159 of 1912), § 21, providing for three recorder's courts, the judges of which shall be chosen by the commission council, it is presumed in the absence of proof, that the recorder's court was created by section 21, not by the commission council.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. — 83(1).]

3. JUDGES — 6 — VALIDITY OF APPOINTMENT — RIGHT TO OBJECT.

One accused of violating a city ordinance cannot contest the legality of an appointment of

the judge of the recorder's court, before which he is tried, on the ground that it violates Const. art. 319, requiring all officers charged with the exercise of the police power of the city of New Orleans to be elected by the electors of the city, since the judge of a court having legal existence is such de facto, if not de jure.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. — 6.]

4. HEALTH — 32 — ORDINANCES — RIGHT TO CONTEST VALIDITY.

The validity of an ordinance, requiring the rat-proofing of all buildings, and requiring the foundations to be of brick or stone laid in cement or concrete, cannot be challenged on the ground that it forbids the use of other materials equally impenetrable to rats, by one who has not attempted to use such material.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 32; Dec. Dig. — 32.]

5. HEALTH — 32 — VALIDITY OF ORDINANCE.

That an ordinance requires all premises to be rat-proofed, whether they are or are not in a sanitary condition, does not render it invalid as showing that it is not based on health considerations.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 32; Dec. Dig. — 32.]

6. MUNICIPAL CORPORATIONS — 121 — ORDINANCES — RIGHT TO QUESTION VALIDITY.

The validity of an ordinance for rat-proofing buildings cannot be questioned on the ground that a requirement that the space between the bottom of the sills of a building and the ground must be not less than 18 inches is arbitrary and unreasonable by one who is not charged with having violated the ordinance in that respect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. — 121.]

7. HEALTH — 32 — VALIDITY OF ORDINANCE.

An ordinance, requiring all buildings to be rat-proofed, is not rendered invalid by failure to name the city itself among the property holders required to rat-proof their premises.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 32; Dec. Dig. — 32.]

8. MUNICIPAL CORPORATIONS — 594(3) — POLICE POWERS — VALIDITY OF ORDINANCE — CERTAINTY OF PENALTY.

An ordinance, requiring all buildings to be rat-proofed, fixing the penalty at a certain amount for each day, is sufficiently definite and certain.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1318; Dec. Dig. — 594(3).]

9. MUNICIPAL CORPORATIONS — 594(1) — POLICE REGULATIONS — VALIDITY — NOTICE.

An ordinance, requiring all buildings to be rat-proofed upon 30 days' notice, is not invalid for failure to designate the particular officer by whom notice shall be given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1316; Dec. Dig. — 594(1).]

10. MUNICIPAL CORPORATIONS — 592(2) — VALIDITY OF ORDINANCE — CONFLICTING JURISDICTION.

An ordinance, requiring rat-proofing to check the bubonic plague, is not invalid on the ground that the bubonic plague is a contagious disease, which might spread beyond the limits of the city, and is therefore cognizable only by the state board of health.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1312; Dec. Dig. — 592(2).]

Appeal from Second Recorder's Court of New Orleans; Ben P. Tiller, Recorder.

Salvador Mangiarisina was convicted of violating an ordinance of the city of New Orleans, and appeals. Affirmed.

Hiddleston Kenner, of New Orleans, for appellant. W. L. Hughes, of New Orleans, for appellee.

PROVOSTY, J. The accused was prosecuted before the Second recorder's court for violation of the following ordinance:

An Ordinance Defining Rat-Proofing of All Buildings.

An ordinance to better protect the public health, and particularly to prevent the introduction and spread of bubonic plague, by providing for the rat-proofing of all buildings, outhouses and other superstructures, stables, lots, open areas and other premises, sidewalks, streets and alleys in the city of New Orleans.

Whereas, during the month of June, 1914, the bubonic plague made its appearance in the city of New Orleans, and thereby threatened the health and lives of the people through the ravages of the dread disease, and menaced the prosperity of the entire community through the imminence of destructive quarantines; and,

Whereas, the city government and the state and city health authorities, in earnest effort to avert the calamities aforesaid, solicited and secured the co-operation and active assistance of the United States Public Health Service in dealing with the crisis impending; and,

Whereas, the board of health of the parish of Orleans and the city of New Orleans, with the concurrence and advice of the United States Health authorities, enacted certain ordinances designated to eradicate and prevent both rodent and human infection from the said bubonic plague, among which said ordinances were Ordinances Nos. 17 and 21 of the board of health series; and,

Whereas, the honorable Supreme Court of the state of Louisiana has, in the case of the city of New Orleans versus Miss M. Sanford et al., held that the said ordinances, although under the stringent circumstances of the case justified and necessary, yet solely because of a certain detail of discretionary executive authority vested thereby in the city health officer, and which authority it is admitted in the opinion of said court has not been by said officer improperly or oppressively exercised, they held, the said ordinances were unconstitutional, and hence null and void; and,

Whereas, the work of the authorities under the health ordinances aforesaid has, up to the present time, entirely averted the disastrous menace of the plague, still the said work is by no means finished, nor is the menace of infection and the spread of the disease finally eliminated; and,

Whereas, abandonment of the work under said ordinances or delay in the prosecution thereof is fraught with grave danger to the health of the people and the commercial prosperity of the community, the commission council of the city of New Orleans is not only constrained by the dictates of prudence, but feels in solemn duty bound to re-enact in the legal form prescribed by the honorable Supreme Court the said health ordinances which the said court has held are, in purpose, both justifiable and necessary. Now therefore:

Section 1. Be it ordained by the commission council of the city of New Orleans, that from and after the promulgation of this ordinance that every building, outhouse and other superstructure, stable, lot, open area and other premises, sidewalk, street and alley, now constructed,

or hereafter to be constructed in the city of New Orleans, shall be rat-proofed in the manner hereinafter provided for.

Sec. 2. Be it further ordained, etc., that it shall be unlawful for any person, firm or corporation to have or maintain, or hereafter to construct any building, outhouse or other superstructure, stable, lot, open area or other premise, sidewalk, street or alley within the city of New Orleans, unless the same shall be rat-proofed in the manner hereinafter provided for.

Sec. 3. Be it further ordained, etc., that for the purpose of rat-proofing, all buildings, outhouses and other superstructures in the city of New Orleans, except stables, shall be divided into three classes, to wit: Class A, Class B and Class C; and the same shall be rat-proofed in the manner following, to wit:

Class A—All buildings, outhouses and other superstructures of class A shall have floors made of concrete, which concrete shall be not less than three (3) inches thick, and overlaid with a top dressing of cement, mosaic tiling, or other impermeable material, laid in cement mortar, and such floor shall rest without any intervening space between, upon the ground, or upon filling of clean earth, sand, cinders, broken stone or brick, gravel or similar material, which filling shall be free from animal or vegetable substances; said floor shall extend, and be hermetically sealed, to walls surrounding said floor, which walls shall be made of concrete, stone or brick, laid in cement mortar, and each wall to be not less than six (6) inches thick, and shall extend into and below the surface of the surrounding ground at least two (2) feet, and shall extend not less than one (1) foot above the surface of said floor; provided that wooden removable gratings may be laid on such concrete floors in such parts of such buildings, superstructures and outhouses as are used exclusively as sales departments.

Class B—All buildings, outhouses and other superstructures of class B shall be set upon pillars or underpinning of concrete, stone or brick, laid in cement mortar, such pillars or underpinning to be not less than eighteen (18) inches high, the height to be measured from the ground level to the top of said pillars or underpinning; and the intervening space between said building and the ground level to be open on three (3) sides, and to be free from all rubbish and other rat-harboring material, or may be made rat-proof by constructing at the margin of the ground area of said building a wall of concrete or brick or stone laid in cement; such wall to extend into and below the surface of the ground at least two (2) feet and to meet the floor of the building above closely and without any intervening space, such walls shall be at least six (6) inches thick and extend entirely around said building; provided that said walls may be built with openings therein for ventilation only, and provided further, that such openings for ventilation may be of such size as the owner may elect and shall be securely screened with metallic gratings having openings between the bars of said gratings of not more than one-half inch, or with wire mesh of not less than twelve gauge, having openings between the wires of said mesh of not more than one-half inch, and the whole so constructed and closed as to prevent the entrance of rats beneath such building.

Class C—All buildings, outhouses and other superstructures of class C shall be rat-proofed as provided in class A except that tar-cinder composition flooring, as hereinafter defined and provided for, may be substituted for the concrete floors provided for in class A. That tar-cinder flooring hereinabove provided for, is hereby defined to be a composition of cinders and coal tar only, and, when laid, to be covered by a wooden floor.

The cinders used in the composition shall be

free of soft ash and clinkers and shall be brought to the work dry.

The coal tar used in the composition shall be the product of the dry distillation of coal, and shall contain not more than two (2) per cent of water, and shall be free from any mixture with other substance or thing.

The composition of, and manner of laying, tar-cinder composition flooring shall be as follows:

To each cubic yard of such cinders shall be added twenty gallons of such coal tar, the whole to be thoroughly mixed on the work where the same is to be laid, and no other substance or thing to be added thereto. This composition shall be laid between the walls hereinabove provided for in rat-proofing buildings of class A, and cover the whole space to be floored, and the whole to be thoroughly tamped or rolled, as provided for hereinafter. The sleepers to be used in the laying of such flooring shall be creosoted by having the creosote pressed into each sleeper, under a pressure of not less than fifteen pounds to the square foot, and such sleepers shall be laid in such composition before the whole of said composition is rolled or tamped, and provided further, that after such sleepers are laid in such composition, and after the whole shall be so rolled and tamped, the whole shall be not less than four (4) inches thick in its thinnest part. Upon this composition and sleepers, shall be laid a wooden flooring of the quality now provided or hereafter to be provided for in the building laws of the city of New Orleans, provided, however, that for the purpose of laying a tar-cinder composition floor, said wooden flooring shall be tongue and groove, well fitted, and the planks firmly set into each other, and the whole, in such manner as to prevent the ingress or egress of rats.

Sec. 4. Be it further ordained, etc., that every restaurant kitchen, hotel kitchen, cabaret kitchen, dairy, dairy depot, dock, wharf, pier, elevator, store, manufactory and every other building, outhouse or superstructure, wherein or whereon foodstuffs are stored, kept, handled, sold, held or offered for sale, manufactured, prepared for market or for sale, except stables, shall be rat-proofed in the manner provided for hereinabove as class A; provided that such part of any structure hereinabove defined as of class A, that shall be entirely over a body of water, may be rat-proofed as of class B, as hereinafter provided for.

"Foodstuffs," as used in this ordinance, is hereby defined to be flour and flour products, animals and animal products, produce, groceries, cereals, grain and the products of cereals and grain, poultry and its products, game, birds, fish, vegetables, fruit, milk, cream and the products from milk or cream, ice cream, hides and tallow, or any combination of any one or more of the foregoing.

That every warehouse and wholesale store wherein dry goods, shoes or other goods, wares or merchandise other than "foodstuffs," are stored, kept, handled, sold, held or offered for sale, manufactured or prepared for sale, except stables, shall be rat-proofed in the manner provided for hereinabove as class C; provided that "foodstuffs," when contained in hermetically sealed containers, impervious to rats, may be stored, kept or offered for sale in class C structures.

All other buildings, outhouses and superstructures, except stables, not hereinbefore specified as class A or class C, and all buildings used exclusively for residential purposes, shall be rat-proofed in the manner provided for hereinabove as class B; provided that the owner of any building, residence, outhouse or other superstructure in class B may, if he so elects, rat-proof same in the manner provided for in class A or in class C, and the owner of a class C structure may, if he so elects, rat-proof same as provided for in class A.

Provided, that in any case where, under the foregoing provisions, any building, outhouse or superstructure, is required to be rat-proofed as of class A and the said building or outhouse or superstructure is used, in part, for residential purposes, and the part used as a residence is effectively separated from the part falling within class A, by permanently and effectively closing all openings above and below the ground floor, or by constructing a new wall, and in either case the whole, in such manner as to make such wall whole and continuous in its entirety, without doorways, windows or other openings, between the part used as a residence and that used for such purpose as makes it fall within class A, then, in such case, and for rat-proofing purposes only, the said building will after such separation, and closure of the openings, or by the construction of such new wall, be deemed to be two buildings, and that part used exclusively for residential purposes may be rat-proofed in the manner provided for as a class B building, and the remaining part of said building shall be rat-proofed in the manner provided for a class A building.

Stables—All buildings now, or hereafter, to be constructed and used for stabling horses, mules, cows and other animals, shall be constructed as follows:

Walls—The walls of such building shall be constructed of concrete, brick or stone, laid in cement mortar, and shall be not less than six (6) inches thick, and shall extend into and below the surface of the surrounding ground not less than two (2) feet and shall extend above the ground a sufficient height to be not less than one (1) foot above the floor level. All openings in such foundation walls shall be covered with metal grating having openings not greater than one-half ($\frac{1}{2}$) inch between the gratings.

Floors—The floors of stables and stalls shall be of concrete not less than three (3) inches thick, upon which shall be laid a dressing not less than one-half ($\frac{1}{2}$) inch thick of cement or stone, laid in cement mortar, in such way as to prevent ingress or egress of rats, and such floors to have a slope of one-eighth ($\frac{1}{8}$) inch per foot to the gutter drains hereinafter provided for.

Stalls—The floors of stalls may be of planking, fitting either tightly to the concrete floor or elevated not more than one-half ($\frac{1}{2}$) inch from the stall floor, and so constructed as to be easily removable. Such removable planking shall be raised at least once a week, and the said planking and the concrete floor beneath thoroughly cleansed.

Gutters—Semicircular or V-shaped gutter drains shall be constructed in such stables in such manner that a gutter shall be placed so as to receive all liquid matter from each stall, and each of these gutters to connect with the public sewer or with a main gutter of the same construction, which, in turn, shall be connected with the public sewer. All openings from drains into sewers shall be protected by a metal grating having openings not more than one-half ($\frac{1}{2}$) inch between the gratings.

Manure Pit—Each stable shall be provided with a manure pit to be sunk into the ground within or near to said stable, which pit shall be lined with cement so as to make same liquid tight, and to have a capacity of at least two and one-half cubic feet for each stall in said stable. Said manure pit shall be provided with a tight-fitted cover, divided into two parts, and so constructed as to render the contents of said pit inaccessible to flies.

Manure—Any manure in and about all stables shall be placed in said manure pit at least once a day. Manure shall be removed from said pit at least twice a week between March 15th and December 1st, and at least once a week between December 1st and March 15th. All manure so removed shall be placed in wagons so pre-

tected as to render said manure inaccessible to flies.

Mangers—Each manger shall be constructed so as to have a slope of two (2) inches towards the bottom, shall be covered with tin or zinc and shall be at least eighteen (18) inches deep to avoid spilling of food.

Feed Bins—All feed bins shall be constructed of cement, stone, metal or wood, and with close-fitting doors. If constructed of wood the bins shall be lined or covered with metal, and the whole so constructed as to prevent the ingress or egress of rats. All grain, malt and other animal food, except hay, stored or kept in any stable, must be kept in such feed bins. Said feed bins must be kept closed at all times except when momentarily opened to take food therefrom, or when same are being filled. No feed shall be scattered about such bin or stable, and all such feed found on the floor or in the stalls of said stables shall be removed daily and placed in the manure pits. No foodstuffs intended for or susceptible of human consumption shall be kept or stored in any stable or any other place where animals are kept.

Sec. 5. Be it further ordained, etc., that the construction and materials used in rat-proofing shall conform to the building ordinances of the city of New Orleans, except and only in so far as the same may be modified herein.

Sec. 6. Be it further ordained, etc., that all accidental and unnecessary spaces and holes, ventilators and other openings other than doors and windows in every building, outhouse and other superstructure in the city of New Orleans shall be closed with cement, mortar or other material impervious to rats or screened with wire having not more than one-half ($\frac{1}{2}$) inch mesh, as the case may require, and all wall spaces shall be closed with cement, mortar or other material impervious to rats, which closure shall extend the full thickness of the wall and shall extend upward at least twelve inches above the floor level, and the whole in such manner as to prevent the ingress or egress of rats. Provided that, in all buildings, outhouses and other superstructures of class A, class C, and in all stables, where there are any spaces in walls between the wall proper and the covering on same, or in ceilings between the ceiling and floor, or other ceiling covering above, said spaces shall be eliminated by the removal of said covering, or so closed with cement, mortar or other material impervious to rats as to prevent the ingress or egress of rats, provided that all such wall spaces shall be closed with cement, mortar or other material impervious to rats, which closure shall extend the full thickness of the wall and shall extend upward at least twelve (12) inches above the floor level.

Sec. 7. Be it further ordained, etc., that all premises, improved and unimproved, and all open lots, areas, streets, sidewalks and alleys, in the city of New Orleans shall be kept clean and free from all rubbish and similar loose material that might serve as a harborage for rats and all lumber, boxes, barrels, loose iron and similar material that may be permitted to remain thereon, and that may be used as a harborage by rats, shall be placed on supports and elevated not less than two (2) feet from the ground, with a clear intervening space beneath to prevent the harboring of rats.

Sec. 8. Be it further ordained, etc., that all planking and plank walks on and in yards, alleys, alleyways, streets, sidewalks or other open areas, shall be removed and replaced with concrete, brick or stone, laid in cement, gravel or cinders, or the ground left bare.

Sec. 9. Be it further ordained, etc., that it shall be the duty of every owner, agent and occupant of each building, outhouse and other superstructure, stable, lot, open area and other premise, sidewalk, street and alley, in the city of New Orleans, to comply with all the provisions of this ordinance.

Sec. 10. Be it further ordained, etc., that it is hereby made the duty of the department of public safety, and particularly through its health department (the city board of health), to enforce the provisions of this ordinance, provided that no affidavit shall be filed against any owner, agent, occupant or other person, charged with the duty of complying with the provisions of this ordinance, until thirty (30) days shall have elapsed after a communication shall have been deposited in the United States mail, addressed by said health department to such owner, agent, occupant or person, to his residence or to the premises upon which said violation shall be alleged to lie, which communication shall designate the character of violation with which such person shall be charged and the location of the premises upon which the offense is alleged to lie.

Sec. 11. Be it further ordained, etc., that each day's violation of any provision of this ordinance shall constitute a separate and distinct offense.

Sec. 12. Be it further ordained, etc., that any person violating any provision of this ordinance shall on conviction be punished by a fine of not less than ten (\$10.00) dollars, nor more than twenty-five (\$25.00) dollars, or in default of the payment of such fine by imprisonment in the parish jail for not less than ten (10) days nor more than thirty (30) days, or both, at the discretion of the recorder having jurisdiction of the same.

Article 319 of the Constitution requires all officers charged with the exercise of the police power of the city of New Orleans to be elected by the electors of the city, and article 141 says that the Legislature shall provide for recorders' courts in said city. Section 21 of the city charter, which is Act 159, p. 253, of 1912, provides that:

"There shall be not less than three recorders' courts in the city of New Orleans, and the judges of these courts shall be chosen by the commission council."

[1, 2] The accused made the objection in the lower court that the recorder's court, before which he was brought for trial, had been created by the commission council, and not by the Legislature, and that it had, therefore, no legal existence. But he offered no evidence in support of this allegation of the said court having been created by the commission council, and we have no knowledge of that fact, if it be a fact. We cannot take judicial notice of city ordinances. *Burke v. Tricall*, 124 La. 774, 50 South. 710. In the absence of such proof, the presumption is that said court was created by said section 21 of the city charter. Not that we wish to intimate that said court would have no legal existence even though created as alleged.

[3] Accused made the point also that the election of the recorders by the commission council, instead of by the electors of the city, is in violation of said article 319 of the Constitution, and that therefore the recorder before whom he was brought to trial was without authority to try him. But nothing is better settled than that an accused has no standing for contesting the legality of the appointment of the judge before whose court he is brought for trial. Where the court itself has a legal existence the judge is such de facto, if not de jure.

[4] It will be noted that said ordinance requires the foundations of buildings to be of brick or stone laid in cement or of concrete. The accused says that a property holder has the right to use for the foundation of his buildings any material equally impenetrable to rats as those here named, and that to restrict him of that right is unconstitutional. Perhaps so; but, until some one has desired to use such other equally impenetrable material, and has been prevented from doing so, we do not see that there is any occasion for considering that question.

[5] Accused says, also, that said ordinance is not based upon any health considerations, since it requires all premises to be rat-proofed, irrespective of whether same are or are not in a sanitary condition.

The answer is that modern science has ascertained that, in a plague-stricken city, premises which may afford a harbor for rats are a menace to the public health, and in that sense are highly unsanitary, no matter how sanitary they might be in the ordinary sense.

[6] The ordinance requires that when there is space between the bottom of the sills of a building and the ground this space must be of not less than 18 inches. Accused says that this is arbitrary and unreasonable, forgetting that since 1879 (Ord. 6022, A. S., § 12; Ord. 7208, A. S., of July 12, 1881; Ord. 6712, N. C. S.; section 3, Ord. 6533, C. S., 1892; section 23, Ord. 6533, C. S.) buildings have been required to have a greater elevation than this. These ordinances were offered in evidence in the Beck Case, 71 South. 883, this day decided. Moreover, accused is not concerned with that feature of the ordinance,

since it is not in that respect that he is charged with having violated the ordinance.

[7] The next ground of complaint is that the city itself is not named among the property holders who are required to rat-proof their premises.

The complaint here is not that the city does not rat-proof her premises in the manner required by this ordinance, but that she has not specifically named herself in the ordinance, and has not denounced a penalty against herself for failure to rat-proof her premises. This point is so evidently without merit that we do not think it needs any discussion.

[8] It is next said that the penalty is not certain or fixed because it is so much for each day. What more certainty and fixation is needed than this we cannot imagine.

[9] Next, it is said that the ordinance does not provide by what particular officer the 30 days' notice to rat-proof shall be given or served.

The city of New Orleans is provided with officers for giving official notice; we do not see what more by way of notice a property holder could need than a notice emanating from, and served upon him by, them.

[10] Next, it is said that bubonic plague is a contagious disease which might spread beyond the limits of the city, and which is therefore a state-wide affair, and as such is cognizable only by the state board of health.

Here again is a point which we do not think needs discussion.

Judgment affirmed.

SOMMERVILLE and O'NIELL, JJ., take no part.

(189 La.)

No. 20518.

COMMERCIAL NAT. BANK v. SANDERS
et al.(Supreme Court of Louisiana. April 24, 1916.
Rehearing Denied May 22, 1916.)*(Syllabus by Editorial Staff.)***1. ABATEMENT AND REVIVAL —EXCEPTION OF LIS PENDENS.**

Where, by inadvertence or otherwise, a citation of appeal was issued to one against whom no appeal had been asked, which appeal as to him was dismissed, and where, before dismissal and while the appeal against him was pending, a suit was filed against such party as defendant, an exception of lis pendens was without merit, as the appeal was never a real appeal sought to be maintained as against him.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 73-85; Dec. Dig. §9.]

2. COURTS —99(2)—FORMER DECISION—LAW OF THE CASE.

In an action for the balance due on a note, the adverse holding in a suit on the same note against other defendants as to the claim that there was no cause of action because the petition did not allege that notice of dishonor was served on defendants as indorsers, was the law of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 840; Dec. Dig. §99(2).]

3. NOVATION —5—NOTE—ACCESSORY OBLIGATION.

Where a firm made a note to its own order and indorsed it as collateral for a loan obtained from the plaintiff, and defendants indorsed such note for accommodation, and the payee accepted in part payment the note of one who sought to buy up all the outstanding obligations of the firms after their failure and merely received such party as an additional debtor and continued to hold the other claims as still existing, there was no novation extinguishing the principal debt and the accessory obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. §5.]

4. BILLS AND NOTES —301—EXTENSION OF TIME FOR PAYMENT—RIGHT OF ACCOMMODATION INDORSER.

The payee's extension of time on a note did not release the accommodation indorsers on a collateral note, as what was done or not done in connection with the principal note did not concern them.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 706-721; Dec. Dig. §301.]

5. EVIDENCE —80(2)—PRESUMPTION—LAW OF ANOTHER STATE.

Where the laws of the state of Texas as to whether the running of limitations against some of the indorsers living in that state where the limitation is two years, were not proved, the presumption was that they were the same as the law of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. §80(2).]

Appeal from Fifteenth Judicial District Court, Parish of Beauregard; Alfred M. Barbe, Judge.

Action by the Commercial National Bank against W. J. Sanders and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 132 La. 174, 61 South. 155; 136 La. 226, 66 South. 854.

Monk & O'Neal, of Leesville, for appellants. S. I. Foster, of Shreveport (Alexander & Wilkinson, of Shreveport, of counsel), for appellee.

PROVOSTY, J. Powell Bros. & Sanders Company made their note to their own order and by themselves indorsed for \$15,000 to be used as collateral for a loan they desired to obtain, and the defendants indorsed this note for accommodation. Powell Bros. & Sanders Company obtained a loan of \$7,500 from the plaintiff bank, and gave the collateral in pledge. When the principal obligation, which was represented by a note, matured, Powell Bros. & Sanders Company paid one-half of its amount, and gave a new note for the other half, and subsequently they made another partial payment and gave another new note for the balance. They failed in business, and D. G. Sanders sought to buy up all their outstanding obligations, including the note held by the bank. The bank was willing to receive payment from him of the balance due, and to transfer to him the note evidencing this balance; but he could pay only a part. This part the bank received, and agreed to transfer the note to him when the balance should be paid. As additional security for this balance the bank took his note for a like amount. But it did not surrender the note of Powell Bros. & Sanders Company, nor the \$15,000 collateral. This collateral was payable at six months, and had long been past due even when the second payment on the principal note was made. The bank simply continued to hold it as collateral, taking no steps to demand payment of it either from the principal debtor or the indorsers. This suit is on this collateral for the balance due on the principal debt.

[1] In a suit brought against them by the plaintiff bank in another parish on this collateral the defendants pleaded to the jurisdiction of the court *ratione personæ* and the exception was sustained, and these defendants were dismissed from the suit. Later judgment was rendered dismissing this other suit as against the other defendants also, and the plaintiff bank took an appeal to this court. This was long after the delay had expired within which an appeal might have been taken from the judgment sustaining the plea to the jurisdiction *ratione personæ*, and dismissing the present defendants from that suit. That judgment had therefore long become final, and these defendants had long been dismissed from the suit, when said appeal was taken as against the other defendants. By inadvertence, or otherwise, however, citation of appeal was issued to W. J. Sanders, one of the present defendants, although no appeal had been asked for as against him. The appeal was, of course, dis-

missed as to him. See 132 La. 174, 61 South. 155. But the present suit was filed before said dismissal had taken place, and therefore while the appeal against W. J. Sanders, such as it was, was still pending. On the strength of the pendency of said appeal the defendants have filed in the instant suit an exception of his pendens.

The exception is without merit. The said appeal was never a real appeal as against W. J. Sanders. No attempt was being made to maintain it as against him.

[2] Another exception filed in the instant suit was that of no cause of action based on the fact that no allegation is made in the petition that notice of dishonor was served on defendants who, as indorsers, it is said, were entitled to such notice.

That point was adversely passed on by this court in the suit on this same note against the other defendants. 136 La. 226, 66 South. 854.

[3] One of the defenses is that by the acceptance of the note of D. G. Sanders for the balance due on the note of Powell Bros. & Sanders Company the principal debt was ex-

tinguished by novation, and the accessory obligation with it.

The evidence shows that the plaintiff bank never consented to novate the debt, but merely received D. G. Sanders as an additional debtor, and continued to hold the other claims as still existing.

[4] Another of the defenses is that by the extension of time granted on the principal note the indorsers on the collateral were released.

The defendants were neither sureties nor indorsers on this principal note, and therefore what was done or not done in connection with it does not concern them. The case of *Alter v. Zunts*, 27 La. Ann. 317, cited by defendants, is not in point. There the party pleading release was an obligor on the principal obligation.

[5] Another of the defenses is that the statute of prescription was allowed to run against some of the indorsers who live in Texas where prescription on such an obligation is of two years. The laws of Texas on this point not having been proved, the presumption is that they are the same as ours.

Judgment affirmed.

(139 La.)

No. 20502.

TRAHAN v. BENOIT.

(Supreme Court of Louisiana. May 9, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by the Court.)

**ASSAULT AND BATTERY §38—CIVIL ACTION—
LIABILITY FOR DAMAGES—INJURIES TO FEEL-
INGS.**

Where a stronger man, without sufficient provocation, assaults a weaker one, though the latter may sustain no serious physical injury, damages will be awarded for the injury to his feelings, and, by way of discouraging his assailant, and others, from so readily and unlawfully availing themselves of the accident of superior strength.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 58; Dec. Dig. §38.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by Paul Trahan against Alcide Benoit. From judgment for defendant, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Shelby Taylor, of Crowley, and R. J. Labauve, of Abbeville, for appellant. Percy T. Ogden, of Crowley, for appellee.

MONROE, C. J. Plaintiff sues for damages, actual and punitive, for personal injury alleged to have been sustained at the hands of defendant.

It appears that enmity had existed between the two men for many years; that they were both past 60 years of age; that plaintiff weighed about 118 pounds, and was not robust; that defendant weighed about 200 pounds and was strong and active; that plaintiff was standing upon the gallery of a country store talking to an acquaintance when defendant, coming to the store, encountered and assaulted him, knocking him down. Two witnesses who were present testify that the assault was without apparent provocation, and that plaintiff was struck a second blow as he was rising, and plaintiff testified to the same effect. Defendant testified that, when he came upon the gallery, plaintiff, who had been drinking, walked around him several times, making demonstrations with his arms, and finally "struck" him "with his foot," and that he thereupon knocked him down, but did not strike him a second time. It was shown that plaintiff was in the habit of drinking, and the effort was made to show that, when so doing, he was dangerous, or quarrelsome, and that he had been drinking on the day of the difficulty, but his admission that he had taken one drink was as far as the proof went in that direction. We therefore find that defendant was at fault in the matter of the assault.

Plaintiff proved the loss of the sight of his left eye and attempted to prove that it was caused by the blow which he received from

defendant. Six unimpeached, and apparently disinterested, witnesses testified that he had told them, at different times during the preceding six or seven years, that he had then suffered that loss. Several of the members of his family testified that both of his eyes were good before the affray, and other witnesses, called by him, testified that they had never heard him complain in that respect. The affair with defendant occurred on March 7, 1912; on the following day plaintiff took his son to the office of his family physician for examination or treatment, but did not, at that time, make any complaint on his own account. On the next day he called again and complained of his eye. The physician found that the face about the eye was bruised, and that the eye itself appeared abnormal, but, not being a specialist, he considered the matter beyond his skill, and merely gave a tentative and innocuous prescription, with the advice that plaintiff call upon one or the other of two oculists or physicians who made the eye more of a specialty, and whom he named. The call thus suggested was not made until within two weeks before the case was tried, and more than twenty-two months after plaintiff was advised to make it.

The expert who was called upon testified that the vision of the left eye was limited to light perception, resulting from dislocation of the lens, and that the eye was useless and would always be so; that the defect might have existed for five or six years and might have resulted from either of several causes, among which he mentioned a severe blow, but was unable to determine whether that or one of the other causes produced the result. Our conclusion is that the defect was of long standing and was not attributable to the blow received from defendant. It is not suggested that plaintiff received any other physical injury at the hands of defendant.

Opinion.

The judge a quo, after hearing the two dozen or more witnesses who testified in the case, and with whom he was probably acquainted, rejected plaintiff's demands, but, whilst we hold his findings in high respect, we are unable to concur in that conclusion. Conceding that plaintiff has attempted to make more out of the case than the circumstances warrant, the facts remain: That defendant was a much more powerful man than plaintiff; that he admitted that he knocked plaintiff down; and that two (of three) persons who happened to be present testified that the assault was without provocation and that defendant struck plaintiff a second time as he was rising. Beyond that, there was another person present (one Jean Royer) to whom plaintiff, according to his testimony, was talking, when defendant, without

warning, struck him from behind. Defendant, on the other hand, says in his testimony:

"I left my house for Morse to get medicine for one of my children who was dying, and, when I got about an acre, or an acre and a half, from the store of Jules Mauboules, I saw Paul Trahan on the gallery. I stopped at the edge of the gallery to go and get my medicine and I had to pass there over a ditch to get on the gallery, and when I got on the gallery he came and put himself right in my passage, where I had to pass, and he had both hands on his hips. I got on the plank and then got on the gallery, and Jean Royer just called to me and then I stopped. I left Paul Trahan at my back, and old man Jean Royer asked me if I didn't have any sorghum seed to let him have, and I told him I had some little, and then I heard Paul Trahan advancing to me, walking, and he passed by my right, and when he got ahead he walked around and passed on the other side. I was standing then as I am standing now (witness illustrates), talking with old man Jean Royer, and the fourth time he came around he struck me with his foot, and at the same time made a motion as if sparring, and then I struck him a lick and knocked him down," etc.

Jean Royer was not called as a witness, and we find no explanation of defendant's failure to call him. The only other witnesses to the fact were called by plaintiff and testified as we have stated; and it is to be remembered that it was not left to him to select them, but that they were called because they happened to have been present and to have seen what occurred. Again, it appears that defendant was taken before the Mayor upon a charge of fighting, that he pleaded guilty, was fined and paid his fine, and that no charge was brought against plaintiff.

We are therefore of opinion that, although plaintiff sustained no physical injury, he should be awarded damages for the injury to his feelings, and by way of discouraging defendant, and others, from so readily and unlawfully availing themselves of the accident of superior strength. It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment for Paul Trahan, plaintiff herein, and against Alcide Benoit, defendant, in the sum of \$500, with legal interest from the date upon which judgment shall become final, together with the costs in both courts.

O'NIELL, J., considers the amount of the judgment excessive.

(139 La.)

No. 21924.

NATIONAL CITY BANK OF CHICAGO v. BARRINGER et al.

(Supreme Court of Louisiana. May 9, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by the Court.)

1. COURTS \S 224(11)—JURISDICTION—JUDGMENT ON RECONVENTIONAL DEMAND.

An appeal from a judgment on a reconventional demand, whatever its amount, should be

to the court having jurisdiction of the main demand. Act No. 137 of 1904, amending Const. art. 96.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 617; Dec. Dig. \S 224(11).]

2. COURTS \S 485—JURISDICTION—TRANSFER OF CAUSES.

Judges of the Supreme Court and of the Courts of Appeal have the right, where cases have been appealed to the wrong court, to transfer said cases to the proper court, instead of dismissing the appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1292-1298; Dec. Dig. \S 485.]

3. APPEAL AND ERROR \S 786—GROUNDS FOR DISMISSAL—APPEAL TAKEN FOR DELAY.

An objection that an appeal was taken for delay is no ground for dismissal. Code Prac. art. 907.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3128; Dec. Dig. \S 786.]

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben O. Dawkins, Judge.

Action by the National City Bank of Chicago against Mrs. George S. Barringer and another. From judgment for plaintiff, defendants appealed, and plaintiff moves to dismiss the appeal. Appeal transferred to Court of Appeal.

Stubbs & Theus, of Monroe, for appellants. Hudson, Potts, Bernstein & Sholars, of Monroe, for appellee.

LAND, J. Plaintiff sued Mrs. Barringer, as maker, and her husband, as indorser, of a certain promissory note, dated Chicago, Ill., January 23, 1914, payable six months after date to the order of the plaintiff in the sum of \$2,000 at its banking house in said city, with 7 per cent. per annum interest after maturity until paid, and with cost of collection and a reasonable attorney fee if not paid at maturity. The petition alleged that said note was secured by the pledge of certain shares of stock issued to the said Mrs. Barringer and duly indorsed in blank by her; that the plaintiff, acting under the authority of the contract of pledge, sold said shares for the net sum of \$714.62, which amount was credited on said note as of date March 26, 1915.

Plaintiff prayed for judgment against the defendants for \$2,000, with 7 per cent. interest thereon from July 23, 1914, and 10 per cent. on the amount of the principal and interest as attorney fees, less the credit of \$714.62 paid on March 26, 1915.

The defendant Mrs. Barringer for answer pleaded the general issue, admitting, however, that she signed the note and act of pledge in question, but averred that the same were executed in the parish of Ouachita, state of Louisiana, and were delivered to her husband, and that the whole transaction was between her said husband and the plaintiff bank, and was an unlawful effort on their part to bind her and her separate property for the debts of her husband and the community.

Defendant, reconvening, prayed for judg-

ment annulling said act of pledge and decreeing defendant to be the owner of said certificates of stock, and ordering plaintiff to deliver them to her within such time as the court may fix, and on failure to do so for judgment in reconvention for the full sum of \$2,500, with legal interest from date of judgment.

In the event of the defendant being held liable on the note, she prayed that the same be credited with the sum of \$1,200, representing the full amount of the proceeds of the sales of said certificates.

The case was tried, and judgment was rendered in favor of the plaintiff as prayed for in its petition.

Defendant applied for and was granted an order of appeal, suspensive and devolutive, returnable to the Supreme Court. Defendant perfected the appeal by furnishing a suspensive appeal bond according to law.

Five days later the plaintiff filed a motion to discharge and vacate the order of appeal, on the ground that the same was inadvertently signed and granted by the judge, and was not taken in good faith. The motion was tried, and the judge testified that he did not read the order, or notice that the order was for an appeal to the Supreme Court. The motion was submitted and denied.

Plaintiff has filed in this court a motion to dismiss said appeal for want of jurisdiction *ratione materiæ*, and represents that the appeal was not taken in good faith, and therefore should not be transferred to the Court of Appeal.

[1-3] As the amount sued for is less than \$2,000, this court has no jurisdiction of plaintiff's demand. Const. art. 85.

The judgment in favor of the plaintiff necessarily operated a rejection of the reconventional demand based as it was on the nonliability of the defendant as the maker of the note sued on by the plaintiff.

Act No. 137 of 1904, adopted as an amendment to article 95 of the Constitution, provides as follows:

"In all cases where there is an appeal from a judgment rendered on a reconventional, or other incidental, demand, the appeal shall lie to the court having jurisdiction of the main demand."

It is manifest that the appeal of defendant should have been taken to the Court of Appeals of that circuit. Jung & Sons Company v. L. A. Trosclair (No. 20440) 71 South. 524, not yet officially reported. Act No. 56 of 1904, p. 135, provides that:

Judges of the Supreme Court and of the Courts of Appeal "shall have the right, in cases where the appellant or appellants have appealed to the wrong court, to transfer said case to the proper court instead of dismissing the appeal," etc.

In Samuel Israelite Baptist Church v. Thomas, 117 La. 253, 41 South. 564, we held that such right to transfer, "is left to the sound discretion of the court," and dismissed

the appeal in that case because the claim of the plaintiff for damages was "manifestly and preposterously inflated." The case at bar presents no such feature.

As plaintiff's judgment bears interest at the rate of 7 per cent. per annum, and is secured by a suspensive bond, we fail to perceive what special injury will result to the plaintiff by the delay caused by the appeal to this court.

It is therefore ordered that this appeal be transferred to the Court of Appeal for the parish of Ouachita; and it is further ordered that the appellants pay all costs in this court.

(139 La.)

No. 21930.

RAGAN v. LOUISIANA RY. & NAV. CO.

In re LOUISIANA RY. & NAV. CO.

(Supreme Court of Louisiana. May 22, 1916.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE ⇐ 164(3)—APPEAL—DISMISSAL.

A suspensive appeal by a defendant from a judgment rendered by a justice of the peace to the district court, perfected by the giving of a lawful bond, should not be dismissed on account of the failure of the justice to seasonably file the transcript of appeal in the appellate court, as directed by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 619-623; Dec. Dig. ⇐ 164(3).]

Action by A. A. Ragan against the Louisiana Railway & Navigation Company. Judgment for plaintiff, appeal dismissed, and defendant applies for writs of certiorari, mandamus, and prohibition. Ordered that writ of peremptory mandamus issue commanding vacation of order dismissing appeal, and that the case be reinstated.

Wise, Randolph, Rendall & Freyer, of Shreveport, and J. D. Rusca, of Natchitoches, for applicant.

LAND, J. On February 12, 1916, a justice of the peace of the parish of Natchitoches rendered judgment in favor of the plaintiff and against the defendant for the sum of \$25 and costs.

Defendant thereupon took an appeal to the district court of said parish, and on February 14, 1916, furnished a suspensive bond in the sum of \$100.

The transcript of appeal was filed in the district court on February 25, 1916, and plaintiffs' counsel moved the court to dismiss the appeal because it was not filed in the appellate court within 10 days from the date of the rendition of the judgment. This motion was sustained, and the appeal was dismissed.

This was error. While the exact point was not decided in Abraham v. Wallenberg, 130 La. 1096, 58 South. 895, all the reasoning of

this court in that case is based on the proposition that as the law makes it the duty of the justice of the peace to transmit to the clerk of the appellate court on or before the return day an exact certified copy of the proceedings, etc., his failure to do so cannot be imputed to the appellant. In the opinion of the rehearing this court said:

"It would be a grave injustice for the courts to read into a law, requiring the justice of the peace to file the record within a designated time, the penalty that the failure of the justice of the peace to discharge this duty must be considered an abandonment" of the appeal.

We adhere to these views. There is no warrant in the Code of Practice for the dismissal of an appeal from a judgment of a justice of the peace to the district court, because of the failure of the justice to perform his statutory duty in the premises, and, we may add, that there is no warrant in the analogies of the law for the dismissal of an appeal for omissions, errors, or irregularities

not imputable to the appellant. C. P. art. 898.

The law has provided simple, informal, rules of practice for the trial of cases before justices of the peace. Appeals from their judgments are triable de novo in district courts; and if a justice of the peace fails to file the transcript as directed by law, the obvious remedy is by mandamus. In appeals to the Supreme Court and to the Courts of Appeal the statute makes it the duty of the appellant to file the transcript in the appellate court. Of course the law in such cases has no application to appeals from justice of the peace courts, where the justice is required to file the transcript.

It is therefore ordered that a writ of peremptory mandamus issue directed to the respondent judge, commanding him to vacate his order dismissing the appeal in the case of *A. A. Ragan v. Louisiana Railway & Navigation Company*, and to reinstate said case on his trial docket for further proceedings according to law.

BOYD v. KELLEY. (No. 17941.)(Supreme Court of Mississippi, Division B.
June 12, 1916.)**1. BILLS AND NOTES** \S 139(1) — **TIME FOR PAYMENT—EXTENSION—VALIDITY.**

The extension of time for the payment of a promissory note after its execution on consideration of procuring the indorsement of a third person is valid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. $\S\S$ 340-343, 349; Dec. Dig. \S 139(1).]

2. EVIDENCE \S 445(9)—**PAROL EVIDENCE AFFECTING WRITINGS—ADMISSIBILITY.**

Evidence of the extension of time for payment of a note, on consideration of the indorsement of a third person, does not violate the rule excluding parol evidence contradicting, adding to, or varying a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2065; Dec. Dig. \S 445(9).]

Appeal from Circuit Court, Attala County;
T. C. Kimbrough, Presiding Judge.

Action by J. A. Kelley against J. Niles Boyd and another. From a judgment against defendant Boyd, he appeals. Reversed, and action dismissed.

T. P. Guyton, S. L. Dodd, and J. G. Smythe, all of Kosciusko, and Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. Geo. L. Teat, of Kosciusko, for appellee.

COOK, P. J. This action was begun in the circuit court against appellant and one Aaron Storer. The suit was based on a promissory note payable January 1, 1914, and an indorsement of Mr. Storer made on the 3d day of March, 1914, three months after the maturity of the note. After the suit was begun, and during the trial, the suit was dismissed as to the indorser, Mr. Storer. Appellant offered to prove that the holder of the note agreed to extend the time of payment of the note to January 1, 1915, if he would get Mr. Storer to indorse the note, and that he did get Mr. Storer to indorse in consideration of the extension of time. Mr. Storer and appellant testified, in the absence of the jury, that Mr. Storer indorsed the note at the solicitation of the holder that the time would be extended as stated. Upon motion all of this evidence was excluded, and the court directed the jury to find a verdict for plaintiff.

[1, 2] We are advised that this action of the court was based on the theory that the evidence was incompetent because it was an attempt to vary the terms of a written contract by parol.

"It is well settled that time of payment of a bill or note may be extended by oral agreement, as this does not, in any way, violate the rule excluding parol evidence to contradict, add to, or vary a written contract, the evidence not being admitted for this purpose, but to prove a new agreement." 7 Cyc. 898b.

"It is just as competent for the principals to a note to extend the time of payment for a specified period as it was to fix the time of pay-

ment originally. And this they may do, according to the prevailing view, by oral agreement. But it is not permissible to prove an oral agreement alleged to have been made prior to the execution of promissory notes to renew them from time to time; for, whereas the promise expressed in the notes is a promise to pay money at the maturity of the instrument, the contemporary understanding would cut it down to a promise to give a new promise to pay." 3 R. C. L. \S 437.

The agreement of forbearance was made in consideration of the maker of the note securing the indorsement of Mr. Storer. The conditions of the contract were met by appellant, the contract was executed, and the maker could not escape the terms of his agreement by dismissing his suit against the indorser. The suit in this case was prematurely instituted. It will be noted that the parol agreement proven in this case was not contemporaneous with the making of the note, but was a subsequent agreement upon a valid and valuable consideration.

Appellee relies on *Hawkins v. Shields*, 100 Miss. 739, 57 South. 4. We think that case was decided in the first two sentences of the paragraph at the bottom of page 746. The balance of the opinion deals with a case not made by the record. The observations of the judge writing the opinion on what would be the law under different facts are, no doubt, sound, and are not, in our opinion, in conflict with the opinion in this case.

Reversed and dismissed.

R. F. WALDEN & CO. v. YATES.

(No. 17432.)

(Supreme Court of Mississippi, Division A.
Feb. 28, 1916. On Rehearing in
Banc, June 5, 1916.)**JUDGMENT** \S 777—**LIEN—"PERSONAL PROPERTY"—"PROPERTY"—VOUCHER.**

Notwithstanding Code 1906, $\S\S$ 1591, 1593, providing, respectively, that the term "personal property," when used in any statute, shall include evidences of rights of action and all written instruments by which any pecuniary obligation shall be created, acknowledged, or incurred, and that the term "property," when used in any statute, includes personal property as above defined in section 1591, and Code 1906, \S 819, making an enrolled judgment a lien on all the property of the defendant within the county, a voucher for the payment of money due is not subject to the lien of an enrolled judgment as "personal property," or "property"; its negotiability being unaffected by such lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1338; Dec. Dig. \S 777.

For other definitions, see Words and Phrases, First and Second Series, Personal Property; Property.]

Holden and Sykes, JJ., dissenting.

Appeal from Circuit Court, Jefferson Davis County; A. E. Weathersby, Judge.

Action by Mrs. Katy Yates against R. F. Walden & Co. From a judgment of the circuit court affirming the judgment of the justice court for plaintiff, defendant appeals. Affirmed on rehearing.

Mayes & Mayes, of Jackson, and C. E. Thompson, of Prentiss, for appellant. Livingston & Milloy, of Prentiss, for appellee.

HOLDEN, J. This is an appeal from the judgment of the circuit court of Jefferson Davis county in favor of appellee. Appellant, Walden & Co., held an enrolled judgment against J. I. Yates for \$133.57. The said J. I. Yates received a voucher from the Trexler Lumber Company for \$130, payable to his order, and on the same day that he received this voucher, he turned it over to his wife, Mrs. Katy Yates, appellee, in satisfaction of some debt alleged to be due by him to her; that is, he turned it over to her by delivering it to her undorsed and not assigned, and stating at the time, "We will carry it to the bank to-morrow and fix it for you." The next day, Mr. Yates carried the voucher to the bank with the intention of placing it to the credit of his wife, with the exception of \$15 in cash, which he intended to carry back to his wife. Upon entering the bank, he handed the voucher to the cashier and asked if it was good, to which the cashier replied that it was, and to indorse it. Mr. Yates indorsed the voucher in blank and laid it just inside the cashier's window, and the cashier was in the act of handing the \$15 to him when the officer, with the writ of execution under the enrolled judgment, seized the voucher under the writ. Following this, the appellee filed her claimant's affidavit in the court of a justice of the peace, and the issue was tried, resulting in a judgment in her favor in the justice's court, from which an appeal was taken to the circuit court, and there she obtained a judgment in her favor, from which the appellant now appeals here.

The only serious question presented to us for decision is whether or not the judgment lien of appellant attached to the voucher when it was issued to Mr. Yates. Under section 819, Code of 1906, an enrolled judgment is made a lien on all the property of the judgment debtor. This section has been construed by various decisions of this court to mean that an enrolled judgment is a lien on both real and personal property, regardless of its character or description, owned or acquired by the judgment debtor. *Jenkins v. Gowen*, 37 Miss. 444; *Minshew v. Davidson*, 86 Miss. 354, 38 South. 315; *Cooper v. Turnage*, 52 Miss. 431; *Cayce v. Stovall*, 50 Miss. 396; *Cahn v. Person*, 56 Miss. 360; *Mitchell v. Wood*, 47 Miss. 231. We think the voucher in this case was personal property (sections 1591, 1593, and 3969, Code of 1906) and easy to identify, and is not fugitive, as is money.

In the instant case, we hold that, under section 819, Code of 1906, the judgment creditor had a lien upon the voucher under his enrolled judgment, which he could enforce by execution as long as he could find and identify the property.

Reversed and remanded.

On Rehearing.

Mayes & Mayes, of Jackson, for appellant. L. C. Hallam, of Jackson, and Livingston & Milloy, of Prentiss, for appellee.

SMITH, C. J. On a former day a judgment of reversal was rendered herein, but it was afterwards set aside and the cause submitted to the court in banc, a majority of which is now of the opinion that the judgment of the court below should be affirmed. In *Beckett v. Dean*, 57 Miss. 232, the facts were:

"Randle Dean, an insolvent, executed, on April 2, 1875, a deed of trust on land to secure a debt due H. H. Harrington, who, on May 2, 1877, transferred the note and trust deed to Toomer, Sykes & Billups, by whom they were subsequently assigned to T. R. Ivy. The appellant, having recovered judgment against Harrington, October 3, 1878, and levied execution, issued June 3, 1878, purchased at the sale the land and all Harrington's 'right, title, interest, and claim at law and in equity,' under the deed of trust, and filed this bill to compel Ivy to deliver the note and trust deed, and to enforce the rights acquired at the sale. On the appellee's demurrer, the bill was dismissed."

One of the contentions of counsel for appellant was that appellant was entitled to have the note and trust deed executed by Harrington delivered up to him, for the reason that his judgment was a lien thereon by virtue of the provisions of sections 830, 2858, and 2859, Code 1871, which sections are practically identical with sections 819, 1591, and 1593, Code 1906. The court, in responding to this contention, said:

"The interest of the beneficiary in a deed of trust executed to secure a debt is not the subject of a judgment lien, and his assignee of the debt secured by the deed of trust takes the debt, which is the principal thing, and the security which is an incident, free from any such lien, and secure against the effort of the judgment creditor to reach it in his hands."

While the question there presented for decision was not whether a judgment was a lien upon a chose in action, but was whether or not the interest of the beneficiary in a trust deed in the land therein described was subject to sale under execution, nevertheless, the opinion there expressed upon the question here under consideration is not without value, for it sets forth what we understand to be generally understood by both bench and bar as the proper construction of the statutes here in question.

In *Bryan v. Henderson Hardware Co.*, 107 Miss. 255, 65 South. 242, while the chose in action there sought to be subjected to a judgment lien was not evidenced by a written instrument, the ground of the court's decision that it was not subject to the lien was not that in order to come within the provisions of section 1591 of the Code the debt must be evidenced by writing, but that a judgment is not a lien upon any debt due the defendant. While it is true that the voucher here in question is personal property under the provisions of section 1591, Code 1906 it is also true that a bill of sale, a deed, and an as-

signment are personal property under the provisions thereof, and to hold that such emoluments are subject to a judgment lien would be absurd. If promissory notes and bills of exchange are subject to judgment liens their negotiability will be thereby practically destroyed; it is therefore hardly possible that the Legislature so intended—surely not when we remember that these statutes have been several times re-enacted without material change since the decision in *Beckett v. Dean*, supra.

When the voucher here in question was seized by the officer it had ceased to be the property of the judgment debtor, and therefore was not subject to be taken on an execution against him.

Affirmed.

SYKES, J., dissents.

HOLDEN, J. (dissenting). The majority decision is contrary to the language and intent of sections 819, 1591, and 1593, Code 1906. It is also in conflict with *Minshaw v. Davidson*, 86 Miss. 354, 38 South. 315, *Jenkins v. Gowen*, 37 Miss. 444, *Cooper v. Turnage*, 52 Miss. 431, *Cayce v. Stovall*, 50 Miss. 396, *Cahn v. Person*, 56 Miss. 360, and *Mitchell v. Wood*, 47 Miss. 231. The Legislature has not changed the statutes in question since the above decisions were rendered, nor since the rendition of the former opinion in this case.

I cannot see my way clear to riding "roughshod" over the expressed will of the Legislature. Consequences following the true construction of a statute, or the wisdom of the law, should not concern this court. Our duty consists only in ascertaining and declaring

the meaning and intent of the statute. To hold that section 1591, Code 1906, which plainly provides that "evidences of rights of action, and all written instruments by which any pecuniary obligation shall be created" are "personal property" means and intends the very opposite to what its language expresses is a strained construction, tantamount to a repeal of the statute, which is legislation by judicial construction. The Legislature said in section 1593 that the character of personal property named in section 1591 is included in the property named in section 819, upon which a lien is declared. When by judicial interpretation a statute is made to speak the opposite of what it plainly declares, some good reason should be pointed out for so doing; but none is given here by the majority of this court, except that *Beckett v. Dean*, 57 Miss. 232 (1879), is cited and relied upon as authority for the position taken. By reading this whole case and the entire opinion therein, a doubt arises as to whether or not this case is in point. But, if it be in point, it is violative of sections 819, 1591, and 1593, Code 1906. These sections were probably erroneously construed in the case of *Bryan v. Henderson Hardware Co.*, 107 Miss. 255, 65 South. 242; but there is a difference, sufficient for distinction, between that case and the case before us now.

After careful consideration, I am unwilling to recede from the position taken in the former opinion. The law in this case, as now settled by the majority of this court, will suit the convenience of the business public handling such property, and it will also please the dodging judgment debtor, by making the statute ineffective as to him in such cases.

NICHOLSON et al. v. FIELDS et al.
(No. 17869.)

(Supreme Court of Mississippi, Division B.
May 20, 1916.)

PERPETUITIES \S 4(4)—WILLS \S 607(1)—VIOLATION OF RULE—STATUTE—FEE SIMPLE.

Where testator's will bequeathed land to named nephews, providing that it should go to them in equal undivided shares on the conditions that if they all had heirs of the body, each should transfer to his issue his share, but if one should fail to have issue, his share should go to the survivor or survivors in equal parts, or if two of them should fail to leave surviving heirs of the body, the survivor should inherit the whole property, but if they all failed to have heirs of the body, the entire property should go to grandsons for life, or to the heirs of their body, or, on failure of heirs of the body in both lines, then to the next of kin, always preferring those bearing testator's name, in equal degree of kinship, such will violated the rule against perpetuities, as embraced in Code 1906, \S 2765, prohibiting estates in fee tail, so that nephews took estate in fee simple.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. \S 8; Dec. Dig. \S 4(4); Wills, Cent. Dig. \S 1368-1369, 1371; Dec. Dig. \S 607(1).]

Appeal from Chancery Court, Kemper County; J. F. McCool, Chancellor.

Bill of complaint by C. S. Fields and others against T. H. Nicholson and others. From a decree for complainants, defendants appeal. Affirmed.

Section 2765 of the Code of 1906, referred to in the opinion, is as follows:

Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the * * * heirs of the donor, in fee simple.

Baskin & Wilbourn, of Meridian, for appellants. Brame & Smith, of Macon, and Whitfield & Whitfield, of Jackson, for appellees.

COOK, P. J. Appellees exhibited their bill of complaint in the chancery court of Kemper county for the purpose of having the court to construe the last will and testament of James Milton Nicholson, Sr., deceased, and to have the court remove the cloud on complainant's title to certain described lands. A demurrer to the bill was filed by appellants, which demurrer was overruled, and appellants filed their answer making same a cross-bill. On a final hearing the following decree was entered in the cause, viz.:

"This day came on to be heard before James F. McCool, chancellor of the sixth chancery district of said state, in vacation, at Kosciusko, Miss., the above-entitled cause under an order made at the December term, 1913, of said chancery court sitting at De Kalb, Miss., taking the said cause under advisement, decree to be rendered in vacation; and, the said cause having been submitted on bill of complaint, exhibits thereto, answer and cross-bill of defendant, answer of complainants, cross-bill, and written agreement, and also on brief of counsel, and the

chancellor, having considered the same and being satisfied that complainants are entitled to the relief prayed for in their bill of complaint, doth order and decree that the allegations of the said bill of complaint be and they are hereby sustained, and that complainants are hereby declared to be the owners in fee simple of the lands in controversy, and the clouds to the complainants' title, as asserted by the said defendants, be and are hereby removed. The said lands being described as follows, to wit [describing the land].

"And the chancellor, being called on by the pleading in this cause to construe the will of James Milton Nicholson, deceased, a copy of which said will is attached as an exhibit to the bill of complaint, which is the main question involved herein, holds and does decree that the said testator, James Milton Nicholson, deceased, in attempting to control the alienation of the lands mentioned in said last will and testament, both the lands devised to his nephews Joseph Allen Nicholson, James Lauren Nicholson, and John Quitman Nicholson, and also the lands devised to his grandsons, the defendants in this cause, beyond the period of time and number of donees not permitted by law, violated the rule against perpetuities under the laws of the state of Mississippi, and the chancellor holds and decrees that the lands devised to his said nephews, they being the first takers thereunder, which said lands are described in said last will and testament, a part of which as above described being in controversy in this suit, became the property in fee simple of said nephews, and that complainants, by virtue of this conveyance executed to them by said nephews, to wit, Joseph Allen Nicholson, James Lauren Nicholson, and John Quitman Nicholson, which conveyance is recorded in Deed Book Y, at page 6 of the records of deeds of Kemper county, are now vested with the fee-simple title to said lands.

"And the chancellor, being also requested to construe the whole will, further holds and decrees that the said James Milton Nicholson, deceased, in attempting to control the alienation of the lands mentioned in said will beyond the period of time and to the number of donees not permitted by law, has violated the rule against perpetuities under the laws of this state. And he holds and decrees that the lands devised therein to the said defendants Thomas Howard Nicholson and James Milton Nicholson were vested in fee simple in said Thomas Howard Nicholson and James Milton Nicholson, to wit [describing the land].

"The chancellor further orders and decrees that the complainants and defendants each pay one-half of all of the costs of this proceeding to be taxed.

"Adjudged and decreed at chambers in the city of Kosciusko, Miss., March 18, 1914.

"James F. McCool, Chancellor."

From this decree this appeal is prosecuted.

The clause of the will construed by the chancellor is in these words:

"I bequeath to my nephews [naming them] the following lands [describing them]. This land is to go to the said Joseph Allen Nicholson, James L. Nicholson and John Nicholson in equal undivided shares, on the following conditions: If they all have heirs of the body, each of them shall transmit unto his issue his share; but if one should fail to have issue of the body his share shall go to the survivor or survivors in equal parts; or if two of them shall fail to leave surviving heirs of the body, then the survivor shall inherit the whole property; but in the event they all fail to have heirs of the body, the entire property hereby bequeathed to them shall go to Thomas Howard Nicholson and James Milton Nicholson, if living, or to the heirs of their bodies, if any. Or, on failure of the heirs of the body in both lines, then to the next of kin, computed as before according to the rule in said

law, but always preferring those bearing the name of Nicholson, in equal degrees of kinship."

The question for us to decide, as we conceive it, is whether or not section 2765 of the present Code, our statute embracing the rule against perpetuities, has been violated by the provisions of the will just quoted,—and, if so, what will be the legal effect of such violation? In other words, who will take the land in controversy?

It will be observed that the first sentence of the will, in express and apt language, devises the land to the nephews of the devisor. If that was all, there could be no doubt about the intention of the testator. But after bequeathing a fee-simple estate, the testator immediately proceeded to annex conditions and limitations to the estate devised. If we cut out the conditions and limitations, the effect of the will is clear and definite. There is no sort of doubt about the intention of the testator. His intention, clearly expressed, was to entail the estate granted to his three nephews. Did he succeed in evading the last clause of section 2765 of the Code? He devised the land to three donees "in equal undivided shares," and then he desired that if either one of these three donees should die without issue, his undivided share should go to the two living donees, but if two of the donees died without issue the survivor would

then "inherit the whole property." So, we have "a devise of lands to a succession of donees then living" exceeding two. But this is not all, the will goes a step further, and provides "in the event they all [meaning the three nephews] fail to have heirs of the body, then the entire property hereby bequeathed to them shall go to" his grandsons, etc. It is impossible to separate the several provisions of this will limiting the estate first granted to the nephews of the testator without making a will for the deceased. His intentions are manifest—he undoubtedly intended to create a fee tail, and succeeded in doing so. He violated the rule against perpetuities, and thereby created "an estate in fee simple" to his nephews.

"Although the construction to be put upon an instrument is not affected by the existence of the rule against perpetuities; yet when there is a good, absolute gift, and the settlor or testator goes on, in an additional clause, to modify the gift, and by modifying it makes it, in part, too remote, the modification is rejected in toto, and the original gift stands." The Rule against Perpetuities, Gray (3d Ed.) § 423; *Hudson v. Gray*, 58 Miss. 882.

There is some confusion in the authorities on this subject in this and other states, but we believe that the rule announced above is the true rule, and that the chancellor was right in so holding.

Affirmed.

HURLBURT v. WESTBROOK. (No. 18156.)

(Supreme Court of Mississippi, Division B.
May 20, 1916.)

1. VENUE \S 46—TWO COURT DISTRICT COUNTY—STATUTE.

Acts 1892, c. 93, entitled "An act to divide Coahoma county into two circuit court and chancery court districts and for other purposes," to a certain extent made the county, for the purposes of the venue of actions, practically two separate and distinct counties, and if a defendant is sued in the wrong district he has the right to a change of venue to the proper district, as if he were a resident of another county and desired change of venue to the county of his residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. \S 46.]

2. VENUE \S 46—TWO COURT DISTRICT COUNTY—REPLEVIN SUIT—STATUTE.

Under Acts 1892, c. 93, dividing Coahoma county into two court districts, section 13, providing that no suit shall be dismissed because defendant may be sued in the wrong district, but the cause shall be transferred on motion to the proper district, defendant, a resident freeholder of the second district of the county, sued in replevin in the first district, the sheriff executing the writ by taking the property, located in the second district, was not entitled to dismissal for lack of jurisdiction, having the option to have the cause transferred to the second district, a citizen of the county being entitled to have a case tried in the district of his residence, unless he or the property be found in the other district, a construction of the statute harmonizing with the Code chapter on replevin, fixing the venue of such actions in the county wherein the property sought to be replevied, or the defendant, may be found.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. \S 46.]

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Jr., Judge.

Replevin by L. G. Hurlburt against John Westbrook. There was judgment for defendant, and plaintiff appeals. Reversed and remanded.

R. H. Kirby, of Friars Point, for appellant. Maynard & FitzGerald, of Clarksdale, for appellee.

COOK, P. J. This suit originated in the circuit court of Coahoma county, and is an action of replevin for the recovery of certain logs. Coahoma county is a two court district county, made so by an act of the Legislature, entitled "An act to divide Coahoma county into two circuit court and chancery court districts, and for other purposes," approved February 19, 1892, p. 362 et seq.

The appellant here was the plaintiff below. He filed his declaration and affidavit for the writ of replevin with the clerk of the circuit court at his office in the courthouse of the first circuit court district of the county, and the writ was delivered to the sheriff, who executed same by taking into his possession the logs which were located in and found in the second circuit court district of the county. Appellee, defendant below, joined issue on the declaration in common form. Appel-

lee also filed a motion to dismiss the suit for want of jurisdiction, and to impanel a jury of inquiry to assess his damages, because: (a) The logs were not found in the first district of the county; and (b) defendant was a resident freeholder of the second district of the county. This motion was sustained and a jury impaneled, who returned a verdict for defendant and assessed his damages at \$421. From this judgment plaintiff prosecutes this appeal.

The Code chapter on Replevin fixes the venue of such actions in the county wherein the property sought to be replevied or the defendant may be found. In this instance, the property and the defendant were found in the second district of the county, while the suit was filed in the first district. If we lay to one side the act of the Legislature dividing the county into two court districts, we are bound to say that the Code chapter on Replevin was strictly followed in the filing of the suit and the execution of the writ. The suit was begun and the papers filed at Friars Point, the county site of Coahoma county, before the passage of the law dividing the county into court districts. The logs were found in Coahoma county, and so was the defendant.

[1] But it is insisted that the statute dividing the county into two court districts had the effect of making the county, for the purposes of the venue of actions, practically two separate and distinct counties. This contention, to a certain extent, is sound. If the defendant is sued in the wrong district he has the right to a change of venue to the proper district just as if he was a resident of another county and desired a change of venue to the county of his residence, but it is nevertheless true that he is a resident of Coahoma county and of no other county, and his rights are measured by the statute dividing the county into two court districts.

Taking a comprehensive view of the statute dividing Coahoma county into two court districts for administrative purposes, and for the convenience of the inhabitants of the county, there does not seem to be any serious difficulty in interpreting the purpose and will of the legislative department of the state. The statute in question differs in some of its details from similar laws, and the infirmities and lack of precision of similar statutes were helpful to the draughtsman of the bill.

Before discussing the section of the law specifically referring to and controlling the question presented in this appeal, we will notice briefly some of the other provisions of the law.

Section 3 provides:

"The sheriff of Coahoma county shall be the proper officer to execute all process required by law to be executed by the sheriff, and to return the same to such district of said county as the same may belong."

May we not say here, that if any error was made in this case the same was made by the sheriff? In other words, was it not made the duty of the sheriff to return this process to the circuit clerk at his office in the second district, when he found the property and the defendant in that district? This view of the law is accentuated by section 8 of the act.

This statute also requires the board of supervisors to meet alternately in each district of the county, and section 11 of the act (somewhat different from similar laws) gives to the board sitting in either district full jurisdiction to do anything such boards are empowered to do just as if the county had not been cut into separate districts.

[2] Section 13, the controlling section, reads thus:

"All civil actions shall be commenced in each of said districts against defendants as if each district was a county, and a change of venue from either of such districts to the other and from either district to any county of the state, and from any county to either of said districts shall be had in the same manner and in the same character of suits as shall be allowed by law from one county to another, and the jurisdiction of the said courts of said districts shall be the same as if each district was a separate county: Provided, however, that any suit or action which may be brought in either of said districts may be commenced by filing the declaration complaint, or other pleading, with the clerk of either of said courts at either Friars Point or Clarksdale; and the said clerk shall issue process thereon, returnable to the court of the proper district, and shall deposit the papers in the case in the district where the action or suit thereon shall be brought; and, provided further, that no suit or action shall be dismissed because of the fact that the defendant may be sued in the wrong district, but said case or cause shall, on motion, be transferred for disposition to the proper district, and all motions for a change of venue provided for by this section in suits hereafter filed shall be made on or before the third day of the term of the court to which such suit is returnable."

Section 14 is here set out to complete the legislative scheme, viz.:

"All civil suits, proceedings or matters now pending in the circuit and chancery courts of said county, where the defendant, if such suits or proceedings were hereafter brought or instituted, would be entitled to be sued or have such proceedings instituted in the second district, shall, on motion of the defendant, be transferred forthwith to the said second district of said county: Provided, a motion to that effect be made on or before the third day of the next succeeding term of the court in which the suit, proceeding or matter, shall be pending, holden after the passage of this act, and no orders, motions or proceedings shall be had in any of said suits until after the expiration of the time hereby fixed and allowed for the making of said motion. In matters or proceedings ex parte, or otherwise, where there shall be no defendant, the same may, at any time, be transferred to the second district, on the motion of the party interested in person, or by his attorney of record."

The second proviso of section 13, supra, seems to relieve the question presented of any difficulty. Appellee invokes a strict construction of the language of this proviso, upon the fallacious assumption that it is in con-

flict with the general law on the subject. There is no conflict, in our opinion, for the visible reason that the statute here involved is designed to meet a situation in Coahoma county, while the general law refers to counties generally—counties wherein there are no separation of parts. The citizen is entitled in both cases to be sued in the county of his residence, or in the county where the property is found. For a further convenience of the people of Coahoma county, a citizen is entitled to have his case tried in the court district of his residence, unless he or the property be found in the other district.

This, we think, is the law of the case, and this, we believe, harmonized the general statute and the special law. From our standpoint there is no inharmony. If the general law is in force, in this case, the case was certainly triable at Friars Point, and the defendant was not entitled to a change of venue. But, we think, the statute enlarges the rights of the defendant by giving him a right to change the venue to the district of his residence in any event. Stated differently and conversely, the statute referring to venue of actions very wisely ignores the place in the county where actions are filed, and recognizing that mistakes would be made in the venue, and to relieve the courts of the necessity of threshing out questions of venue, and to convenience litigants, defendants may have the case sent to the district of his residence, but he cannot in such cases have the suit dismissed. To repeat, we believe the defendant was not entitled to have the cause dismissed. He had the option to have the cause transferred to the second district, and that was the limit of his rights.

Turner v. Lilly, 56 Miss. 576, and Ellison v. Lewis, 57 Miss. 588, are cited by appellee to support the action of the trial court. These cases were brought in the courts of a justice of the peace, and the court said in one of the cases that a replevin suit was, under our statutes, an action in rem and was triable wherever the property was found; the other case characterizes the action as *sui juris*, meaning thereby, no doubt, that the venue of such actions was in any justice district where the property or the defendant could be found because of the statute fixing the venue of actions in replevin. These decisions, we believe, are not decisive or helpful in the present case. If the rule there announced was controlling here, appellee would be lost, because he was sued in the county where both he and the property were found. The statutes dividing the county, however, gives the right to change of venue, unless the property or the defendant be found in the district wherein the action was begun. By the plain language of the statute, in case the action of replevin is filed in the wrong district, this will not work as abatement of the suit, but will give the defendant the privilege of applying for a change of venue to the district of his residence. The language of

the statute is broad, and when we consider the situation, the legislative intent is not doubtful.

Reversed and remanded.

POSTAL TELEGRAPH-CABLE CO. et al. v. ROSS. (No. 18304.)

(Supreme Court of Mississippi, Division A. June 5, 1916.)

1. TELEGRAPHS AND TELEPHONES ¶78(1)—FAILURE TO DELIVER MESSAGE—PENALTY.

It is error to instruct peremptorily for plaintiff in her suit for the statutory penalty of \$25, provided by Laws 1908, c. 76, for failure to deliver a message, the statute expressly applying only to delay in delivery or incorrect transmission.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 79; Dec. Dig. ¶78(1).]

2. TELEGRAPHS AND TELEPHONES ¶73(5)—FAILURE TO DELIVER MESSAGE—QUESTIONS FOR JURY.

Where a telegraph company failed to deliver a message within proper limits, and due to neglect of its servants to transmit and without other excuse, and the addressee sued for punitive damages, it was error to refuse to submit that issue to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. ¶73(5).]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Action by Gladys Ross, by next friend, against the Postal Telegraph-Cable Company and the Western Union Telegraph Company. From judgment on peremptory instruction for plaintiff for the statutory penalty, the Postal Company appeals, and from the remainder of the judgment adverse to her, on peremptory instructions, plaintiff prosecutes a cross-appeal. Reversed and remanded on both appeals.

This suit was begun by Gladys Ross against the Postal Telegraph-Cable Company and the Western Union Telegraph Company, for damages for the failure of the defendants to deliver a telegram sent by a relative from Utica, Miss., to the plaintiff at Inverness, Miss., apprising the plaintiff of the death of her grandmother. Plaintiff sues for the statutory penalty of \$25 imposed by chapter 76 of the Laws of 1908, and also for punitive damages in the sum of \$2,000. The facts in evidence show that the telegram was delivered to the agent of the Western Union Telegraph Company at Utica, Miss., about 7 o'clock p. m., July 1, 1914, and that the Western Union Telegraph Company had no line or office at Inverness, Miss., and that the message was sent to the relay of the Western Union Telegraph Company at Jackson, Miss.,

and there delivered by the agent of the Western Union Telegraph Company to the agent of the Postal Telegraph-Cable Company about 10:25 p. m., and that the message was then relayed through the office of the Postal Telegraph-Cable Company at Memphis, Tenn., being received at Memphis about 11 o'clock p. m. The Memphis operator called the Inverness office, but could not get a response, it being shown that the office at Inverness, Miss., closes at 7 p. m., and does not reopen until 7 a. m. The chief operator of the Postal Telegraph-Cable Company at Memphis testifies that he hung the message which had been relayed though his office on the hook where messages going in the direction of Inverness were placed, for the purpose of having it transmitted to Inverness the following morning after 7 o'clock, when the Inverness office would be open. The message seems not to have been sent by any one afterwards, and was never transmitted to the plaintiff. After the evidence was in the court gave a peremptory instruction in favor of the Western Union Telegraph Company, and gave a peremptory instruction in favor of the Postal Telegraph-Cable Company so far as punitive damages were concerned, and a peremptory instruction in favor of the plaintiff for the statutory penalty of \$25 for failure to deliver the message. The Postal Telegraph-Cable Company appeals, and the plaintiff prosecutes a cross-appeal.

Campbell & Cashin, of Greenville, for appellant. Moody & Williams and S. D. Neill, all of Indianola, and J. M. Forman, of Inverness, for appellee.

HOLDEN, J. [1, 2] The right of recovery of the statutory penalty of \$25 in this case is controlled by the rule announced in *Marshall v. Telegraph Co.*, 79 Miss. 154, 27 South. 614, 89 Am. St. Rep. 585, and *Western Union Telegraph Co. v. Hall*, 79 Miss. 623, 31 South. 202. Therefore the lower court erred in granting the peremptory instruction in favor of the appellee for the statutory penalty; and the judgment, on direct appeal, is reversed and the cause remanded. On the cross-appeal, the judgment of the lower court, refusing cross-appellant an instruction to the jury on punitive damages, under the facts in the case, was erroneous; and the judgment of the lower court, on cross-appeal, must be reversed, as this feature of the case is controlled by the law announced in *Steinberger v. Western Union Telegraph Co.*, 97 Miss. 260, 52 South. 691, and *Postal Telegraph Co. v. Christian*, 102 Miss. 845, 59 South. 933.

Reversed and remanded on direct and cross appeal.

YAZOO & M. V. R. CO. v. ARMSTRONG & CO. (No. 18174.)(Supreme Court of Mississippi, Division A.
June 5, 1916.)**1. CARRIERS — 228(5) — CARRIAGE OF LIVE STOCK — DELAY — INJURIES.**

Where delay in a shipment of cattle caused unusual shrinkage, the shipper may recover upon proof of the weight of the cattle at the time of the shipment and at the time they were received, together with proof of the normal shrinkage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. — 228(5).]

2. CARRIERS — 229(2) — CARRIAGE OF LIVE STOCK — DAMAGES.

Where a shipment of cattle was negligently delayed, the shipper may recover the difference between the price the cattle would have brought had they reached their destination within a reasonable time and the price they actually brought.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 964; Dec. Dig. — 229(2).]

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

Action by Armstrong & Co. against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes, Wells, May & Sanders, of Jackson, for appellant. S. H. Coleman, of Greenwood, for appellee.

SYKES, J. This is an appeal from a judgment of the circuit court of Leflore county in favor of appellees against appellant for the amount of \$308. Suit was filed on a claim for damages for the sum of \$484 because of losses alleged to have been sustained by appellees on account of damages to a shipment of two carloads of cattle shipped from Inverness, Miss., to St. Louis, Mo., consigned to Clay-Robinson & Co. The items of damage were as follows:

Extra car charges.....	\$ 37 00
5,000 lbs. extra shrinkage in cattle at 8¢ per lb.....	150 00
Loss in market from decline in price...	147 00
Five lost cattle at \$30 per head.....	150 00
	<hr/>
	\$484 00

[1, 2] The testimony in this case for the appellees, the plaintiffs in the court below, was very vague and indefinite upon all of the items of damages sued for. The testimony shows that the cattle were loaded into two cars by the agent of the shippers, and that when they reached St. Louis one car had been unloaded and the cattle reloaded into two cars, and it seems that there was an extra charge of \$37 freight for this third car. While the testimony to establish this fact is rather uncertain, at the same time

we believe there was enough testimony to submit the question to the jury. Consequently, it was not error in the court below to refuse the peremptory instruction asked by the appellant. The next item of damages claimed is 5,000 pounds of shrinkage in cattle at 3 cents a pound, \$150, caused by an unusual delay en route. This item is not sustained by the testimony. The testimony merely shows that one carload of cattle reached St. Louis two days before the other two cars, whereas the two original cars were shipped together from Inverness. This unexplained delay on the part of the appellant would have been a sufficient justification to have found it guilty of negligence in delaying these last two cars, provided the testimony of the plaintiff had shown what this extra shrinkage or loss in weight caused by the two days' delay was. There is always a loss in weight on every shipment of cattle, and it was incumbent upon the plaintiffs in this case to show the jury what this necessary shrinkage was and the amount of the extra shrinkage caused by the delay in the shipment. This the testimony wholly failed to do. Plaintiff was entitled to recover the difference in the prices the cattle would have brought had they reached their point of destination within a reasonable time and the price they actually brought upon the market. There is an item of damage of five cattle lost in transit in these cars. Plaintiff fails, however, to show that all the cattle shipped did not reach St. Louis. The depositions of all the parties who unloaded and counted all of these cattle upon their arrival at St. Louis were not taken. In fact, it seems from the record that interrogatories were filed to some witnesses in St. Louis who failed to respond to same. The exact weight of the cattle at the time they left Inverness is not properly shown by the testimony. It seems that the cattle were weighed by two different parties, and that these weights were taken down, but when these parties testified, neither of them produced his original weights, and they only testified approximately as to the weight of the cattle. This should be rectified in another trial. The exact weight of the cattle when they reached St. Louis is not shown, because the plaintiffs failed to take the depositions of all of the parties who weighed all of the cattle upon their arrival in St. Louis. There are certain papers filed as exhibits to depositions taken in St. Louis, but it is not shown that the statements contained on these exhibits are correct. Upon another trial the plaintiffs may be able to supply the necessary testimony to make out the case.

Reversed and remanded.

DIAMOND RUBBER CO. et al. v. FOHEY et al. (No. 18018.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

PARTNERSHIP §41—LIABILITY OF STOCKHOLDERS—DEFECTIVE ORGANIZATION.

A corporation is not so defectively organized as to render its stockholders liable as partners or otherwise for its debts, though its charter is not recorded in the office of the chancery clerk of the county where it does business, and though it commenced and continued to do business with a capital stock subscribed and paid in less than the full amount authorized by its charter, which does not require a certain amount of capital stock to be paid in before commencing business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. §41; Corporations, Cent. Dig. § 74.]

Appeal from Chancery Court, Forrest County; J. M. Stevens, Chancellor.

Suit by the Diamond Rubber Company and others against M. F. Fohey and others. From a judgment sustaining demurrer to the declaration, plaintiffs appeal. Affirmed.

The suit is against stockholders and directors of the Hattiesburg Automobile & Machine Company, a corporation, seeking to hold defendants liable for the debts of the corporation.

T. C. Hannah and Currie & Smith, all of Hattiesburg, for appellants. S. E. Travis, of Hattiesburg, for appellees.

SMITH, C. J. We are of the opinion that a corporation is not so defectively organized as to render its stockholders liable for the debts thereof as partners or otherwise, although: (1) Its charter is not recorded in the office of the chancery clerk of the county in which it does business; and (2) it commenced and continued to do business with a capital stock, subscribed and paid in, less than the full amount thereof authorized by its charter, such charter not requiring a certain amount of capital stock to be paid in before it can commence business.

Affirmed.

GULF & S. I. R. CO. v. DIXON. (No. 17517.)

(Supreme Court of Mississippi, Division B.
June 12, 1916.)

CARRIERS §265—CARRIAGE OF PASSENGERS—SPECIAL TRAINS.

Where it was the annual custom of a railroad company to run an excursion train which always stopped on flag at a certain station to take on passengers, no notice being given to the public that the custom would be changed, by the course of business and established custom plaintiff was invited and had a right to take passage on the train at the station, and when this right was denied had a cause of action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1040-1048; Dec. Dig. §265.]

Appeal from Circuit Court, Smith County; W. H. Hughes, Judge.

On suggestion of error. Suggestion of error sustained. Former opinion reversed, and judgment below for plaintiff affirmed.

For former opinion, see 70 South. 898.

T. J. Wills, of Raleigh, for appellant. Nobles & Cantwell, of Raleigh, and G. G. Lyell, of Jackson, for appellee.

COOK, P. J. The suggestion of error, we think, should be sustained. The evidence that the excursion train was always stopped at the station in question since the excursions were put on by the railroad company is not disputed. So, it appears, that it was the annual custom of the company to run an excursion train to Jackson, and this train always stopped, on flag, at this station, to take on passengers. This was the custom established by the course of business adopted by the common carrier. There was no notice given to the public that the custom would be changed. By the course of business and the established custom, appellee had a right to take passage on the train, and when he was denied this right he had a cause of action against the company. By the theretofore unvarying custom he was invited to take passage on this particular train, and the secret orders to the conductor was not notice to him that a change of the custom had been made.

Affirmed.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PLUMMER-LEWIS CO. v. FRANCHER.
(No. 17360.)

(Supreme Court of Mississippi. Division B.
May 15, 1918. Suggestion of Error
Overruled June 12, 1918.)

1. **CORPORATIONS** \S 503(3)—**VENUE—CHANGE.**
The right to a change of venue is not given to a corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 1943, 1944; Dec. Dig. \S 503(3).]

2. **CORPORATIONS** \S 503(1)—**ACTION AGAINST—VENUE—STATUTE—FOUND—"PRINCIPAL PLACE OF BUSINESS."**

Code 1906, \S 707, fixes the venue of civil actions in the county in which the defendant may be found, except where otherwise provided. Sections 708-711 provide for the venue of actions against railroads, express companies, telephone companies, etc. Section 8927 prescribes the form of the sheriff's return of personal service and where service is had on some other person than the defendant, and section 3932 provides that, if the defendant is a corporation, personal service may be had on certain named officers or an agent or a director, and that, if no such person can be found in the county, it shall be sufficient to post a copy of the process on the door of the corporation's office or principal place of business, and that in suits against railroads, sleeping car, telegraph, express, and steamboat companies or corporations the process may be served on any agent of the defendant, or sent to any county in which the corporation's office or principal place of business may be located, and there served as therein authorized. *Held* that, in the absence of other statutory provisions fixing the venue of actions against it, a suit against a domestic trading corporation engaged in buying and selling cotton and domiciled in H. county must be begun in the county of its domicile, the phrase "principal place of business" being synonymous with "domicile"; so that process upon its agent domiciled in A. county did not give the circuit court of that county jurisdiction.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 1935, 1937-1939, 1942; Dec. Dig. \S 503(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Principal Place of Business*.]

Appeal from Circuit Court, Attala County;
J. A. Teat, Judge.

Action by C. C. Francher against the Plummer-Lewis Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Watkins & Watkins, of Jackson, for appellant. Flowers, Brown, Chambers & Cooper, of Jackson, for appellee.

COOK, P. J. C. C. Francher filed his declaration in the circuit court of Attala county declaring upon an alleged breach of contract, and process was served upon an alleged agent of appellant, a domestic corporation organized under the laws of this state, which agent was found in Attala county.

The defendant corporation appeared and filed a plea challenging the jurisdiction of the circuit court of Attala county. The plea averred that the defendant was a domestic corporation, and that it was domiciled at Jackson, Hinds county, and also that

the process was not served on an agent of the defendant qualified to receive process. Issue was joined on these pleas, and the issue was fought out on the facts. The uncontradicted facts sustained the averment of the plea that defendant was a domestic corporation, and that its domicile was fixed at Jackson, Hinds county, by its charter. The trial court peremptorily instructed the jury to find for the plaintiff on this issue. The verdict of the jury was rendered accordingly.

Several questions are presented by the briefs in this case, but we have elected to confine our opinion to a single point determinative of this case. The question is: Did the circuit court of Attala county have jurisdiction to try a case instituted in that county against a domestic corporation domiciled at Jackson, Hinds county, the corporation defendant being a trading corporation engaged in the buying and selling of cotton, and exercising its franchise through an agent located in the county of the venue of the action?

[1, 2] The venue of civil actions generally is fixed by section 707, Code 1906, "in the county in which the defendant or any of them may be found, except where otherwise provided, and except actions of ejectment and actions of trespass on land." Sections 708, 709, 710, and 711 provide for the venue of actions in cases that are described in section 707 by the phrase "except where otherwise provided." The defendant in this case does not come within the excepted class of defendants mentioned in sections 708, 709, 710, and 711, nor is this, an ejectment suit, or action of trespass on land.

The question is, then: Was the defendant found, or could the defendant be found in Attala county, when its domicile was fixed by law in Hinds county? If it can be said that the corporation is "a citizen resident in this state," and that it has a "household and residence," there would be but little difficulty in arriving at a satisfactory solution of the problem presented by this appeal by sustaining a motion for a change of venue, but we believe the right of change of venue is not given corporations.

We will go a step further to see if the chapter on "Process" throws any light on this problem. Section 3927 prescribes the forms for the returns which the sheriff must make on process directed to him, and this section prescribes: (1) Form for personal service; (2) form where service is had on some other person than the defendant, and manifestly this form is for natural persons, if it be taken literally, and the same is true if we read literally from 3. So far, our statutes do not in terms provide for the venue of actions against corporations of the class to which the defendant in this case belongs, nor a form of service in cases like the present one.

Section 3932 is the statute that points the way for serving process on all domestic corporations. The first clause is the general clause, and provides for personal service on the officers named "or agent or upon any one of the directors of such corporation." This clause refers to all corporations of whatever kind or description. The second clause refers to sleeping car companies alone, and the third clause is confined to steamboat companies. Then follows a sentence which refers to cases where none of the officers and agents mentioned in the preceding part of the section can be found, and provides that in this event "then it shall be sufficient to post a true copy of the process on the door of the office or principal place of business of the corporation."

May we not say just here that thus far section 3932 refers to and contemplates that the action, in the first instance, was begun in the county wherein was located "the office or principal place of business of the corporation" made defendant? We think so. It is clear that the directions of the statute are intended for the guidance of the officer to whom the process is directed, and ordinarily, of course, the process from the circuit court is directed to the sheriff of the county in which the suit has been filed. The succeeding part of this section of the Code, we believe, makes it clear that the first part of the section refers to actions begun in the county where the office or principal place of business of the corporation sued is located. We quote that part of section 3932 just referred to, the same being the two concluding sentences of the section, viz.:

"In suits against railroads, sleeping car, telegraph, telephone, express, steamboat, and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such companies or corporations, the process may be served on any agent of the defendant or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or may be served on any one of the foregoing officers of such corporation or company, and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon them in person. When any writ or process against such corporation, company, receiver, or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons; and all process and notices to be served upon such companies, corporations, or receivers may be served as herein directed."

It will be observed that this part of section 3932 refers to the class of corporations for which the venue of actions is fixed by sections 708 and 709, to wit, railroad, express, steamboat, or telegraph corporations, to which are added by this section, telephone and sleeping car corporations. In other words, sections 708 and 709 fix the venue of actions against railroad, express, steamboat, or telegraph corporations, and section 3932 provides the alternative methods for serving

process on all of the corporations mentioned in sections 708 and 709, and adds to the number two other classes of corporations, viz., sleeping car and telephone corporations.

By the quoted sentences of section 3932, in suits against railroads, sleeping car, telegraph, telephone, express, steamboat, and insurance companies, the process may be served on the officers, agents, employes and attorneys of the corporations, if found or if not found, the process may be sent to any county in which the office or principal place of business is located and served by posting a copy on the door of the office or principal place of business of the corporation defendant.

As above stated, the first part of section 3932 evidently refers to suits brought in the county where the office or principal place of business is located, and it seems equally clear that the concluding sentence refers to suits begun in a county where the line, route, or way of the corporation may be, but not where the office or principal place of business is located. Any of these corporations may be sued "in any county in which any part of such railroad, express route or line, steamboat way or telegraph line may be," and the process may be sent to the county of the office or principal place of business, in case no agent can be found in the county of the venue. Why sleeping car and telephone corporations are not mentioned in sections 708 and 709 it would be idle to conjecture.

To sum up, we find that the venue of actions against certain named corporations is fixed by statute in any county where they may be exercising their franchises, and that the statute does not place the corporation sued in this case within that class. We find furthermore that the section of the Code prescribing how process may be served on corporations like the one in the instant case inferentially and by exclusion fixes the venue of actions like this against corporations of this kind in the county wherein the office or principal place of business is located.

The statute (section 920) leaves no doubt about the venue of actions against foreign corporations; they may be sued in any county where an agent may be found; whereas section 707 fixes the venue of actions where the defendant may be found. In this case the defendant is a corporation, and was not found in the county where the suit was begun. We think, in the absence of a statute fixing the venue of actions against domestic corporations of the class sued in this case, the suit must be begun at the domicile of the corporation, and that the phrase "principal place of business" used in the statute is synonymous with "domicile." If we should hold that domestic corporations like the defendant may be sued in any county where an agent might be found, it would impose upon such defendant a burden of inconveniences and costs, which we do not believe was contemplated by the statutes of the state, especially when it is clear that corporations

are denied the right to have the venue changed to its residence or domicile—a right accorded to natural citizens.

The courts of other states do not help us in the solution of our puzzle. The decisions, as a rule, are based upon statutes, but there are some decisions which seem to be based on the assumed common-law rule, and they are in hopeless conflict. One group fixed the venue of actions against corporations in the county of the domicile or principal place of business, while another group in any county where the corporation may be exercising the powers conferred on it by its charter.

We gather from our statutes that the Legislature selected a class of corporations—public service corporations—and by special enactment provided that they might be sued in any county wherein they exercised their franchises, but failed to fix the venue of actions against corporations of other kinds. So we conclude that it was not the purpose of the Legislature to place corporations generally in the special class.

We judge, by the drift of the evidence in the court below, that the case went off there upon the question of the qualifications or competency of the agent served to receive process, and that the point stressed here was not stressed in the trial court. However, we think the real point lies on the face of the record, and in deciding this point it is unnecessary to decide the minor point, which, no doubt, was the controlling point in the trial court.

The judgment of the circuit court is set aside, and judgment here dismissing the suit.

Reversed and dismissed.

BARTON-PARKER MFG. CO. v. MOORE. (No. 18027.)

(Supreme Court of Mississippi, Division A.
June 5, 1916.)

PRINCIPAL AND AGENT §123(7) — **ACTION AGAINST PRINCIPAL—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE.**

Evidence examined, and *held* sufficient to show authority of agent to bind his principal by purchase of goods.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 426; Dec. Dig. §123(7).]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action by the Barton-Parker Manufacturing Company against O. S. Moore. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Appellant is a dealer in jewelry with domicile at Memphis, Tenn. One of appellant's salesman sold to appellee certain merchandise, taking in payment therefor several notes. The goods were delivered in accordance with the contract and part of them sold by the appellee. Appellee paid the first note, and afterwards declined to pay the balance as they matured, contending that the goods did not come up to the warranty, and, further, that he did not sign the notes, but same were signed by his father, who clerks in his store, and who was without authority to sign notes.

It is shown by the record that appellee's father frequently purchased goods from traveling salesmen, and that the goods here purchased were placed in the store with appellee's knowledge, and that he sold some of them, and that he had knowledge of the execution of the contract and had accepted the shipment of goods and placed them on sale in his store.

On the trial in the circuit court the appellee obtained a peremptory instruction, and from judgment thereon appellant prosecutes this appeal.

Currie & Smith, of Hattiesburg, for appellant. Currie & Currie, of Hattiesburg, for appellee.

SMITH, C. J. Conceding that appellee's father was without authority to execute the promissory note in question, the evidence abundantly shows that he did have authority to purchase the goods, so that a recovery therefor may be had upon the itemized statement thereof filed with the note; and the peremptory instruction in favor of appellee was not warranted by the evidence, either upon the ground that the purchase was induced by fraudulent representations, or that the consideration for appellee's promise to pay had wholly failed.

Reversed and remanded.

HILL et al. v. PETTY. (No. 18183.)
(Supreme Court of Mississippi, Division A.
June 5, 1916.)

1. REPLEVIN \S 135—DAMAGES FOR DETENTION—AWARD.

In replevin for a horse and a cow and calf, where the officer levied only on the horse, and the animal was released on defendants' bond, judgment on the bond for value of the horse and cow, including an award for detention, cannot stand, as the cow was not levied upon.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 532-540; Dec. Dig. \S 135.]

2. CHATTEL MORTGAGES \S 172(8, 9)—REPLEVIN—INSTRUCTIONS—JUDGMENT—ESSENTIALS.

Where property replevied under deed of trust given to secure a debt was of a value greater than the amount of the debt, the jury should, under Code 1906, \S 4233, declaring that, if plaintiff recover, and defendant has given bond for the property, judgment shall be against defendant and the sureties on his bond that they restore the property to plaintiff or pay him the value thereof or his interest, if a limited one, as assessed by the jury, be instructed as to the trustee's interest, and judgment should be for the restoration of the property to the trustee or payment of his limited interest.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 308, 315; Dec. Dig. \S 172(8, 9).]

Appeal from Circuit Court, Carroll County; Allen Thompson, Special Judge.

Replevin by J. C. Petty, trustee, against Cora Hill and others, begun in justice court, and appealed to circuit court. From a judgment there for plaintiff, defendants appeal. Reversed and remanded.

Elmore & Ruff, of Lexington, for appellants. J. W. Conger, of Valden, for appellee.

SYKES, J. This appeal is from a judgment rendered by the circuit court of the second district of Carroll county against appellant and the sureties on a replevin bond. The cause was originally begun by an affidavit in replevin made by J. G. Petty, trustee, before a justice of the peace. Petty was trustee in a deed of trust executed by appellants Cora Hill and Floyd Weeks to W. H. Brewer and assigned to MacWall, conveying certain personal property as security for the debt therein mentioned. The horse mentioned in the deed of trust was valued in the affidavit at \$60, and the cow and her calf were valued at \$12. The affidavit alleged merely a wrongful detention of the property. The return of the officer who executed the writ of replevin showed that he levied on the horse, which he valued at \$120, and for which he accepted bond. The return is silent as to the cow and calf. Judgment was rendered in the justice of the peace court in favor of the defendants, and an appeal was duly prosecuted by plaintiff to the circuit court. In the circuit court there was filed by the plaintiff a statement of an account due by the defendants to the beneficiary of the deed of trust. The balance due claimed in this account is the sum of \$84.78.

The plaintiff also filed in the circuit court a written demand for \$25 as damages for the wrongful detention of the property.

[1] On the same day that this claim for damages was filed the plaintiff obtained judgment by default against the defendants, but the amount of the debt for which this judgment was rendered is not shown. A jury was impaneled to assess the value of the horse and cow, and the judgment of the court was that the defendants restore this property to the plaintiffs, and it also awarded the sum of \$25 damages for the wrongful detention of the property. It was error to find for plaintiff for this sum of \$25. Since the cow was not levied upon by the sheriff, the bond did not include it, and the sureties are in no way liable for its value or return.

[2] The record shows that the plaintiff had only a limited interest in the property which was the amount of the debt due under the deed of trust, and that the property replevied was worth more than the amount of this debt; consequently, under section 4233 of the Code of 1906, the jury should have been instructed by the court as to the amount of interest of the plaintiff in this property, since it was a limited interest, and the value of the property was greater than this interest, and the judgment should have been to restore the property to the trustee or pay him the value of this limited interest as assessed by the verdict of the jury. *Bates v. Snider*, 59 Miss. 497; *Bond v. Griffin*, 74 Miss. 599, 22 South. 187. The appellee should have amended his affidavit as to the value of the property in the court below to an amount at least as much as the indebtedness due him on the account sued on. *Johnson v. Tabor*, 101 Miss. 78, 57 South. 365.

Reversed and remanded.

Ex parte TILLMAN. (No. 18977.)
(Supreme Court of Mississippi, Division A.
June 5, 1916.)

HABEAS CORPUS \S 4—RESTRAINT—BINDING OVER TO AWAIT ACTION OF GRAND JURY.

The judgment of a justice of the peace, on preliminary trial of a felony charge, binding over defendant under bond to await the action of the grand jury, was a preliminary decision, not appealable, restraining defendant in his liberty, and the writ of habeas corpus will lie to determine whether such restraint is wrongful.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 4; Dec. Dig. \S 4.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Habeas corpus on behalf of Ebb Tillman. From a judgment dismissing the writ petitioner appeals. Reversed and remanded.

M. Ney Williams, of Raymond, for relator.

HOLDEN, J. The appellant, Ebb Tillman, was arrested and given a preliminary trial before a justice of the peace in Hinds coun-

ty on a felony charge, and was bound over, under a bond of \$1,000, to await the action of the grand jury. Failing to make said bond, he was committed to jail. Subsequently the appellant sued out a writ of habeas corpus, returnable before Judge W. H. Potter, a circuit judge. When the case was called for hearing, objection was made by the state to the introduction of any evidence on the part of appellant, which objection was sustained, and the circuit judge refused to hear the cause upon the merits, and accordingly dismissed the writ of habeas corpus.

It seems from the record here that the action of the circuit judge was based upon the ground that the judgment of the justice of the peace, binding the party over to await the action of the grand jury, was conclusive, and could not be disturbed, or questioned by the writ of habeas corpus. The conclusion reached by the learned circuit judge was erroneous; and we hold that, under the facts disclosed by this record, the appellant was entitled to a hearing of the writ on the merits, and a decision, as to whether or not he was wrongfully deprived of his liberty. The justice of the peace had no final jurisdiction at the committing trial, nor was his judgment a final judgment which could be appealed from, but was a preliminary decision, restraining the appellant in his liberty; and in such a case, the writ of habeas corpus will lie to determine whether such restraint is wrongful.

Reversed and remanded.

DOLPH v. STATE. (No. 18765.)

(Supreme Court of Mississippi, Division B.
June 12, 1916.)

1. LANDLORD AND TENANT §253(1)—REMOVAL OF PROPERTY—CRIMINAL RESPONSIBILITY—INTENT.

In a prosecution for removing from the premises garden produce subject to a landlord's lien, contrary to Code 1906, § 1261, intent to defeat or impair the lien is the gravamen of the charge.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1031, 1033; Dec. Dig. §253(1).]

2. LANDLORD AND TENANT §253(1)—REMOVAL OF PROPERTY—CRIMINAL RESPONSIBILITY—INTENT—EVIDENCE.

In a prosecution for removing from the premises garden produce subject to a landlord's

lien contrary to Code 1906, § 1261, evidence is admissible to prove defendant's understanding that lien applied only to corn and cotton, not to the produce removed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1031, 1033; Dec. Dig. §253(1).]

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Will Dolph was convicted of removing property subject to a lien from leased premises, and he appeals. Reversed and remanded.

A. A. Chaney, of Vicksburg, for appellant. Lamar F. Easterling, Asst. Atty. Gen., for the State.

COOK, P. J. Appellant was indicted and convicted, under section 1261, Code 1906, for removing property subject to lien from premises. Appellant was a share cropper, and one Mr. Childs was his landlord. The contract was verbal. According to the landlord's version, appellant was to deliver to him one-half of all of the agricultural products raised by him. According to appellant's understanding of the contract he was to deliver to his landlord one-half of the cotton and corn grown on the land. The trial court would not permit appellant to tell the jury what was his understanding of the contract. It seems that appellant also planted a potato patch and sold the potatoes produced thereon, pocketing the proceeds.

[1, 2] The gravamen of the charge was that appellant removed the potatoes from the leased premises "with intent to defeat or impair the lien." If appellant believed that he a right to sell or use the "garden truck," it followed that he did not remove the potatoes with intent to defeat the landlord's lien. It is probably not too much to say that according to the custom in this state, the tenant on a cotton and corn farm is usually entitled to horticultural products, and it is not unreasonable to assume that he so construed his contract. He did not have notice of the lien, because he understood that his contract excepted the potatoes. This evidence should have gone to the jury. The jury, with this evidence before them, might have reasonably believed that there was no intent to defeat or impair the landlord's lien.

Reversed and remanded.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PARKER v. SOUTHERN RY. CO. IN MISSISSIPPI. (No. 18166.)(Supreme Court of Mississippi, Division B.
June 12, 1916.)**1. RAILROADS** ⚡246—**OPERATION—OBSTRUCTION OF CROSSING.**

Where the evidence showed that defendant's railroad train blocked the streets for one-half hour at midnight, preventing plaintiff from reaching her home from the depot of another railroad, and compelling her to stand out in the cold rain, causing illness, and ruining her wearing apparel, a peremptory instruction for defendant was error.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 758-760; Dec. Dig. ⚡246.]

2. EVIDENCE ⚡344 — **DOCUMENTARY EVIDENCE—CERTIFIED COPIES.**

In an action for injuries from exposure resulting from the obstruction of street crossings by a train, the exclusion of a certified copy of an ordinance prohibiting railroad trains from standing on crossings for longer than five minutes was error, notwithstanding evidence that the city clerk, when he signed the certificate, was at home in bed, and the ordinance was copied from the minutes of the board of aldermen, and not from the ordinance book, but was, in fact, the same as it appeared on the ordinance book.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1293; Dec. Dig. ⚡344.]

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

Action by Mrs. Cordelia Parker against the Southern Railway Company in Mississippi. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

M. B. Grace, of Birmingham, Ala., for appellant. Catchings & Catchings, of Vicksburg, for appellee.

POTTER, J. This is an appeal from the circuit court of Leflore county by Mrs. Cordelia Parker, who was plaintiff in the trial court, and the Southern Railway Company in Mississippi was defendant there and appellee here.

Plaintiff alleged in her declaration that she was a resident of the city of Greenwood, and was residing on the north side of defendant's main line, and that on the 24th day of December, 1913, plaintiff left the depot of the Yazoo & Mississippi Valley Railroad Company, where she had been to meet her brother, about 12 o'clock at night, and was endeavoring to reach her home, and to do so it was necessary to cross defendant's railroad, and that a freight train of defendant was blocking all the crossings in said city in this immediate vicinity, and it was impossible for her to cross said railroad track and reach her home. She charged that it was a very cold, disagreeable night, and was raining very hard. In trying to cross at the Main street crossing she found it blocked, and appealed to a brakeman on defendant's train and asked him to have the crossing "cut" so that she could cross the tracks of defendant, advising him that she was get-

ting very wet standing in the rain, and that the rain was cold, and, notwithstanding her request, the defendant's said brakeman willfully and negligently failed, neglected, and refused to "cut" said crossing, notwithstanding there was a locomotive attached to said train, and that the crossing could have been "cut" with but little effort. She further charged in her declaration that there was a city ordinance of the city of Greenwood prohibiting the defendant railroad company from keeping the streets in said city blocked by cars or otherwise for a longer period than five minutes; but, notwithstanding this, she was forced and compelled by a willful violation of said ordinance by said company to stand in a downpour of rain for half an hour until she had been thoroughly wet and chilled. She charged that she was made ill and suffered much pain on account of her illness, and in addition to this that her wearing apparel became wet and was ruined and was rendered utterly unfit for further use, and she brought her suit for \$50 damages to her wearing apparel, \$2,500 for personal injuries, and \$2,500 punitive damages.

In support of this declaration the plaintiff testified that, in company with her husband, on the 24th day of December, 1913, she went to the Yazoo & Mississippi Valley depot in the city of Greenwood for the purpose of meeting her brother, that the train was late, and did not reach there until about 12 o'clock, and that it was necessary for her to cross the Southern Railroad tracks to reach her home. Leaving the depot that night, she tried to cross at three different crossings, the Church street crossing, the Walthall street crossing, and the Main street crossing, and that all these crossings were blocked by the cars of the appellee, that after she had tried to cross at both the Church street and Walthall street crossings she tried at the Main street crossing, and, finding this blocked, she requested a brakeman in the defendant's employ to "cut" the crossing and let her by, but that the brakeman replied that he could not do it and went on. She further testified that it was a very cold night and raining hard, and that she was kept standing at the Main street crossing for 20 minutes or more, and that she was compelled thereafter to go to another crossing, called the Howard street crossing, and stayed there about five minutes "before they cut the crossing there." The plaintiff testified that she was given a severe cold by standing in the rain on the night in question, that she had neuralgia for several days, and that she had a cold from the effects of the drenching she had received for two or three weeks. Her husband and brother testified to about the same effect. The plaintiff offered in evidence a certified copy of an ordinance of the city of Greenwood prohibiting railroad trains to stand on crossings for a longer period of time than five minutes. The

defendant objected to the introduction of this ordinance, and put Mr. M. B. Grace, counsel for the plaintiff, on the stand, and proved by him that he prepared the certificate, and that Mr. Hicks, the city clerk, signed the certificate when he was at home in bed, and that the ordinance was copied from the minutes of the board of aldermen, and not from the ordinance book. Mr. Grace testified that the ordinance in question was copied from the minute book, but that it is the same as it is on the ordinance book. It is further proven that at the time the ordinance was copied from the minute book that the ordinance book had been misplaced, and that diligent effort to locate it had been made, but to no avail. In addition to offering the certified copy of the ordinance in question, the minutes of the board, with the original ordinance in question, were introduced in testimony. But upon objection of the defendant both the certified copy of the ordinance made by the clerk and the original ordinance as shown by the minutes were excluded as testimony, and the defendant company upon its motion was granted a peremptory instruction.

[1] The granting of the peremptory instruction in this case was error. The testimony for the plaintiff in this case showed a most willful disregard of plaintiff's rights, resulting in considerable injury to her. *Southern Railway Co. v. Floyd*, 99 Miss. 519, 55 South. 287; *Illinois Central R. R. Co. v. Engle*, 102 Miss. 878, 60 South. 1; *Terry v. New Orleans Great Northern R. R. Co.*, 103 Miss. 679, 60 South. 729, 44 L. R. A. (N. S.) 1069; *Anderson v. Railroad Co.*, 81 Miss. 587, 33 South. 840; *Railroad Co. v. Alexander*, 62 Miss. 496; *Railroad Co. v. Dufree*, 69 Miss. 439, 13 South. 697.

[2] It was error also to exclude the minute book showing the ordinance of the city of Greenwood prohibiting a railroad train to block a public crossing for a longer period of time than five minutes. The minute book was the original of the ordinance in question and was competent testimony, and material to plaintiff's case.

Reversed and remanded.

FUNCHESS v. WADE. (No. 17784.)
(Supreme Court of Mississippi. June 12, 1916.)
Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.
Action between W. F. Funchess and Sallie Wade. From the judgment, Funchess appeals. Affirmed.

G. C. Broome, of Hazlehurst, for appellant. Flowers, Brown, Chambers & Cooper, of Jackson, for appellee.

PER CURIAM. Affirmed.

71 SO.—58

EVANS v. GIDWITZ. (No. 18312.)
(Supreme Court of Mississippi. June 12, 1916.)
Appeal from Circuit Court, Tallahatchie County; N. A. Taylor, Judge.

Action between J. T. Evans and A. I. Gidwitz. From the judgment, Evans appeals. Affirmed.

Boatner & Hearst, of Sumner, for appellant. Rowe Hays, of Sumner, and Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

NEW ORLEANS & N. E. R. CO. v. HARRIS.
(No. 18049.)

(Supreme Court of Mississippi. June 5, 1916.)
Suggestion of Error Overruled
June 19, 1916.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the New Orleans & Northeastern Railroad Company and Cheney Harris, administrator. From the judgment, the Railroad Company appeals. Affirmed.

A. S. Bozeman, of Meridian, and R. H. & J. H. Thompson, of Jackson, for appellant. Fellwell & Cameron, of Meridian, for appellee.

PER CURIAM. Affirmed.

CROSBY v. CROSBY. (No. 18296.)
(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between Effie Crosby and William Crosby. From the judgment, Effie Crosby appeals. Affirmed.

Theo. McKnight, of Vicksburg, for appellant. W. E. Mollison, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

GULF & S. I. R. CO. v. LACK. (No. 18211.)
(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Smith County.
Action between the Gulf & Ship Island Railroad Company and A. W. Lack. From the judgment, the Railroad Company appeals. Affirmed.

T. J. Wills, of Raleigh, for appellant. Hilton & Hilton, of Mendenhall, and Currie & Currie, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

WARD et al. v. IRWIN et al. (No. 17449.)
(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Chancery Court, Quitman County; M. E. Denton, Chancellor.

Action between C. W. Ward and others and Joseph M. Irwin and others. From the judgment, the parties first named appeal. Affirmed.

P. H. Lowrey, of Marks, for appellants. R. L. Ward, of Sumner, for appellees.

PER CURIAM. Affirmed.

REEVES GROCERY CO. v. THOMPSON.
(No. 18179.)

(Supreme Court of Mississippi. June 12, 1916.)
Appeal from Circuit Court, Monroe County;
Claude Clayton, Judge.

Action between the Reeves Grocery Company
and A. J. Thompson. From the judgment, the
Grocery Company appeals. Affirmed.

Wiley H. Clifton, of Aberdeen, for appellant.
Leftwich & Tu5b, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

CRANE v. MONTGOMERY. (No. 18155.)

(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Chancery Court, Yazoo County;
O. B. Taylor, Chancellor.

Action between Mary P. Crane and L. G.
Montgomery. From the judgment, Crane ap-
peals. Affirmed.

Holmes & Holmes, of Yazoo City, for appel-
lant. E. L. Brown, of Yazoo City, for appellee.

PER CURIAM. Affirmed.

**HARBOUR v. LAUREL OIL & FERTILIZ-
ER CO.** (No. 19095.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Circuit Court, Neshoba County.
Action between C. D. Harbour and the Laurel
Oil & Fertilizer Company. From the judg-
ment, Harbour appeals. On motion to dismiss
appeal. Sustained.

W. J. Pack, of Laurel, for the motion.

PER CURIAM. Motion to dismiss sustained.

**DONLEY v. SOUTHERN RY. CO. IN MISS-
ISSIPPI.** (No. 17619.)

(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Carroll County;
J. A. Teat, Judge.

Action between S. I. Donley and the Southern
Railway Company in Mississippi. From the
judgment, Donley appeals. Affirmed.

M. B. Grace, of Birmingham, Ala., and L.
Brame, of Jackson, for appellant. Gardner,
McBee & Gardner, of Greenwood, for appellee.

PER CURIAM. Affirmed.

**YAZOO & M. V. R. CO. v. PICKENS &
FINCHER.** (No. 18292.)

(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Holmes County;
F. E. Everett, Judge.

Action between the Yazoo & Mississippi Val-
ley Railroad Company and Pickens & Fincher.
From the judgment, the Railroad Company ap-
peals. Affirmed.

Boothe & Pepper, of Lexington, for appellant.
Elmore & Ruff, of Lexington, for appellee.

PER CURIAM. Affirmed.

STUYVESANT INS. CO. v. ANDREWS.
(No. 18318.)

(Supreme Court of Mississippi. June 12, 1916.)

Appeal from Circuit Court, Clay County; T.
C. Kimbrough, Judge.

Action between the Stuyvesant Insurance
Company and W. T. Andrews. From the judg-
ment, the Insurance Company appeals. Af-
firmed.

Critz & Critz and J. E. Caradine, all of West
Point, for appellant. McLaurin & Armistead,
of Vicksburg, for appellee.

PER CURIAM. Affirmed.

PATRICK v. HENSLEY et al. (No. 18316.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Benton County;
J. G. McGowen, Chancellor.

Action between R. O. Patrick, administra-
tor, and Joseph Hensley and others. From the
judgment, the administrator appeals. On mo-
tion to dismiss appeal. Sustained.

Thos. Spight, of Ripley, for the motion.

PER CURIAM. Motion to dismiss sustained.

POLK v. DRENNAN. (No. 19094.)

(Supreme Court of Mississippi. June 5, 1916.)

Appeal from Chancery Court, Marion County;
D. M. Russell, Chancellor.

Action between E. E. Polk and J. V. Drennan.
From the judgment, Polk appeals. On motion
to dismiss appeal. Sustained.

McIntosh Bros., of Collins, for the motion.

PER CURIAM. Motion to dismiss sustained.

SMITH v. STATE.

(Supreme Court of Florida. May 18, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §398(1)—EVIDENCE—BEST AND SECONDARY EVIDENCE.

While secondary evidence should not be admitted in substitution for primary evidence, yet where the evidence offered is primary or original in its character, it should not be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-881; Dec. Dig. § 398(1).]

2. CRIMINAL LAW §398(2) — EVIDENCE — BEST AND SECONDARY EVIDENCE.

Secondary evidence of the contents of records may be given when such records are destroyed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 882-886; Dec. Dig. § 398(2).]

3. CRIMINAL LAW §21—NATURE OF CRIME—INTENT—STATUTORY PROVISIONS.

While all common-law crimes consist of two elements, the criminal act or omission, and the mental element, commonly called criminal intent, it is within the power of the Legislature to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 22; Dec. Dig. § 21.]

4. JUSTICES OF THE PEACE §30—CRIMINAL RESPONSIBILITY—"MALPRACTICE IN OFFICE."

A failure of a justice of the peace to pay over to the county treasurer within ten days after the receipt thereof all fines collected by him as such magistrate, without excuse for such failure, is a violation of section 4035, Gen. St. 1906, and such failure, whether the result of willfulness or negligence, may be regarded as "malpractice in office" within the meaning of section 3481, Gen. St. 1906.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 66-70; Dec. Dig. § 30.]

For other definitions, see Words and Phrases, First and Second Series, Malpractice.]

5. OFFICERS §121—CRIMINAL RESPONSIBILITY—MALPRACTICE IN OFFICE.

The word "willfully" as used in Gen. St. 1906, § 3481, is a part of the definition of the offense of extortion, and does not, by construction, become an element of the offense of "any malpractice in office not otherwise especially provided for," condemned in the same section.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 207, 208; Dec. Dig. § 121.]

6. CRIMINAL LAW §1188—APPEAL—DISPOSITION OF CAUSE—REVERSAL.

Where a sentence pronounced in a criminal case is not in substantial compliance with statutory requirements, the judgment will be reversed and the cause remanded for a proper sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3222-3224; Dec. Dig. § 1188.]

Error to Circuit Court, Jackson County; E. C. Love, Judge.

J. A. Smith was convicted of malpractice in office, and brings error. Reversed and remanded.

Smith & Davis and Will H. Price, all of Marianna, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

PER CURIAM. This writ of error was taken to a conviction of the statutory offense of "malpractice in office" in neglecting to pay over to the county treasurer, within ten days after the receipt of same, money received and collected by the accused as justice of the peace in payments of fines imposed upon convictions before the justice of the peace. Section 3481, Gen. Stats. of 1906; section 3481, Compiled Laws of 1914.

A witness for the state testified that the accused kept a docket as justice of the peace; that a part of the docket "was torn out—a hundred and one or some odd pages, I don't remember exactly. They were the pages that covered the past six or eight months in court. I don't know what became of them. As well as I remember about the docket, all of the 1914 docket was destroyed and all of the 1915 except a few pages, as well as I remember." The court asked the state attorney, "Have you got the docket?" Answer, "No, sir; have never been able to get it."

[1] Witnesses for the state were asked questions as to the conviction and fines of the named persons before the defendant as justice of the peace. These questions were objected to by counsel for the defendant on the ground that the record is the best evidence, and there is no proper showing that the record was lost or destroyed. The objections were overruled and exceptions taken.

While secondary evidence should not be admitted in substitution for primary evidence, yet where the evidence offered is primary or original in its character, it should not be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive. 17 Cyc. 467; 10 R. C. L. 903.

[2] Secondary evidence of the contents of records may be given when such records are destroyed. See 10 R. C. L. 915; Williams v. Richardson, 66 Fla. 234, 63 South. 446; 17 Cyc. 523.

Under the circumstances of this case there was no improper substitution of secondary for primary evidence, and there was no error in admitting original, positive, and independent oral testimony as to the convictions and the imposition and collections of fines by the defendant when acting as a justice of the peace. The record may have been in the custody of the defendant who made it.

The statute provides:

"Any officer of this state who willfully charges, receives or collects any greater fees than he is entitled to charge, receive or collect by law, or who is guilty of any malpractice in office not otherwise especially provided for, shall be punished by imprisonment not exceeding one year,

or by fine not exceeding five hundred dollars." Section 3481, Gen. Stats. 1906, Compiled Laws 1914.

"All fines imposed by any such court, if paid before the accused is committed, shall be received by the justice of the peace who constituted the court before which the accused was convicted, and by such magistrate paid over to the county treasurer within ten days after the receipt thereof, to be disposed of according to law.

"If the accused be committed, payment of any fine imposed upon him shall be made to the sheriff of the county, who shall, within ten days after the receipt thereof, pay over the same to the county treasurer for the purpose aforesaid." Section 4035, Gen. Stats. 1906, Compiled Laws 1914.

It appears that the fine was collected by the defendant as justice of the peace before the convicted person was committed. If the fines were in fact collected by the defendant as justice of the peace and not paid over, the regularity of the collections is not material.

[3] While all common-law crimes consist of two elements—the criminal act or omission, and the mental element, commonly called criminal intent, it is within the power of the Legislature to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer. *Mills v. State*, 58 Fla. 74, 51 South. 278; *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249, 31 L. R. A. (N. S.) 467, 20 Ann. Cas. 1152; 8 R. C. L. 62.

[4, 5] A failure of a justice of the peace to pay over to the county treasurer, within ten days after the receipt thereof, all fines collected by him as such magistrate, without excuse for such failure, is a violation of section 4035, Gen. Stats. 1906, and such failure, whether the result of willfulness or negligence, may be regarded as "malpractice in office" within the meaning of section 3481, Gen. Stats. 1906. The word "willfully" as used in section 3481 is a part of the definition of the offense of extortion, and does not, by construction, become an element of the offense of "any malpractice in office not otherwise especially provided for," condemned in the same section.

In giving and refusing charges to the jury these rules of law were substantially followed. If technical error was committed, the facts in evidence show the error, if any, to be harmless.

There is evidence to sustain the verdict. If mitigating circumstances exist, they cannot be considered on this writ of error.

The sentence is that the defendant for his "said offense do forfeit and pay a fine of \$200 and * * * be confined in the county jail at hard labor for a period of ninety (90) days, and that you pay the costs of the prosecution."

[6] Section 3481, General Statutes, under which the conviction was had, provides for punishment "by imprisonment not exceeding one year, or by fine not exceeding five hundred dollars," but section 3175, General Statutes, provides that:

"Whenever the punishment is prescribed to be fine or imprisonment (whether in the state prison or county jail), in the alternative, the court may, in its discretion, proceed to punish by both fine and such imprisonment."

However, section 4012, General Statutes, provides:

"Whenever the sentence shall be one of both fine and imprisonment, it shall also provide for an additional period of imprisonment in the county jail or in the state prison, according as the other period of imprisonment may be in a county jail or the state prison, for which such person shall be held in default of payment of fine and costs. Such additional period shall commence and run from the expiration of the other period of imprisonment fixed by the sentence."

This latter section of the statute was not complied with in rendering the sentence. The judgment must be reversed, and the cause remanded for a proper sentence. See *Thompson v. State*, 52 Fla. 113, 41 South. 899; *Taylor v. State*, 67 Fla. 127, 64 South. 454.

It is so ordered..

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

DOKE v. STATE.

(Supreme Court of Florida. May 18 1916.)

(Syllabus by the Court.)

1. HOMICIDE \S 117 — JUSTIFICATION — SELF-DEFENSE.

In a prosecution for murder the defense of self-defense is not sustained where it appears that the defendant killed the deceased before using all reasonable means in his power and consistent with his own safety to avoid the danger and avert the necessity of taking the life of the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 164-167; Dec. Dig. \S 117.]

2. HOMICIDE \S 250 — EVIDENCE — SUFFICIENCY.

Evidence examined, and found sufficient to support a verdict of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 515-517; Dec. Dig. \S 250.]

Error to Circuit Court, Alachua County; J. T. Wills, Judge.

Claud Doke was convicted of manslaughter, and brings error. Affirmed.

W. S. Broome and D. M. Bule, both of Gainesville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

ELLIS, J. Claud Doke was convicted of manslaughter in the circuit court for Alachua county upon an indictment charging him with the murder of W. Lewis Abbott, and comes here upon writ of error complaining that the evidence is not sufficient to support the verdict.

Claud Doke was indebted to W. Lewis Abbott in the sum of \$10 for the purchase of an old buggy, and was unable to pay. Abbott was persistent in his efforts to collect the debt from Doke, notwithstanding the latter's repeated statements to Abbott that he was unable to pay.

About 8 or 10 months before Abbott was killed Doke suffered from an attack of typhoid fever, which confined him to his bed for about 2½ months, which left him in a very weak physical condition, and a very greatly swollen leg, which made it necessary for him to use crutches for a long while after he was able to leave his room.

On the day of the difficulty in which Abbott was killed Doke had abandoned his crutches, but his leg was still swollen, and he was not in a normal state of health according to the physician who had attended him during his illness. According to the testimony of the defendant below and other witnesses, the attitude of Abbott toward Doke was hostile, overbearing, and insulting to the extent perhaps of intimidating the latter, who on more than one occasion avoided him.

Abbott had threatened Doke with violence if the latter failed to pay the debt within a certain time, and on the morning of the day in which the former was killed he said to O. D. Moore, a deputy sheriff, that he was

going out to Doke's place and if Doke did not pay the debt, Abbott would have the \$10 or "that much hide," and to another witness, Henry Money, a barber, he said that Doke owed him \$10 and, "I am going to have it or kill him."

Upon the day of the fatal encounter between these two men, Abbott and Doke, the latter was moving his family and household goods from the place where he had been living, to Trenton. Two wagonloads of household goods had been taken away, and Claud Doke and Gene Doke, a cousin of the defendant, the only person it seems other than the two participants who was present and witnessed the shooting, had returned for the third load. Claud Doke had borrowed a shotgun from a neighbor, and had carried it with him on at least one of the two trips, and had returned with it in his possession when he and his cousin came for the third load. It seems that Claud Doke had said to his uncle, R. L. Horn, about a month before, that he owed Abbott \$10 and was not able to pay him, and was not going to pay him; that he did not want Abbott to bother him, because if he did, somebody might get hurt, and about two weeks after this conversation Abbott said to the same witness that Doke owed Abbott for a buggy, and, "He better pay me, or he will be sorry he didn't." Abbott's threats, however, seem not to have been communicated to Doke, nor had the latter's words been carried to Abbott. This was the situation as well as we can ascertain from the record, when Claud Doke and his cousin Gene Doke returned to the former's house for the third load of household furniture. Abbott and two other men were sitting on the porch. There was some evidence to the effect that Abbott had his knife out "whittling." The other two men seem to have left before the difficulty occurred. Neither Doke nor Abbott spoke to each other. The wagon was loaded, and the two Dokes were preparing to leave. Claud Doke had the gun in his hand. Abbott arose from where he was sitting on the porch of the house, and came to where the Dokes were standing, and asked Claud Doke for a settlement of the debt. Doke replied that he had nothing "to settle with." Abbott asked when he would have it, and Doke replied, "I don't know; as soon as I can collect it or get it." Whereupon Abbott observed that he did not see why "Claud" should be running and dodging from him; that "it is not treating me right." According to the witness Gene Doke:

"Claud jumped up on the shed with the gun, and he says, 'Whoever says I have been dodging and running from you tells a G— d— lie.' Then Abbott made for him. He run just the width of the wagon and jumped down on the ground and came around by the horses' head and run, I suppose, 20 steps to where he was shot."

When Doke jumped upon the shed, he held the gun in his hands unbreached. When Ab-

bott started toward Duke, the latter ran "across the width of the wagon, and Abbott right behind him." They passed Gene Duke near the horses' head; the gun was still unbreached. Gene Duke attempted to take the gun away from Claud Duke, who jumped to one side, and ran about 20 steps, with Abbott close behind him, when Duke fired upon Abbott, inflicting a wound in the lower part of the latter's abdomen, from which he died within two hours. When he fell he exclaimed, "Gene, he has killed me!" Claud Duke said, "I know it, and it may break my neck, but I can't help it." When the body of Abbott was being prepared for burial, his knife was found in his trousers pocket partly open, as if some trash had accumulated under the blade. Gene Duke did not see a knife in Abbott's hand when the latter ran toward Claud Duke, although he was in a position that would have enabled him to see it if Abbott had had it in his hand. Claud Duke, however, said that Abbott had the knife in his hand and attempted to cut Duke just before he fired the shot. The jury found the defendant guilty of manslaughter, and he was sentenced to be confined in the state prison at hard labor for 18 months.

The plaintiff in error insists that the circumstances under which Claud Duke killed the deceased clearly showed that Duke was justifiable, upon the theory of self-defense, in taking the life of the deceased.

[1] That the defendant was where he had a right to be there can be no question; but whether it be considered that he was within his own inclosure or not the taking of the life of the deceased was not justified unless the defendant used all reasonable means in his power and consistent with his own safety to avoid the danger and avert the necessity of killing the deceased. See *Owens v. State*, 64 Fla. 383, 60 South. 340; *Stafford v. State*, 50 Fla. 134, 39 South. 106; *Danford v. State*, 53 Fla. 4, 43 South. 593; *King v. State*, 54 Fla. 47, 44 South. 941; *Peadon v. State*, 46 Fla. 124, 35 South. 204.

In the *Danford Case*, supra, the court said the principle that it is the duty of one to avoid a difficulty he has reason to believe is imminent, if he may do so without apparently exposing himself to death or great bodily harm, cannot be denied, and that whatever qualifications it may have will depend upon the circumstances of each particular case; that a man violently assaulted in his own house or on his own premises near his house is not obliged to retreat, but may stand his ground and use such force as may appear to him as a cautious and prudent man to be

necessary to save his life or to save himself from great bodily harm. In cases where a combat is mutually sought, the duty of retreating seems to apply to both parties, for both being in the wrong, neither can right himself without retreating. And in the case of *Ballard v. State*, 31 Fla. 286, 12 South. 865, the court said a defendant may, as a reasonable man, have believed that he was in danger of losing his life, or of incurring bodily harm, and yet if he brought about the necessity himself without being reasonably free from fault, the killing would not be justifiable or excusable. See *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; *Padgett v. State*, 40 Fla. 451, 24 South. 145.

[2] We think that the question of the defendant's freedom from fault and the reasonableness of his belief under the circumstances that he was in danger of death, or great bodily harm from the deceased, was peculiarly for the jury to determine. The accused may have had and entertained some resentment against the deceased for the latter's persistent insulting and annoying efforts to collect the debt which the defendant owed him. Carrying the gun backward and forward from his own home to the new one to which he was moving may have been a precautionary measure against his meeting with the deceased and to have in his possession the means wherewith to hurt somebody if the deceased "bothered" him. The possession of the gun with the ammunition ready at hand may have emboldened him to use the violent language toward the deceased which he used; he certainly did not decline a fight except by loading his gun after the deceased spoke to him, and, after replying in language which indicated no fear of the deceased under the circumstances, and which was calculated to precipitate a difficulty which he must have believed was imminent, turned and ran a short distance. It is true he fled apparently from the deceased, but he turned and fired at close range upon the deceased, who was probably unarmed and approaching upon the defendant's invitation, which at least was implied. Under these circumstances we cannot say that the accused was free from fault in bringing on the difficulty, that the jury had no evidence before it that the unfortunate affair was unnecessary, and that the accused reasonably believed that he was in imminent danger of death or great harm, and used all reasonable means in his power to avoid the necessity of taking life. So the judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

SMITH v. WILSON.

(Supreme Court of Florida. May 18, 1916.
Rehearing Denied June 14, 1916.)

*(Syllabus by the Court.)*1. JUDGMENT \S 131 — ENTRY — STATUTORY PROVISIONS.

Section 1425 of the General Statutes of 1906, providing for the entry of final judgment upon default, requires a strict conformity to its terms on the part of the clerk of the court, who in entering the final judgment acts merely in a ministerial capacity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. \S 131.]

2. JUDGMENT \S 130—ENTRY—REQUISITES.

The entry by the clerk of a final judgment upon default should recite the proofs of the claim that were produced and filed; that he ascertained from such proofs the amount found to be due, which should be followed by language signifying the entry of a judgment for the amount so assessed or ascertained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 241, 242; Dec. Dig. \S 130.]

3. EXECUTION \S 319—SHERIFF'S DEED—ADMISSIBILITY IN EVIDENCE.

In an action of ejectment, a sheriff's deed, based upon a judgment void upon its face, is inadmissible as a muniment of title.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 935-939; Dec. Dig. \S 319.]

Error to Circuit Court, De Soto County; F. A. Whitney, Judge.

Action by Elizabeth B. Wilson against Norton Smith. Judgment for plaintiff, and defendant brings error. Reversed.

Brown & Jones, of Arcadia, for plaintiff in error. John W. Burton and L. Grady Burton, both of Arcadia, for defendant in error.

ELLIS, J. The defendant in error brought an action of ejectment to recover certain lots of land in Avon Park, De Soto county, from Norton Smith, who is the plaintiff in error here. The plaintiff in the court below claimed title to the lots in controversy under the will of her former husband, Frank T. Cullens, who claimed title under a deed from Abbie R. Dodge, who claimed under a deed from Andrew L. Pearce, as sheriff of De Soto county, who levied upon and sold the property under an execution which issued out of the circuit court for De Soto county, "at the suit of the Polk County National Bank, plaintiff, against the Florida Development Company and O. M. Crosby, defendants."

During the progress of the trial the plaintiff introduced in evidence a certified copy of a judgment in favor of Polk County National Bank, and against Florida Development Company, a corporation, and O. M. Crosby. But to the introduction of this paper in evidence the defendant, Norton Smith, by his attorneys objected, upon several grounds, as follows:

"1. That said judgment was not shown to be a valid judgment.

"2. Because said judgment is void for the rea-

son that the wording of same though it purports to be a final judgment, is nothing more than a default.

"3. Said judgment was entered by the clerk of the court in vacation on a promissory note and the clerk entered judgment for \$175.00 as attorney's fees.

"4. For the further reason that said judgment is immaterial and irrelevant.

"5. And because said judgment does not carry the entire record of the case with, and upon, which it is based."

The copy of the judgment offered in evidence by the plaintiff is in the following form:

"In the Circuit Court of the Sixth Judicial Circuit in and for De Soto County, Florida.

"The Polk County National Bank v. The Florida Development Company, a Corporation Created and Existing under the Laws of the State of Florida, and O. M. Crosby, Whose Christian Name is Unknown to Plaintiff.

"Assumpsit. Damages, \$3,000.00.

"The above-styled cause coming on to be further heard on this the 16th day of September, 1895, and it appearing from the returns of the sheriff filed herein that the defendants were duly served according to law; that the plaintiff filed its cause of action in said cause, the same being a promissory note given by said defendant. It also appearing that defendants filed their appearance according to law, but, having failed to plead, answer, or demur, it further appearing that a default judgment was duly entered up against the defendants for want of such pleadings, it is therefore ordered and adjudged that the defendants are due the plaintiff the sum of \$1,500 as principal and \$50 accrued interest to this date, also \$175 attorneys' fee, together with thirteen dollars and eighty-six cents cost in said cause by it expended and that execution issue therefor.

"Witness my hand and official seal at Arcadia, Fla., date above written.

"[Seal.] John H. Alford, Clerk."

The plaintiff also offered in evidence a paper called a stipulation, which was signed by the attorneys appearing in the case for Norton Smith and in his behalf, whereby it was agreed that the title to the lots in controversy became vested in the Florida Development Company, a corporation, by sufficient deeds of conveyance therein enumerated, beginning with the patent of the United States to the State of Florida, dated February 14, 1880. The last clause of the stipulation is in the following words:

"The defendant further stipulates that there was issued out of the circuit court of De Soto county, Fla., on the 16th day of September, 1895, an execution, sufficient in form and substance, upon a judgment before then found in the circuit court of said county, in the suit of Polk County National Bank, plaintiff, against the Florida Development Company and O. M. Crosby, and that thereon and by virtue thereof, A. L. Pearce, then sheriff of said county, advertised and sold the lands here in question at public sale."

The defendant's attorneys objected to the reading in evidence of the last paragraph of the stipulation quoted above upon the grounds:

"First, Because a valid judgment has not yet been issued; second, because same is irrelevant and immaterial."

Both of these objections the court overruled, to which rulings the defendant excepted. A jury was waived by the parties and the issues tried by the judge. Objections were also interposed by the defendant and overruled by the court to the introduction in evidence of the sheriff's deed to Abbie R. Dodge, the latter's deed to Frank Cullens, and a certified copy of the latter's will and probate of same. Those objections being all based upon the alleged invalidity of the judgment against the Florida Development Company and O. M. Crosby in favor of the Polk County National Bank, a certified copy of which had been admitted in evidence over the defendant's objections. These and other rulings of the court constitute the basis of the 13 errors assigned. Only one assignment of error is discussed by the attorneys for plaintiff in error, and that one raises the question of the admissibility in evidence of the certified copy of the judgment in favor of the Polk County National Bank against the Florida Development Company and O. M. Crosby.

The contention is made that the judgment is void because not in due form, and, being void, the proceedings based upon it were without authority of law; that the sheriff's deed to Abbie R. Dodge, therefore, was a nullity, as was her deed to Frank T. Cullens and the latter's devise to the plaintiff of the lands in controversy. The defendant in error insists that the judgment is not void for imperfections in form; that its validity should be tested by its substance and not its shadow; that it clearly adjudged the relation to exist between the plaintiff and defendants as creditor and debtors; adjudged the amount to be due from the defendants to the plaintiff, and that execution should issue therefor. Counsel for defendant in error cite the case of *Ponder v. Moseley*, 2 Fla. 207, 48 Am. Dec. 194, and *Price v. Winter*, 15 Fla. 66, in support of the proposition that:

"The title of a purchaser at a judgment sale is not affected by errors in the proceedings if the court had jurisdiction of the parties and of the subject-matter."

The application of the doctrine announced in those cases to the one at bar is not apparent. In the case of *Ponder v. Moseley*, *Ponder* became the purchaser of property at a public sale under an execution which issued upon the judgment of the court in conformity to the statute. The Supreme Court afterward held the judgment to be erroneous, but the court in the *Ponder* Case held that the purchaser acquired a good title to the property nevertheless, because while the judgment was erroneous, it was not void, and therefore all acts performed under it were valid so far as third persons were concerned. The court said that judgments of courts of general or competent jurisdiction are not considered under any circumstances as mere nullities, but as records importing

absolute verity and of binding efficacy until reversed by a competent appellate tribunal. In the case of *Price v. Winter*, *Price* was the purchaser of certain lands at a judicial sale under an order of a court having jurisdiction of the subject-matter and of the parties, one of whom was an infant. *Winter*, one of the devisees under his father's will, and at the time of the sale an infant, sought to set aside the sale and have a partition of the land. The Supreme Court, after holding that the circuit court which ordered the sale had jurisdiction of the subject-matter and the parties interested, the minor being represented by a guardian ad litem, held that *Price* acquired the interest of the minor at the sale, and refused to set it aside, it appearing that he occupied no fiduciary relation to *Winter*; that the bid was for the full value of the land, and no fraud in fact existed in connection with the sale.

The plaintiff in error in this case contends that there was no judgment, not that the judgment was erroneous or voidable, but that the so-called judgment of the court, a certified copy of which was offered in evidence, is not in fact a judgment of the court, but a mere finding of the clerk as to the defendant's indebtedness to the plaintiff and the amount due, and was not such an adjudication as concluded the matter in controversy between the parties upon which legal process for its enforcement could issue.

[1-3] An inspection of the document reveals the names of the parties plaintiff and defendant, the court in which the action was pending; that the action was upon a written instrument for the payment of money; that the defendants had been duly served with process, and had appeared to the action, but had failed to plead or demur, and that a default had been duly entered against the defendants for their failure to plead or demur; and that the plaintiff had produced and filed the written instrument for the payment of money upon which the action was founded. It further appears that the clerk of the court undertook to enter final judgment for the plaintiff against the defendants under section 1035, Revised Statutes of 1892, section 1425, General Statutes of 1906. This statute provides that:

The clerk "shall assess the amount which the plaintiff is entitled to recover for the principal and interest, and enter up judgment for the same, upon which judgment execution shall issue immediately unless otherwise ordered by the court."

In the case of *Blount v. Gallaher*, 22 Fla. 92, the court held that a final judgment entered by the clerk should set forth fully what evidence was produced by the plaintiff to enable the clerk to ascertain and assess the damages and to show what was the basis of the judgment. This strict conformity to the statute is required because the clerk acts in a mere ministerial capacity; he is a mere agent by whom the judgment authorized by the statute is written out and

placed among the records of the court. In support of this view the court quoted from the language of Mr. Justice Field in *Kelly v. Van Austin*, 17 Cal. 564. The judgment in the case of *Blount v. Gallaher*, supra, was defective, in that it did not show what evidence was produced by the plaintiff to enable the clerk to assess the damage and to show what was the basis of the judgment. No such criticism, however, can be made of the judgment involved in this case. There was on file the written instrument upon which the action was founded, and the clerk assessed the amount which the plaintiff was entitled to recover for the principal and interest, although it does not appear that in assessing the amount due by the defendants, the clerk acted upon the proofs produced and filed upon the entry of default. *Ropes v. Snyder Harris Bassett Co.*, 37 Fla. 529, 20 South. 535. But, assuming that the clerk acted upon the proofs produced in assessing the amount due by the defendants, an assumption which in view of the statute, rules of court, and the decisions of the Supreme Court is of exceedingly doubtful propriety, he did nothing more than assess the amount due, and there stopped; the words with which he closed the entry, viz., "and that execution issue therefor," were superfluous because the statute provides for the issuing of the execution upon a judgment immediately unless otherwise ordered by the court. We cannot give to the words "ordered and adjudged" which appear in the instrument the double significance and importance of indicating the act of assessing the amount

due and the entry of the judgment for the same. There are no words in the document which may be said to constitute the judgment proper. The paper contains a mere recital of certain facts as to service of the process, the filing by the plaintiff of the promissory note upon which the action was founded, the entry of a default against the defendants for failure to plead or demur, and the assessment by the clerk of the amount due from the defendants to the plaintiff, all of which is required to be done before a final judgment may be entered. The power given by the statute to the clerk to enter final judgment consequent upon defaults in pleading should be strictly construed. See *Ropes v. Snyder Harris Bassett Co.*, supra; *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568, 33 South. 473; *Register v. Pringle Bros.*, 58 Fla. 355, 50 South. 584; *Cosmopolitan Fire Ins. Co. v. Boatwright*, 59 Fla. 232, 51 South. 540.

The power given by the statute does not appear to have been strictly pursued by the clerk in assessing the amount due, in that the record failed to show that the clerk acted upon the proofs produced upon the entry of default when he assessed the amount which the plaintiff was entitled to recover, nor was the power to enter up judgment for the same attempted to be exercised at all.

We think therefore that the fourth assignment is well taken.

The judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

MUNROE, City Treasurer, v. REEVES.
(Supreme Court of Florida. May 18, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 931—BONDS.

Where a municipality issues bonds in different separate amounts for several purposes, some of which bonds are for municipal purposes authorized by law, and a severable amount of the bonds may not legally be issued by the city, the bonds that are legal may be sustained, and those that are illegal and severable may be declared invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1944-1947; Dec. Dig. ¶ 931.]

Appeal from Circuit Court, Gadsden County; E. C. Love, Judge.

Suit by Ira D. Reeves against George D. Munroe, City Treasurer of the City of Quincy. From an order overruling a demurrer to the bill, defendant appeals. Affirmed, and cause remanded for further proceedings.

W. J. Oven, of Tallahassee, for appellant.
Y. L. Watson, of Quincy, for appellee.

PER CURIAM. Chapter 5844, Acts of 1907, in section 22 authorized the town of Quincy to issue bonds "for the purpose of erecting schoolhouses and maintaining a system of public education in said municipality." The city, pursuant to ordinances, etc., issued \$80,000 of bonds for various municipal purposes, including also "for the purpose of erecting a schoolhouse and maintaining a system of public education in said city, \$10,000." Chapter 6095, § 1, Acts of 1909, validated the entire bond issue of \$80,000, including those issued—

"for the purpose of erecting a schoolhouse and maintaining a system of public education in said city, ten thousand (\$10,000.00) dollars, as provided for in said ordinance, in such form and containing such recitals and provisions as the council of the city of Quincy, Florida, may, by resolution, determine or have heretofore, by resolution, determined; and any and all such bonds of the city of Quincy, Florida, issued, or which may hereafter be issued by the city of Quincy, Florida, under said ordinance, and in pursuance of the ratification of said ordinance, by the special election held on the 27th day of April, 1909, be, and the same are, hereby declared legal and valid, and said bonds shall not be held invalid on account of any irregularity, defects or imperfections whatsoever, in the proceedings, taken or to be taken by the city of Quincy, Florida, in the issuing of said bonds, or the issuing of the said bonds in excess of any amount limited by the law of Florida, at the time of the election aforesaid, or the passages of the ordinance aforesaid, and all the defects or other irregularities in such proceedings, or issuing of said bonds in excess, or any limit of indebtedness that may be prescribed by the laws of Florida, at the time of the holding of the election aforesaid, or the passage of the ordinance aforesaid, are hereby cured and the issuing and sale of said bonds as provided for by said ordinance, are hereby authorized and permitted."

The payment of interest on the entire issue of \$80,000 was enjoined upon a bill filed for that purpose, and a demurrer to the bill

of complaint was overruled, from which latter ruling the defendant appealed. Authority clearly existed for issuing all the bonds except the \$10,000 school bonds, and the latter are severable from the others.

Irregularities in the issue of the bonds were cured by the validating act; but, if the city cannot under the Constitution legally issue the \$10,000 of school bonds, the interest payments thereon may be enjoined. As the \$10,000 of school bonds issued in this case may not on this record be differentiated from a similar issue adjudged illegal in *Brown v. City of Lakeland*, 61 Fla. 508, 54 South. 716, the same result follows in this case. It does not appear that the bonds were issued for the purpose of higher education or for an independent school system of the city.

The purpose of the \$10,000 bond issue is evidently to supplement the funds of the "system of public free schools," that is by the Constitution required to be "uniform." Under the Constitution the town as such cannot legally issue bonds for that purpose. By organizing as a school district under sections 10 and 11 and section 17, an amendment of 1911, of article 12 of the Constitution, so that the "incorporated town * * * may constitute a school district," the purpose of the bond issue may be accomplished, and the credit of the community preserved.

There is equity in the bill as to the \$10,000 school bonds; therefore the demurrer to the whole bill was properly overruled.

The order appealed from is affirmed, and the cause remanded for proceedings in accordance with this opinion.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

ELLIS, J., takes no part.

EATON et al. v. HOPKINS et al.
(Supreme Court of Florida. May 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 737—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where a single assignment of error attacks a ruling of the court upon a demurrer which was interposed to two or more pleas, such an assignment will be tested by the sufficiency or insufficiency as the case might be, of any one of the pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3030-3032; Dec. Dig. ¶ 737.]

2. COVENANTS — 111 — BREACH — RIGHT OF ACTION.

An action for a breach of the covenant of warranty in a deed of conveyance to two or more persons in common may be brought by any one or more of the grantees named in the deed.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 186, 187; Dec. Dig. ¶ 111.]

3. APPEAL AND ERROR \S 1066 — REVIEW—HARMLESS ERROR—INSTRUCTIONS.

A charge technically erroneous upon the burden of proof becomes harmless if the undisputed evidence is sufficient to establish the point upon which the court erroneously charged concerning the burden of proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

4. COVENANTS \S 137—ACTIONS FOR BREACH—EXTENT OF RECOVERY.

In an action by one or more grantees in common for a breach of the covenant of warranty, the plaintiffs may recover only so far as their own interests extend.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 271; Dec. Dig. \S 137.]

5. COVENANTS \S 130(1) — ACTIONS FOR BREACH—DAMAGES.

In an action for a breach of the covenant of warranty, where the vendor conveys the property a second time under circumstances that would charge him with knowledge of the fact that he had previously conveyed the property, and the latter purchaser takes the paramount title by being the first to comply with the recording laws, the measure of damages to be applied is compensation for the actual injury sustained, or "damages for the loss of the bargain," including costs and expenses incident to a defense of the title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. $\S\S$ 245, 246, 251; Dec. Dig. \S 130(1).]

Error to Circuit Court, Madison County; M. F. Horne, Judge.

Action by George W. Hopkins and another against R. L. Eaton and another, as administrators of the estate of William M. Girardeau, deceased. Judgment for plaintiffs, and defendants bring error. Reversed.

T. L. Clarke, of Monticello, for plaintiffs in error. Wm. T. Hendry, of Perry, for defendants in error.

ELLIS, J. On the 25th of October, 1902, William M. Girardeau and his wife conveyed to George W. Hopkins, Mattie C. Collins, and Charles Marthinson 120 acres of land in Taylor county. The consideration expressed was \$600. The interests conveyed were an undivided one-fourth to Charles Marthinson, the same quantity to George W. Hopkins, and an undivided one-half interest to Mattie C. Collins. The deed contains a covenant of general warranty.

On September 28, 1904, William Girardeau and his wife conveyed the same land to William O'Brien, and, as the grantees in the first deed of conveyance had not caused their deed to be recorded, the circuit court in August, 1908, in a suit brought by George Hopkins and Mattie Collins against William O'Brien to cancel the latter deed as a cloud upon the title, decreed that O'Brien was a bona fide purchaser of the land for a valuable consideration and without notice of the title of Hopkins and Mattie Collins, and dismissed the bill. William Girardeau was given due notice of the suit and made a party defendant.

On September 4, 1909, William Girardeau

died testate, naming two executors of his will, one of whom died, and the other, Mary Girardeau, widow of deceased, was removed, and in October, 1910, the two defendants, R. L. Eaton and G. C. McCall, were granted letters of administration upon William Girardeau's estate de bonis non cum testamento annexo.

Before the death of William Girardeau, and prior to the institution against O'Brien of the suit to remove the cloud upon plaintiffs' title, they and Charles Marthinson brought an action at law against William Girardeau in 1906 to recover the purchase money paid by William O'Brien to William Girardeau "based upon Girardeau's warranty deed" for money had and received by Girardeau for the use of the plaintiffs. That suit was dismissed.

R. L. Eaton is the son-in-law of Mrs. Mary Girardeau, widow of the deceased, and at one time one of the executors of her deceased husband's will. She was removed from that position largely through the activity of Mr. Eaton, who, with Mr. McCall, as stated, was appointed administrator. During Mrs. Girardeau's executorship the plaintiffs, through their attorney, Mr. S. D. Clarke, on September 8, 1910, wrote Mr. Eaton giving full information as to the history and nature of the plaintiffs' claim against the estate of William Girardeau, and requested him to "take up the matter," as Mr. Clarke supposed Mrs. Girardeau would be guided largely by Mr. Eaton's views. In reply to this letter Mr. Eaton wrote upon the margin directing Mr. Clarke to take the matter up with Mrs. Girardeau, and saying that, if she said anything to him about it, he would advise her to pay it. After Mr. Eaton's appointment as administrator, Mr. Clarke again wrote him, referring to the letter of September 8, 1910, and requesting Mr. Eaton to close the matter at once. The last letter followed the first in about eight months. Mr. William T. Hendry, attorney for the plaintiff, early in the year 1914 applied to Mr. Eaton for a settlement, and tried to get him to give Mr. Hendry an "acknowledgment of the account for \$1,000," but Eaton refused to do so, and offered to pay \$600 in settlement.

On October 8, 1909, Mrs. Mary Girardeau and T. M. Puleston, the then executrix and executor of the will of William M. Girardeau, caused to be published in a newspaper published in Monticello the notice to creditors of the estate required by statute. The notice was published for eight weeks, and proof of the publication made in October, 1914.

The plaintiffs commenced this action of covenant upon the warranty contained in the Girardeau deed of 1902 in the month of May, 1914, in the circuit court for Madison county. The defendants, R. L. Eaton and G. C. McCall, as administrators, pleaded: First that the covenants were made to plaintiffs

and Charles Marthinson jointly, that neither he nor his personal representatives were made parties plaintiff, "and the plaintiffs are not entitled to claim or recover for any moneys paid by said Charles Marthinson for the purchase of the lands mentioned in plaintiffs' declaration"; second, that plaintiffs had made an election of remedies, and were estopped by their action at law commenced in 1906 in assumpsit for money had and received from suing the defendants in covenant upon the warranty contained in the deed of 1902; and, third, that the claim of the plaintiffs was barred by the statute of nonclaim.

The plaintiffs demurred to the first and second pleas, and joined issue upon the third. The demurrer was sustained, and the parties went to trial upon the issue joined upon the third plea. By stipulation between the attorneys representing the plaintiffs and defendants a jury was waived, and the cause was tried by the judge without a jury. The court found that Girardeau committed a breach of the warranty contained in the deed of 1902 when he sold in September, 1904, the same lands to O'Brien, an innocent purchaser, and from that date became indebted to the plaintiffs in the sum of \$600, that prior to the institution of this suit Charles Marthinson died, and the right of action survived to the surviving joint "warrantees," and that the plaintiffs' claim was duly presented to the administrators of the estate of William M. Girardeau within two years from the publication of the notice to creditors under the statute of nonclaim, and entered judgment for the plaintiffs against the defendants in the sum of \$1,098.50, principal and interest. The defendants took a writ of error to that judgment, and assign six errors, as follows: First, sustaining the demurrer to the first and second pleas; second, in holding that under the third plea the burden of proof was upon defendants to show that the claim was not presented to the executors or administrators within the period required by the statute; third, the finding for plaintiffs; fourth, the holding by the court that the right of action upon the death of Marthinson survived to the plaintiffs; fifth, allowing interest upon the plaintiffs' claim "from the date of the purchase of said lands on the purchase price or any part thereof"; and, sixth, overruling the motion for a new trial.

[1] The plaintiffs in error in one assignment attack the order of the court sustaining the demurrer to the first and second pleas. If, therefore, one of the pleas was bad, the assignment must fail. Each error relied upon should be distinctly specified and separately assigned. The rule that, when one assignment was made attacking several distinct instructions, this court would go no further than to ascertain if the court below acted properly in giving one of the instructions, has long been recognized in this state,

and was definitely applied to the rulings on pleadings in the case of *Daniel & Finley v. Siegel-Cooper Co.*, 54 Fla. 265, 44 South. 949. The rule obtains in this state as to the admission or rejection of evidence, the giving or refusing of instructions, and the striking or refusing to strike different pleas. There is no reason, so far as we are able to perceive, why the rule should not also apply to instances where one assignment attacks an order sustaining or overruling a demurrer to several pleas. *McMillan v. Warren*, 59 Fla. 578, 52 South. 825.

[2] The first plea was bad. In the first place, it did not go to the entire declaration. It may be construed to admit the plaintiffs' right to maintain the action, but not for the entire sum paid by all three grantees in the deed of 1902. Whether it may be so construed, the plea was bad, because the covenants in the deed of 1902 by which the grantees became tenants in common were several; the interests were several; their freeholds were several; therefore the action upon the breach was several. *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Lahy v. Holland*, 8 Gill (Md.) 445, 50 Am. Dec. 705; 7 R. C. L. 1193; *Swett v. Patrick*, 11 Me. 179; *Midgley v. Lovelace*, *Carthew*, 289, 90 English Reports, Reprint. We think the second plea was also bad because neither the action in assumpsit nor the one in covenant could be maintained unless the plaintiffs admitted the breach of warranty by the grantor. Each case rests upon the theory that the grantor conveyed a good title to O'Brien. The actions therefore were not inconsistent.

[3] As to the burden of proof on the presentation of the claim, the error, if any, was harmless, because the evidence showed sufficient knowledge on the part of one of the administrators as to the nature and character of the claim, brought to his attention within two years from the publication of the notice by an attorney for the plaintiffs. See 11 R. C. L. pp. 192-194.

[4] The court erred, however, in the finding as to the amount the plaintiffs should recover from the defendants. The evidence showed their interest to be three-fourths, and that of Marthinson to be one-fourth. The plaintiffs may recover for the breach only so far as their own interests extend. *Lahy v. Holland*, *supra*.

[5] The measure of damages for a breach of a covenant of warranty, according to *Devlin on Deeds*, is the consideration paid for the land, or what it was worth as determined by the parties, with interest for the time the purchaser has lost the mesne profits; also the costs and expenses incurred by the covenantee in defending the suit to evict him. 2 *Devlin on Deeds*, § 934. Where, however, the vendor conveys the property a second time under circumstances that would charge him with knowledge of the fact that he previously conveyed the property, and the latter purchaser places his deed of record prior to

the recording of the first conveyance, and thereby takes the paramount title and right of possession, and the first vendee is evicted, and sues his vendor for damages for breach of the covenant of warranty and quiet possession, the measure of damages to be adopted, as we view the law, is the same as in cases where the vendor has contracted and agreed to convey, and thereafter, having good title and right to convey, declines and refuses to do so, in which case the measure of damages to be applied is that of adequate compensation for the actual injury sustained, or "damages for the loss of the bargain." *Madden v. Caldwell Land Co.*, 16 Idaho, 59, 100 Pac. 358, 21 L. R. A. (N. S.) 332; 7 R. C. L. p. 1186; *Munson v. McGregor*, 49 Wash. 276, 94 Pac. 1085.

In *Johnson v. McMullin*, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670, it was held that, where the vendor sells the property to a third person, and thereby puts it out of his power to perform, the measure of damages to which a vendee in a contract of purchase is entitled is the value of the property at the time the deed ought to have been delivered, less the amount of the purchase money due, citing *Hopkins v. Lee*, 19 U. S. (6 Wheat.) 109, 5 L. Ed. 218; *Gibbs v. Champion*, 3 Ohio, 335. See *Vallentyne v. Immigration Land Co.*, 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas. 212; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457; *Burdick v. Seymour*, 39 Iowa, 452; 2 *Warvelle on Vend. & Pur.* § 936; 2 *Sutherland on Damages*, § 579; *Matheny v. Stewart*, 106 Mo. 73, 17 S. W. 1014; *Arentsen v. Moreland*, 122 Wis. 187, 99 N. W. 790, 65 L. R. A. 973, 106 Am. St. Rep. 951, 2 Ann. Cas. 628.

In *Munson v. McGregor*, *supra*, the vendee was allowed to recover the difference between the two prices, together with the amount paid upon the purchase price, with interest from the commencement of the suit. Practically the same rule was recognized in *Bartlett v. Smith*, 146 Mich. 188, 109 N. W. 260, 117 Am. St. Rep. 625, where the vendee was allowed to recover the value of the improvements made in good faith by him, together with the payments made, less the value of the use of the premises.

The rule is very generally recognized that in such cases the good faith of the vendor

cannot be used by him in mitigation of damages. See *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677. Whether the vendor is actuated by bad faith in refusing to convey the land in one case or carelessly or in bad faith conveys the land a second time, thereby defeating the first conveyance, which was not placed of record, the results to the vendee are the same. The vendor cannot urge a defense which starts with his own violation of the rights of his grantee, as was said by the Supreme Court of Maine in *Williamson v. Williamson*, 71 Me. 442. See 2 *Sutherland on Damages* (2d Ed.) p. 213; *Matheny v. Stewart*, *supra*; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Fleckten v. Spicer*, 63 Minn. 454, 65 N. W. 926.

There is undoubtedly a diversity of opinion among the courts and text-writers as to the correct measure of damages in cases of this kind. We think that the case is more analogous to those in which the vendor, having at the time of the contract a good title and right to convey, afterwards refuses to make the conveyance, than to those cases where after conveyance the vendee through no act of the vendor is ousted of the possession and title by a superior right. In the latter case the authorities are in general harmony on the proposition that the vendee in an action of covenant against the vendor on the breach of warranty may recover the money paid on the purchase price, but differ as to the date from which interest should be allowed, some holding that interest should be computed from the date of the deed, and others from the date of eviction. Upon this point we express now no opinion, but hold that in a case of this kind the measure of damages is adequate compensation for the actual injury, or, as sometimes expressed, "damages for the loss of the bargain," which should include the costs and expenses incident to a defense of his title. The court erred in entering judgment in favor of the plaintiffs for the full amount of the purchase price and interest, which was greater than the three-fourths interest represented by them. For this reason, the judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

GRAHAM v. CITY OF WEST TAMPA.
(Supreme Court of Florida. May 18, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS —958—TAXATION—ASSESSMENT.

The Constitution ordains that the Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, that is subject to taxation, that all property shall be taxed upon the principles established for state taxation, but cities and towns shall make their own assessments for municipal purposes, and, when general statutes provide regulation by which just valuations and uniform and equal taxation may be attained, it is not essential that such regulations be incorporated in the charter of a city which has the powers conferred upon municipalities by the general laws, and under a power to tax such city may prescribe appropriate regulations to secure just valuations and a uniform and equal rate of taxation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2023-2037; Dec. Dig. —958.]

2. TAXATION —347—ASSESSMENT—REQUIREMENTS.

Valuations for taxation must have a just relation to the real value of the property assessed, and there must be no substantial inequality in valuations in the various kinds and items of property that is subject to the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 579-581, 583; Dec. Dig. —347.]

3. CONSTITUTIONAL LAW —284(1)—DUE PROCESS OF LAW—ASSESSMENT FOR TAXATION.

The means and methods prescribed for ascertaining the value of property for taxation purposes must be substantially observed and followed, or else the assessment will be invalid and a taking of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 896; Dec. Dig. —284(1).]

4. TAXATION —347—ASSESSMENT—VALIDITY.

While the law accords a range of discretion to the officer authorized to ascertain and determine valuations of property for purposes of taxation when the officer proceeds in accordance with and substantially complies with the requirements of law designed to ascertain such values, yet, if the steps required to be taken in making valuations are not, in fact, and in good faith actually taken, and the valuations are shown to be essentially unjust or unequal abstractly or relatively, the assessment is invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 579-581, 583; Dec. Dig. —347.]

5. TAXATION —453—ASSESSMENT—COLLECTION—JURISDICTION OF EQUITY.

Where the essential requirements of law are not observed in making valuations of property for assessment, and the valuations as made are shown by admissions or proofs to be clearly excessive, unjust, and unequal, appropriate relief may be had in equity, even though the proceedings authorized by law for seeking relief from administrative officers were not utilized, where the case made shows a flagrant violation of or omission to follow the mandatory requirements of the law in valuing property for taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 809; Dec. Dig. —453.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill of equity by James S. Graham against the City of West Tampa. From an order sustaining a demurrer to the bill of complaint, defendant appeals. Reversed.

Sandler & Nysewander, of Tampa, for appellant. Howard P. Macfarlane, of Tampa, for appellee.

WHITFIELD, J. In a bill of complaint Graham alleges, in effect, that he owns described lands in the city of West Tampa; that under asserted authority the municipality "attempted to assess, levy and collect taxes for the year 1914 against complainant's said land, the said taxes amounting to \$74.70, as shown by the defendant's assessment roll for the said year"; that such levy and assessment are illegal and void, because the charter act contains no provision for "uniform and equal rate of taxation," or "prescribe such regulations as shall secure a just valuation of all property"; that an ordinance of the city adopted prior to the present city charter purporting to provide for the constitutional requirements of uniformity, equality, and just valuation, is ultra vires, and was incapable of being ratified by the present city charter; that the property was not "taxed upon the principles established for state taxation," as required by the Constitution; that said taxes are not, in fact, just; that one W. J. Twitt acted as defendant's tax assessor for the year 1914, and, as such assessor, it became and was his duty to do those things and adopt such methods as would adequately secure to complainant a just valuation of his property for assessment, but, wholly failing thus to do, said assessor assessed complainant's land at a value entirely arbitrary, unjust, and excessive, said value being arrived at or determined in an arbitrary and illegal manner; that said assessor at no time visited or inspected said lands, though unacquainted with their value, and though often requested so to do by complainant, and complainant on information and belief charges that said assessor made no effort to ascertain and determine the value of said lands, and that the value actually placed thereon by said assessor, to wit, \$4,150, was by him fixed arbitrarily, and not upon any evidence which might or could enable him to form a fair and just estimate of its value for assessment; that said assessed value is more than double the actual cash, fair, or just value of said lands; that they have never been and are not worth over \$2,000; that said assessor failed to assess for taxation the personal property of numerous of defendant's taxpayers, including complainant; that, in fact, no due or real effort was made by said assessor to assess the personal property, subject to taxation by defendant, during said year; that he listed for personal property taxation for that year not over 200 persons, as appears by defendant's assessment roll, whereas defend-

ant's personal property taxpayers are many times said number, that is to say, the persons owning personal property subject to taxation by defendant for said year far exceeded the number actually taxed, said omission to assess or tax such a great amount of personal property being contrary to constitutional principles of uniformity and equality of taxation; that not only is the assessed valuation of complainant's lands unjust and excessive, regardless of the assessed value of similar lands within defendant's limits, but said valuation is equally unjust and excessive in proportion to the valuation placed on said other property; that said lands are almost entirely wild and woodlands, unplatted and suited only for agricultural purposes and derive no benefit whatever from said city government.

The prayer is that the collection of the tax be enjoined, and the asserted lien be held illegal and void.

A demurrer to the bill of complaint was sustained, and the complainant appealed.

[1] The Constitution provides that:

"The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes."

"No tax shall be levied except in pursuance of law."

"The Legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for state taxation."

Sections 1, 3, and 5, art. 9, Const.

"The Legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors." Section 8, art. 8, Const.

Chapter 5867, Acts of 1907, as revised and amended by chapter 6792, Acts of 1913, contains the charter powers granted to the city of West Tampa. Section 2 of the latter chapter contains the following:

"Said corporation is hereby granted all the powers given to municipal corporations under the general laws of the state and in addition thereto the following special powers, which shall not be construed as limited or qualified by any provisions or limitations contained in said general laws, viz., power to affix a valuation upon property within its limits, both real and personal, for the purpose of municipal taxation, independent and irrespective of such valuation as fixed by the state."

The following provision appears in the General Statutes:

"The city or town council shall have power to raise by tax and assessment upon all real and personal property, and by license on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties herein granted and imposed; and to enforce the receipt and collection of the same in the manner now provided by the laws

of the state for the assessment and collection of state taxes and licenses." Section 1052, Gen. Stats. 1906.

The Constitution expressly and mandatorily requires that:

(1) "The Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal," that is not lawfully exempted from taxation; (2) that "no tax shall be levied except in pursuance of law"; (3) "the Legislature shall authorize the several * * * incorporated cities or towns in the state to assess and impose taxes for * * * municipal purposes, and for no other purposes"; (4) "and all property shall be taxed upon the principles established for state taxation"; and (5) "but the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits."

The provision of section 8 of article 8 of the Constitution that "the Legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time" does not conflict with the above-quoted provisions of sections 1, 3, and 5 of article 9 of the Constitution.

The charter act of the city of West Tampa by incorporating therein the powers given to municipalities under the general laws of the state, which powers include the power of taxation, thereby conferred upon the city the power of taxation, and such power carried with it the incidental power and the organic duty to provide for a uniform and equal rate of taxation and for a just valuation of all taxable property both real and personal within the jurisdiction of the city. The general laws of the state provide the regulations by which just valuations and uniform and equal taxation may be attained, and it was not necessary to include regulations for that purpose in the charter acts.

An ordinance of the city prescribes regulations in substantial accord with the statutory regulations for obtaining just valuations and uniform and equal taxation, and such ordinance is a sufficient provision on the subject; it having been continued in force by the amended charter act.

While the objections to the asserted taxing power of the city do not appear to be well founded, the allegations as to the manner in which the power was exercised in the case are sufficient to call for a response from the city.

[2, 3] Valuations for taxation must have a just relation to the real value of the property assessed, and there must be no substantial inequality in valuations in the various kinds and items of property that is subject to the tax. The means and methods prescribed for ascertaining the value of property for taxation purposes must be substantially observed and followed, or else the assessment will be invalid and a taking of property without due process of law.

[4] While the law accords a range of dis-

cretion to the officer authorized to ascertain and determine valuations of property for purposes of taxation, when the officer proceeds in accordance with and substantially complies with the requirements of law designed to ascertain such values, yet, if the steps required to be taken in making valuations are not in fact and in good faith actually taken, and the valuations are shown to be essentially unjust or unequal abstractly or relatively, the assessment is invalid. Valuations of property for taxation must be ascertained in the manner required by law and must have relation to the actual value of the property; and there must be no substantial inequality in valuations.

[6] Where the essential requirements of law are not observed in making valuations of property for assessment, and the valuations as made are shown by admissions or proofs to be clearly excessive, unjust, and unequal, appropriate relief may be had in equity, even though the proceedings authorized by law for seeking relief from administrative officers were not utilized, where the case made shows a flagrant violation of or omission to follow the mandatory requirements of the law in valuing property for taxation.

The allegations of the bill of complaint as to the manner in which the valuation of the complainant's property was ascertained that are admitted by the demurrer show manifest injustice and illegality, which require a response from the city.

The order appealed from is reversed.

TAYLOR, O. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(139 La.)

No. 21961.

CITY OF ALEXANDRIA et al. v. POLICE JURY OF RAPIDES PARISH et al.

(Supreme Court of Louisiana. May 13, 1916.
On Motion to Dismiss Appeal, May 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftarrow 150(1)—PROHIBITION ELECTION—ANNULMENT—RIGHT TO APPEAL.

An appeal by third persons from a judgment annulling an election on the prohibition question will be dismissed where appellants do not allege and prove a direct pecuniary interest in the suit. A future, contingent, and speculative interest confers no right of action or of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934, 946; Dec. Dig. \Leftarrow 150(1).]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR \Leftarrow 810 — ELECTION CONTEST—PUBLIC INTEREST.

The appeal of citizens and taxpayers of a parish from judgment annulling, at suit of a city, an election voting prohibition in the parish, involves a public interest, entitling it to be transferred to the preference docket.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3191-3194; Dec. Dig. \Leftarrow 810.]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; James Andrews, Judge.

Suit by the City of Alexandria and others against the Police Jury of Rapides Parish, Ben F. Thompson, and others. There was a judgment for complainant, and citizens, property owners, and taxpayers of the parish appeal. On motions to remove from the preference docket, and to dismiss appeal. Motion to return case to the ordinary docket denied, and motion to dismiss appeal granted.

White, Holloman & White, of Alexandria, for defendants. Blackman, Overton & Dawkins, of Alexandria, for plaintiffs.

On Motion to Remove from Preference Docket.

PROVOSTY, J. On the ex parte application of the appellants, this case was ordered to be transferred to the preference docket, as involving a public interest, under section 3 of rule 10 (67 South. 1x). Appellees now move that said order be rescinded, and, in the alternative, ask that a motion which has been filed to dismiss the appeal be heard and disposed of in advance of the merits, in view of the very great probability of the said motion having to be sustained.

The facts are that, prohibition having been voted in the parish of Rapides at an election held under the auspices of the police jury, the city of Alexandria filed this suit to contest the election, and obtained judgment, and the police jury, by formal resolution, acquiesced in the judgment; and the appellants then took the present appeal, alleging themselves to be citizens, property owners, and taxpayers of the parish of Rapides, and to have an interest as such in the maintenance of prohibition in said parish because thereby the property values and the public revenues will be increased, taxation and criminal expenses reduced, desirable immigration promoted, and they themselves will be procured "the gratification of an intellectual enjoyment of religion, morality, and taste"; and alleging, further, that they have an interest as voters in seeing that the result of the said election be passed on by this court; and alleging, further, that they and a large number of other citizens, voters, and taxpayers of said parish have organized themselves into an Anti-Saloon League, and that they desire to appeal in the further quality of members and officers of this league, the object of whose organization is to promote temperance and oppose intemperance.

The grounds of the motion are as follows:

"That said appellants were and are not parties to said suit.

"That said appellants are third persons in relation to said suit and said judgment.

"That said appellants have no appealable interest in said cause.

"That said appellants have no direct pecuniary interest in said cause.

"That said appellants have not been aggrieved or injured by the judgment rendered by the dis-

strict court from which they undertake to prosecute this appeal.

"That, in fine, said appellants have not, and do not allege and show that they have, any interest in said cause, or in the judgment from which they undertake to prosecute this appeal, that can serve as a legal ground or basis for the prosecution of an appeal from said judgment."

[2] The case, in our opinion, certainly involves a public interest. It affects a large parish of the state and the city of Alexandria, and the inhabitants thereof, in all the respects mentioned in the allegations upon which the prayer for the appeal is based.

But the right of the appellants to take the appeal, and thereby to impose upon this court and upon the appellees the task of considering the case on its merits, is not so clear; there is wisdom therefore in the suggestion that the motion to dismiss be first considered and disposed of, in order that, in the event of its being sustained, the consideration of the merits be dispensed with.

This, however, should not be allowed to delay the trial of the merits, and this court will, in consequence, take order accordingly.

Motion to return the case to the ordinary docket is denied, and the motion to dismiss is fixed for trial for Monday, 22d of May, 1916.

On Motion to Dismiss Appeal.

LAND, J. [1] In November, 1915, an election was held in the parish of Rapides for the purpose of taking the sense of the qualified voters for that parish as to whether or not intoxicating liquors should be licensed and sold throughout the limits of said parish on and after January 1, 1917.

The returns of said election showed, on their face, a majority of 7 votes in favor of prohibition, and the police jury of the parish by a vote of 8 to 7 so proclaimed the result of the election.

Thereupon the present suit was instituted to perpetually enjoin the police jury from passing an ordinance giving effect to said election and from prohibiting the sale of intoxicating liquors as a result thereof.

The plaintiffs based their cause of action upon alleged defects and illegalities occurring prior to the date of election; among other grounds, that no officers of election had been legally provided, that the form of the ballot was unintelligible and misleading, and that there was no proclamation of election giving voters to know that the election would be held; that no election had been held at McNary precinct; that the election had not been held at the election precincts as established and numbered by the police jury.

The case was tried, and judgment was rendered in favor of the plaintiffs, decreeing the election to be null, void, and of no effect, and perpetually enjoining the police jury from passing an ordinance giving effect to said election, and from prohibiting the sale of intoxicating liquors as the result thereof.

The police jury unsuccessfully moved for a new trial, and the judgment was signed.

Thereupon the police jury, by a vote 8 to 4, resolved not to appeal from said judgment, and directed the district attorney to formally acquiesce in the judgment. Whereupon that official appeared in open court and filed a motion informing the judge presiding that the police jury would not prosecute an appeal from said judgment, but on the contrary formally acquiesced therein.

On March 22, 1916, Benjamin F. Thompson and other persons representing themselves as officers and members of the Rapides Parish Anti-Saloon League, and as residents, voters, property owners, and taxpayers of said parish, petitioned for and were granted an order for a devolutive appeal returnable to the Supreme Court of this state.

The petition of appeal contains the following allegations supported by affidavit:

"I. Petitioners present this petition individually and as members and officers of the Rapides Parish Anti-Saloon League, of which the said Benjamin F. Thompson is president, H. H. White is vice president, C. Cottingham is secretary, and the other named persons are members of the executive committee.

"II. Petitioners aver that they are third persons not the original parties to this suit; that they are citizens and residents, voters, property owners, and taxpayers of Rapides parish, Louisiana; that they have been aggrieved by the judgment which has been rendered herein, and that they desire to take appeals, both suspensive and devolutive therefrom, to the honorable Supreme Court of Louisiana, at New Orleans, Louisiana.

"III. They aver that they are interested in this litigation, and the particulars in which they have been aggrieved by the said judgment are, among others, as follows:

"(A) They have suffered a pecuniary grievance because they, as residents, citizens, property owners, and taxpayers, are interested in the subject-matter of this suit, which affects the fiscal affairs, the revenues, and the financial condition of the city of Alexandria, of which city a number of petitioners are citizens, and of the parish of Rapides. In this connection petitioners aver that they are informed and verily believe, and so aver on information and belief, that if the decision of this court is reversed on appeal, and the prohibition of the sale of intoxicating liquors in Rapides parish is put into legal effect from and after January 1, 1917, the property values in Rapides parish, Louisiana, generally, and the valuation of the individual property of petitioners will be greatly increased; that the criminal expenses of the parish will be greatly decreased; that desirable immigration into the parish will be greatly promoted; that taxation will be greatly reduced, and that the material prosperity of the parish, and of petitioners individually will be greatly enhanced.

"(B) Besides the financial interest which petitioners have in this case, petitioners have an interest apart from any pecuniary loss or privation, or any pecuniary gain which they may experience from said decision, to wit: The gratification of an intellectual enjoyment of religion, morality, and taste, which though not exactly appreciable or measurable in money, yet constitute legal rights, the deprivation of which so aggrieve petitioners as to entitle them to appeal.

"(C) Petitioners further aver that they are further aggrieved by the said judgment because under the local option laws of Louisiana they, as citizens and voters, have a legal, moral, po-

tical, and financial interest in the result of this litigation, and in seeing that the result of the local option election which was contested in this suit is finally passed upon, and adjudicated by the highest court in this state, and that same be put into legal force and effect.

"Petitioners further represent that the Rapides Parish Anti-Saloon League is a voluntary association composed of a large number of citizens, voters, and taxpayers of Rapides parish, Louisiana, which has a central organization at Alexandria, Louisiana, and has ward organizations in the various wards of this parish, the purpose of which league is generally to promote the cause of temperance, to oppose intemperance, to secure the prohibition of the sale of intoxicating liquors, by virtue of the local option laws of Louisiana relative to that subject; that the said Rapides Parish Anti-Saloon League was largely the instrumentality in bringing about the local option election which is contested in this suit, and that the said league and officers and individuals who compose it have an interest, both financial and moral, in the result of the litigation, and are aggrieved by the judgment which has been rendered; and the said Rapides Parish Anti-Saloon League Committee by virtue of a resolution adopted at a meeting of the said executive committee, held at Alexandria, Louisiana, on the 8th day of March, 1916, a copy of which resolution is attached hereto, and made part hereof."

The city of Alexandria and its coplaintiffs, who were the original plaintiffs, filed a motion to dismiss the appeal on the following grounds:

"That said appellants were and are not parties to the suit.

"That said appellants are third persons, in relation to said suit and judgment.

"That said appellants have no appealable interest in said cause.

"That said appellants have no direct pecuniary interest in said cause.

"That said appellants have not been aggrieved or enjoined by the judgment rendered by the district court from which they undertake to prosecute this appeal.

"That, in fine, said appellants have not, and do not allege and show that they have any interest in said cause, or in the judgment from which they undertake to prosecute this appeal, that can serve as a legal ground or basis for the prosecution of an appeal from said judgment."

The same plaintiffs also filed another motion to dismiss this appeal on the ground that the Supreme Court is without jurisdiction *ratione materię* in the premises.

This motion is without merit. The city of Alexandria alleged that:

It "derives from the licensing of the sale of liquor at retail within its corporate limits the annual revenue of not less than thirty thousand dollars."

Several wholesale and retail liquor dealers in the city of Alexandria are also plaintiffs in this suit, and each of them alleged that he derived from his business a net annual profit of not less than \$2,100.

Appellees contend that the appellants have no direct pecuniary interest in the subject-matter of this suit, and therefore cannot appeal. In support of this proposition, the appellees cite a number of cases, commencing with *Lafitte v. Duncan*, 4 Mart. (U. S.) 622, and ending with *Levert v. Shirley Planting Company*, 135 La. 929, 66 South. 301. In the latter case it was held that stockholders of a

corporation have no pecuniary interest in its property which entitles them to appeal from an order of seizure and sale. Of course a shareholder has an *indirect* and, sometimes, a very *valuable* interest in the property of the corporation.

Plaintiffs allege that prohibition in the parish of Rapides will directly and necessarily deprive the city of Alexandria of \$30,000 in annual revenues, and break up the business of all dealers of intoxicating liquors. Appellants, on the other hand, allege:

That, if prohibition should go into effect on January 1, 1917, "the property values in Rapides parish, Louisiana, generally, and the valuation of the individual property of petitioners, will greatly increase, that the revenues of the parish will be greatly increased; that the criminal expenses of the parish will be greatly decreased; that desirable immigration into the parish will be greatly promoted; that taxation will be greatly reduced; and that the material prosperity of the parish and of petitioners individually will be greatly enhanced."

The pecuniary interest thus alleged is future, contingent, and speculative, and is not "a real and actual interest," already arisen, required for the bringing of an action. Code of Practice, art. 15.

In this litigation, the police jury represented the people of the parish of Rapides. The same police jury, which had ordered and supervised the election and proclaimed the result, was made the defendant in the suit to annul the election. After the final judgment against the police jury, that body, in the exercise of its discretion, resolved to acquiesce in the judgment, and not to prosecute an appeal therefrom.

The appellants have a common interest with all other prohibitionists of the parish in reversing said judgment, and the antiprohibitionists have a like common interest in sustaining said judgment. But such common interest will not support an appeal.

In *Guilbeau v. Detlege*, 32 La. Ann. 909, an election case, judgment was rendered in favor of the plaintiff, and the defendant did not appeal. But the incumbent in office appealed, as a third party, alleging a large pecuniary interest. The appeal was dismissed, the court saying:

"The rule of law which grants to a third party the right of appeal from a judgment rendered in a suit to which he was not a party, requires him to *allege* and *show* a direct pecuniary interest in the controversy."

This court, in *State ex rel. Newman v. Hayles*, 32 La. Ann. 1135, an election case, repelled the contention that an important public interest affecting the people of an entire parish was sufficient to give the court jurisdiction.

This court's jurisdiction is limited to the category of cases set forth in article 85 of the Constitution. The present appeal does not involve any amount or question within our appellate jurisdiction.

We realize the importance of the question of prohibition in any community, but at the

same time we would not be justified in usurping jurisdiction in order to determine such question.

Appeal dismissed.

(139 La.)

No. 21945.

WILSON v. YAZOO & M. V. R. CO.

In re YAZOO & M. V. R. CO.

(Supreme Court of Louisiana. May 22, 1916.)

(Syllabus by Editorial Staff.)

CERTIORARI \Leftrightarrow 5(1) — PROHIBITION \Leftrightarrow 3(2) — REMEDY BY APPEAL.

A case involving the overruling by the trial court of exceptions to the manner in which citation was served is appealable, so that certiorari and prohibition will not lie.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 5(1); Prohibition, Cent. Dig. §§ 5, 6; Dec. Dig. \Leftrightarrow 3(2).]

Action by Bessie Wilson against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant applies for writs of certiorari and prohibition. Application denied.

Hunter C. Leake, of New Orleans, and Harvey E. Ellis, of Covington (Chas. N. Burch and H. D. Minor, both of Memphis, Tenn., of counsel), for relator.

PROVOSTY, J. An exception to the manner in which citation was served was overruled by the trial court; and defendant applies to this court for the writs of certiorari and prohibition. The case is appealable, and the trial court has jurisdiction of it; therefore the remedy is by appeal, and the said writs will not lie. State ex rel. Jennings v. Miller, Judge, 109 La. 704, 33 South. 739; Iberia v. Morgan's L. & T. R. & S. Co., 129 La. 492, 56 South. 417; State ex rel. La. Trust Savings Bank v. Board of Liquidation, 135 La. 571, 65 South. 745.

Application denied, at the cost of relator.

(139 La.)

No. 20652.

MONTGOMERY-FERGUSON CO. v. WILLIAM T. HARDIE & SONS.

(Supreme Court of Louisiana. March 20, 1916. Rehearing Denied June 5, 1916.)

(Syllabus by Editorial Staff.)

1. PARTNERSHIP \Leftrightarrow 242(5)—ACTION BY PARTNERSHIP—EVIDENCE.

In a suit by a firm brought on the ground that the proceeds of the cotton shipped by it to the defendants exceeded its debt to the defendants, leaving out of the account the debt of the partner to whose business the firm had succeeded, and that the defendants owed such amount, and that the firm had never agreed to pay the debt of such partner, and that he was without authority to represent the firm in agreeing that the firm should pay it, evidence held to show that the firm's business was merely a continuation of such partner's business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 506; Dec. Dig. \Leftrightarrow 242(5).]

2. PARTNERSHIP \Leftrightarrow 146(1) — AUTHORITY OF PARTNER.

In such case the partner whose business had been so continued by the firm was authorized to enter into the agreement with the defendants whereby he executed two notes to defendants, one in settlement of his own debt, and one for the amount agreed to be advanced to his firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242, 245; Dec. Dig. \Leftrightarrow 146(1).]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by the Montgomery-Ferguson Company against William T. Hardie & Sons. Judgment for defendants, and plaintiff appeals. Affirmed.

Richardson & Richardson, of Homer, for appellant. Miller, Miller & Fletcher, of New Orleans, for appellees.

PROVOSTY, J. Passing over the exception of want of proper parties and the plea of prescription, although the exception of want of proper parties would seem to be well founded, since the only way in which R. P. Dawson, now admittedly a partner in the plaintiff firm, was made a party, if at all, was by a supplemental petition which is not in the record and, so far as appears, was never filed, and coming at once to the merits, we find plaintiff's claim to be unfounded.

The facts are that G. E. Montgomery had been doing business with the defendant firm for some years, and keeping a good account with them, when, in the latter part of 1902, he formed a partnership with James L. Drew, and Christie O. Ferguson for carrying on the same business, which consisted, in the main, of the ownership and operation of a cotton plantation, and, in connection with it, the carrying on of a commissary, or country store, business. The store was at Robeline, La., and the business was conducted from there. The partnership assumed charge of the business on the 1st of January, 1903.

The defendants are commission merchants and cotton factors in New Orleans. They make cash advances to planters and country store merchants on the faith of cotton to be consigned to them for sale on a commission. In January, 1903, when Montgomery, Ferguson & Co. succeeded G. E. Montgomery in the latter's plantation and store business, this business was owing a balance to the defendant company, and all the cotton of the cotton season of 1902-03 has not yet been shipped. On January 4, 1903, G. E. Montgomery wrote to the defendants as follows:

"I will be down in the next few days and settle up my account with you, as I have made a change in the business, as you will see from the above [meaning from the letter head]. Those are the gentlemen who have been interested with me in the plantation, and we all thought it best to take an equal interest in the store. And all cotton to be shipped from now on will come in the firm's name."

The letter head of the paper on which this was written was as follows:

"G. E. Montgomery "Drew Ferguson "Office of Montgomery, Ferguson & Co. "Robeline, La."	C. O. Ferguson J. L. Ferguson
---	----------------------------------

At that date Montgomery's account with the defendant company showed a considerable debit balance (the exact amount of which is not shown in the record), and the defendant company held his note for \$6,500 to represent and stand for whatever balance he might be found owing on final settlement. The defendant company had some cotton on hand for him unsold.

The business with the defendant company continued uninterrupted; the only change being that a new account was opened in the name of the firm, and all cottons received were credited to this new account, and the checks upon the defendant company were drawn by the new firm instead of by Montgomery individually.

On January 24, 1903, a letter signed "G. E. Montgomery, per Hyams," and written on paper with the heading of the new firm, was received by the defendant company. Hyams was the bookkeeper of the new firm. This letter contained a remittance of \$1,500 to be applied to the credit of Montgomery's individual account and ended as follows:

"And when balance shipments are completed I will straighten out the difference."

On February 2, 1903, the defendant firm wrote Montgomery that, as he was no longer shipping the cotton in his name, they would request a remittance on his personal account.

In answer to this letter the defendant company received a letter dated March 14, 1903, written by the bookkeeper of the firm under the letter head of the firm and signed "G. E. Montgomery, per Hyams," stating that he (Montgomery) had been unable to make the collections which he expected to make, and that he proposed to give the note of the firm payable in the fall in settlement of the balance due by him, and to agree on the part of the firm to ship not less than 600 bales in the next cotton season, or to pay a forfeit for any shortage in the number of bales to be thus shipped.

On April 23, 1903, the defendant company wrote to Montgomery inclosing a statement of his account which showed a debit balance of \$4,850.47, and two bales of cotton unsold, and expressing a willingness to accept the note of the new firm in settlement of this debt, provided a remittance of \$1,500 to \$2,000 was made in reduction of it, and advising him that the firm had been drawing heavily, although no arrangements had yet been made for the year's business.

On the 25th Montgomery wrote in answer that he could not send cash, but could send some notes of the Victoria Lumber Company for \$6,000.

On May 6, 1903, Montgomery came to New Orleans, and there made the necessary arrangements with the defendant company for the advances of the year. The defendant company agreed to make the advances, and Montgomery, for the new firm, executed two notes, one in settlement of his own debt, and one for the amount agreed to be advanced, and agreed to ship 800 bales of cotton, or pay a commission of \$1 per bale for any shortage.

On September 16, 1903, the defendant company mailed to the new firm a statement of its account. On this statement was a memorandum to the effect that the defendant company held the two notes executed by Montgomery.

On November 25, 1903, the defendant company mailed to the new firm another statement of its account, and on this statement also the two notes figured.

On December 1, 1903, the plaintiff firm wrote to the defendant company:

"Mr. Montgomery will be in to see you this week in regard to his individual account."

And on December 4th:

"We suppose Mr. Montgomery has been around to see you in regard to his account, as he has been in New Orleans this week."

Both these letters were written by J. L. Ferguson.

The defendant company answered on the 5th that it did not understand what was meant exactly by Mr. Montgomery's individual account, as he had none with it; to please explain.

On December 8th J. L. Ferguson wrote:

"I did not know that this amount had been transferred to the present firm's account. Saw Mr. Montgomery yesterday. He explained that he had spoken to other members of the firm about this matter, but had neglected to call my attention to it. I did not understand the situation is the reason I referred to it."

In April, 1903, Mr. Montgomery moved from Robeline to Natchitoches, La., but continued to draw drafts on the defendant company for the firm, and also to correspond for the firm. Mr. J. L. Ferguson remained at Robeline in immediate charge of the business there. In February, 1904, the defendant company sent Mr. Montgomery, at his request, at Natchitoches, a statement of the plaintiff firm's account. This statement, like the others, contained a memorandum of the notes. Whether the attention of Mr. J. L. Ferguson was brought at once to this statement of account does not appear; but on August 22, 1904, he wrote the defendant company for his firm:

"We are in receipt of your statement of recent date, and do not fully understand some of it. We will see Mr. Montgomery in a few days and check it up with him. We notice you make a charge for cotton not shipped also interest on that amount. We certainly don't understand this as we did not know of such contract being made. Mr. Montgomery also states that \$750 had been paid by the Victoria Lumber Co. for our credit. We will write you again as soon as we see him which will be in this or the first of next week."

On September 1, 1904, Mr. J. L. Ferguson, wrote the defendant company for his firm:

"We have never understood fully the arrangements made by Mr. Montgomery, and have made a date with him for Monday next to check up. Our books show that we shipped cotton to more than cover our account of last year. And we note from your statement gotten recently that you applied the cotton to note given by Mr. Montgomery for his personal account, and which we wrote you that we did not understand when we first received statement showing this item last summer. Will write you again as soon as we check up with Mr. Montgomery, at which time he says he will settle amount due by him."

Some time in 1904 (date not fixed in the record) Montgomery had sold his interest to a Mr. Lee Tigner. Whether this was before or after September 1, 1904, when, for the first time, J. L. Ferguson, for the plaintiff firm, announced the intention not to be bound by the note given by the firm for the balance due for the preceding year's business, does not appear.

No drafts were drawn by the plaintiff firm on the defendant company after December 24, 1903. The defendant company had then on hand a good deal of cotton for the plaintiff firm, which at the request of the plaintiff firm it was holding for a better market. This cotton the defendant company disposed of in the course of the year 1904; and on August 18, 1904, rendered a final account of it. This left the plaintiff firm owing a balance of \$4,149.14; all debts paid, including the note given for the balance due by Montgomery on the preceding year's business. During the years 1905, 1906, 1907, 1908, and 1909 the defendant company went on collecting the pledged notes of the Victoria Lumber Company and attributing the proceeds to the payment of this balance, until in December, 1909, it rendered a final account showing full payment of this balance. In October and November, 1904, J. L. Ferguson wrote several letters to the defendant company for his firm insisting that his firm did not owe this Montgomery debt, nor the commissions charged for the shortage on the 800 bales of cotton agreed by Montgomery to be shipped. As each of the pledged notes of the Victoria Lumber Company matured and was collected the defendant company rendered to the plaintiff firm a statement of account showing the credit.

The present suit was filed in May, 1912. The contention of the plaintiff firm is that the proceeds of the cotton shipped by it to the defendant firm exceeded by \$2,711.43 its debt to the defendant company, leaving out of the account the Montgomery debt, and that the defendant company owes this amount, as the plaintiff firm never agreed to pay this Montgomery debt; Montgomery

having been without authority to represent it in agreeing to do so.

The Messrs. Ferguson testify that they never had any knowledge of Montgomery's having made this agreement for the firm until about the time Mr. J. L. Ferguson wrote the letter of September 1, 1904.

The bookkeeper testifies that, as far as he recollects, the firm's account with the defendant company was carried on the books of the plaintiff firm as a continuation of the Montgomery account. To the interrogatory:

"Did J. L. Ferguson know during the season of 1903 that George E. Montgomery was in debt to William T. Hardee & Co. at the end of 1902?"

—he answered:

"I don't know what kept him from knowing it, as he was with me in the store where the books were, and the account was kept in them; he looked at the books every day."

In one of the letters of the plaintiff firm the statement is made that Montgomery sold out his interest in the business at a handsome profit.

Montgomery left the country some years ago, and his whereabouts are unknown.

The defendant firm contends that Montgomery, in binding the firm for the balance of his account of the year 1902, acted with the full knowledge and consent of his partners, at least of J. L. Ferguson, and that, at any rate, the plaintiff firm, having reaped the benefit of the arrangement made by Montgomery for obtaining advances from the defendant company for continuing the business, of which arrangement this agreement to pay the balance due on the preceding year's business was a part, and having delayed to repudiate said agreement until it was too late for the defendant company to protect itself by proceedings against Montgomery's interest in the firm, is now estopped from contesting the said act of Montgomery.

[1, 2] We think the firm's business was merely a continuation of Montgomery's business. This conclusion results inevitably from all the circumstances of the case, notable among which are the two facts, otherwise inexplicable, that part of the cotton of Montgomery's business season of 1902 which, if he had not formed this partnership, would have gone in part payment of this debt of his, was credited to the account of the firm, and that the firm drew drafts on the defendant company to an amount exceeding \$2,000 without any arrangement whatever having been made for that line of conduct, except the implied and tacit one that the one business was but a continuation of the other.

Under these circumstances we think Montgomery had authority to enter into the said agreement.

Judgment affirmed.

(139 La.)

No. 21701.

RICHARDSON et al. v. McDONALD.

(Supreme Court of Louisiana. May 9, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by the Court.)

1. REAL ACTIONS \S 8(1)—PETITORY ACTIONS—
—GROUNDS.

A transfer of real estate in proceedings containing informalities or irregularities rendering the title voidable, but not absolutely null, cannot be set aside in a petitory action against a third possessor, who was not a party to the transaction complained of. The only remedy is by a direct action of nullity against the parties to the transaction.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. \S 26-28, 31; Dec. Dig. \S 8(1).]

2. MORTGAGES \S 56—VALIDITY—SIGNATURE.

The mortgagee's failure to sign the act of mortgage does not render it absolutely null. His proceeding to foreclose the mortgage is an acceptance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 145; Dec. Dig. \S 56.]

3. ABSENTEES \S 7—FORECLOSURE OF MORTGAGE—EXECUTORY PROCEEDINGS—APPEAL.

The only remedy of a defendant in executory proceedings, who complains merely that there was not sufficient authentic evidence before the court to warrant the issuance of the order of seizure and sale, is to appeal from the order.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. \S 14-19; Dec. Dig. \S 7.]

4. ABSENTEES \S 3 — CONSTITUTIONAL LAW \S 309(1)—DUE PROCESS OF LAW—APPOINTMENT OF ATTORNEY—PROCEEDINGS IN REM.

The provisions of article 737 of the Code of Practice, authorizing the court to appoint an attorney to represent an absent mortgagor and have the foreclosure proceedings in rem prosecuted contradictorily against him, where the mortgagor has confessed judgment and expressly authorized such proceedings, are not so unjust or unreasonable as to destroy or impair a fundamental right, and do not violate the Fourteenth Amendment of the Constitution of the United States, nor article 2 of the Constitution of this state.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. \S 2; Dec. Dig. \S 3; Constitutional Law, Cent. Dig. \S 929, 930; Dec. Dig. \S 309(1).]

5. ADVERSE POSSESSION \S 76—PRESCRIPTION—
—COLOR OF TITLE—FORECLOSURE SALE.

The designation of the attorney appointed by the judge to represent an absent mortgagor in a foreclosure proceeding, as curator ad hoc instead of attorney for the absentee, is merely an informality, which is cured by the prescription of five years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 451-454; Dec. Dig. \S 76.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by J. S. Richardson and others against O. P. McDonald. From a judgment for plaintiffs, defendant appeals. Affirmed.

Stubbs & Theus, of Monroe, for appellant. Thigpen & Herold, of Shreveport, for appellees.

O'NIELL, J. This was originally an action of slander of title, instituted by J. S. Richardson and his lessees. It was converted

into a petitory action by the pleadings of the defendant, O. P. McDonald, who therefore occupies the position of plaintiff. Judgment was rendered in favor of the original plaintiffs, rejecting the demand of the defendant, McDonald, to be recognized as the owner of the land, and he has appealed.

The property in contest was seized under and by virtue of a writ of seizure and sale in the foreclosure of a mortgage in executory proceedings entitled "Bank of Webster v. O. P. McDonald," and was adjudicated to one J. I. Allen on the 26th of March, 1904. Allen sold it to one J. M. Mixon on the 7th of November, 1906, and Mixon sold it to J. S. Richardson on the 28th of February, 1911.

The defendant, as plaintiff in this petitory action, attacks the validity of the proceedings by which the property was taken from him, with the following contentions, viz.:

First. That the act of mortgage on which the executory proceedings issued was not granted in favor of any one, nor accepted by any one as mortgagee, and was therefore a nudum pactum.

Second. That the order of seizure and sale was null because it issued without citation or notice to the defendant, and without authentic evidence of the indebtedness; that the promissory note alleged to have been secured by the mortgage was the only evidence of the debt; and that the copy of the mortgage, which was null on its face, was not filed in evidence in the executory proceedings.

Third. That the demand or notice to pay, served on John F. Stevens, as curator ad hoc, in the executory proceedings, was null, because it was not directed to nor served upon the defendant, McDonald, nor served upon any person as his attorney or representative, and because the notice did not allow a reasonable time for the defendant's appearance, and was therefore not due process of law.

Fourth. That all of the proceedings including the sale in the executory proceedings were null, and, if sustained, would deprive the defendant of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and the second article of the Constitution of this state.

[1] The Bank of Webster is not a party to this suit, nor is J. I. Allen or J. M. Mixon. Therefore the plaintiff in this petitory action must fail if the act of mortgage and the executory proceedings were not absolutely null; that is, if they were only voidable, not void. A transfer of real estate that is voidable, not absolutely void, cannot be annulled except by a direct action of nullity against the parties to the transaction. See Vinton Oil & Sulphur Co. v. Gray, 135 La. 1059, 66 South. 357, reviewing the jurisprudence on this subject.

The plaintiff in the action of slander of title, as defendant in the petitory action, ni-

ed pleas of prescription of five and ten years, and a plea of *res judicata*, based upon the judgment of this court in the executory proceedings entitled *Bank of Webster v. O. P. McDonald*, 137 La. 574, 68 South. 959.

[2] The act of mortgage on which the executory proceedings issued is somewhat irregular. No one was designated as the payee or mortgagee, except by inference from the declaration in the act that the mortgage was granted to secure the payment of the promissory note described in the act, and that the note was remitted to the Bank of Webster. No one signed the act of mortgage as mortgagee; but it is settled by the jurisprudence of this court that the acceptance of a promissory note secured by mortgage and a subsequent suit by the party to whom the note was given to foreclose the mortgage is sufficient evidence of the acceptance of the mortgage. See *Roberts v. Bauer*, 35 La. Ann. 455, reviewing the jurisprudence of this court and of France on the subject. See, also, *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747, 35 South. 889. There is therefore no merit in the contention that the act of mortgage was a *nudum pactum*, or that it was invalid merely because it did not, in terms, declare that the promissory note secured by the mortgage was payable to the Bank of Webster, or that the mortgage was granted in favor of that bank.

[3] The contentions, that the three days' notice served upon the curator *ad hoc* appointed to represent the defendant, O. P. McDonald, who was absent from this state when the executory proceedings were instituted, was not a legal notice, and that there was not sufficient authentic evidence before the judge who issued the fiat, were disposed of by this court on the appeal of O. P. McDonald from the order of seizure and sale. See *Bank of Webster v. O. P. McDonald*, 137 La. 574, 68 South. 959. As to the latter complaint, that the authentic evidence on which the judge of the district court issued the order of seizure and sale was insufficient, the defendant's only remedy was by appeal. Being a nonresident, he was allowed two years in which to appeal from the order of seizure and sale. He took the appeal more than two years after the property had been sold in the executory proceedings, and, on the appellee's motion to dismiss the appeal, the appellant contended that his delay for appealing had not expired because the demand or notice to pay (corresponding with the notice of judgment in ordinary proceedings) was not addressed to nor served upon him, but was addressed to and served upon a curator *ad hoc*. That contention was therefore a necessary issue to be decided in passing upon the motion to dismiss the appeal; and it was considered and decided in the judgment dismissing the appeal. See 137 La. 574, 68 South. 960. It was also decided that the act of mortgage and the executory proceedings were not absolutely null, and that the defendant's right

to appeal from the order of seizure and sale was lost by the lapse of two years.

[4] Assuming that the question of due process of law was not disposed of on the appeal from the order of seizure and sale, and treating the question as an original one, our conclusion is that the defendant, O. P. McDonald, was not deprived of his property without due process of law. As defined in article 733 of the Code of Practice, the act of mortgage on which the executory proceedings issued imported confession of judgment. The mortgagor acknowledged the debt for which the mortgage was given in the presence of a notary public and two qualified witnesses, and thus authorized the mortgagee to resort to executory proceedings if the debt should not be paid. Thereafter the defendant left the state without having appointed an attorney to represent him; and by article 737 of the Code of Practice, the judge was authorized, on the request of the mortgagee, to appoint an attorney to represent the absentee and to have the notice to pay and the notice of seizure served upon him. Testifying as a witness in this case, the defendant, McDonald, admitted that when he left the state he knew that if he did not pay his debt to the Bank of Webster his property might be seized and sold during his absence; and he admitted that he did not make any effort to pay it.

One of the fundamental powers and purposes of government is to legislate upon titles to real estate, in the security of which the general welfare of society is involved. The Fourteenth Amendment of the Constitution of the United States only restrains the exercise of a legislative power so unreasonable, arbitrary, and unjust that it would, if exercised, destroy or impair a fundamental right. The law does not require that personal notice of its provisions be given to every individual whose rights are affected, and it does not, by charging every one with knowledge of its provisions, infringe upon their fundamental rights. See *American Land Co. v. Zeiss*, 219 U. S. 66, 31 Sup. Ct. 200, 55 L. Ed. 97, quoting *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, and *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 3 L. Ed. 918. The power of the state to determine by what process an individual may be divested of his title to real estate is subject to his fundamental right to have notice and an opportunity to be heard. That right was not violated in this case. Article 737 of the Code of Practice, authorizing the court to appoint an attorney to represent an absent mortgagor and have the three days' notice to pay served upon him and the foreclosure proceedings in rem prosecuted contradictorily against him, where the mortgagor has confessed judgment and expressly authorized such proceedings, is not so unjust or unreasonable as to destroy or impair a fundamental right.

[5] Assuming that the question was not disposed of by the judgment of this court on the

appeal from the order of seizure and sale, our opinion and conclusion is that the designation of the attorney appointed to represent the absent defendant as curator ad hoc instead of attorney for the absentee was not an absolute nullity, but was nothing more than an informality, that is cured by the prescription of five years, under article 3543 of the Civil Code. See *Louaillier v. Castille*, 14 La. Ann. 777; *Allan v. Couret*, 24 La. Ann. 24; *Frazer v. Zylicz*, 29 La. Ann. 534; *Munholand v. Scott*, 38 La. Ann. 1043; *Webb v. Keller*, 39 La. Ann. 68, 1 South. 423; *Nagel v. Clement*, 113 La. 196, 36 South. 935, citing with approval *White v. Evans*, 94 U. S. 6, 24 L. Ed. 40.

The judgment appealed from is affirmed.

(139 La.)

No. 20763.

STEVENS v. ALLEN.

(Supreme Court of Louisiana. Jan. 24, 1916.
On Rehearing, May 22, 1916.)

(Syllabus by the Court.)

1. SEPARATION FROM BED AND BOARD—DOMICILE OF PARTIES.

Where the husband and wife were married in the state of New York, and the wife some 12 years later, refused to follow the husband to the state of Oregon, and the husband subsequently became a resident of the state of Louisiana, the wife continuing to reside in the state of New York, *held*, that the husband could not sue in the court of Louisiana for a separation from bed and board on the ground of the alleged abandonment in the state of New York, although the husband may have had a domicile of origin in the state of Louisiana. There can be no abandonment of the matrimonial domicile in this state where there has been no common dwelling.

Provosty and O'Niell, JJ., dissenting.

On Rehearing.

2. DIVORCE—§ 62(2, 6)—DOMICILE—§ 4(1), 5—ABSENCE IN MILITARY SERVICE—HUSBAND AND WIFE—GROUNDS FOR DIVORCE—"ABANDONMENT"—JURISDICTION.

A youth whose domicile is in Louisiana and who is appointed cadet in the military academy at West Point, and remains in the army until his voluntary retirement, after 30 years of continuous service, does not thereby forfeit such domicile, and the wife, whom he marries in another state, has no other domicile than his, and, save for just cause, can acquire no other and is bound to follow, and live with, him whithersoever he may choose to go and reside; and, in such case, where the wife, without just cause, refuses to accompany the husband to the station and temporary residence to which he is assigned by his superior officers, she is guilty of "abandonment," within the meaning of our law, notwithstanding that she has never been within this state, and the husband, who shortly thereafter retires and establishes an actual residence in Louisiana, at the place of his original domicile, may bring suit in a court of such residence and domicile for separation a mensa et thoro, and summon the wife therein, by substituted service, to return to the matrimonial domicile so established, and such court is vested with jurisdiction in the premises, and may render judgment determining the marital status of the plaintiff, which judgment will be binding, at least, within the limits of this state, and, according to the

views of this court, should be binding in other jurisdictions.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 200-202, 210, 220; Dec. Dig. § 62(2, 6); *Domicile*, Cent. Dig. §§ 5-8, 10-23, 24-35; Dec. Dig. § 4(1), 5.

For other definitions, see *Words and Phrases*, First and Second Series, *Abandonment*.]

Land, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Gustave W. S. Stevens against Grace Elizabeth Allen, his wife. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Howe, Fenner, Spencer & Cocke, of New Orleans, for appellant. J. M. Quintero, of New Orleans, curator ad hoc, for appellee.

LAND, J. This is a suit for separation from bed and board on the ground of abandonment. The curator ad hoc, appointed to represent the defendant, excepted to the jurisdiction of the court upon the admitted fact that the wife had never been within the limits of the state of Louisiana. This exception was sustained, and the suit was dismissed. The plaintiff has appealed.

Plaintiff's father, Gen. Walter H. Stevens, was an officer in the United States Army, who, in 1848 married plaintiff's mother in the state of Louisiana, and in 1861 resigned his office, and established his residence in the city of New Orleans. A short time thereafter Gen. Stevens entered the Confederate Army. It appears from the deposition of the widow of Gen. Stevens that, after the close of the Civil War, he went to Mexico for a time, but never changed his residence.

The plaintiff was born in the state of Virginia, but remained there only 7 months, and, when he attained the age of 19 years, was appointed as a cadet to the United States Military Academy of West Point from the state of Louisiana. Plaintiff, having graduated from said institution, entered the United States Army, and there remained continuously until March 1, 1913, when he retired with the rank of lieutenant colonel. Thereupon the plaintiff returned to New Orleans, where he has been residing since March, 1913. Plaintiff alleges "that he has at all times retained his domicile in the city of New Orleans," but there is no allegation or proof of his actual residence in that city prior to the year 1913.

Plaintiff further alleges that in July, 1899, while stationed temporarily as an officer in the United States Army at Ft. Meyer, Va., he was married to the defendant in the city of Brooklyn, N. Y. Plaintiff further alleges that in November, 1912, he was stationed at Ft. Stevens, Or., and that his said wife refused without cause to accompany him to Ft. Stevens, although plaintiff went to Brooklyn at the time and lived there for several days with his wife and urged her to return with

him. Plaintiff further alleges that his wife is now residing at 747 Quincy street in Brooklyn.

Defendant and the plaintiff were married in the city of Brooklyn in 1899. In July, 1912, she and her husband were living there together; and there is nothing to show that the defendant since her marriage has lived elsewhere. The alleged abandonment took place in the state of New York; and the defendant has been living separate and apart from her husband since November, 1912.

[1] The question is whether the courts of Louisiana have jurisdiction to decree a separation from bed and board in a case of this kind. The judge a quo held that his court had no jurisdiction in the premises.

The curator ad hoc cites *Heath v. Heath*, 42 La. Ann. 437, 7 South. 540, which is on all fours with the case at bar, with the exception of plaintiff's claim of domicile of origin in the state of Louisiana. Plaintiff's complaint is not that his wife refused to return to the city of New Orleans, but that she refused to accompany him to his temporary residence in the state of Oregon. In *Heath v. Heath*, supra, the court said:

"In this case the parties to the marriage never had a matrimonial domicile in this state, as the wife has never been here with her husband. There never has been a common dwelling here, and therefore the wife could not abandon it. *Muller v. Hilton*, 18 La. Ann. 1 [71 Am. Dec. 504]; *Champon v. Champon*, 40 La. Ann. 40 [3 South. 397]."

See, also, *Nicholas v. Maddox*, 52 La. Ann. 1493, 27 South. 966.

The matrimonial domicile of the parties was in Brooklyn.

The plaintiff's suit is based on the alleged abandonment of 1912, and he does not claim a separation from bed and board on the ground that, since the establishment of his residence in the city of New Orleans, he has invited his wife to live with him, and that she has refused to do so.

Judgment affirmed.

PROVOSTY and O'NIELL, JJ., dissent.

On Rehearing.

MONROE, C. J. [2] The trial court sustained an exception to its jurisdiction "*ratione personæ* and *ratione materiæ*," leveled at the case as presented by the petition, which case is also supported by the testimony of plaintiff's mother and the records of the War Department, and, briefly restated is as follows:

In 1882, plaintiff, being then 18 years of age and domiciled in New Orleans, was appointed cadet in the United States Military Academy at West Point from the First Congressional District of Louisiana, and entered the Academy accordingly. In 1886 he was graduated and appointed lieutenant of artillery, and he remained continuously in the service until March, 1913, when he voluntarily retired with the rank of lieutenant colonel, and, having established his actual resi-

dence in New Orleans, where he had always retained his legal domicile, he brought this suit, alleging that, in 1899, while stationed at Ft. Meyer, Va., he had been married, in Brooklyn, N. Y., to the defendant herein; that in November, 1912, being then stationed at Ft. Stevens, Or., his wife had refused, without legal cause, to accompany him thither, although he had gone to Brooklyn and there lived with her for several days, urging her so to do; and he prayed that an attorney be appointed to represent her; that she be cited, notified, and summoned, through said attorney, as provided by law, to return to the actual residence and matrimonial domicile; and that, in due course, he have judgment decreeing a separation from bed and board. The three reiterated summonses to return were accordingly issued and served upon the attorney (duly appointed curator ad hoc), after which, and upon showing that defendant had failed to comply therewith, judgment was rendered, condemning her to return, and the judgment was similarly served, from month to month, for three months, and the curator then filed the exception to jurisdiction, which, having been sustained, presents the question that we are here called on to consider.

The following propositions of law are established beyond dispute in this state and, generally speaking, in other jurisdictions, to wit:

1. With the exception below stated, a married woman has no other domicile, and can acquire no other, than that of her husband, and is bound to follow and live with him wherever he may choose to reside. Civil Code, arts. 39, 120; *Chrétien v. Her Husband*, 5 Mart. (N. S.) 61; *Dugat v. Markham*, 2 La. 35; *Neal v. Her Husband*, 1 La. Ann. 315; *Sanderson v. Ralston*, 20 La. Ann. 312; *Gahn v. Darby*, 36 La. Ann. 70; *Larquite v. His Wife*, 40 La. Ann. 457, 4 South. 335; *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747; *Nicholas v. Maddox*, 52 La. Ann. 1493, 27 South. 966; *Birmingham v. O'Neil*, 116 La. 1085, 41 South. 323; *First Nat. Bank v. Hinton*, 123 La. 1025, 49 South. 692; 14 Cyc. 846.

The exception arises whenever it becomes necessary and proper that the wife should acquire a separate domicile, as, when the misconduct of the husband compels her to leave him, or, when he abandons her. *Champon v. Champon*, 40 La. Ann. 28, 3 South. 397; *Smith v. Smith*, 43 La. Ann. 1140, 10 South. 248; *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747; *Succession of Benton*, 106 La. 494, 31 South. 123, 59 L. R. A. 135; *Wilcox v. Nixon*, 115 La. 47, 38 South. 890, 112 Am. St. Rep. 266; *King v. King*, 122 La. 582, 47 South. 909; 14 Cyc. 818, 847.

2. Unless otherwise provided by law, the domicile of origin is retained until another is acquired. *Gravillon v. Richards*, 13 La. 395, 33 Am. Rep. 563; *Sanderson v. Ralston*, 20 La. Ann. 312; *Succession of Steers*, 47 La.

Ann. 1551, 18 South. 503; Succession of Simmons, 109 La. 1095, 34 South. 101; Marks v. Germania Saving Bank, 110 La. 659, 34 South. 725; Ballard v. Puleston, 113 La. 239, 36 South. 951; First Nat. Bank v. Hinton, 123 La. 1024, 49 South. 692; 14 Cyc. 851.

3. Voluntary absence of two years, or the acquisition of a domicile in any other state of the Union, forfeits the domicile in this state; but domicile, once acquired, is not forfeited by absence on business of the state or of the United States. C. C. 41, 46; State v. Poydras, 9 La. Ann. 187; Walden v. Canfield, 2 Rob. 466; Kinder v. Scharff, 125 La. 594, 51 South. 654; 14 Cyc. 850.

4. The same tests are applied in establishing change of domicile from one state to another as from one parish in this state to another parish. Hyman, Lichtenstein & Co. v. Schlenker & Hirsch, 44 La. Ann. 108, 10 South. 623; Succession of Simmons, 109 La. 1097, 34 South. 101.

5. The rule that no valid personal judgment can be rendered against a nonresident merely upon constructive service has no application to proceedings in rem and is—

"moreover, limited by the inherent power which all governments must possess over the marriage relations, its formation and dissolution, as regards their own citizens. From the exception, it results that, where a court of one state, conformably to the laws of such state, or, the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state, as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state, in dealing with its own citizens concerning the marriage relation, was repugnant to the due process clause of the Constitution." *Haddock v. Haddock*, 201 U. S. 567, 26 Sup. Ct. 525, 50 L. Ed. 868-869, 5 Ann. Cas. 1.

Prior to the decision thus quoted, the doctrine had been recognized that, where the courts of a state, in the exercise of the jurisdiction to determine the marital status of a citizen of such state, decreed the dissolution of the marriage tie by which he was bound, the judgment so rendered was entitled to full faith and credit in the other states and operated to dissolve the marriage as to both the parties thereto, the idea being that there could be no such thing as a husband without a wife or a wife without a husband; but, in the case cited, it was held that the jurisdiction which one state may possess quoad its own citizen does not, of itself, confer, or attract the jurisdiction to determine the marital status of the citizen of another state, and that it is only when the court has jurisdiction of both parties, that its judgment is entitled to extraterritorial recognition by virtue of the full faith and credit clause of the Constitution.

Thus, in *Atherton v. Atherton*, 181 U. S. 157, 21 Sup. Ct. 544, 45 L. Ed. 795, it appeared that the plaintiff, being a resident of New York and the defendant a resident of Kentucky, they were married in New York, and went immediately to Kentucky, where they

established their residence and lived for several years, during which period a child was born to them. The wife then left the husband on account of bad treatment and returned to the home of her mother in New York, and there was a contract between her husband and herself concerning the custody and maintenance of the child, which she carried with her, and concerning alimony for herself. The husband then brought suit in Kentucky for a divorce, on the ground of abandonment by the wife, and obtained judgment, and the wife, having brought suit in New York for separation from bed and board, on account of cruel and abusive treatment whilst living in Kentucky, the husband set up the judgment of divorce which he had obtained, as a bar to the action, but the New York court decided that it was inoperative and void, as to the wife, for the reason that she was not personally cited, had made no appearance, and, having ceased to be a resident of Kentucky and become a resident of New York, the Kentucky court acquired no jurisdiction over her by the substituted service authorized by the law of that state. In holding that there was error in the ruling so made, and that the judgment rendered by the Kentucky court was entitled to full faith and credit in the courts of New York, Mr. Justice Gray, as the organ of the Supreme Court, said (181 U. S. 171, 21 Sup. Ct. 544, 45 L. Ed. 795):

"In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky. * * *

181 U. S. 162, 21 Sup. Ct. 544, 45 L. Ed. 795:

"The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relation of husband and wife and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law."

181 U. S. 166, 21 Sup. Ct. 544, 45 L. Ed. 795:

"Chancellor Kent, * * * says of that case [referring to the case of *Harding v. Alden*, 9 Greenl. (Me.) 140, 23 Am. Dec. 549] that it was there held 'that a decree of divorce did not fall within the rule that a judgment rendered against one not within the state, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another state, and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband.'"

"And the Chancellor adds, 'This is an important and valuable decision.' 2 Kent. Com. 110, note.

"In *Ditson v. Ditson* (1856) 4 R. I. 87 (of which Judge Cooley, in his treatise on Constitutional Limitations, 403, note, says there is no

case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits), the Supreme Court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown, and said:

"It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, states; that a state cannot be deprived, directly or indirectly, of the sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that status; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and, finally, that in the exercise of this judicial power, and in order to [secure] the validity of a decree of divorce, whether a *mensa et thoro* or a *vincula matrimonii*, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because nonresidents, foreigners, or domiciled inhabitants of other states have not or will not, become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may, and can, act conclusively in such a matter upon the rights and interests of such persons, giving them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions."

In the cited case of *Haddock v. Haddock*, it appeared that plaintiff and defendant resided in New York and were there married, in 1868, but never lived together, and that the husband abandoned the wife, moved to Connecticut, where he acquired a domicile, and, in 1881 obtained a judgment of divorce upon substituted service, the wife, so far as appears, having never been in Connecticut and not having submitted herself to the jurisdiction of the court by which the judgment was rendered. Eighteen years later (1899) the wife brought suit in New York for separation from bed and board, and obtained personal service on the husband, who offered the Connecticut judgment as a bar to the action, but it was excluded on the grounds that the Connecticut court had not obtained jurisdiction, quoad the wife, by the substituted service, or publication, and that the cause of action (desertion by the wife) was falsely alleged. As may be inferred from the excerpt which we have already made from its opinion, the Supreme Court of the United States held that, though the judgment in question was entitled to recognition in Connecticut, it could not be enforced in New York; saying, by way of answer, in part, to the argument that the domicile within one

state of one party to a marriage gives such state jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other states, by reason of the full faith and credit clause of the Constitution.

"If the fact be that, where persons are married in the state of New York, either of the parties to the marriage may, in violation of the marriage obligation, desert the other and go into the state of Connecticut, there acquiring a domicile, and procure a dissolution of the marriage which would be binding in the state of New York as to the party to the marriage there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage, as to its domiciled citizens, would be of no practical avail. * * * No one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the states would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the states over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. * * * and, as the government of the United States has no delegated authority on the subject, that government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus, neither the states nor the national government would be able to exert that authority over the marriage tie possessed by every other civilized government. * * * It is urged that the suit for divorce was a proceeding in rem and therefore the Connecticut court had complete jurisdiction to enter a decree, as to the res, entitled to be enforced in the state of New York. * * * But, as the marriage was celebrated in New York, between citizens of that state, it must be admitted, under the hypothesis stated, that, before the husband deserted the wife in New York, the res was in New York, and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the res it follows that it was divisible, and therefore there was a res in the state of New York and another in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another. * * * As we have pointed out, * * * it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state. The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484. * * * The same doctrine was clearly expounded in the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier v. Le Mesurier* (1895) A. C. 507, where it was said: 'When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its

forum, its decrees, dissolving their marriage, ought to be respected by the tribunals of every civilized country. * * * On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trespasses upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority."

The court states the following, among others, as propositions which are "irrevocably concluded" by its previous decisions, to wit:

"Where husband and wife are domiciled in a state, there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause."

"Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state, in order to avoid his marital obligations, such other state, to which the husband has wrongfully fled, does not, in the nature of things, become a new domicile of matrimony, and therefore is not to be treated as the actual or constructive domicile of the wife. Hence the place where the wife was domiciled, when so abandoned, constitutes her legal domicile until a new actual domicile be by her elsewhere acquired."

"So, also, it is settled that, where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state, having jurisdiction over the husband, may in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom and treat the wife as having her domicile in the state of the matrimonial domicile for the purposes of the dissolution of the marriage, and, as a result, have power to render judgment dissolving the marriage which will be binding upon both parties, and be entitled to recognition in all other states by virtue of the full faith and credit clause."

Applying to the case before it the various propositions regarded as settled, the court stated, as beyond dispute, the conclusions:

(a) That no question could arise, on the record, concerning the right of the state of Connecticut to give effect, within its borders, to the judgment of divorce rendered by one of its courts in favor of one of its citizens, there domiciled; (b) that, as New York was the domicile of the wife and "the domicile of matrimony" from which the husband had fled, the domicile of the wife continued in New York; (c) that, as the wife was not constructively present in Connecticut, by virtue of a matrimonial domicile, and was not there individually, and did not appear in the case, and was only constructively served with notice to appear, the Connecticut court did not acquire jurisdiction by virtue of her domicile or as a result of personal service.

According to the court's statement of the case, the complaint charged that the parties were married in New York, where they both resided, and that the husband "immediately following the marriage abandoned the wife," and thereafter failed to support her; and the referee found "that after the marriage the parties never lived together." The expression, "the domicile of matrimony," as used by the court in stating its conclusions, must therefore have been intended to de-

scribe the domicile which, by operation of law, resulted from the merger of the domicile of the wife into that of the husband, by the fact and upon the instant of the marriage, and notwithstanding its immediate abandonment by the husband; and that seems to have been the view taken by this court in *D'Auvilliers v. Her Husband*, 32 La. Ann. 606, in which it appeared that the defendant was a citizen and resident of Louisiana, and that, while sojourning in France, he had married a lady of that country, who thereafter brought the suit for final divorce in a Louisiana court. To the objection, that plaintiff's complaints were of matters which occurred out of the state, and, the marriage having taken place out of the state and the wife never having actually lived here, that such matters could not constitute ground of an action for divorce, the court said:

"Though the marriage actually occurred in France, the marriage contract and other proceedings show that defendant was, at the time, only temporarily commorant in France. The marriage there was contracted with reference to the laws of this state; the husband's domicile, and the domicile of the wife, as well as that of the husband, was, from the instant of the marriage, in Louisiana."

And so, although it does not appear that there was any marriage contract (as contradistinguished from the contract of marriage) in this case, the plaintiff, as an officer of the army, was only temporarily in New York, at the time of the marriage, and it is fair to assume, until the contrary is shown, that defendant knew when she married him that his domicile was in Louisiana, and that, under the law, as well of New York as of Louisiana, his domicile would immediately become her domicile, and she would incur the obligation to follow and reside with him wherever he might choose to live.

It is no doubt true, in general, that a domicile can only be established *facto et animo*, but it is also true that, if the law so declares it may be established, or retained, without regard to either fact or intention, and that is the case with the officers in the service of the government, as, for instance, those who enter the military or naval service, of whom it may be said that, in most instances, they depart from the homes of their childhood with the expectation of devoting their lives to such service, leaving no actual domiciles behind them, and with no actual intention of returning to establish them, and yet the law declares that they neither lose the legal domiciles which they leave nor acquire others in their travels. C. C. 41, 46; 9 R. C. L. 551. If, then, the legal domicile of the plaintiff at the time of the marriage was in Louisiana, and the domicile of the defendant was fixed by that of the plaintiff from the moment he became her husband, the domicile of husband and wife being therefore one and the same, where else than in Louisiana could there have been a matrimonial domicile? Where else than in Louisiana could any one have brought either, or both, of them into court, to

answer a personal demand, save by personal service?

In *Dugat v. Markham et al.*, 2 La. 29, it appeared that Anne Dugat married D. K. Markham, a lawyer and that they immediately went to live on her plantation in the parish of Lafayette, of which he was put in charge; that dissatisfaction arose which resulted in his leaving the plantation and resuming the practice of his profession in a nearby village, after which he moved to Opelousas in the parish of St. Landry; that he invited his wife to follow him, which she refused to do; that a suit was brought against both of them in St. Landry for a board and tavern bill which he had incurred whilst in the village, and that the citations were served at the domicile which he had established in St. Landry; that Markham appeared and answered for both; and that judgment was rendered against both, the wife being held liable on the ground that, by the marriage contract, she had bound herself to support the entire charges of matrimony. A *fi. fa.* was issued under which her property was seized, and she enjoined its further execution and prayed that the judgment be annulled on the grounds that she had never been cited, and that her husband was not authorized to appear in her behalf, and the ground last mentioned was sustained, but, with reference to that first mentioned, the court said (2 La. 35):

"The first question of law arising out of these facts relates to the legality of the service of citation on the wife, and depends for its solution on her domicile. When married persons are not separated from bed and board, the domicile of the wife is by law that of the husband. See La Code, art. 48."

The article thus cited (now article 39) as also part of article 122 (now 120) were applied in *Neal v. Her Husband*, 1 La. Ann. 315, in which it appeared that plaintiff had been married to defendant in Arkansas, and had there lived with him until, by conduct which entitled her to a divorce, he had compelled her to leave him, when she came to Louisiana, where she was residing when she brought the suit, praying for divorce, and was met with a plea to the jurisdiction of the court, filed by the curator ad hoc who had been appointed to represent the absent defendant, which plea was sustained by the trial court. In dealing with the question so presented upon her appeal, this court said:

"The court below did not err. Under the well-settled jurisprudence of all the states of this Union with whose jurisprudence we have any acquaintance, and in view of the principles expressly established by our own statutes, and especially of those provisions of our Code which declare that a married woman has no other domicile than that of her husband, and that she must follow him wherever he chooses to reside, it is manifest that no court of this state should entertain this suit to dissolve a marriage, contracted in Arkansas, where the husband continues to live, for causes there originating."

The doctrine thus enunciated was no doubt, generally accepted at the time (70 years ago)

when the opinion from which we have quoted was handed down, and, subject to the important exception that, where there is legal justification, the wife may acquire a separate domicile, is still accepted as may be seen from the following excerpt from a valuable work now in course of publication, to wit:

"Following the rule established at common law a woman, on her marriage, loses her own domicile and acquires that of her husband, and the matrimonial domicile is presumed to be that of the husband at the time of the marriage. In general, this rule governs, no matter where the wife actually resides. Under this rule it has been held that, in a suit for divorce, based on the ground of a wife's desertion of her husband, the legal fiction that a wife's domicile follows that of her husband gives jurisdiction to the court of a state to which the husband had removed and in which he had resided for the time required by the statute, although the marriage took place and the desertion arose in the state in which the defendant continued to reside." 9 R. C. L. pp. 543, 544.

To the foregoing there is to be added the following, embodying the exception to the rule as stated, which is as well recognized in the settled jurisprudence of to-day as is the rule, to wit:

"When the wife lives separate and apart from her husband, without sufficient cause, she cannot acquire a separate and distinct domicile." *Id.* 545.

And to the same effect are the following expressions by this court and other authorities:

"Although the law fixes the domicile of the wife as being that of her husband, universal jurisprudence recognizes an exception to the rule in the case where the husband's conduct has been such as to furnish lawful ground for divorce, which justifies her in leaving him, and therefore necessarily authorizes her to live elsewhere and to acquire a separate domicile." *Smith v. Smith*, 43 La. Ann. 1146, 10 South. 248 (citing *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604; *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; 2 Bishop, Mar. & Div. 475; *Schouler Hus. & Wife*, § 574; 5 A. & E. Enc. of Law, p. 756).

See, also, *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747; *Succession of Benton*, 106 La. 495, 31 South. 123, 59 L. R. A. 135; *Wilcox v. Nixon*, 115 La. 47, 38 South. 890, 112 Am. St. Rep. 266.

"Later cases have, however, broken away from the rule [that the wife is incapable of acquiring a separate domicile] where the wife has been abandoned or forced by brutal treatment to leave the husband, when she is permitted to establish a domicile for herself, and in New York it seems to have been repudiated altogether." 14 Cyc. 847, 848.

And all of the authorities seem now to be agreed that, where any married person, whether husband or wife, in good faith acquires a domicile in, and becomes a citizen of, a particular state or country, such state or country possesses the inherent power to determine his or her marital status, within its territorial limits, and may dissolve the marriage tie without regard to the place in which it was contracted, or in which the cause for the dissolution arose, or to the domicile of the other party.

"However, it is well settled in this country that every state has the right to determine the marital status of the persons bona fide domiciled within its limits, and the courts may acquire, under statutory sanction, jurisdiction to dissolve the marriage relation of such persons, irrespective of where the marriage was celebrated, or where the cause of divorce arose, or where the domicile of the defendant may be; and this is true though the parties never lived together within the state." 9 R. C. L. pp. 339-400 (citing *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129) note, 59 L. R. A. 151 and other authorities).

"If the plaintiff is a bona fide resident of the state of the forum, it is generally recognized that the courts of that state may acquire jurisdiction to decree a divorce in his or her favor, irrespective of the domicile or residence of the defendant, and such decrees will be valid in the state of the forum to dissolve the marriage relation irrespective of what effect may be given to it in other states." 9 R. C. L. p. 400, § 195 (citing *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 795, note 16 L. R. A. 489 and other authorities).

The law of this state "considers marriage in no other view than as a civil contract" (C. C. arts. 86, 90), and declares that "the husband and wife owe to each other, mutually, fidelity, support and assistance" (C. C. art. 119), and, whilst also declaring that "a married woman has no other domicile than that of her husband" (C. C. art. 39) and that "the wife is bound to live with her husband and to follow him wherever he chooses to reside," further declares, in the same article, that "the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition" (C. C. art. 120). There is no suggestion in this record that the plaintiff has, in any respect failed to comply with the obligations thus imposed upon the husband, or that the wife had any sufficient reason for her failure to comply with the obligation imposed upon her, to follow and live with him. The case is therefore, within the rule, as prescribed by the law and is not within the exception thereto; nor is it within the doctrine of the cases to which we are referred, save, perhaps, that of *Heath v. Heath*, 42 La. Ann. 439, 7 South. 540, in which it has been held that actions for separation a mensa et thoro and a vinculo cannot be maintained in the courts of this state for causes arising between persons who were married and domiciled elsewhere prior to their acquiring a domicile here; for in the instant case, the legal domicile of the plaintiff (husband) has always been in Louisiana, and hence was in Louisiana at the time of his marriage in New York, and at the time of the refusal of his wife to accompany him to the military post in Oregon, which was assigned to him by the government as his temporary residence, which refusal constituted the abandonment of which he complains; and, notwithstanding such assignment of residence, his legal domicile, in Louisiana, remained unchanged and the legal domicile of the wife, which, by reason and upon the in-

stant of the marriage became one with that of the husband, also remained unchanged.

The learned curator ad hoc referring in his original brief to the argument of plaintiff's counsel, says:

"Counsel admit that, in order to give the Louisiana court jurisdiction, it is necessary that it have jurisdiction over the marital status of the parties. This marital status, counsel say, and say correctly, is the 'res,' or 'thing,' which gives the court jurisdiction. * * * All of this is true, but, in the case at bar, there is no res, or thing, or marital status, before the Louisiana courts, and consequently there can be no proceeding in rem for or against a res, or thing, which is not found in this jurisdiction. Now, what is necessary to establish this res, or thing, or marital status? We say it is the 'dwelling, jointly,' of the spouses within the state, and, in the matter before your honors, the plaintiff's petition admits that the wife has never been within the state of Louisiana. * * * The theory that the domicile of the husband is the domicile of the wife has no application in a suit for separation from bed and board; the res, or thing, which is the marital status, must be within the state, and the husband cannot bring it into the state, or create the res, by coming alone, into the state, though it may be his ancient, individual domicile."

But the "Haddocks," never dwelt jointly in New York, or elsewhere, nor did the husband ever establish a domicile there, or elsewhere, in which the wife was invited to live with him, and yet the Supreme Court of the United States found that they had a matrimonial domicile in New York, from which it may be inferred that the court considered (since the mere fact of marriage in a particular place can hardly be thought to establish a domicile of any kind in such place) that the establishment of the matrimonial domicile resulted, as a matter of law, from the conjunction of the circumstances that the husband's domicile was in New York and that the domicile of the wife became one and the same by reason of the marriage, which is the case that we have here. The plaintiff in this case, however, by reason of his being domiciled here, necessarily subjects to the jurisdiction of our courts something more than one-half of the res, to which the curator refers, for there is included, not only his own marital status, but also his quality of master and head of the community of acquets and gains which resulted from the marriage (and which is strictly a Louisiana institution), with the potentiality, on the one hand, of acquiring property, and the obligation or burden, on the other, of sharing such acquisition with a wife and partner who absents herself in, apparent disregard of the obligation which she has assumed, and is now in the attitude of refusing to follow her husband to the residence selected by him, notwithstanding that, if matters remain in their present condition, she may, at the end of his life, assert her rights as widow in community and be awarded one-half of all that he may have accumulated. *Cole's Widow v. Executor*, 7 Mart. (N. S.) 41, 18 Am. Dec. 241; *Dixon v. Dixon's Ex'r*, 4 La. 188, 23

Am. Dec. 478. In the case first above cited the court (after referring to the case of *Saul v. His Creditors*, 5 Mart. [N. S.] 569, 16 Am. Dec. 212) said:

"It is true in that case husband and wife had both resided in this state, and in the present instance, the husband alone lived in Louisiana. But we then determined that the law, * * * which regulated the rights of husband and wife, was real, not personal. * * * It follows, then, as a consequence, that property within the limits of this state must, in the dissolution of the marriage, be distributed according to the laws of Louisiana, no matter where the parties reside, because, viewing the statute as real, it is the thing on which it operates that gives it application, not the residence of the person who may profit by the rule it contains."

In his supplemental brief, the learned curator argues that plaintiff's counsel is seeking to have the court change, in substance the phraseology of the Code, by striking out of article 145 the words "matrimonial domicile," and striking out of article 143 the words "common dwelling," and substituting therefor "husband's domicile" and "common domicile," which it is said, "would be legislating and giving to the codal provisions an entirely different meaning from that intended by the legislators." The articles mentioned read:

"Separation grounded on abandonment by one of the married persons can be admitted only in the case when he or she has withdrawn himself or herself from the common dwelling, without lawful cause, has constantly refused to return to live with the other, and when such refusal is made to appear in the manner hereafter directed. C. C. 143. * * *

"The abandonment with which the husband or wife is charged must be made to appear by three reiterated summonses, made to him or to her from month to month, directing him or her to return to the place of the matrimonial domicile, and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of the said judgment, given to him or her from month to month for three times successively.

"The summons and notification shall be made to him or her at his or her usual residence, if he or she lives in the state, and, if absent, at the place of the residence of the attorney who shall be appointed to him or her by the judge for that purpose, at the suit of the husband or wife praying for separation from bed and board." C. C. 145.

The contention of the learned curator, as we understand it, is, that the words, "common dwelling," as used in article 143, can have no other meaning than habitation, in this state, in which plaintiff and defendant have lived together, and from which defendant has withdrawn, without lawful cause, and that the words, "matrimonial domicile," as used in article 145 have about the same meaning, and that view is thought to find support in the opinion in *Heath v. Heath*, 42 La. Ann. 439, 7 South. 540, in which case it appeared that the litigants were married in Maine, and, later, moved to Massachusetts, where they lived for some years, when the wife abandoned the common dwelling, after which the husband came to New Orleans, and, having established himself, permanently, brought suit, after a few years, for sep-

aration from bed and board, on account of the abandonment in Massachusetts. The court said:

"There never has been a common dwelling here, and therefore the wife could not abandon it. * * * The married parties have never resided together in this state, and have therefore never acquired any matrimonial domicile in Louisiana to which the wife could be summoned."

We find nothing in article 143 which authorizes the inference that the words "common dwelling," as there used, were intended to be confined in their application to a dwelling in Louisiana, since "dwelling" is merely another word for "residence," which may, or may not, be the legal domicile of the occupant.

"It is customary to distinguish between residence and domicile, on the ground that any place of abode, or dwelling place, constitutes a residence, however temporary it may be, while the term 'domicile' relates rather to the legal residence of a person, or his home, in contemplation of law. As a result, one may be a resident of one jurisdiction although having a domicile in another." 9 R. C. L. p. 539.

It is true that "domicile" is also used instead of "residence," but we are of opinion that it was used advisedly in article 145, to distinguish it from "common dwelling," as used in article 143, since the abandonment by wife of husband, or husband of wife, would be as effective, from a temporary dwelling, at a summer resort, as from the legal domicile, whereas it would only be in a court having jurisdiction of such domicile that a suit could be maintained against the abandoning spouse for separation from bed and board on account of the abandonment.

This court has several times held that the failure of the wife to accompany her husband to the residence chosen by him is an abandonment within the meaning of article 143 (*Gahn v. Darby*, 38 La. Ann. 70; *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747; *Nicholas v. Maddox*, 52 La. Ann. 1493, 27 South. 966), and, if that were not the case, then, should a citizen of Louisiana marry in a country or state in which divorces are not allowed and the lady were to decline to accompany him to his domicile and home in Louisiana and the courts of his domicile should refuse to entertain his suit for separation and divorce, he would remain a married man without a wife for the balance of his life, and his wife would be entitled, at his death, to one-half of the estate accumulated by him in the meanwhile, contingencies which were foreseen and provided against by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, in which *Yield, J.*, as the organ of the court, said:

"The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were

sought in the state of the defendant; and, if the application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress."

Our reconsideration of the case, then, leads us to the conclusions that the defendant, having no other legal domicile than that of her husband, is properly sued here, as at the place of her, and of the matrimonial domicile, and hence that any judgment that may be herein rendered should be entitled, under the Constitution of the United States, to full faith and credit in the other states of this Union, and, by international law, to recognition in all other jurisdictions; but the learned courts of other states and countries may entertain a different view of that matter, and the question of the recognition of the judgment elsewhere will be determined by them. We further conclude, however, that the plaintiff herein, being a bona fide citizen and resident of the state of Louisiana, is entitled to demand that the courts of this state shall exercise the jurisdiction, which the state has conferred on them, to determine his marital status within the limits of the state, and that, in the case as presented, he would be entitled to the judgment prayed for irrespective of the fact that he was married in New York; that the cause of action originated there; that the defendant is residing there; and that she has never been, or lived with him, in Louisiana. And this view of the matter, we think, is strengthened by the enactment of the late statute, being Act No. 296 of 1910, which reads:

"That in any action for separation from bed and board or divorce, where the defendant is absent from the state, or in case of reconvention, when the plaintiff is absent from the state; and in actions for divorce based on a judgment of separation from bed and board, when the adverse party is absent from the state, the court having jurisdiction over the cause shall, upon application by any party in interest, appoint a curator ad hoc to represent such absent party, and all proceedings shall be had contradictorily with said curator ad hoc, and any judgment or divorce may be rendered against same curator ad hoc as might be rendered against his principal as if he were present in person in open court."

It is therefore ordered that the judgment appealed from be set aside, and that this case be remanded, to be proceeded with according to law and to the views herein expressed; the costs of the appeal to be paid by defendant, and those of the district court to await the result.

LAND, J. I am constrained to dissent from the conclusion reached by the majority of the court in the very able and learned opinion of the CHIEF JUSTICE.

The plaintiff, after proper invitation to his wife to follow him to his actual domicile established in this state and her refusal to do so, might have sued her for a separation. But the petition does not show that he ever

invited her to live with him in this state and that she refused to do so. On the contrary, the plaintiff instituted the present suit under the provisions of the Civil Code relating to cases where one of the spouses leaves the "common dwelling" or matrimonial domicile in this state. It results from the following provisions of the Civil Code that abandonment as a cause for separation from bed and board is predicated on the existence of a "common dwelling" or "matrimonial domicile" in this state, viz.:

"Art. 143. Separation grounded on abandonment by one of the married persons can be admitted only in the case when he or she has withdrawn himself or herself from the common dwelling without a lawful cause, has constantly refused to * * * live with the other, and when such refusal is made to appear in the manner hereafter directed."

"Art. 145. The abandonment with which the husband or wife is charged must be made [to] appear by the three reiterated summonses made to him or her from month to month, directing him or her to return to the place of the matrimonial domicile, and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of the said judgment, given to her from month to month for three times successively."

"The summons and notification shall be made to him or her at the place of his or her usual residence, if he or she lives in this state, and, if absent, at the place of the residence of the attorney who shall be appointed to him or her by the judge for that purpose, at the suit of the husband or wife praying for separation from bed and board."

In *Muller v. Hilton*, 13 La. Ann. 2, 71 Am. Dec. 504, the court, after quoting C. C. 141 (now 143), said:

"Under this article of the Code, we do not think the present action is maintainable. Unless by a fiction of law, it is difficult to perceive how the defendant can be considered as having withdrawn from the common dwelling, when it was alleged by her husband that she still resides in New York, where the marriage was contracted. It is then certain that the abandonment or cause of action did not originate since the plaintiff acquired his alleged domicile in this state."

In *Edwards v. Green*, 9 La. Ann. 318, the court said:

"We hold it to be sound doctrine that parties who did not contract marriage under, or with reference to [our laws] cannot base, in our tribunals, an action for divorce on matters which occurred in another state before they had acquired a domicile in this."

In *Champon v. Champon*, 40 La. Ann. 31, 3 South. 397, the court said:

"The true meaning of this aphorism, touching the domicile of the wife being that of her husband, is that the domicile of the wife is the domicile that the husband has at his marriage, or provides after marriage for himself and his wife."

"A man's domicile is his house, where he establishes his household." *Sanderson v. Ralston*, 20 La. Ann. 314.

Our Civil Code uses the words "common dwelling" and "matrimonial domicile" as synonymous.

Plaintiff is not shown to have ever resided in the state of Louisiana prior to 1913; and the only common dwelling which he provided for himself and wife was in the state

of New York. The charge in the petition is that the wife refused to leave that dwelling and accompany the plaintiff to Oregon.

Plaintiff's domicile of origin in Louisiana is a mere fiction of law, which cannot, by any stretch of the judicial imagination, be converted into the "common dwelling" of the spouses. The husband fixed the matrimonial domicile in the city of Brooklyn, state of New York, the place of the marriage, and there lived with his wife for nearly 12 years. The husband had no residence in the state of Louisiana, and the parties immediately after their marriage in the city of Brooklyn took up their residence there. The long continuance of their residence in that place indicates their intent to make it their permanent abode.

Mr. Story discusses a similar case as follows:

"But suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is then to be deemed the matrimonial domicile?

"Foreign jurists would answer that it is the domicile of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York." *Conflict of Laws* (8th Ed.) p. 271. "The same doctrine has been repeatedly acted on in the state of Louisiana." *Id.* p. 273.

Dicey says:

"The husband's actual (or intended) domicile at the time of the marriage is hereinafter termed 'the matrimonial domicile.'"

See Dicey on *Conflict of Laws*, p. 648 (*American Notes by Moore*). The same writer says:

"A soldier does not acquire a domicile in the place where he is stationed." *Id.* p. 148.

On the case as presented in the petition, the plaintiff at the time of the marriage, had no actual domicile in Louisiana, and the matrimonial domicile was fixed by him in New York. It remained there, or nowhere, until the plaintiff acquired an actual domicile in the city of New Orleans in the year 1913. The courts of this state have no jurisdiction over the alleged abandonment of the New York domicile in the year 1912.

(189 La.)

No. 21820.

McADAMS v. WELLS FARGO & CO. EXPRESS.

(Supreme Court of Louisiana. May 9, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by Editorial Staff.)

1. CARRIERS §200—REGULATION—PROCEEDING TO SET ASIDE ORDER OF COMMISSION—EFFECT.

Const. art. 286, as amended by Act No. 14 (Ex. Sess.) of 1907, providing that every order fixing a rate shall go into effect at a time fixed by the commission, and remain in effect and be complied with until set aside by the commission, or final judgment of a court of competent jurisdiction in suit to set it aside, directly conflicts in terms with the further provision that,

where a rate is contested and maintained, the carrier shall forfeit a penalty for each day its operation is suspended by suit, so that, to reconcile the two provisions, the latter must be held to contemplate suit with injunction, which suspends the rate, and the former a suit without injunction, which does not suspend, so that if the carrier, pending suit without injunction, exacts the old rate under protest, it must refund the difference between the old and new rates; the new rate not being suspended.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 901-905; Dec. Dig. §200.]

2. CARRIERS §200 — REGULATION — EXCESS CHARGES—REFUND.

A carrier, having exacted under protest an excessive rate, cannot defeat the shipper's recovery on the ground that, if he is reimbursed, there will be discrimination, contrary to Const. art. 286, against others who paid such rate without protest; but, if the rate is illegal, all who paid it must be reimbursed, to avoid discrimination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 901-905; Dec. Dig. §200.]

Certiorari to Court of Appeal, Parish of Orleans.

Action by J. E. McAdams against the Wells Fargo & Company Express. Application for certiorari or writ of review to review a judgment of the Court of Appeal, affirming a judgment of the District Court for plaintiff. Judgment affirmed.

Hunter O. Leake and Johnston Armstrong, both of New Orleans, for appellant. Emerson Bentley, of Shreveport, and E. Howard McCaleb, of New Orleans, for appellee.

PROVOSTY, J. In November, 1909, the railroad commission of the state made an order reducing express rates on liquors shipped out of the city of Alexandria. The defendant express company filed suit against the commission to annul this order, as being unreasonable, unfair, confiscatory, and discriminating against other shipping points; and, on the theory that the suit thus filed had the effect of suspending the operation of said order, although unaccompanied by an injunction, it exacted payment of plaintiff and other liquor shippers from Alexandria at the old or higher rates. Plaintiff paid the difference between the two rates under protest. The other shippers, it seems, made no protest. In December, 1911, the commission issued an order, general for the entire state, to be effective in March, 1912, which was understood to have superseded the order of 1909, although having made no reference to it, and notwithstanding the following clause:

"There are many special rates in effect applying on commodities which move frequently and in great volume. Such rates will not be disturbed."

Immediately after the adoption of this general order, the suit of the defendant company against the commission was dismissed. We are not advised whether it had been put at issue. At any rate it did not come to judgment. The dismissal was on the joint motion

of the parties. Plaintiff then brought the present suit to recover back from the defendant company the amount paid under protest. His contention is that the said suit did not have the effect of suspending the operation of the order, but that said order remained in full force and operation until superseded by the order of December, 1911.

[1] Article 286 of the Constitution, as amended (Act No. 14, p. 16, Extra Session, of 1907), reads:

"Provided that every order or decision of the commission, fixing and establishing a rate or charge for the transportation of passengers or freight, or for the transmission of messages or conversations by telephone or telegraph, within the state, shall go into effect at such times as may be fixed by the commission, and shall remain in effect and be complied with unless and until set aside by the commission, or by a final judgment of a court of competent jurisdiction, rendered on final trial in a suit to set aside and annul same."

This would seem to leave no room for discussion. Another proviso, however, reads:

"Provided, that whenever any rate * * * of the commission is contested in court, as provided by this Constitution, * * * and the same is maintained on final trial, * * * the railroad, express * * * company, * * * shall forfeit and pay to the state not less than \$10 nor more than \$50 per day, for each day that the putting into effect and operation of the rate * * * may have been suspended by such suit."

It will be noted that, while the first of these provisos explicitly declares that a suit contesting an order shall not suspend its operation, the second speaks of the order being suspended by a suit contesting it. Therefore, if both of these provisos have reference to the same kind of suit, they stand in flat contradiction of each other. The only way to reconcile them is to hold that the first has reference to a suit which does not suspend—that is to say, to a plain, ordinary suit, unaccompanied by injunction—and that the other has reference to an injunction suit.

Against that interpretation the defendant invokes the decision of this court in the case

of *Kansas City S. Ry. Co. v. Railroad Commission*, 106 La. 582, 30 South. 131, to the effect that injunction will not lie to suspend an order of the commission. But that decision was rendered prior to the amendment of 1907, when the first of the above-transcribed provisos was not contained in the Constitution, and when the second of these provisos read as follows:

"Provided that whenever any rate * * * is contested in court, as provided for in article 285 of this Constitution, no fine or penalty for disobedience thereto * * * shall be incurred until after said contestation shall have been finally decided by the courts, and then only for acts subsequently committed."

Under this provision, a suit had the effect of suspending the order of the commission without an injunction; and, manifestly, the very purpose of the adoption of the first of the above-transcribed provisos was to make a change in that regard. But the second of said provisos, when it speaks of an order being suspended by suit, necessarily contemplates that such a thing as the suspending of an order by suit is possible, notwithstanding the expressions of the first proviso; and no other way is known by which such suspension could be effected than by an injunction. The conclusion is therefore irresistible that this second proviso contemplates that an injunction will lie.

[2] It is argued that inasmuch as all the other shippers of liquors from Alexandria paid this overcharge, and are not demanding the return of it, the allowing of this return to plaintiff would have the effect of making the defendant charge more to these other shippers than to plaintiff, and that a discrimination of this kind is forbidden by article 286 of the Constitution.

The overcharge was illegal, and necessarily must be restored. If, therefore, discrimination is to be avoided, it will have to be by defendant's making restitution to all alike.

The judgment of the Court of Appeal is affirmed, at the cost of relator.

(139 La.)

No. 20611.

KID et al. v. CURRIE, Sheriff, et al.
(Supreme Court of Louisiana. May 22, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 635(1)—DISMISSAL—
GROUNDS—INSUFFICIENCY OF RECORD.

Where important records and documents alleged to have been made parts of the original petition by reference, for the purpose of showing the facts of the case more fully and with greater certainty, have been omitted from the transcript of appeal, and no effort has been made by the appellants to supply the missing documents, which the court deems necessary for a proper understanding of the case, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2776-2778, 2780, 2782, 2829; Dec. Dig. \S 635(1).]

O'Niell, J., dissenting.

Appeal from Third Judicial District Court, Parish of Bienville; W. C. Barnett, Judge.

Action by Sallie Kid and another against J. E. Currie, sheriff, and others. From a judgment for defendants, plaintiffs appeal. Dismissed.

S. C. McGarrity and Reynolds & William, all of Arcadia, for appellants. Stubbs & Theus, of Monroe, for appellees.

LAND, J. This suit was dismissed on an exception of no cause of action, and the plaintiffs have appealed.

Defendants have moved to dismiss the appeal for the reason that certain important documents are omitted from the transcript, being sheriff's deed of sale "sought to be annulled" and the record in the suit of First National Bank of Arcadia v. C. F. Petty et al., 130 La. 441, 58 South. 141, under which said sale was made, No. — in the district court and No. 18610 in the Supreme Court, and in the alternative have prayed that the transcript be amended or supplemented by the inclusion of said documents.

Plaintiffs, as judgment creditors, sued to annul a certain sheriff's sale of the property of their common debtor, purporting to have been made under a judgment in a certain suit, and made the said sale and the said suits parts of their petition by reference.

The plaintiffs made the usual allegations of fraud, and further alleged that the sheriff's sale was null because made under a judgment, the execution of which had been suspended by an appeal to the Supreme Court.

Counsel for plaintiffs and appellants have made no motion, or offer, to supplement the record, and, as a matter of fact, have made no appearance in this court.

As the plaintiff made the records and documents referred to parts of their petition, we may assume that they were considered by the district judge in the rendition of his judgment.

This court cannot intelligently consider

the allegations of the petition in the absence of the records and sheriff's sale made parts thereof, for the purpose of showing the facts of the case more fully and with greater certainty.

It is therefore ordered that the appeal herein be dismissed at the costs of the plaintiffs and appellants.

O'NIELL, J., dissents.

(139 La.)

No. 20557.

BEUGNOT v. NEW ORLEANS LAND CO.
(Supreme Court of Louisiana. April 3, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by Editorial Staff.)

1. DEEDS \S 114(3)—SALES—CONSTRUCTION—
PROPERTY CONVEYED.

Although the seller of land intended to sell the entire area, and so declared in an act executed some years later between herself and her grantee, yet, where her act of sale fixed the north or lake side boundary line as a line bounded by another tract, including the strip in dispute, her sale must necessarily be so limited.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 320, 321; Dec. Dig. \S 114(3).]

2. DEEDS \S 114(3)—SALES—CONSTRUCTION—
SALE PER AVERSIONEM.

A sale of an area bounded by fences along the south and west side, with ends extending into the water, and by a bayou on the east side and a canal on the north side, serving to hold the cattle pastured therein, was a "sale per aversionem," with the canal as one of the boundaries.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 320, 321; Dec. Dig. \S 114(3).]

3. ADVERSE POSSESSION \S 38—PRESCRIPTION
—PUBLIC AND OPEN POSSESSION—PASTURAGE.

Possession of the strip in dispute, merely by projecting a boundary fence across it and into a canal beyond and by projecting another boundary fence to and into a bayou, making an inclosure for cattle, where the canal was not known to be on an avenue, where the whole area was a swamp, without anything to indicate the location of the avenue, and where the projection of the fence was not shown to have been with intent to possess the strip as owner, together with the building of a barbed wire fence on the side of the canal, was not sufficiently public and unequivocal to amount to a prescription, as the allowing of one's cattle to range on a neighbor's uninclosed adjoining land is no sign of possession, such as is required for prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 147; Dec. Dig. \S 38.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Petitory action by Mrs. M. A. A. Beugnot against the New Orleans Land Company. Judgment for defendant, and plaintiff appeals. Judgment set aside, and ordered and decreed that there be judgment recognizing the plaintiff as owner of an undivided one-third of certain described property.

Charles Schueldau and Wm. Winans Wall, both of New Orleans, for appellant. Charles Louque and Frank McGloin, both of New Orleans, for appellee.

PROVOSTY, J. The tract of land formerly known as the Allard plantation, part of which now constitutes the City Park, was bounded on the north—that is to say, on the side towards Lake Pontchartrain—by a tract of land known as the Beugnot tract. Both tracts were bounded on the east by Bayou St. John. They fronted on this bayou, and extended back 40 acres from it between parallel lines. Both were many years ago subdivided into streets and squares. Taylor avenue was on the Beugnot tract. It ran east and west; that is to say, parallel with the north and the south boundary lines. It was 105 feet from the south (or city side) boundary line, and, of course, the same number of feet north of the north (or lake side) boundary line of the Allard tract. Along Taylor avenue is a canal, which may have been part of Gen. Butler's scheme for the drainage of the city during the war, as it seems to have been known as "Butler's Canal." It has also been known as "Marigny Canal." The 105-foot strip between Taylor avenue, or this canal, and the Allard tract, or, to be more precise, the part of it claimed by the defendant, is the property involved in this suit, a petitory action.

Plaintiff traces title to the former owners. Defendant shows title to the Allard tract, and claims this strip by the prescriptions of 10 and 30 years.

This Beugnot tract was until recent years a swamp, water-covered most of the time; and the adjoining part of the Allard tract was little, if any, better. The first and only actual possession shown of either tract was by one Puissegur, who in 1886 acquired the Allard tract, and used it and also the 105-foot strip in question as a pasture for cattle. He had a fence along the south and the west sides of this pasture land, but none on the east and the north sides. On the latter sides the Bayou St. John and the Taylor Avenue Canal served as fences for holding in the cattle; the ends of the fences being projected into the water of these channels.

In 1889 his succession sold the area thus inclosed to one Larrieu, and the latter established a dairy on it; and he, after him his widow used this area as a pasture for the cattle of their dairy until November, 1903, when the widow sold the Allard tract, part of it to George G. Friedrichs.

[1] In this sale to Friedrichs the property sold is described as being bounded north (or on the lake side) by land belonging to the purchaser. Friedrichs had bought the Beugnot tract at tax sale, and was at that time claiming to be the owner of it, including, of course, this 105-foot strip. Bounded by land of the purchaser meant therefore, and could only mean, bounded by the Beugnot tract, including this 105-foot strip. Hence our saying that the sale was only of the Allard tract.

Mrs. Larrieu intended to sell the entire

area, including the 105-foot strip. She so declared in an act executed some years later between her and Friedrichs; but, as a matter of fact, her act of sale fixed the north (or lake side) boundary line as just stated, and the sale must necessarily be so limited. From that time the only possession that was held of this strip of 105 feet was by Friedrichs; and he held it by virtue of his tax title to the Beugnot tract, and not as continuing the possession which Puissegur and the Larrieus had theretofore held. This is shown by his own testimony given in another case. It follows that the possession begun by Puissegur in 1886, which was thus terminated in 1903 by this sale to Friedrichs, did not last 30 years.

[2, 3] We think the sale by Puissegur to Larrieu was a sale per aversionem, with Taylor avenue as one of the boundaries; but we do not think that the possession which Puissegur and Larrieu held of this 105-foot strip was sufficiently public and unequivocal for prescription. The only sign there was of Puissegur's or Larrieu's possession of this 105-foot strip consisted in that the west boundary fence was projected across it to and into the Taylor Avenue Canal. It is true that thereby, and by the like projection of the south boundary fence to and into Bayou St. John, an inclosure was effected sufficient for holding cattle. But, in the first place, nothing shows that this canal was known to be on Taylor avenue. It did not go by that name, but by that of Butler's Canal or Marigny Canal. The whole area was a swamp, nothing to indicate the location of Taylor avenue. In the second place, nothing shows that the projection of this fence was with any intention to possess this strip as owner, or with any other intention than thereby to avoid the necessity of making a fence along the north boundary. Even if the owners of the Beugnot tract had known of the existence of this projection, they might well have been willing to tolerate it, in a neighborly spirit, in order not to compel their neighbor to incur the useless expense of building and maintaining a fence along the north boundary line. Of course, the allowing of one's cattle to range upon a neighbor's uninclosed adjoining tract is no sign of possession, such as is required for prescription.

In 1902 there was a barbed wire fence on the north (or lake) side of the canal. It had been there a long time, for the wire was rusty and some of the posts were rotten; but how long, or who put it there, is not shown, and hence it does not aid the prescription.

A precise description of the property in suit, according to a plan made of the Beugnot tract by Charles De l'Isle, surveyor and civil engineer, on 3d of February, 1862, which is annexed to an act of sale passed before P. E. Laresche, notary public, June 13, 1862, is as follows:

"(1) A certain portion of ground in square No. 864, measuring 640 feet front on Taylor avenue, 105 feet 7 inches and 2 lines on the road along Bayou St. John, 105 feet 7 inches and 2 lines on Esplanade, and 640 feet on the line dividing the same from the property purchased by George G. Friedrichs from Widow Larrieu.

"(2) A certain portion of ground in square No. 865, measuring 300 feet on Taylor avenue, and the line dividing the same from the property purchased by George G. Friedrichs from Widow Larrieu, and 105 feet 7 inches and 2 lines on each of Esplanade and Barracks streets.

"(3) A certain portion of ground in square No. 866, measuring 300 feet on Taylor avenue and the line separating the same from the property purchased by George G. Friedrichs from Widow Larrieu, and 105 feet 7 inches and 2 lines on each of Hospital and Barracks streets.

"(4) A certain portion of ground in square No. 867, measuring 300 feet on Taylor avenue and the line dividing the same from the property purchased by George Friedrichs from Widow Larrieu, and 105 feet 7 inches and two lines on each of Ursulines and Hospital streets."

The judgment appealed from is set aside, and it is now ordered, adjudged, and decreed that there be judgment recognizing the plaintiff, Mrs. Marie Aimee Augustin Beugnot, as owner of an undivided one-third of the property hereinabove described, and as such entitled equally with her co-owners to the possession of said property, and condemning defendant to pay the costs of this suit.

(189 La.)

No. 21952.

UNION SEED & FERTILIZER CO. v. J. SUPPLE'S SONS PLANTING CO. et al.
(Supreme Court of Louisiana. May 22, 1916.
Concurring Opinion June 17, 1916.)

(Syllabus by the Court.)

AGRICULTURE \S 15½—LIENS—PERSONAL LIABILITY.

One who purchases agricultural products from a farmer does not thereby make himself personally liable for the payment of the debts of the farmer that were secured by unrecorded liens on the crop.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. \S 15½.]

Appeal from Twenty-First Judicial District Court, Parish of Iberville.

Action by the Union Seed & Fertilizer Company against the J. Supple's Sons Planting Company and another. From a judgment for defendants, plaintiff appeals. Heard on certified question from the Court of Appeal. Case remanded, with instructions to affirm judgment of trial court.

Miller, Miller & Fletcher, of New Orleans, and J. H. Pugh, of Plaquemine, for appellant. Borron & Wilbert, of Plaquemine, for appellees.

O'NIELL, J. The question propounded by the Court of Appeal is whether the plaintiff's petition sets forth a cause of action for a personal judgment against the defendants, J. Supple's Sons Planting Company and J.

Supple's Sons Mercantile Company in solido, or against either of them, by the following allegations, viz.:

(1) That the plaintiff, Union Seed & Fertilizer Company, on the 20th of March, 1914, acquired by purchase and assignment all of the property, real and personal, of the New Orleans Acid & Fertilizer Company, including a claim for \$1,500, bearing interest at 6 per cent. per annum from the 18th of April, 1911, due for fertilizers sold and delivered on that day to M. Hanlon's Sons, used by them in the cultivation of a crop of sugar cane raised during that year on their Nottaway plantation, and secured by lien or privilege on the aforesaid crop and the proceeds thereof.

(2) That the defendant mercantile company made advances to M. Hanlon's Sons to the amount of \$35,000 to make the crop of 1911, on condition that the cane should be delivered to the defendant planting company, to be by it manufactured into sugar and sold, and that the mercantile company should collect the proceeds of the sale and apply the same to the extinguishment of the debt due for the advances the mercantile company had made.

(3) That the mercantile company collected from the planting company the proceeds of the crop to the amount of \$46,000, and, having reimbursed itself for the advances (\$35,000), retained the balance (\$11,000) in satisfaction of unsecured debts due by M. Hanlon's Sons, in accordance with its contract with M. Hanlon's Sons, and to the prejudice of the plaintiff's lien and privilege.

The Court of Appeal certifies that this suit was filed on the 5th of May, 1915, and that the plaintiff does not pray for recognition of a lien or privilege on the proceeds of the crop of 1911, nor allege that the proceeds are held by either of the defendants; the allegation being that the credit due to M. Hanlon's Sons for the surplus of proceeds over and above the amount of advances made by the mercantile company was extinguished by ordinary debts due by M. Hanlon's Sons to the mercantile company. The Court of Appeal submits the questions for decision: First, whether the manufacturer, who converted the sugar cane into sugar and molasses, and, according to an agreement with the cane grower, sold the sugar and molasses, and paid the entire proceeds to the commission merchant, who had advanced an amount less than the proceeds of the crop, is personally liable for the debt due by the cane grower to the plaintiff, a third party, whose claim was secured by a lien and privilege on the crop; and, second, whether the commission merchant, by applying the surplus of the proceeds of the crop to the payment of an unsecured debt due by the cane grower, became personally liable for the debt due by the cane grower to the plain-

tiff for the price of the fertilizers used in the cultivation of the cane.

Our answer is that the plaintiff has not a cause of action against either of the defendants. The debt due by M. Hanlon's Sons to the plaintiff for the fertilizers furnished and used for the cultivation of the crop of 1911 was secured by a lien or privilege on the crop and the proceeds thereof. R. C. C. § 3217. The proceeds of the crop consisted of the credit due to M. Hanlon's Sons from the sale of the crop, and that credit vanished when, with the consent of M. Hanlon's Sons, it was applied to the payment of their debts.

The case of *Welsh v. Barrow*, 3 La. Ann. 133, where an overseer enforced his lien or privilege on the proceeds of a crop of sugar cane after the plantation had been sold with the growing crop, seems to have been decided on the theory that the debt representing the proceeds of the sale of the crop was not extinguished by confusion; that "the proceeds were," as the court said, "in the defendant's pocket." In *Garcia v. Garcia et al.*, 7 La. Ann. 526, the overseer enforced his lien or privilege on the crop before it was removed from the plantation by the commission merchant, in whose favor a contract of antichresis had been made by the owner. In the cases of *Hewitt v. Williams*, 47 La. Ann. 742, 17 South. 269, and *Hewitt v. Same*, 48 La. Ann. 686, 19 South. 604, where the lien of the furnisher of supplies was recognized on a quantity of cotton and the proceeds of the sale of it, after the debtor had transferred the plantation and cotton to his wife by a dation en paiement, the cotton affected by the lien was seized under writs of sequestration and attachment. We are not called upon now to pass upon the correctness of that decision in so far as it held the transferee of the property liable for the debt of her husband. The important distinction between that case and the one before us is that in the case cited the plaintiff had the crop seized, and had his lien recognized and enforced upon it; whereas in the case before us the crop and its proceeds were not in existence when the suit was filed. There is the same distinction between the present case and that of *Weill & Co. v. Kent et al.*, 52 La. Ann. 2139, 28 South. 295, where it was held that the growing crop passed to the purchaser of the plantation, "without personal liability on his part to the furnisher of supplies; but he takes it cum onera." It is true that, when that case was before the court a second time (107 La. 322, 31 South. 761), it was said that the court had already held that the purchaser of the plantation, without knowledge of the existence of the unrecorded lien or privilege in favor of the furnisher of supplies, and without any privity of contract, could be held personally liable for the debt due to the furnisher of supplies, to the extent of the value of the crop he received; but it does not appear that the court went that far in

the previous decision, and the doctrine cannot be maintained. Personal actions must be based upon one of the four causes that give rise to personal obligations. They are contracts or quasi contracts, offenses or quasi offenses. C. P. 28. Personal actions arise from contracts where one has bound himself for his own advantage, as by selling, purchasing, hiring, or letting, or by any like contract. C. P. 28. Personal actions arise from quasi contracts when they are based upon the obligations imposed upon him who has managed the affairs of another without being authorized. C. P. 30. Personal actions arise from offenses when one person has become liable to another for the injury he has inflicted on him by some crime or offense, such as theft or slander. C. P. 31. Personal actions arise from quasi offenses when the ground of action is the injury done to another by one of those faults which are not considered real crimes or offenses. C. P. 32. In the case before us there was no contract, quasi contract, offense, nor quasi offense on the part of either of the defendants; hence there was nothing on which a personal action could arise in favor of the plaintiff. Any expression to the contrary in *Weill v. Kent*, 107 La. 322, 31 South. 761, is in conflict with the provisions of the Code of Practice, and must be, and is now, overruled.

The decision in *National Bank of Commerce v. Sullivan*, 117 La. 163, 41 South. 490, was not that one who purchased a crop thereby rendered himself personally liable for unrecorded claims for supplies advanced to make the crop. In fact, the decision cannot even be considered authority for the general proposition that the privilege of the furnisher of supplies follows the crop in the hands of third persons without registry of the claim; because, to that extent, the then Chief Justice and one of the Associate Justices dissented from the opinion, and another of the justices was absent, and did not take part in the decision. And in a later case attention was called to the fact that the purchaser had bought the crop while it was growing, and, by aiding the party who had raised it to "run the crop off," had disclosed an actual knowledge of the lien and privilege affecting it. See *Loeb v. Collier*, 131 La. 377, 59 South. 816. In the latter case the only question presented for decision was whether a purchaser of a bale of cotton from one who had not raised it took it subject to a secret lien for necessary supplies furnished to the party who had raised it; and it was decided that the lien did not follow the cotton into the hands of the second purchaser as an article of commerce. In the case of the *Brooklyn Cooperage Co. v. Cora Planting & Mfg. Co.*, 137 La. 811, 69 South. 195, it was held merely that the privilege of the furnisher of supplies to make a crop of sugar was not lost by the sale of the sugar, inasmuch as it remained on the plantation in the possession of the seller.

We have given an analysis of the foregoing

decisions because they are referred to by the Court of Appeal as casting much doubt upon the question presented for decision. One who purchases agricultural products from a farmer does not thereby render himself personally liable for the debts of the farmer secured by unrecorded liens on the crop.

Under authority of article 101 of the Constitution, this case is remanded to the Court of Appeal, with the instruction to affirm the judgment of the district court, maintaining the exception of no cause of action, and rejecting the plaintiff's demand at its cost.

PROVOSTY, J. (concurring). The point decided in *Weill v. Kent*, 107 La. 322, 31 South. 761, is shown by the syllabus. In that case the question of whether the privileged creditor upon a crop has a right of action against a third person who has received the crop or the proceeds thereof was not before the court, and, as a matter of course, was not considered, and, still less, decided. The sole legal question before the court was as to whether, in order that the privileged creditor should have a right of action against the purchaser of the crop, it was necessary that this purchaser should have had at the time he purchased the crop actual knowledge of the existence of the privilege, or whether presumptive knowledge would suffice. On the question of the right of action against the purchaser of the crop the court did not undertake to announce any new doctrine, but undertook only to recapitulate what had been decided in the same case on the previous appeal. In stating the case on the previous appeal the court said (page 2145 of 52 La. Ann., page 298 of 28 South.):

"The plaintiffs do not assert a claim of personal indebtedness against either Beary or the Abby & Highland Planting & Manufacturing Company, Limited. If either or both have come under obligations by reason of a privilege upon the crop, it is by reason of their voluntary act in becoming purchasers of the same cum onere."

The extent of the doctrine of the case, as decided on the two appeals, is simply that the purchaser of a crop burdened with privileges takes it subject to the privilege, and that the registry of the privilege is not necessary, nor knowledge of its existence.

(139 La.)

No. 21905.

STATE v. PAILET.

(Supreme Court of Louisiana. May 9, 1916.
Rehearing Denied June 5, 1916.)

(Syllabus by the Court.)

1. **GRAND JURY** ¶2—**ORGANIZATION—QUORUM—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

The provisions of section 3 of Act No. 98 of 1880 that the grand jury for the parish of Orleans should consist of 16 members, 12 of whom should constitute a quorum, were entirely superseded by the provisions of article 117 of the Constitution of 1898 (retained in the Constitution of 1913) that the grand jury shall con-

sist of 12 members, 9 of whom must concur to find an indictment. The number required to constitute a quorum is the number who must concur to find an indictment.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. §§ 1, 17; Dec. Dig. ¶2.]

2. **INDICTMENT AND INFORMATION** ¶10—**GRAND JURY—QUORUM—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

As the law only requires the concurrence of 9 members of the grand jury to find an indictment, it does not require the presence of more than 9 members during the deliberations or finding or presentment of the indictment.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 50-61; Dec. Dig. ¶10.]

3. **CRIMINAL LAW** ¶939(1)—**NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

A new trial should not be granted to admit alleged newly discovered evidence, when it develops on the trial of the motion that the witnesses whose testimony is proposed to be offered in evidence on a second trial could have been produced on the first trial, and that the defendant knew that the witnesses were in possession of the facts, if they were facts, to which they propose to testify on a second trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318, 2321-2323; Dec. Dig. ¶939(1).]

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chretien, Judge.

Herman D. Paillet was convicted of murder, and appeals. Affirmed.

Robert H. Marr and Thos. G. Moran, both of New Orleans, for appellant. Ruffin G. Pleasant, Atty. Gen., Chandler C. Luzenberg, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., both of New Orleans, for the State.

O'NIELL, J. The defendant was indicted by the grand jury of the parish of Orleans, only 9 members being present at the finding and presentment of the indictment, for the crime of murder. He was tried and convicted, and has been sentenced to suffer the penalty of death. On appeal to this court he relies upon two bills of exception, one of which was reserved to the overruling of his motion in arrest of judgment, and the other was reserved to the overruling of his motion for a new trial.

[1, 2] The motion in arrest of judgment refers to the fact that only nine members of the grand jury were present during the deliberations on this case and at the finding and presentment of the indictment. The contention of the learned counsel for the defendant is that, although the Constitution does not require that more than 9 members of the grand jury must concur to find an indictment, the law provides that a quorum shall consist of 12 members.

This question was presented for decision and was decided contrary to the defendant's contention in the case of *State v. Griggsby*, 117 La. 1046, 42 South. 497, in *State v. Walker*, 137 La. 197, 68 South. 407, and in *State v. McLaughlin*, 138 La. 958, 70 South. 925.

The learned counsel for the defendant in this case dispute the correctness of the ruling in the cases cited.

The common law adopted by the thirty-third section of the Crimes Act of 1805 provided that the grand jury should consist of not less than 12 nor more than 23 members; the concurrence of 12 being necessary to find an indictment. The number of members required to concur to find an indictment in this state was not changed until the adoption of the Constitution of 1898.

In the Act No. 98 of 1880, providing for the organization of the criminal district court of the parish of Orleans, as established by the Constitution of 1879, section 3 contained this provision:

"That the grand jury for the parish of Orleans shall consist of sixteen persons, twelve of whom shall constitute a quorum."

Article 117 of the Constitution of 1898 provided, and article 117 of the Constitution of 1913 also provides, that:

"A grand jury of twelve, nine of whom must concur to find an indictment, shall be impaneled in each parish," etc.

It is not contended that the state violated the Fifth or Fourteenth Article of Amendment, or exceeded any restriction or limitation, of the Constitution of the United States, in abolishing the common-law requirement for an indictment for the crime of murder. That serious question was decided in favor of the right of the state in the case of *Joseph Hurtado v. People of the State of California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, and the question was again considered and the decision affirmed in *Hallinger v. Davis*, 146 U. S. 314, 322, 13 Sup. Ct. 105, 36 L. Ed. 986; and in *McNulty v. California*, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; *Hodgson v. Vermont*, 168 U. S. 262, 272, 18 Sup. Ct. 80, 42 L. Ed. 461, 464; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119, 20 Sup. Ct. 77; *Bolin v. Nebraska*, 176 U. S. 83, 44 L. Ed. 382, 20 Sup. Ct. 287; and *Maxwell v. Dow*, Warden of Utah State Prison, 176 U. S. 581, 617, 20 Sup. Ct. 448, 494, 44 L. Ed. 597, 611.

The only question presented by this bill of exception therefore is whether the law of this state requires that all of the 12 members composing the grand jury shall be present, or only requires that 9 members shall be present, to constitute a quorum.

In the Act No. 135 of 1898, carrying out the provisions of articles 116 and 117 of the Constitution of 1898, relating to juries in other parishes than the parish of Orleans, section 7 provided that:

"The grand jury shall be composed of twelve members, nine (9) of whom must concur to find an indictment."

Section 7 of the Act No. 135 of 1898 was amended and re-enacted by Act No. 155 of 1906 (relating to juries in the state of Louisiana, the parish of Orleans excepted) so as to declare expressly that 9 members of the

grand jury should constitute a quorum in other parishes than the parish of Orleans, viz.:

"The grand jury shall be composed of twelve members, nine (9) of whom must concur to find an indictment, and nine members present shall constitute a quorum for the transaction of business with full power and authority to investigate all matters and to find and report indictments and other matters, the same as if the twelve were present and acting, provided that, when less than twelve are present, at least nine (9) shall concur to find indictments or report on other matters. In the event the foreman should be absent, then the presiding judge shall appoint one of the remaining eleven as acting foreman, or foreman pro tempore, who shall possess and exercise all the powers (whilst so acting) of the foreman."

As the Act No. 155 of 1906 does not apply to the parish of Orleans, there has been no legislation reducing the number of grand jurors necessary to constitute a quorum in the parish of Orleans since the number required to constitute a quorum was fixed at 12 by Act No. 98 of 1880, unless the provision in article 117 of the Constitution of 1898 and of 1913 that 9 members of the grand jury must concur to find an indictment means that 9 members shall constitute a quorum.

It might be inferred, from the fact that the Legislature saw fit to amend section 7 of Act No. 135 of 1898 by declaring expressly in Act No. 155 of 1906 that 9 members of the grand jury (in other parishes than the Parish of Orleans) shall constitute a quorum, that it had not been so provided by article 117 of the Constitution, declaring that 9 members of the grand jury must concur to find an indictment. Our opinion, however, is that this legislation as to other parishes than the parish of Orleans was intended merely to remove any doubt that 9 members of the grand jury should constitute a quorum, under article 117 of the Constitution. It was held in the case of *State v. Causey*, 43 La. Ann. 901, 9 South. 900, when the law (Act No. 44 of 1877) required that the grand jury should be composed of 16 members, and that 12 had to concur to find an indictment, that it was not required that more members than the number necessary to find an indictment should be present and take part in the deliberations. It was therefore held, inferentially at least, that the number of grand jurors required to constitute a quorum was the number whose concurrence was necessary to find an indictment.

Applying the rule of reason and pursuing the spirit of the law, without having to depart from its letter, it is reasonably certain that the defendant was not prejudiced by the fact that no more grand jurors took part in finding the indictment against him than the law required should concur in the finding. Assuming that each member of the grand jury is governed by his own conscience and judgment in the deliberations and findings of that body, a defendant is more secure from the finding of an indictment against him by the concurrence of 9

members of the grand jury when only 9 are present than he would be if a greater number were present.

We are reminded that, although the Constitution only requires the concurrence of 9 members of a petty jury of 12 to render a verdict in a prosecution for which the penalty is imprisonment at hard labor, the law requires that all of the 12 jurors must be present during their deliberations and at the finding and rendering of the verdict. That is because the common law requires that the members of a petty jury must not separate from the time they are impaneled until they render their verdict in a capital case, and from the time the case is submitted to them until they render their verdict, where the offense is not capital. But that provision of the common law has nothing to do with the number of members of the grand jury required by the Constitution or by statute to constitute a quorum or to concur in finding an indictment.

Our conclusion is that the provisions of article 117 of the Constitution of 1898 (retained in the Constitution of 1913) that the grand jury in each parish of this state shall consist of 12 members, and that 9 of them must concur to find an indictment, superseded entirely, in the parish of Orleans, the provisions of section 3 of Act No. 98 of 1880 that the grand jury for the parish of Orleans should consist of 16 persons, 12 of whom should constitute a quorum. The expression "twelve of whom," in the provision of section 3 of Act No. 98 of 1880 "that the grand jury for the parish of Orleans shall consist of sixteen persons, twelve of whom shall constitute a quorum," meant 12 of the 16 persons required by that statute to constitute a grand jury. It would be unreasonable to hold that, when the framers of the Constitution reduced the number of members necessary to constitute a grand jury from 12 to 16, by abolishing the provision of section 3 of Act No. 98 of 1880 "that the grand jury for the parish of Orleans shall consist of sixteen persons," they retained in force and effect the requirement "twelve of whom shall constitute a quorum," so that the "twelve of whom" would mean all 12 members of the grand jury.

We have considered the defendant's contention as an original proposition, as if the question had never been presented before; and, with much deliberation, we come to the conclusion that our former rulings on this question are correct; that the number of members of the grand jury for the parish of Orleans required to constitute a quorum is the number of members who must concur to find an indictment; that is, 9 members, according to article 117 of the Constitution.

[3] The defendant's motion for a new trial was founded on his averment that he had discovered new and additional evidence after his conviction. He alleged that Abraham

Gerson and Miss Fannie Pallet would testify that on the morning of the killing they heard the deceased threaten to take the life of the accused, and that Mrs. Abraham Gerson would testify that on the day before the killing she heard the deceased threaten to take the life of the accused. The motion contains the allegation that the attorneys representing the defendant did not know, and could not have ascertained with due diligence, before the trial of the case, that the witnesses above named would testify to the facts recited. And it was alleged that the newly discovered evidence was not cumulative and was pertinent and important. The motion was supported by the affidavits of the witnesses that they would testify to the facts recited in the motion, and it was also supported by the affidavits of the attorneys for the accused that they only learned of the newly discovered evidence after the conviction of the defendant, and that they could not, by the exercise of due diligence, have learned before the trial that the witnesses named, or any other witness, would swear to the facts recited in the motion; "the said witnesses being not at all friendly to the accused."

Mr. and Mrs. Abraham Gerson and Miss Fannie Pallet testified on the trial of the motion for a new trial, and the state introduced in evidence a statement signed by Mrs. Gerson two days after the homicide, together with the testimony of the police officer before whom the statement was signed. The evidence adduced on the trial of the motion, together with the testimony given by the defendant in his trial before the jury, is attached to and forms part of the bill of exception reserved to the overruling of the motion for a new trial.

In the statement per curiam, in the bill of exception, the following reasons are given for overruling the motion for a new trial, viz.: That the defendant did not exercise due diligence to obtain the evidence before he was convicted; that the testimony offered was not newly discovered evidence; that it was only cumulative or corroborative of the testimony given by the defendant as a witness on his trial before the jury; and that, in the opinion of the judge, the defendant had not proven an overt act on the part of the deceased as a basis for the introduction of evidence that previous threats had been made by the deceased.

The testimony attached to the bill of exception discloses that the victim of this tragedy, Nathan D. Pallet, was the defendant's father, and that Miss Fannie Pallet and Mrs. Annie Pallet Gerson, the wife of Abraham Gerson, are the defendant's sisters.

Mrs. Gerson testified on the trial of the motion for a new trial that she went to her father's home on the evening before he was killed, and found him very much provoked; that she asked him what was the matter,

and he replied that he was disgusted and was going to take Herman's life, saying "that it was either one way or the other between them; that he would either kill himself or the boy;" and that Herman (the defendant) passed through the stable where the witness and her father were talking, and stopped and listened to the conversation. She repeated more than once, and the fact is not disputed, that the defendant heard the conversation between the witness and her father. She testified that, although she visited the defendant in the prison twice before the trial and discussed the case with him, asking him if his plea would be self-defense, and although she attended the trial during several days, she felt very bitter towards her brother, and did not tell him that she had heard the threats made by her father until after the trial. The latter statement is of no importance in view of her admission that the defendant had heard the conversation in which the threats were made, and knew that she had heard them, if they were really uttered. In the statement signed by Mrs. Gerson two days after the killing it is recited that the defendant went to her store at about 8 o'clock on Monday evening, the day before the killing, and said "that he was tired with life, as things never went right with him, that he was going to end all, and that it would be all over Wednesday." It is recited that the witness asked the defendant if he meant that he was going to kill their father, and he replied, "Well, if you think so, all right, if you take it that way," and that the witness knew, when the defendant said "end all," that he meant their father, because the defendant had often threatened to kill the whole family. Mrs. Gerson's explanation of the statement she signed two days after the killing is not at all satisfactory. She testified that she was very nervous and excited when she signed the statement, and did not know what she was doing; that she did not remember that her brother had ever threatened their father, and did not remember the statement she signed two days after the killing. To a number of the questions propounded to her on cross-examination her answer was: "I do not remember."

With due respect for Mrs. Gerson's sympathy for her brother, we are convinced that the only feature of her testimony that was "newly discovered," or discovered after the conviction of her brother, was the fact that she would consent to testify that her father had threatened her brother's life. We are also convinced that her withholding from the defendant and his attorneys until after his conviction the information that she would testify that her father had threatened her brother's life was not due to a feeling of bitterness on her part. She had no information to conceal from the defendant, because, if she heard the threat, the defendant knew she heard it. Our conclusion is that the dis-

trict judge was justified in holding that the defendant did not exercise due diligence with regard to the testimony of Mrs. Gerson, and that it was not to be regarded, after the conviction, as newly discovered evidence. We refer to the last two sentences in the opinion rendered in *State v. Vige*, 137 La. 130, 68 South. 383.

Abraham Gerson and Miss Fannie Pallet both testified to what Nathan D. Pallet said to the defendant, in the presence of both witnesses, in the kitchen, about an hour or an hour and a half before the killing. Abraham Gerson's version of the occurrence is that "the old man was fussing with Pallet, and said one must get out of the house;" that the elder Pallet applied vile epithets to his son, and the latter replied that he would leave the house if the father wished it, "and then the old man threatened him; he said he must get out from the house, that's all;" that he would put an end to himself or the defendant; "one must get out." The witness swore that he had not told the defendant "about having heard these threats" until after the trial, because he had felt so bitter against him. He admitted, however, that he had visited the defendant in prison twice before the trial, took apples to him, and wept when the verdict was rendered. As other reasons for not having testified to the alleged threats on the trial, Mr. Gerson said his health was bad, and he "did not want to mix up in such a business," and, besides, that he had three children, was not a rich man, and had no time to waste. These were not very cogent reasons for Mr. Gerson's unwillingness to testify to the alleged threats. He could not have given a better reason for not telling the defendant "about having heard these threats" than that the defendant was present when the threats were made, and knew the witness heard them, if they were really uttered. As in Mrs. Gerson's case, the only feature of Mr. Gerson's testimony that was "newly discovered" after the trial was that Mr. Gerson would so testify. His being qualified to furnish the testimony was not newly discovered.

Miss Fannie Pallet's version of what occurred in the kitchen is that her father and brother and brother-in-law, Abraham Gerson, were all quarreling. But she did not testify that her father threatened to take the defendant's life. She said:

"My father and brother Herman and brother-in-law were quarreling together, and my father said that either one would have to get out or something would happen. * * * 'If one of us does not get out of here, something will happen.' * * * 'Either of us will have to get out of here,' meaning himself or Herman, 'or something will happen.'"

The witness testified that her brother, Herman, did not say anything during the quarrel. The killing occurred in a stable on the premises about an hour or an hour and a half after the alleged quarrel. The witness testified that she did not visit her brother in

prison, and did not tell him or any one else that she had heard the quarrel in the kitchen, until after her brother was convicted. But it is not contended that the defendant did not know that his sister was present and heard the quarrel in the kitchen. Therefore it does not appear that the existence of the evidence proposed to be given by Miss Fannie Paillet was discovered by the defendant after his conviction; and the testimony tendered is of little or no importance.

It is not necessary to consider the other reasons assigned by the district judge for refusing to grant a new trial. We fail to find any error in the proceedings had in this case. The verdict and sentence appealed from are therefore affirmed.

(189 La.)

No. 21650.

CITIZENS' INS. CO. v. HEBERT, Secretary of State.

(Supreme Court of Louisiana. Jan. 24, 1916. On Rehearing, June 5, 1916.)

(Syllabus by Editorial Staff.)

1. INSURANCE ¶20—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—"TAX"—STATUTE.

Act No. 295 of 1914, requiring foreign fire insurance companies to pay the state treasurer 1 per cent. of premiums received, to be turned over to the proper officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of their license to do business in the state, does not levy a "tax," though it is a requisition by the sovereign authority of an amount of money to be contributed toward the public expenses, as it lacks the essential feature of a tax of being obligatory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 18, 18-22; Dec. Dig. ¶20.]

For other definitions, see Words and Phrases, First and Second Series, Tax.]

2. TAXATION ¶24—CONSTITUTION—STATE PURPOSES.

Local assessments for local purposes do not come within Const. arts. 224, 227, providing that the Legislature can itself directly exercise the taxing power only for state purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 57; Dec. Dig. ¶24.]

3. TAXATION ¶24—STATE PURPOSE—FIRE INSURANCE—CONDITION OF DOING BUSINESS—STATUTE—CONSTITUTIONALITY.

Act No. 295 of 1914, requiring foreign fire insurance companies to pay the state treasurer 1 per cent. of premiums received, to be turned over to the proper officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of their license to do business in the state, is not violative of Const. arts. 224, 227, providing that the Legislature can itself directly exercise the taxing power only for state purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 57; Dec. Dig. ¶24.]

4. TAXATION ¶20—EXTRATERRITORIAL JURISDICTION.

The taxation power of a state has no jurisdiction over persons or property outside of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 51-54; Dec. Dig. ¶20.]

5. STATES ¶119—LOAN OF CREDIT—FIRE INSURANCE—CONTRIBUTION TO FIRE DEPARTMENTS.

Act No. 295 of 1914, requiring foreign fire insurance companies to pay the state treasurer 1 per cent. of premiums received, to be turned over to the proper officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of their license to do business in the state, is not violative of Const. art. 58, providing that the funds, credit, property, and things of value of the state shall not be loaned, pledged, or granted to or for any person or persons, association or corporation, public or private.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. ¶119.]

6. STATES ¶130—APPROPRIATIONS—NECESSITY—FIRE INSURANCE—CONTRIBUTING TO FIRE DEPARTMENTS—CONSTITUTIONALITY.

Such provision is not violative of Const. art. 45, providing that no money shall be drawn from the treasury except in pursuance to specific appropriation made by law, and no appropriation of money shall be made for more than two years, since the constitutional provision has application only to moneys properly belonging to the state that have gone into the treasury subject to appropriation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. ¶130.]

7. CONSTITUTIONAL LAW ¶81—"POLICE POWER"—"SOVEREIGN POWER."

In its broader sense the term "police power" of the state is in a measure convertible with the term "sovereign power."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ¶81.]

For other definitions, see Words and Phrases, First and Second Series, Police Power; Sovereign Power.]

8. INSURANCE ¶18—FOREIGN COMPANIES—RIGHT TO EXCLUDE.

The state has the right to exclude a foreign insurance company that has established a business in the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 13, 14; Dec. Dig. ¶18.]

9. CONSTITUTIONAL LAW ¶101—INSURANCE ¶4—VESTED RIGHTS—FOREIGN CORPORATION.

The aforesaid requirement of Act No. 295 of 1914 is not unconstitutional as divesting vested rights; the permission previously given a foreign insurance company to do business in the state not being a vested right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 209-211; Dec. Dig. ¶101; Insurance, Cent. Dig. § 4; Dec. Dig. ¶4.]

10. CONSTITUTIONAL LAW ¶130—OBLIGATION OF CONTRACTS.

Said provision is not unconstitutional as impairing the obligation of contracts; the permission previously given a foreign insurance company to do business in the state not being a contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 301; Dec. Dig. ¶130.]

11. STATUTES ¶113(8)—TITLE—CONSTITUTIONALITY.

Act No. 295 of 1914, entitled, "An act to declare and define the conditions upon which foreign fire insurance companies, etc., doing business in this state may engage and carry on business, etc., and to provide for the distribution of funds arising from the compliance with this act," requiring foreign fire insurance companies to pay the state treasurer 1 per cent. of

premiums received, to be turned over to the proper officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of their license to do business in the state, is not violative of Const. art. 31, requiring the object of every act to be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 144; Dec. Dig. § 113(3).]

O'Niell, J., dissenting.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by the Citizens' Insurance Company against Alvin E. Hebert, Secretary of State. From a judgment for plaintiff, defendant appeals. Judgment set aside, injunction dissolved, and suit dismissed.

R. G. Pleasant, Atty. Gen., and Harry Gamble, Asst. Atty. Gen., for appellant. J. Zach Spearing, of New Orleans (O. J. Doyle, of New York City, and Legler & Gleason, of New Orleans, of counsel), for appellee. Howe, Fenner, Spencer & Cocke, of New Orleans, amicus curiæ.

PROVOSTY, J. Plaintiff, a fire insurance company organized under the laws of Missouri, has enjoined the secretary of state from enforcing as against it Act 295, p. 603, of 1914, entitled

"An act to declare and define the conditions upon which foreign fire insurance companies, corporations or associations doing business in this state may engage and carry on business in this state and to provide for the distribution of funds arising from the compliance with this act."

Plaintiff alleges that it has complied with all the conditions heretofore imposed by the laws of this state upon foreign fire insurance companies for being allowed to do business in this state, and has heretofore been, and now is, engaged in doing business in this state, and desires to continue, but that the Legislature of this state has passed said act, and that the same is null, as violative of the following articles of the Constitution of this state: Article 31 requiring the object of every act to be expressed in its title; articles 224 and 227, providing that the Legislature can itself directly exercise the taxing power only for state purposes; article 58, providing that the funds, credit, property, and things of value of the state shall not be loaned, pledged, or granted to or for any person or persons, association, or corporation, public or private; article 45, providing that no money shall be drawn from the treasury except in pursuance of specific appropriation made by law, and no appropriation of money shall be made for a longer term than two years; articles 55 and 56, providing that all appropriations other than those made by the general appropriation bill shall be made by separate bills, which must embrace but one subject, each appropriation to be for a spe-

cific purpose; article 57, providing that no appropriation of money shall be made in the last five days of the session, or shall be valid unless the act making it is signed by the presiding officers of the two houses full five days before final adjournment; article 53, providing that no money shall be taken from the public treasury nor any appropriation made for private, charitable, or benevolent purposes to any person or community; and, finally, article 166, providing that no ex post facto law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested unless for purposes of public utility, and for adequate compensation previously made.

We give in the margin the allegation of the petition as to what is the substance of the act.¹ An outline of it here will suffice. It

¹Section 1. That no fire insurance company not incorporated by the laws of this state; shall carry on any fire insurance business in this state save and except upon the conditions imposed in and by the said act as well as all other provisions now or hereafter imposed by law.

Sec. 2. That every fire insurance company, organized under the laws of any other state, or of any foreign government, desiring to engage in or carry on fire insurance business in this state, shall return to the secretary of state an account verified by oath of all premiums received from fire insurance business during the preceding year in any incorporated town, city or village in this state having, or that may have a regularly organized fire department under the control of the mayor and council, or other constituted authority and having in serviceable condition for fire duty, fire apparatus and necessary equipment belonging thereto to the value of one thousand & 00/100 (\$1,000.00) dollars and upwards.

And the said section 2 also provides that:

"Such returns must be made by said companies, corporations or associations within sixty days after the promulgation of this act and thereafter within sixty days after the thirty-first day of December of each year."

Sec. 3. That every such fire insurance company shall, within the above-mentioned respective periods of sixty days after the approval of the act or after December 31st, or each year, pay to the state treasurer, "the sum of \$1 upon the \$100, and at that rate upon the amount of all premiums written on fire insurance within the limits of such incorporated cities, towns or villages" hereinabove referred to during the preceding year.

Sec. 4. That every such company shall keep accurate books of all business done by it upon fire insurance within the limits of such cities, towns and villages and it is made the duty of the secretary of state to investigate such returns, if he has reason to suspect any irregularity, fraud or dishonesty.

Sec. 5. That upon the failure or neglect of any company affected by the terms of the act to keep such books or to report and pay over any of the money due on premiums at the time and in the manner specified in the preceding sections, or who shall make a false return of business, shall for each offense forfeit the sum of five hundred & 00/100 (\$500.00) dollars to be applied to the purposes prescribed in the act.

Sec. 6. That in default of the payment of the tax or a failure to pay or satisfy any forfeiture adjudged to be due by the provisions of the act, the secretary of state is directed to revoke the license of such defaulting company to do busi-

requires foreign fire insurance companies to keep an account of the business done by them in each of the incorporated cities, towns, and villages of the state that have a regularly organized fire department under the control of the corporate officers, and to make yearly to the secretary of state, at a date fixed, a sworn return, showing what premiums have been received by it in the preceding 12 months from the business done in each of said cities, towns, and villages, and to pay to the treasurer of the state, at a date fixed, 1 per cent. of the premiums thus received, under penalty of \$500, or of revocation of its license to do business in the state in default of compliance with the act and of payment of said penalty of \$500 in case it has been incurred, and requires the state treasurer to pay over to the treasurers of the several cities, towns, and villages, the amount appearing to have been thus received from the business done in them respectively, to be turned over by the said corporate treasurers to the proper officers of the fire departments of the corporations, to be used exclusively for rendering such fire departments more efficient.

[1-3] The act does not profess to exercise the power of taxation; the word "tax" is not mentioned in it. It professes to withhold permission to do business in the state unless a certain contribution is made towards the maintenance of the fire departments of the several municipalities where the business is done. This contribution, undoubtedly, has some of the features of a tax. It is an amount of money required by the sovereign authority to be contributed towards the public expenses. But it lacks the essential feature of a tax, of becoming obligatory; or, in other words, of having for its sanction some proceeding against person or property. Its sole sanction is the withholding of permission to do business. It can never become a debt. It is more in the nature of a price paid to the state for acquiring from her the permission to do business in her cities, towns, and villages. But even if, generally speaking, it were a tax, this would not necessarily bring it within the intendment of said articles 224 and 227 of the Constitution. Not every

exercise of the taxation power comes within the contemplation of those articles. For instance, local assessments for local purposes do not. *Charnock v. Levee District*, 38 La. Ann. 323. And certain taxes are levied without any exercise at all of the taxation power, but of the police power. *Cooley, Taxation*, c. XIX. Those articles were never aimed at hampering the sovereign power of the state against a measure of this kind in the interest of local fire protection, but simply against the imposition of taxes, properly so called, for other than strictly state purposes.

[4] The taxation power of the state has no jurisdiction over persons or property outside of the state. The theory upon which this act proceeds is that these insurance companies are outside of the state, and are required to pay this amount for permission to come in. As a tax proper, this exaction, therefore, would under the theory of the act, be null as being imposed upon a subject outside of the state and beyond the jurisdiction of her taxation power. This shows it not to be a tax proper, but, as stated a while ago, more in the nature of a price paid to the state for the purchase of her permission to come in.

But the amount thus collected belongs to the state, it is said, and the state is prohibited from giving to the municipalities any of her moneys or things of value.

[5] We experience no difficulty in disposing of that contention. Very true, instead of having this money merely pass through her treasury on its way to the beneficiaries, the state might have had it remain there, like her other moneys, for defraying her own expenses; and in that sense the money is hers, and when she directs it to be turned over to the municipal fire departments she in a sense gives it to them. But if it were not for the special need of this money on the part of these municipal fire departments, and also of the peculiar relation in which they stand, or are supposed to stand, towards these fire insurance companies, serving to protect them from loss, this contribution would probably not be exacted at all, so that the state is in reality giving nothing by this statute, parting with nothing, but merely exercising her sovereign power in behalf of her municipal-

ness in this state and after such revocation it shall be unlawful for such company to do business in this state, though the secretary of state is authorized to renew or revive the authority to do business in this state upon the subsequent compliance with the terms of the act.

Sec. 7. The provisions of section 7 are in full as follows, to wit:

"That the state treasurer shall pay over to the treasurer of the cities, towns, or villages having or that may hereafter have a regular organized fire department, as aforesaid in section 2 of this act, the full and respective amounts collected upon the premiums on business done in each of said cities, towns or villages, respectively, from the foreign insurance companies, corporations or associations doing business therein. Provided, that the moneys so paid over to and received by the said cities, towns or villages shall be by them respectively

set apart and used solely and entirely for the objects and purposes of this act."

Sec. 8. The provisions of section 8 are in full as follows, to wit:

"That all money so collected and received under the provisions of this act by the treasurer of any incorporated city or town or village, shall within thirty days from the time said moneys are received as aforesaid be paid over by said treasurer to the secretary treasurer, treasurer, or other fiscal representatives of the organized fire department, of said city, town or village. Provided, that all such moneys derived under the provisions of this act shall be used for the purpose of rendering more efficient and efficacious the fire department of said city, town or village as the board of commissioners, fire board or other governing body of said department shall see fit and direct, and for no other purpose whatsoever."

ities for providing them with these funds from the expenditure of which the insurance companies, it is supposed, will derive a special benefit.

[6] As for the provisions against the withdrawing of money from the public treasury without an appropriation having been regularly made, they can have application only to moneys properly belonging to the state that have gone into the treasury subject to appropriation. The moneys to be realized under this act are not of that character. We freely recognize that these provisions are not to be circumvented by the simple device of not allowing the public moneys to go into the state treasury, or allowing them to go there only as belonging to certain beneficiaries and not to the state; that any measure which would be a mere subterfuge with that end in view would be null. But the present act does not present that objectionable feature. It is a case where certain moneys which the state would probably not exact for herself—would have no special reason for exacting for herself; in fact, might be unjustified in exacting for herself—are required to be contributed towards a purpose in which the forced contributors are supposed to have a special interest. Other instances where moneys are thus attributed directly to the beneficiaries without the formality of a legislative appropriation are found in our laws; for instance, Act No. 53, p. 63, of 1882, requires the avails of the tax on auction sales to be paid directly to the board of administrators of the Charity Hospital; and Acts 122, p. 282, of 1904, and Acts 143, p. 221, of 1910, require the fire insurance companies to pay a certain amount to the state to be turned over to the fire prevention bureau, without the need of any appropriation by the Legislature.

[7] Among the grounds of injunction is not the one that said act of 1914 is violative of the Fourteenth Amendment of the federal Constitution. But that question arises incidentally, inasmuch as the validity of said statute is to be sustained only on the theory of its not being an ordinary taxation measure, but merely the exercise of the "police power" of the state, using that term in its broader sense in which it is, in a measure, convertible with the term "sovereign power." The question is not an open one. In *Hooper v. California*, 155 U. S. 652, 15 Sup. Ct. 207, 39 L. Ed. 299, the Supreme Court of the United States said:

"The principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state has been long settled."

In *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 621, 19 Sup. Ct. 308, 43 L. Ed. 575, the court said:

"Each subsequent Legislature has equal power to legislate upon the same subject. The Legislature has at any time the power to repeal or modify the act granting such permission,

making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury."

In *Harrison v. St. Louis*, 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187, where a railroad already established in a state was sought to be excluded, and the cases of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Life Ins. Co. v. Prewitt*, 202 U. S. 248, 26 Sup. Ct. 619, 50 L. Ed. 1014, 6 Ann. Cas. 317, were invoked as authority, the court distinguished those cases, saying:

"Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the state of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a state of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the state to exert its lawful power."

[8] Here the right of the state to exclude an insurance company that has established a business in the state is recognized. In the case at bar, the only respect in which the statute in question would affect the complainant company, so far as appears from the record, would be that it could no longer do business in the several municipalities of the state.

[9, 10] The objection as to vested rights being divested, or the obligation of contracts impaired, is sufficiently answered by what has been already said. The permission which the state has heretofore given to the plaintiff company to do business in this state is not a vested right, nor a contract.

[11] Remains the question of the sufficiency of the title of the act. The criticism made of it is that it conveys no intimation of an intention to impose a tax, although its real object is to impose a tax, and that, in stating merely that the object is to impose a condition upon the companies for being allowed to do business in the state, it is misleading and deceiving.

This title might have been made more full and explicit by mentioning what were the conditions the act was designed to impose, instead of merely stating in general terms that the object was "to declare and define" these conditions; but, as appears from what has been already said in this opinion, what the act does is to impose upon fire insurance companies an additional condition for being allowed to do business in the state, and that object is certainly covered by the general terms that are used.

The judgment appealed from is therefore set aside; the injunction herein is dissolved, and this suit is dismissed at the cost of plaintiff in both courts.

O'NIELL, J., dissents, being of the opinion that the charge imposed on foreign insurance

companies for doing business in this state, by Act No. 295 of 1914, is a license tax.

On Rehearing.

MONROE, O. J. The opinion and judgment heretofore handed down herein are reinstated and made the judgment of this court.

O'NIELL, J., dissents and hands down reasons.

O'NIELL, J. (dissenting). The statute in contest, approved July 9, 1914, attempts to impose the charge of 1 per cent. of the premiums on all fire insurance written by foreign corporations in the cities, towns, and villages of the class designated, during the year ending on the 31st of December, 1913, as well as during the entire year 1914 and subsequent years. The provisions of the second and third sections of the statute leave no doubt that the charge of 1 per cent. was to be computed and imposed upon the business done during the period exceeding a year and a half preceding the adoption of the law. Section 2 provides that every foreign fire insurance company "now or hereafter desiring to engage in or carry on business in this state" shall, within 60 days after the promulgation of the act, and thereafter within 60 days after December 31st of each year, render an account to the secretary of state of all business done in the designated cities, towns and villages in the state during the year ending on December 31st of each year. Hence the first account to be rendered was of the business done during the year ending on December 31, 1913. Section 3 provides that the foreign insurance companies shall, within 60 days after the approval of the act, and thereafter within 60 days after the 31st day of December of each year, pay to the state treasurer 1 per cent. of the premiums on all fire insurance business written in the cities, towns, and villages of the class designated, "during the year ending December 31st in each preceding year or for such portion of such period as said company, corporation or association shall have done business in this state." Hence, it follows that the first payment, to be made within 60 days after the approval of the act, that is, on or before the 7th of September, 1914, at the rate of 1 per cent. of the premiums on all fire insurance written during the preceding year ending on the 31st of December, was to be computed on, and charged for, the business done during the calendar year 1913. And the second payment, to be made within 60 days after the 31st of December, 1914, was to be computed on, and charged for, the business done during the entire calendar year 1914, notwithstanding the statute was only approved on the 9th of July of that year.

The manifest purpose and object of the statute, therefore, was not to define the conditions on which foreign fire insurance companies might do business in this state, nor

to regulate their manner of doing business, but to obtain revenue, by taxing the business done and to be done by them, for the protection and benefit of the property owners and inhabitants of the cities, towns, and villages of the class designated in the statute.

We observe also that in section 4 of the statute in question it is made the duty of the secretary of state to investigate the accounts rendered by each foreign insurance company, "and collect the amount which he shall find to be due." Section 5 imposes a penalty of forfeiture or fine of \$500 for each offense of failing or neglecting to keep the accounts of the business done, or for failure or neglect to report or pay over any money due within the time specified, or for making a false return of the business done. Section 6 authorizes the secretary of state to revoke the license of any foreign insurance company defaulting in payment or failing to pay or satisfy any forfeiture adjudged to be due under the provisions of the act. The same section provides that, after such revocation of its license, it shall be unlawful for a foreign fire insurance company to do business in this state, unless the secretary of state sees fit to permit the company to continue doing business on compliance with the requirements of the statute.

Under a reasonable construction of this statute, therefore, the payment by a foreign insurance company of the penalties imposed in sections 5 and 6, for a failure to render a correct account and make payment within the time specified, would not relieve the secretary of state of his duty to collect the amount found to be due on his investigation of the accounts rendered, as provided in section 4 of the act. The statute does not provide any special remedy on the part of the secretary of state for collecting the amount which the statute makes it his duty to collect; but when the liability is created, the right and duty of the secretary of state to enforce payment implies and carries with it his right to proceed with an ordinary action for the debt. The penalty of forfeiture or fine of \$500 and of forfeiture of the license or right to do business in this state is not—and was not intended to be—the remedy whereby the secretary of state should perform his duty of collecting the 1 per cent. due on insurance premiums, because, as a matter of fact, the fear or threat or imposition of the penalty might not force or coerce the collection of the amount due by a delinquent insurance company. As was said by the Supreme Court of the United States, in *Pollard v. Bailey*, 20 Wall. 520 (87 U. S.) 22 L. Ed. 378, although, where a statutory liability is provided with a special remedy, that remedy alone must be employed for its enforcement, a liability created by statute without a special remedy may be enforced by an appropriate common-law action.

It appears, therefore, that the charge of 1 per cent. of the premiums on fire insurance

written by foreign companies in certain designated municipalities in this state was to become a debt, which, by the express terms of the statute, it was the duty of the secretary of state to collect. And that is the only element of the charge that is deemed lacking, and is deemed essential to constitute a tax, in the majority opinion rendered in this case.

A careful reading of the statute in question shows that the use of the word, "tax," or of any word that might readily be considered synonymous with or equivalent to the word, "tax," was studiously and adroitly avoided in framing this act. In the third section, the charge imposed is given its first designation as "the sum of \$1 upon the \$100, and at that rate upon the amount of all premiums written on fire insurance within the limits of such incorporated cities, towns or villages during the year ending December 31st in each preceding year or for such portion of such period as said company, corporation or association shall have done business in this state." In the next section, making it the duty of the secretary of state to investigate the accounts rendered by the insurance companies and to collect the charge of 1 per cent., it is called "the amount which he shall find to be due." Thereafter it is designated, "the money due on premiums," "the amounts collected upon the premiums on business done," "the money so paid over and received," "money so collected and received," and "money derived under the provisions of this act." The effort of the Legislature in avoiding the use of a name that might be called "tax" is as conspicuous as the word itself would have been. But we should not "to the fascination of a name surrender judgment hoodwinked."

The charge of "\$1 upon the \$100 and at that rate on the amount of all premiums on fire insurance written," is a tax of 1 per cent. on the volume of business done, for the license or privilege of carrying on the business—call it what we may. This charge or burden, of having to pay a certain proportion or percentage of the revenues of the business permitted to be done, imposed by the Legislature for the purpose of raising revenue for a public purpose, contains all of the elements of the definition of a license tax or privilege tax. See *Cooley on Taxation* (3d Ed.) pp. 1, 4, 10, 31; *Succession of Mercier*, 42 La. Ann. 1142, 8 South. 732, 11 L. R. A. 817; *Cooley's Constitutional Limitations* (5th Ed.) p. 616; *Burroughs on Taxation*, § 4, p. 2, adopting the definition of Judge Dillon in *Hanson v. Vernon*, 27 Iowa, 47, 1 Am. Rep. 215; *Judson on Taxation*, § 1, p. 2, and section 409, p. 524; *Gray on Limitations of Taxing Power*, § 57, p. 44.

The charge or burden imposed by the statute under consideration cannot be dealt with as a local assessment, because local assessments are charges or burdens imposed upon property presumably in compensation of, and

in proportion to, some special benefit to inure to the property assessed, from the use of the avails of the assessment. See *State v. Merchants' Insurance Co.*, 12 La. Ann. 802, declaring a charge of \$500 per annum, imposed upon fire insurance companies for the benefit of the fire departments, a tax, and distinguishing it from the local assessment referred to in *Yeatman v. Crandall*, 11 La. Ann. 220, and in the cases there cited.

The charge or duty demanded by the statute under consideration was not imposed in the exercise of the police power to regulate the fire insurance business, because, although the police power to regulate a business includes the right to impose a license tax on the business, nevertheless, if the sole or main object of the tax is to raise revenue, it cannot be imposed under the authority or guise of the police power, but must find its sanction in the taxing power alone. In other words, the police power can be exercised only for the purpose of promoting the public welfare. It cannot be used as a means of levying a tax for a purpose for which the taxing power is withheld by the Constitution. If this distinction between the police power and the taxing power cannot be observed and enforced, constitutional limitations on the taxing power amount to nothing. See *Parish of East Feliciana v. Louis Levy*, 40 La. Ann. 332, 4 South. 309, quoting Dillon on Municipal Corporations, §§ 93, 609, and citing *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Mayor v. Roth*, 29 La. Ann. 261, and *Board of Trustees of New Iberia v. Miguez*, 32 La. Ann. 923. See, also, *Parish of Morehouse v. Brigham*, 41 La. Ann. 667, 6 South. 257; *Canal & Claiborne Ry. Co. v. Crescent City Ry. Co.*, 47 La. Ann. 326, 16 South. 844; and *State ex rel. Lyons v. Court of Appeal*, Third Circuit, 49 La. Ann. 1226, 22 South. 368.

The Legislature has attempted, by the act in question, to exercise the taxing power of the state for the local purpose of benefiting the municipalities having fire departments of the class defined in the statute. The Constitution clearly limits the exercise of the taxing power of the Legislature to state purposes, and leaves it to the governing authority of each municipal corporation to levy taxes for municipal purposes of a public nature. Article 224 provides:

"The taxing power may be exercised by the General Assembly for state purposes and by parishes and municipal corporations and public boards, under authority granted to them by the General Assembly, for parish, municipal, and local purposes, strictly public in their nature."

Article 227 further limits the exercise of the taxing power of the Legislature to the purpose of maintaining the state government and her public institutions, viz.:

"The taxing power shall be exercised only to carry on and maintain the government of the state and the public institutions thereof, to educate the children of the state, to preserve the public health, to pay the principal and interest of the public debt, to suppress insurrection, to

repel invasion or defend the state in time of war, to provide pensions for indigent Confederate soldiers and sailors, and their widows, to establish markers or monuments upon the battlefields of the country commemorative of the services of Louisiana soldiers on such fields, to maintain a memorial hall in New Orleans for the collection and preservation of relics and memorials of the late Civil War, and for levee purposes, as hereinafter provided."

The license tax imposed upon foreign fire insurance companies, by the Act No. 295 of 1914, was not levied for any of the purposes mentioned in article 227 of the Constitution, and, in my opinion, is in plain violation of the provision that the taxing power shall not be exercised for any other purpose.

In the recent case of the Board of Administrators of the Charity Hospital v. Richhart et al., 71 South. 735, not yet officially reported, it was held that the so-called duty or charge of one-half of 1 per cent. of the proceeds of every adjudication of property by an auctioneer, dedicated to the Charity Hospital in New Orleans, by Act No. 46 of 1904, was not a tax on the property, and that the statute did not violate any provision of the Constitution. The charge or burden provided for in that statute, however, was not imposed upon property nor upon a business or occupation. And the purpose for which the revenue was raised was to aid in maintaining one of the institutions of the state, for which the Legislature was expressly authorized by the Constitution to make appropriations. See articles 53 and 227.

I am also of the opinion that the Act No. 295 of 1914 is violative of article 31 of the Constitution, in that the object of the law—that is, to raise revenue for the fire protection of the property owners and inhabitants of municipalities having fire departments of a designated class, by levying a license tax on foreign fire insurance companies for the privilege of doing business in such municipalities—is not expressed in the title of the act.

I respectfully dissent from the opinion and decree rendered in this case.

(189 La.)

No. 21859.

SHREVEPORT MILL & ELEVATOR CO. v. STOEHR.

In re SHREVEPORT MILL & ELEVATOR CO.

(Supreme Court of Louisiana. May 22, 1916.)

(Syllabus by the Court.)

SALES \S 168(3)—REMEDIES OF SELLER—RECOVERY OF PRICE.

Where a merchant, having contracted to furnish to a baker hard wheat flour of a certain brand, ships flour of another brand, representing it to be of the same grade as the brand ordered, and the baker uses only enough of it to find out that it is of an inferior grade, he is not required to pay for the portion which he used in testing the flour, and which proved to be of no value to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 406; Dec. Dig. \S 168(3).]

Action by the Shreveport Mill & Elevator Company against John Stoeher. Judgment for defendant, and plaintiff brings certiorari. Affirmed.

Grisham & Oglesby, of Winnfield, for relator. Huey P. Long, Jr., of Winnfield, for defendant.

O'NIELL, J. A writ of certiorari and a rule to show cause why the judgment in this case should not be reversed were issued because it was inferred from the relator's petition that an injustice had been committed. The answer of the respondent judge and the record disclose that the proceedings have been entirely regular, and that the judgment rendered by the justice of the peace and affirmed by the district court was according to the law and the evidence.

The testimony was not reduced to writing, but the statement of the respondent judge is admitted to be a correct statement of the facts. The relator's traveling salesman undertook to supply the defendant with what is called hard wheat flour for his bakery business. The defendant gave an order for 25 sacks, or 12½ barrels, of hard wheat flour of a brand called "Split Silk," at \$7.50 per barrel. The relator, being out of "Split Silk" flour, bought and shipped to the defendant 25 sacks of a brand of flour called "Ambrosia," supposed to be a hard wheat flour of the same grade as "Split Silk." By an error on the part of the relator, the flour was billed to the defendant as "Split Silk." The defendant did not learn that the flour was not of the brand stated in the invoice until it was delivered at his bakery. Under the belief that it was hard wheat flour, he used two sacks blended with other flour, and the result was an inferior quality of bread. He had been using "Split Silk" flour in his bakery, but had never used "Ambrosia." To give it a further test, he used four sacks without blending it with other flour, and the result of the day's baking was unfit for his trade. The bread was given away and fed to hogs. The defendant immediately notified the Shreveport Mill & Elevator Company of his experience with the flour, and was instructed to return it. He returned the remaining 19 sacks promptly, and the Shreveport Mill had "Split Silk" flour shipped to him in its stead from New Orleans.

The relator sued the defendant in the First ward justice court for \$22.50, the invoice price of 6 sacks of "Ambrosia" flour. In his answer the defendant alleged that the flour had been of no value to him for the reasons stated above; and he filed a reconventional demand for \$35 damages for the loss of a day's business. On proof of the facts recited above, judgment was rendered dismissing the plaintiff's demand and the defendant's reconventional demand, and the plaintiff appealed. The case was tried de novo in the

district court, and the judgment was affirmed, at the cost of the plaintiff, appellant.

The relator's counsel admit in their brief that the "Ambrosia" flour was made from new wheat; but they contend that the defendant, being an experienced baker, should have discovered that it was not a hard wheat flour when he blended it with other flour, and should not have tried it pure. We agree with the judge of the First ward justice court and the judge of the district court that the purchaser had a right to rely upon the representation of the seller that the flour was of the grade ordered, though it was not of that brand. He had no other means of ascertaining that it was not fit for the purpose for which it was sold to him than by testing it. The quantity used in the test proved to be of no value or benefit to him, and he should not be required to pay for it.

The writer is of the opinion that the exercise of the authority of this court to issue writs of certiorari in the general supervision and control over inferior courts conferred by article 94 of the Constitution should be regulated by articles 855, 857, 864, and 865 of the Code of Practice, and should be confined to cases where the proceedings are null or irregular in form, and not extended to cases where the court below is acting within the exercise of its jurisdiction. See *State ex rel. Kramer v. Judge*, 32 La. Ann. 217; *State ex rel. City v. Judge*, 32 La. Ann. 552; *State ex rel. Valetton v. Skinner*, 33 La. Ann. 255; *Markey v. Judge*, 33 La. Ann. 378; *Buisson v. Judge*, 33 La. Ann. 1427; *Unbehagen v. Justice*, 35 La. Ann. 365; *State ex rel. Berthoud v. Judge*, 34 La. Ann. 782; *Brown v. Ragland*, 35 La. Ann. 838; *Troegel v. Judge*, 35 La. Ann. 1164; *Brown v. Houston*, 35 La. Ann. 1194; *State ex rel. O'Malley v. Judge*, 35 La. Ann. 1194; *State ex rel. Insurance Co. v. Judge*, 36 La. Ann. 317; *State ex rel. Bright & Co. v. Judge*, 36 La.

Ann. 482; *Waterworks Co. v. Levy*, 36 La. Ann. 941; *State ex rel. Forman v. Judge*, 37 La. Ann. 113; *State ex rel. Race v. Judge*, 37 La. Ann. 120; *Williamson v. Judge*, 37 La. Ann. 385; *Wood & Bro. v. Judge*, 38 La. Ann. 377; *Id.*, 38 La. Ann. 921; *State ex rel. Gooch v. Judge*, 38 La. Ann. 968; *Brousard v. Judge*, 39 La. Ann. 776, 2 South. 559; *May v. Recorder*, 39 La. Ann. 983, 3 South. 181; *State ex rel. Block v. Perrault*, 41 La. Ann. 179, 6 South. 18; *State ex rel. Shakespeare, Syndic, v. Duffel*, 41 La. Ann. 557, 6 South. 14; *State ex rel. Railroad Co. v. Riley*, 43 La. Ann. 177, 8 South. 598; *State ex rel. Chandler v. Ellis*, 43 La. Ann. 825, 9 South. 639; *State ex rel. Rocchi v. Judge*, 45 La. Ann. 535, 12 South. 941; *State ex rel. City v. Judge*, 45 La. Ann. 952, 13 South. 181; *State ex rel. Hogsett v. Patin*, 47 La. Ann. 1534, 18 South. 507; *State ex rel. Express Co. v. Justice*, 48 La. Ann. 1249, 20 South. 729; *State ex rel. Brakenridge Lumber Co. v. Tully*, 48 La. Ann. 1532, 21 South. 119; *State ex rel. Perilloux v. Magistrate*, 49 La. Ann. 1212, 22 South. 661; *State ex rel. Guarneri v. Rost*, 52 La. Ann. 968, 27 South. 365.

The majority of the members of the court adhere to the view expressed in the late case of *Loeb v. Collier*, 131 La. 378, 58 South. 816, citing *Thompson & Co. v. Gosserand*, 128 La. 1029, 55 South. 663, and *State ex rel. Union Sawmill Co. v. Summit Lumber Co.*, 117 La. 643, 42 South. 195, that, although, as a general rule, certiorari can issue only in cases where the regularity of the proceedings in the lower court is attacked, the power granted to this court by the Constitution is plenary, and its exercise rests in the discretion of the court. The judgment of the district court affirming that of the justice court is therefore affirmed at the cost of the relator.

T. L. FARROW MERCANTILE CO. v. RIGGINS. (8 Div. 306.)

(Court of Appeals of Alabama. May 30, 1916.)

1. LANDLORD AND TENANT §331(5) — RENTING ON SHARES—BREACH—COMPLAINT.

In an action for damages for breach of contract, a complaint, which in setting forth a contract for the rental of land on shares did not attempt to describe the land, the number of stock and quantity of fertilizer to be furnished to plaintiff, the quantity of land to be cultivated, or the kind of crop, was demurrable as uncertain and indefinite.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1382; Dec. Dig. § 331(5).]

2. LANDLORD AND TENANT §331(5)—PLEADING—COMPLAINT.

In an action for breach of contract for rental of land on shares, an allegation that under the contract plaintiff started a two-horse crop was not a sufficient allegation that the contract was for a two-horse crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1382; Dec. Dig. § 331(5).]

3. LANDLORD AND TENANT §331(6) — EVIDENCE—ADMISSIBILITY.

In an action for breach of contract for rental of land on shares, evidence of the value of the growing crop on the land at the time of the alleged breach of the contract was inadmissible, since the action was not destructive of such crop, but for preventing plaintiff from completing its cultivation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1383; Dec. Dig. § 331(6).]

4. LANDLORD AND TENANT §331(6)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action for breach of contract for rental of land on shares, where the year in which the crop was planted was past, evidence as to what kind of crops the land was capable of producing, adaptability of the land to the crops planted, manner in which plaintiff was cultivating the land, average per acre yield of that land under similar conditions and cultivation, and the market value of the crops when they, under the conditions and circumstances, would have been gathered would be admissible in arriving at the value of the crop which would have been made had plaintiff been permitted to perform the contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1383; Dec. Dig. § 331(6).]

5. DAMAGES §62(4)—RENTING ON SHARES—BREACH OF CONTRACT — MASTER AND SERVANT—MEASURE OF DAMAGES.

In an action for breach of contract for rental of land on shares, although the relation between the parties was that of tenants in common, and not that of a contract of hire within Code 1907, § 4743, which would have given plaintiff a lien on crops produced, since the contract provided that plaintiff do the work personally, it will be treated as a breach of contract for personal services, and the proper measure of damages is the value of one-half of the crops that would have been gathered by him, less one-half the cost of fertilizer and such sum plaintiff received from other employment, or could have made had he, in the exercise of reasonable effort, been able to obtain at the same place employment of the same general nature.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 128-131; Dec. Dig. § 62(4).]

6. DAMAGES §182 — BREACH OF CONTRACT — MEASURE OF DAMAGES—EVIDENCE—REDUCING DAMAGES.

In an action for breach of contract of rental of land on shares, where the crop season at the time of the breach had not advanced too far to permit plaintiff, in the exercise of reasonable effort and expense, to rent similar lands and replace the stock and tools that the defendants had agreed to furnish, evidence of his financial condition at time of the breach was admissible on the question whether by reasonable efforts he could have minimized the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 500; Dec. Dig. § 182.]

7. SET-OFF AND COUNTERCLAIM §5 — "RECOUNPMENT"—"SET-OFF."

A "recoupment" applies when the abatement claimed springs out of or is closely related to the contract or transaction on which the recovery is sought, while a "set-off" is based on an independent cause of action.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 5; Dec. Dig. § 5.]

For other definitions, see Words and Phrases, First and Second Series, Recoupment; Set-Off.]

8. SET-OFF AND COUNTERCLAIM §6 — RECOUNPMENT—STATUTE.

Code 1907, §§ 5860, 5865, permitting a judgment in favor of a defendant against a plaintiff on a plea of recoupment, as well as on a plea of set-off for the amount defendant's claim exceeds that of plaintiff, has not enlarged the class of demands which may be the subject of recoupment.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 617; Dec. Dig. § 6.]

9. SET-OFF AND COUNTERCLAIM §58—SET-OFF—DAMAGES.

Under Code 1907, § 5865, on a plea of recoupment, if the claim of defendant equals that of plaintiff, judgment must be rendered for defendant, but under section 3666 on a plea of set-off, under such circumstances, defendant would not have judgment, but would be entitled to have his costs sustained in establishing the set-off taxed against plaintiff.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 129; Dec. Dig. § 58.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by Oliver Riggins against the T. L. Farrow Mercantile Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

John A. Lusk & Son, of Guntersville, for appellants. Street & Isbell, of Guntersville, for appellee.

PELHAM, P. J. The appellee sued the appellants to recover damages for the breach of a contract. The complaint consists of one count, which is as follows:

"The plaintiff claims of the defendants the sum of \$250, for the breach and violation of a contract, the substance of which was and is as follows, to wit: Along about the first of the year 1913, one Ernest Howle rented lands to the plaintiff on the halves; that is, Howle was to furnish the land, stock, feed for the stock, and the tools, and plaintiff was to do the work of making and gathering the crops, and the crops were to be divided in halves, each party to pay one-half of the fertilizer. That under this agreement plaintiff started a two-horse crop, plowed up some of the land, cleared up and prepared

the land for cultivation, and planted some of the crops. In the spring when the crops had been thus started, the said landlord (Ernest Howle) died. And after the death of said Howle, the defendant came to plaintiff and told him that he held a mortgage on the land, stock, tools, etc., that Howle had agreed to furnish plaintiff to make the crops. And the said T. L. Farrow then and there agreed that he would take the place of said Ernest Howle and would let him keep the land, stock, and tools and would furnish feed for the stock as Howle had agreed to do. The proposition was accepted and agreed to by plaintiff. And plaintiff then and there entered upon the work of making the crops under the new contract, proceeding to prepare the land for planting, and planting the crops and working over the young crops. That after plaintiff had proceeded with his crops, under the new agreement with defendant for some days or weeks, defendant notified plaintiff that he could not and would not furnish the land, stock, and tools and feed for the stock as he had agreed to do, and took the stock away from plaintiff, and failed and refused to comply with his said contract, and notified plaintiff that he would no longer comply with, or try to comply with, his part of the contract, to the great damage of plaintiff, as aforesaid, of \$250."

The complaint was amended by striking out "T. L. Farrow" wherever it appeared in the body of the complaint and inserting in lieu thereof the word "defendants."

[1] It is elementary that in declaring upon a breach of contract, the parties must be held to observe reasonable certainty in the more substantial parts of the declaration which describe the cause of action. The subject-matter of the contract and the terms imposing the obligations relied upon must be stated with sufficient certainty, clearness, and precision to enable the defendant to prepare to defend against the action and plead a judgment thereon in bar of another recovery, and in such manner that from the breach assigned compensation therefor in damages can be computed with reasonable certainty. *Moore v. Smith*, 19 Ala. 774; *Kennedy v. McDiarmid*, 157 Ala. 496, 47 South. 792; *American Tie & Timber Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 South. 246. An inspection of the complaint in the present case shows that it does not conform to these elementary rules, and it is too uncertain and indefinite to be supported, when attacked by demurrer. It does not attempt to describe the lands which, under the contract, were to be furnished by the defendants and cultivated by the plaintiff. A reasonable identification of the lands was material in the matter of enabling the defendants to prepare to defend the action, and, if necessary, to plead *res adjudicata* in another action. This point was not taken by demurrer, but the demurrer did point out that the complaint failed to show that there was any provision in the contract as to the quantity of land that was to be cultivated, and that it did not allege the kind of crops that were to be grown. The necessary fertilizer, one-half of the cost of which was to be paid by the defendants, for a crop of corn or oats might be materially different from that required for a crop of cotton or wheat

or other kind of grain or vegetable, and would vary in amount as to the quantity of land to be cultivated. The number of stock required, which the defendants were to furnish, would vary with the quantity of land and probably with the kind of crop; and the feed for the stock and the number of plows, which the defendants were to furnish, would be increased or diminished according to the number of animals employed. It is therefore readily observed that these matters have to do, not only with the amount of damages, but are materially descriptive of the defendants' obligation or duty under the contract, and without them this obligation or duty is not described with such definiteness that the defendants would be enabled to prepare to defend the action and upon which a breach could be assigned that could be compensated for in damages capable of being computed with reasonable certainty. It is the insistence of counsel that the complaint alleges in substance that the defendants agreed to furnish the plaintiff lands, stock, and tools to make a two-horse crop, and that after the plaintiff had proceeded to the planting and working of the crop, the defendants breached the contract; that the complaint, therefore, alleges a contract and a breach thereof. Assuming this to be true, nevertheless the complaint is totally wanting as to a description of the kind of crop, as well as to the quantity of land. A complaint may allege a duty owing by the defendant to the plaintiff and a breach thereof, and, if not demurred to, may, if it states a substantial cause of action, support a judgment, but it may be so indefinite or uncertain as to fail to comply with the elementary rules first above referred to, and be fatal on attack by demurrer. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Kennedy v. McDiarmid*, 157 Ala. 496, 47 South. 792.

[2] However, the allegations of the complaint do not bear out the insistence of counsel that there was a contract for a two-horse crop, except probably by inference. "Good pleading requires that the facts which constitute the cause of action relied on shall be stated in the complaint, and not left in inference. Facts, when averred, may be established inferentially from other facts shown in evidence, but this is a rule of evidence and not of pleading." *Fidelity & Deposit Co. of Maryland v. Walker et al.*, 158 Ala. 129, 48 South. 600; *Daniels v. Carney*, 148 Ala. 81, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 84, 12 Am. Ann. Cas. 612.

[3] The trial court, against objection, admitted evidence of the value of the crop at the time of the alleged breach of the contract. In this, it is our opinion that the court erred. The action is not for the destruction of or injury to a growing crop, but is for damages for the breach of a contract, by which breach on the part of the defendants the plaintiff was not permitted to complete the cultivation and gathering of the

crop according to the contract, and was thereby deprived of the fruits of that contract. In actions *ex contractu*, only such damages as are the natural and proximate result of the breach of the contract, and which could reasonably have been contemplated by the parties as a probable result of the breach, are recoverable. *Bell v. Reynolds & Lee*, 78 Ala. 511, 56 Am. Rep. 52.

[4] The primary purpose of awarding damages is actual compensation to the injured party. In the assessment of actual compensation to be paid to the plaintiff, in the present case, it is necessary to arrive at what would have been the value of the crop if the plaintiff had been permitted to complete and gather it, because he, under the contract, was to receive one-half of it. To show the probable future yield of any crop would be a most difficult matter, because it depends upon so many varying contingencies as to render it very indeterminate; but where, as in the present case, the year in which the crop was planted has passed, and the character of the season and the circumstances and conditions existing throughout the year are known, it is possible to arrive at what the lands would have produced with reasonable certainty. "A party who has broken his contract cannot escape liability because of the difficulty there may be in finding a perfect measure of damages. It is enough if the evidence furnishes data for an approximate estimate of the * * * damage." *W. T. Adams' Machine Co. v. South State Lumber Co.*, 2 Ala. App. 476, 56 South. 826; *Bigbee Fertilizer Co. v. Scott*, 3 Ala. App. 333, 56 South. 834. In arriving at the value of the crop that would have been made and gathered had the plaintiff been permitted to perform the contract, it would be proper to admit, and for the jury to consider, evidence showing what, if anything, was gathered from the crops, if any part thereof was completed and gathered by another person, and the manner of cultivation, the kind of crops the land was capable of producing, the adaptability of the land to the kind of crops that were planted, the manner in which the lands were being cultivated by the plaintiff, the average yield of that land per acre under similar conditions and with similar cultivation, as well as the average yield of similar crops on similar lands in the immediate neighborhood under similar circumstances, and the market value of the crops when they, under the conditions and circumstances, would have been gathered (*Bigbee Fertilizer Co. v. Scott*, 3 Ala. App. 333, 56 South. 834; *Bell v. Reynolds & Lee*, 78 Ala. 511, 56 Am. Rep. 52); and as a further aid to the jury it would be proper to permit opinions of experts (*International Agr. Corp. v. Burton* [Sup.] 69 South. 417). The value of the growing crop at the time of the alleged breach of the contract could be of no assistance to the jury in determining what it would be worth when completed or gathered, or in estimating plain-

tiff's damages. A crop in its early stages might be of great value, and practically of no value at the harvesting season. The plaintiff, under the allegations of this complaint, was to receive one-half of the crop when gathered.

[5] It is well settled in this state that at the time the present contract was entered into the relation between the parties as described by the complaint is that of tenants in common, and that the contract was not one of hire, within section 4743, Code 1907, which would have given the plaintiff a lien on the crops produced (*International Agr. Corp. v. Burton*, supra; *Hendricks v. Clemmons*, 147 Ala. 590, 41 South. 306; *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 South. 837); but since the contract as alleged shows that "the plaintiff was to do the work"—not to have it done or to furnish the labor—it partakes of the nature of a contract for personal services, the compensation to be one-half of the crop; and, with reference to a diminution of the damages, so far as other employment is concerned, we think it proper that the rules applicable to the breach of a contract for personal services be applied to it. In this class of cases, the general principle applies that whoever seeks redress for injury from the conduct of another is under a moral and legal duty to use due diligence in preventing loss thereby. *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. However, a party is entitled to his bargain or the benefits of his contract; the obligation to use due diligence is based on a moral and equitable principle, and in order to reduce the damage the injured party is not obligated to forego, or to waive for the benefit of the wrongdoer, his own rights or advantages. The party discharged, therefore, must make reasonable effort to obtain employment of the same general nature and description as that for which he was employed under the contract, but not at a different place from that in which the original employment contemplated his remaining during the term. *Strauss v. Meertief*, supra; *Wilkinson v. Black*, 80 Ala. 329. The defendants should be permitted in the present case to show, in diminution of damages, that the plaintiff accepted, or was offered at the same place, employment of the same general nature, or that he failed to make reasonable effort to obtain such employment at the same place, and that if he had done so such employment could have been obtained by him. *Wilkinson v. Black*, supra. And if the plaintiff accepted employment of a different kind, at the same place or at another place, his earnings from that employment should be considered in diminution of damages, because if he had continued under the contract, the contemplated return from his services would be included in the value of his one-half of the crops which he is entitled to receive. The burden of proof as to these matters rests on the defendant. *Strauss v. Meertief*, supra. The proper

measure of damages which would actually compensate the plaintiff for the breach of the contract as here alleged is the value of the one-half of the crops that would have been made and gathered by him, less one-half of the cost of the fertilizer and such sum that the plaintiff received from other employment, or such sum that he could have made had he, in the exercise of reasonable effort, been able to obtain, at the same place, employment of the same general nature and description as that described in the contract.

[6] An attempt was made in the court below to show the financial condition of the plaintiff. If the crop season at the time of the breach of the contract had not advanced too far to permit the plaintiff, in the exercise of reasonable effort, and at a reasonable expense, to rent similar lands at the same place and to replace the stock and tools that the defendants agreed to furnish, evidence of the financial condition of the plaintiff at the time the contract was breached would be relevant on the question as to whether or not the plaintiff, by reasonable efforts, could have minimized the damages. "If the party entitled to the benefit of the contract can protect himself from the loss arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable." *Murrell v. Whiting*, 32 Ala. 54; *Watson v. Kirby*, 112 Ala. 436, 20 South. 624.

[7] The defendants pleaded as a recoupment that the plaintiff was indebted to defendant T. L. Farrow Mercantile Company in two sums, viz., \$25 and \$30, secured, respectively, by two mortgages, the first executed by the plaintiff and Ernest Howle, and the second only by the plaintiff, and each mortgage purported to cover the crop of the plaintiff. A recoupment applies when the abatement claimed springs out of or is closely related to the contract or transaction on which the recovery is sought. A set-off is based on an independent cause of action. *Washington v. Timberlake*, 74 Ala. 259. Unaffected by our statute, under the common law there could be no judgment on a plea of recoupment for the excess against the plaintiff, as there could be under a plea of set-off. A recoupment at common law, as has been said by the Supreme Court in *Grisham v. Bodman*, 111 Ala. 194, 20 South. 514—

"is in some sense a means of enforcing a cause of action by the defendant against plaintiff, either wholly or partially, as the defendant's claim for damages may or may not be less than plaintiff's demand, yet such cause of action is enforced not as an independent claim or debt of the defendant, but by way merely of cutting off, reducing the plaintiff's claim, so that the effect and result of a plea of recoupment sustained is an adjudication that to the extent of the sum recouped the plaintiff had no claim or debt. 'For,' as said by Mr. Parsons, 'the essential difference between recoupment or reduction on the one hand, and set-off on the other, is that

in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims; but that a part of the whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him.' * * * while on a plea of recoupment, 'a defendant may deduct from the plaintiff's claim all just demands or claims owned by him, or payments made by him, in the very same transaction, or even in other, but closely connected, transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff, on that cause of action, so much as he seeks, and not that he ought not to pay the plaintiff so much, because on another cause of action the plaintiff owes him. If he can so present and use his claims, he diminishes the plaintiff's claim by way of reduction.' 2 Parsons on Contr. 862, 863. And this doctrine that recoupment goes, not to the effectuation of a counterclaim as a set-off against plaintiff's demand, but in diminution, reduction, and, it may be, to the destruction of plaintiff's claim or cause of action has been long recognized in this state." *Peden v. Moore*, 1 Stew. & Port. 71, 21 Am. Dec. 649.

[8, 9] And while the common-law rule has been changed by our statute (Code, §§ 5860, 5865), which permits a judgment in favor of the defendant against the plaintiff on a plea of recoupment, as well as on a plea of set-off for the amount that the defendant's claim exceeds that of the plaintiff, the statute has not enlarged the class of demands which may be the subject of recoupment (*Martin v. Brown*, 75 Ala. 442; *Ewing v. Shaw*, 83 Ala. 333, 3 South. 692), and there is still another distinction between the two kinds of pleas under our statute, in that on a plea of recoupment, if the claim or demand of the defendant just equals the claim or demand of the plaintiff, judgment must be entered for the defendant (Code, § 5865), but on a plea of set-off, under such circumstances, the defendant would not be entitled to judgment against the plaintiff; he would be entitled to have the costs sustained in establishing his set-off taxed against the plaintiff (*Fuller v. Hunter*, 34 Ala. 56; *Jonas, Schwab & Co. v. Hall*, 156 Ala. 560, 47 South. 137; Code 1907, § 3666), and the defendant's set-off not having exceeded the plaintiff's claim, the plaintiff would be entitled to judgment which would carry all the costs except that to be taxed against the plaintiff as aforesaid. The question as to which party should pay these costs would therefore, in such case, be determined by whether or not the plea is a recoupment or a set-off. In view of the fact that our statute has not enlarged the class of demands which may be the subject of recoupment, it will be observed that the debt set up in the plea might be pleaded as a set-off. In *Merchants' Bank v. Acme Lumber Mfg. Co.*, 160 Ala. 435, 49 South. 782, the Supreme Court said:

"By pleading recoupment, the defendant says: Taking the contract between us, with all its reciprocal obligations, I owe you either much less than you claim or nothing at all."

The debt pleaded as recoupment in the present case is not made to appear to arise out of or to be connected with the reciprocal

obligations of the contract sued upon. *Dalton v. Bunn & Allison*, 152 Ala. 577, 44 South. 625.

The plea contained some allegations with reference to a provision in the mortgage empowering the mortgagee to take possession of the property therein described, but since the plea was expressly stated therein to be in recoupment, the purpose of these allegations is not clear; they should be so stated that a material issue can be taken thereon.

The assignments of error in this case are numerous. We have not dealt with each separately, but have attempted to state the law applicable to the case in such manner as to be of some service on a new trial. The cause must, for the reasons pointed out, be reversed and remanded.

Reversed and remanded.

MURPHY v. STATE. (8 Div. 395.)

(Court of Appeals of Alabama. April 4, 1916.
Rehearing Denied May 30, 1916.)

1. CRIMINAL LAW § 1091(9) — APPEAL AND ERROR — REVIEW — PRESUMPTION — INSTRUCTION.

In order to have the refusal of requested instructions reviewed, the bill of exceptions need not affirmatively show their presentation to the court before the jury retired.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2818, 2831, 2943; Dec. Dig. § 1091(9).]

2. CRIMINAL LAW § 829(1) — APPEAL AND ERROR — HARMLESS ERROR — REFUSING REQUESTED INSTRUCTIONS.

Under Acts 1915, p. 815, it is not error to refuse requested instructions adequately covered by other portions of the charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829(1).]

3. HOMICIDE § 340(1) — INSTRUCTION — MALICE.

A murder trial instruction that defendant's malice "may be inferred from the shooting," unless the evidence relating to the shooting shows the contrary, does not constitute reversible error for failing to add that such inference is rebuttable.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 715; Dec. Dig. § 340(1).]

4. CRIMINAL LAW § 825(1) — REQUEST FOR INSTRUCTIONS—FURTHER INSTRUCTIONS.

Where an instruction correctly states the law, but accused fears it may mislead the jury, he should request an explanatory charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2005; Dec. Dig. § 825(1).]

5. CRIMINAL LAW § 1172(1)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.

Reversal will not be granted for a merely misleading charge, unless it clearly prejudiced the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3128, 3154; Dec. Dig. § 1172(1).]

6. CRIMINAL LAW § 823(5)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

An instruction that accused's malice "may be inferred from the shooting" is not prejudicial,

where other portions of the charge state that such inference may be rebutted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. § 823(5).]

7. CRIMINAL LAW § 761(9) — APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION—ASSUMPTION—FACT.

The court's assumption in an instruction that accused inflicted wounds on the deceased is not reversible error, where such fact is not disputed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1754; Dec. Dig. § 761(9).]

8. CRIMINAL LAW § 476—EVIDENCE—OPINION EVIDENCE—CAUSE OF DEATH.

A physician's opinion as to the cause of death is competent evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1062; Dec. Dig. § 476.]

9. WITNESSES § 289 — REDIRECT EXAMINATION—MATERIALITY.

Where accused cross-examines as to an immaterial dispute between himself and his alleged murder victim, he cannot complain because the matter is fully developed on redirect examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1004; Dec. Dig. § 289.]

10. HOMICIDE § 188(5)—EVIDENCE—ADMISSIBILITY — SELF-DEFENSE — DECEASED'S CHARACTER.

Under an issue of self-defense in a murder trial, deceased's character cannot be shown by testimony as to what a particular individual said about him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 395; Dec. Dig. § 188(5).]

11. CRIMINAL LAW § 1086(14)—APPEAL AND ERROR—PROCEEDINGS NOT IN RECORD.

Where the bill of exceptions does not disclose the grounds of accused's objection to testimony, nothing is presented for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2794; Dec. Dig. § 1086(14).]

12. HOMICIDE § 188(5)—EVIDENCE—ADMISSIBILITY — SELF-DEFENSE — DECEASED'S CHARACTER.

Testimony that a witness thought he knew deceased's character for peace and quiet, and that it was good, is admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 395; Dec. Dig. § 188(5).]

13. HOMICIDE § 188(1)—EVIDENCE—ADMISSIBILITY—SELF-DEFENSE—DECEASED'S CHARACTER.

Testimony as to whether witness had heard of deceased having lawsuits is inadmissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 391; Dec. Dig. § 188(1).]

14. HOMICIDE § 188(1)—EVIDENCE—ADMISSIBILITY — SELF-DEFENSE — DECEASED'S CHARACTER.

Testimony as to whether witness had heard of deceased having any "trouble" over an immaterial matter is inadmissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 391; Dec. Dig. § 188(1).]

15. HOMICIDE § 188(1)—EVIDENCE—ADMISSIBILITY — SELF-DEFENSE — DECEASED'S CHARACTER.

Testimony as to deceased's reputation for being a "fussy, disagreeable man" is inadmissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 391; Dec. Dig. § 188(1).]

16. HOMICIDE — 174(7)—EVIDENCE—ADMISSIBILITY—ACCUSED'S REFUSAL TO FLEE.

Where the state does not show a flight by accused, his testimony that he did not flee is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 365; Dec. Dig. —174(7).]

17. HOMICIDE — 188(1)—EVIDENCE—ADMISSIBILITY — SELF-DEFENSE — DECEASED'S CHARACTER.

Testimony as to deceased's character for peace and quiet held admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 391; Dec. Dig. —188(1).]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Jim Murphy was convicted of murder in the second degree under an indictment charging first degree murder, and appeals. Affirmed.

The charges requested for the state and given are as follows:

(4) If the wounds inflicted by defendant on Skidmore, and that by reasons of said wounds, and as a result thereof, the deceased was caused to have some other disease from which he died, then defendant would be responsible for inflicting said wounds unless he acted in self-defense in inflicting them.

(5) If deceased died from heart trouble which was brought about by reason of the infliction of the wounds, if it was brought about thus, then defendant is responsible for the death of deceased; and, if defendant thus caused the death of Skidmore, and did not act in self-defense in so doing, then defendant is not guiltless.

(7) If, from the evidence in this case, you find beyond a reasonable doubt that defendant, in this county, before the finding of this indictment in this case, shot deceased with a pistol, and that this shooting was done wrongfully, without justification, and was done maliciously, and you further find that said wounds so inflicted contributed to the death of deceased, that is, by bringing about the condition that caused deceased to die, then defendant would be guilty of murder of deceased; and in determining whether the shooting was maliciously done I charge you that malice on the part of defendant towards the deceased may be inferred from the shooting of the pistol, unless the evidence which shows the shooting with a pistol shows it was used without malice.

The other facts sufficiently appear.

E. W. Godbey and Wert & Lynne, all of Decatur, for appellant. W. L. Martin, Atty. Gen., J. P. Mudd, Asst. Atty. Gen., and O. Kyle, of Decatur, for the State.

PER CURIAM. Appellant was indicted for murder in the first degree, was convicted of murder in the second degree and given a sentence of ten years. The evidence for the state tended to show that the deceased, having taken up and put in his lot some cattle belonging to the defendant that were trespassing upon the premises of deceased in a stock-law district and doing damage to his crops, notified defendant over the phone, who promised that he would that afternoon go over to deceased's, pay the amount of damage that his (defendant's) cattle had done, and take them home; that upon the arrival of defendant that afternoon at the

house of deceased he, accompanied by deceased and deceased's son, looked over the field where the cattle had trespassed for the purpose of estimating the damages, and then returned to the lot of deceased where the cattle were impounded, when it was discovered that a part of the cattle that had so trespassed did not belong to defendant; that thereupon a dispute or altercation arose between defendant and deceased as to the amount of damage the former should pay the latter for the injury done by his cattle that, in common with the others, had done the trespassing; that, no adjustment having been reached, the defendant finally said in an angry tone that he would let the law settle that matter later, but would now take his cattle home, and was proceeding to drive the cattle toward the lot gate, which he had ordered one of his servants to open, when the deceased and his son hurried to the gate, closed it, and stood with their backs against it, whereupon defendant immediately pulled his pistol and fired at deceased, the bullet striking deceased just below the knee, shattering the leg bone, from the effects of which the evidence tended to show the deceased died in 42 days thereafter.

The evidence for the defendant tended to make out a case of self-defense, and to show, among other things, that defendant did not shoot deceased until deceased was attempting to shoot defendant also with a pistol.

[1, 2] The only exceptions reserved relate to the rulings of the court on the admission and rejection of evidence, to its giving certain written instructions requested by the state, and to its refusal to give certain written instructions requested by defendant. There is no merit in the state's contention that the bill of exceptions does not show that these refused instructions were requested before the jury retired, and hence that they cannot be considered. *Central of Ga. Ry. Co. v. Courson*, 10 Ala. App. 581, 65 South. 698. We find, however, upon a consideration of them, that, even assuming that each asserted a correct proposition of law applicable to the facts of the case their refusal would not justify a reversal of the judgment of conviction because it appears that each was fully covered either in the oral charge of the court or in written instructions given at defendant's request. *General Acts 1915*, p. 815, amending section 5364 of the Code of 1907.

[3-6] None of the written charges that were given at the request of the state have become the subject of criticism in the brief of appellant's able counsel, except the ones numbered respectively 4, 5, and 7, it being conceded—which is undoubtedly true—that all the rest were properly given. The reporter will set out in full said charge 7, the concluding paragraph of which, reading as follows:

"And in determining whether the shooting was maliciously done, I charge you that malice on the part of defendant toward deceased may be inferred from the shooting with a pistol, unless the evidence which shows the shooting with a pistol shows it was without malice"

—forms the basis of appellant's counsels' criticism of the charge, which may be best stated in their own language as found in their brief, to wit:

"The last clause of the charge, and which instructs the jury that malice may be inferred from the shooting with a pistol, unless the evidence which shows the shooting 'shows that the weapon was used without malice,' is the equivalent of telling the jury that they might shut their eyes to all proof tending to rebut malice, except any proof thereof that might have been included in the proof of the shooting. No matter how cogent the extraneous proof rebutting all presumption of malice, still, if that rebuttal did not grow out of the proof of the shooting itself, the jury might, under their oaths, according to this charge, ignore it, and, not finding any inherent thing rebutting malice, convict defendant of murder."

Viewing the charge as a whole, and in the light of the evidence, we think it not subject to the criticism named. The part complained of was merely intended to assert, and only asserted the well-known doctrine that in a homicide case malice may be inferred from the intentional use of a deadly weapon unless the evidence which proves the killing disproves the malice. *Allen v. State*, 148 Ala. 588, 42 South. 1006; 2 Mayf. Dig. 659, par. 7. It is true that the charge did not expressly state that this inference is a rebuttable one, but such idea is implied from, or, to say the least, is not excluded by, the language of the charge. It was hence a correct exposition of the law, and if, from its failure to go further and explain that the inference of malice so authorized to be drawn under the conditions named in the charge was a rebuttable one, and should be allowed to last only until overcome by rebutting evidence offered by defendant, defendant feared that the jury might misunderstand it and be misled into erroneously believing something now suggested by him, but which the charge did not assert, that is, that they, the jury, had a right, unless the evidence for the state which showed the killing showed also an absence of malice, to conclusively infer the existence of malice and to ignore all other evidence, it was his duty to have asked an explanatory charge. *Daniel v. Bradford*, 132 Ala. 262, 31 South. 455; 5 Mayf. Dig. 150, par. 2; 6 Mayf. Dig. 103, par. 4. His criticism of the charge, even if just, shows, at most, that it was merely misleading. The rule is that the lower court will never be reversed for giving a misleading charge unless it clearly appears that the jury was misled by it to the prejudice of the party against whom it was given. *Vandiver v. Waller*, 143 Ala. 411, 39 South. 136; 2 Mayf. Dig. 573, par. 17; 6 Mayf. Dig. 110, par. 17. It does not so appear here. On the contrary, the record affords persuasive evidence that the jury could not reasonably

have been misled by the charge into believing that it meant what defendant now contends; for it appears from the record that the court, in its oral charge, dealt also with the subject of malice, instructing the jury, among other things, as follows:

"Malice is an inferential fact; that is, it may be inferred from facts and circumstances positively proven, but the measure of proof must be so full as to exclude every other reasonable hypothesis. * * * It is the province of the jury to ascertain its existence. Whenever it is proven beyond a reasonable doubt that one person has taken the life of another with a deadly weapon, the law presumes that it was done with malice, and imposes upon the slayer the burden of rebutting this presumption, unless the evidence which proves the killing shows it to have been done without malice."

In the light of this oral charge, which states fully and correctly the law on the subject, we see no room for rational contention that when the court subsequently, in a written instruction given at the instance of the state, correctly stated a part of the law on the subject, the jury were misled into believing that the part not stated was contrary to what the court had instructed them in the oral charge; hence we think baseless the complaint of the defendant here when he contends that the jury were misled to his prejudice by the written instruction mentioned into believing that, if the evidence which showed the killing with a deadly weapon failed to show that it was done without malice, they had a right not only to infer malice, but to infer it conclusively, and to disregard all extraneous rebutting evidence, however trustworthy and cogent they might deem it. The charge merely stated the conditions under which malice may be inferred—not must be believed—and stated them correctly. Its failure to go further and explain that the inference as authorized is not a conclusive, but a rebuttable, one, and ceases when overcome by opposing evidence offered by defendant does not, we think, render the charge either faulty or misleading. We are unable to find that any of the authorities cited by defendant hold to the contrary.

[7] Charges 4 and 5 given at the request of the state, while by no means model charges, furnish no ground for reversal. Each is a correct application of the law to some of the tendencies of the evidence. 1 Mayf. Dig. 659, par. 8. It is true that, as contended by defendant, each is subject to the criticism that it assumes that the defendant inflicted wounds on the deceased, but, as this fact was proved without dispute in the evidence, the assumption of its truth by the court in the charge affords defendant no cause for complaint. *Birmingham Ry., L. & P. Co. v. Mullen*, 138 Ala. 614, 35 South. 701.

[8] The court did not err in overruling defendant's objection to the following question propounded by the state to its witness Dr. Wilson, to wit:

"Tell the jury what, in your opinion, caused his [deceased's] death, Doctor." *Mobile Life Insurance Co. v. Walker*, 58 Ala. 290; L. &

N. R. Co. v. Stewart, 128 Ala. 330, 29 South. 562.

[9] It developed from the evidence, without objection, that prior to the fatal difficulty between defendant and deceased there had been a dispute and some feeling between them as to a land line, and that defendant had built a wire fence between their adjoining properties which deceased subsequently had cut down. Defendant's counsel, on the cross-examination of one of the state's witnesses, drew out the fact that this dividing fence so built by defendant was built on the line that had recently been surveyed by the county surveyor as the land line between defendant's and deceased's lands. This attempt on the part of defendant's counsel to justify defendant's conduct in building the fence on this line and to show inferentially that deceased did wrong in cutting down that fence was entirely immaterial to any issue in the case. The defendant, having thus opened the door to illegal evidence on this subject, is in no position to complain at the subsequent action of the court in allowing the state, on the redirect examination of this witness, to draw out in rebuttal of the mentioned immaterial evidence the fact that the line so surveyed by the county surveyor, and on which defendant so built the dividing fence between his own and deceased's lands, was over on deceased's side of what previously had been looked upon as the dividing line, and which was marked by an old fence which had stood there for many years. The rule is that irrelevant evidence is admissible to rebut other irrelevant evidence which was introduced by the party objecting. *Kroell v. State*, 139 Ala. 1, 36 South. 1025; *Longmire v. State*, 130 Ala. 66, 30 South. 413; 5 Mayf. Dig. 572, par. 2675.

[10] After defendant's witness Russell Mitchell had testified that he knew deceased, but could not say whether or not he was a turbulent and fussy man, defendant's counsel asked the witness if he (witness) ever heard anybody say whether deceased was that kind of a character or not, to which question the court sustained an objection. In this the court did not err. Such a question might have been proper in rebuttal and on the cross-examination of a state's witness who had testified to the good character of deceased for peace and quiet, and for the purpose of testing the knowledge of the witness (Smith v. State, 103 Ala. 57, 15 South. 866); but defendant by the question was endeavoring to prove by his own witness the bad character of deceased, which could not be done in this way. Knowledge of the estimation in which a man is generally held in the community, and not of what some particular individual may think or say about him, is the only predicate for testimony as to his character. *Jackson v. State*, 106 Ala. 12, 17 South. 333; *Moulton v. State*, 88 Ala. 116, 6 South. 758, 6 L. R. A. 301; *Morgan v. State*, 88 Ala. 224, 6 South. 761.

[11] The solicitor, on the cross-examination of one of defendant's witnesses who had testified to defendant's good character for peace and quiet, asked the witness if he had not heard, or if it was not rumored in the community, that defendant would get drunk and carry a pistol. The bill of exceptions recites immediately following the setting out of this question as follows: "The defendant objected to this question on the following grounds." But the grounds are nowhere set out. Hence no question is presented for review on this exception, as we are not permitted to speculate upon the grounds of objection interposed. The same may be said with reference to defendant's motion to exclude the answer of the witness.

[12-14] There was no error in overruling defendant's objection to the question propounded by the solicitor on cross-examination to defendant's witness McCullough, who, after having testified that he thought he knew deceased's general character in the community in which he lived, was asked if he thought he knew it for peace and quiet, and who was permitted to answer that he thought he did, and that it was good. *Collins v. State*, 3 Ala. App. 70, 58 South. 80; *White v. State*, 114 Ala. 10, 22 South. 111; *Rhea v. State*, 100 Ala. 119, 14 South. 853. On redirect examination the defendant asked the witness, among other things, if he had ever heard of deceased having any law suits. The court properly sustained the state's objection to this question. *Maxwell v. State*, 11 Ala. App. 53, 65 South. 732. Likewise the court properly sustained the state's objection to defendant's question to this witness asking if witness had ever heard of deceased's "having had any trouble about the cotton warehouse at Hartselle." "Trouble," as used in the question, is a word of broad signification, and deceased may have had some about the cotton warehouse at Hartselle, and yet have had neither a fuss nor a quarrel nor a personal difficulty about it. As to rumors of either of the latter, the defendant might have inquired for the purpose of testing the knowledge of the witness as to deceased's good character for peace and quiet to which witness had testified, but the fact that deceased had had "trouble" had no bearing on this issue, and the objection to the question was properly sustained. *Maxwell v. State*, supra.

Defendant's witness T. Crow, who testified to defendant's good character, but who did not, either on direct or cross examination, testify at all as to deceased's character, was on redirect examination asked by defendant if he (witness) had ever heard of deceased being in quarrels or fusses. It has been heretofore pointed out that the law does not permit defendant to prove deceased's bad character in this way; hence the court did not err in sustaining the state's objection to defendant's question. Authorities supra.

[15] Defendant's witness Geo. Russell, after testifying on direct examination that he

knew deceased, was asked by defendant if he knew deceased's "reputation for being a fussy, disagreeable man." On all doubtful questions as to who was the aggressor at the time of the fatal difficulty, the violent and bloodthirsty character of deceased, if such he had, should be allowed to enter into the account, but not his character merely for fussiness and disagreeableness; hence the court did not err in sustaining the state's objection to the question mentioned. *Rhea v. State*, 100 Ala. 119, 14 South. 853.

[16] No flight of the defendant having been shown by the state, the action of the court in declining to let defendant prove that he did not flee from the community was free from error. *Pate v. State*, 94 Ala. 14, 10 South. 685; *Johnson v. State*, 94 Ala. 35, 10 South. 687; *Jordan v. State*, 81 Ala. 31, 1 South. 577; *Barnett v. State*, 165 Ala. 59, 51 South. 299.

[17] The testimony of the state's witness J. L. Draper as to the good character of deceased for peace and quiet was entirely admissible, and defendant's objections thereto were properly overruled. *Jones v. State*, 104 Ala. 30, 16 South. 135.

We have discussed all the errors insisted upon except the motion for a new trial. Under the act approved September 22, 1915 (General Acts 1915, p. 722), amending section 2846 of the Code of 1907, rulings of the lower court on motions for new trials in criminal cases may now be reviewed on appeal. In the present case, which was tried after that act became operative, defendant made a motion for a new trial, which was overruled, and it is strenuously urged in brief that the court erred in so doing. We have carefully examined the evidence, and are not convinced that the action of the lower court in this particular was wrong. General Acts 1915, p. 722. A recent statute relieves us of the duty of discussing that evidence. General Acts 1915, p. 595, § 3.

We find no error in the record, and the judgment of conviction is affirmed.

Affirmed.

NOTE.—The foregoing opinion was prepared by Judge THOMAS before his retirement, and has been adopted by the court.

WILSON v. STATE. (5 Div. 205.)

(Court of Appeals of Alabama. May 18, 1916.)

1. WITNESSES — 37(1)—KNOWLEDGE—PROBATIVE FORCE OF EVIDENCE.

In a prosecution for having sold cotton seed upon which there was an unsatisfied mortgage lien, where defendant claimed that he had requested and received permission of the mortgagee to be allowed to raise money to give the hands on his place some Christmas money, the mortgagee stating that he might sell and turn the proceeds over to the women hands, testimony of a woman hand as to whether defendant gave her the proceeds of the seed cotton he sold was admissible, though there was no showing that she was present at the sale or knew any-

thing about the money being the proceeds of the seed cotton; the probative force of the evidence being for the jury.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80, 83, 87; Dec. Dig. — 37(1).]

2. CRIMINAL LAW — 448(1)—WITNESSES — 240(4) — EVIDENCE — LEADING QUESTION CALLING FOR CONCLUSION.

In a prosecution for selling cotton seed upon which there was an unsatisfied mortgage lien, the question to a woman hand of defendant "Did the defendant or not give you the money the proceeds of the seed cotton he sold to Mr. J. S. Pace?" defendant claiming that the mortgagee had assented to the sale so that defendant might give his hands some Christmas money, was formally objectionable as calling for the witness' conclusion and as being leading.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035, 1036; Dec. Dig. — 448(1); *Witnesses*, Cent. Dig. § 839; Dec. Dig. — 240(4).]

3. CHATTEL MORTGAGES — 234 — CRIMINAL LAW — 807(1)—TRIAL—INSTRUCTIONS.

In a prosecution for selling cotton seed subject to an unsatisfied mortgage lien, the charges, "I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt," and, "I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt, but such doubt may arise when there is no probability of his innocence arising under the testimony," were properly refused, as involved, confusing, and argumentative.

[Ed. Note.—For other cases, see *ChatTEL Mortgages*, Cent. Dig. § 495; Dec. Dig. — 234; *Criminal Law*, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. — 807(1).]

4. CRIMINAL LAW — 561(1) — REASONABLE DOUBT.

If the conduct of defendant, upon a reasonable hypothesis, is consistent with his innocence, the jury must acquit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1267; Dec. Dig. — 561(1).]

Appeal from Macon County Court; M. B. Abercrombie, Judge.

Houston Wilson was convicted of crime, and he appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

EVANS, J. Appellant was convicted of having sold without the consent of mortgagee certain cotton seed upon which there was an unsatisfied mortgage lien, in violation of section 7423, Code 1907. Appellant admitted the sale of the cotton seed, but testified that he had requested permission of the mortgagee to be allowed to sell the seed in order to raise money to give the hands on his (appellant's) place some Christmas money, and that mortgagee had said that he might sell and turn over the proceeds to the women hands on the place. All of this was denied by the mortgagee.

[1, 2] One Sallie Hicks, who testified on behalf of appellant, was asked the following question, to which the court sustained an

objection by the state, and to which action appellant duly excepted:

"Did the defendant or not give you the money the proceeds of the seed cotton he sold to Mr. J. S. Pace?"

It does not appear from the record that witness Sallie Hicks was present at the sale to Pace, or knew anything about the money being the proceeds of the seed cotton, and while the question for determination is the consent vel non of the mortgagee, yet, in view of appellant's version of the matter, the ulterior fact of his having paid money over to Sallie Hicks was a circumstance which, taken in connection with the other testimony, might properly be considered by the jury as having some tendency to bear out appellant's version of the matter. Whatever of weight or probative force it might have was a matter addressed to the jury. While this is true, the form of the question was objectionable, in that it both calls for a conclusion of the witness and is leading and the court will not be put in error for sustaining the objection.

[3, 4] The bill of exceptions further reveals exceptions to the refusal of the court to give the following charges:

"(1) I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt. (2) If the conduct of the defendant upon a reasonable hypothesis is consistent with his innocence you must acquit him. (3) I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt, but such doubt may arise when there is no probability of his innocence arising under the testimony."

Charges 1 and 3 were properly refused because they were involved, confusing, and argumentative, and a similar charge was recently so held. *Bunk James, alias Buster James v. State*, 72 South. —. Charge 2 was a correct statement of the law. Its refusal was error, and must work a reversal. *Howard v. State*, 151 Ala. 22, 44 South. 95; *Gregory v. State*, 140 Ala. 16, 37 South. 259.

The judgment of the court below is accordingly reversed, and the cause remanded.

Reversed and remanded.

PRICE v. STATE. (1 Div. 213.)

(Court of Appeals of Alabama. May 30, 1916.)

CRIMINAL LAW §1005—APPEAL—OMISSION FROM TRANSCRIPT—STATUTE.

Code 1907, § 6256, as amended by the act approved September 22, 1915 (Acts 1915, p. 708), specifically authorizing the omission from

the transcript on appeal of an order for a special venire to be drawn as in case of capital felonies, being merely a matter of procedure, in no wise invading any substantive right of an accused, took effect from and after its passage as to all matters to be reviewed on appeal, irrespective of the date of trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2563; Dec. Dig. §1005.]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

George Price was convicted of robbery, and he appeals. Judgment affirmed.

W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was convicted of robbery and sentenced on July 7, 1915, to serve a term of 20 years in the penitentiary. Appellant presented no bill of exceptions within the time allowed by law, and an inspection of the record proper reveals no question of law thereon as to demurrers, charges, or otherwise.

In obedience to the mandate of section 6264, Code 1907, we have examined the record for error apparent thereon. The transcript does not disclose that any order was made for a special venire to be drawn as in cases of capital felonies. A recent act approved September 22, 1915, so amends section 6256, Code 1907, as specifically to authorize the omission of such an order in making up the transcript on appeal. The question then arises: Has the act in question any operation or effect in this case, as the judgment of conviction antedated the passage of the act? The act in question incorporated into the statute what was already provided by rule of practice 27, adopted by the Supreme Court, and harmonized said rule and section 6256, Code 1907. The purpose of the act and rule was merely to direct and control the clerks of various nisi prius courts in the making up of their transcripts so that the same should not be incumbered with formal and routine matters unless some point or question was raised thereon. The act in question is merely a matter of procedure, in no wise invading any substantive right. The purpose and object sought was to give force and effect to the operation of the act from and after its passage as to all matters to be reviewed on appeal, irrespective of the date of trial.

The proceedings and judgment entry appearing in all things to be regular, the judgment of the court below is affirmed. *Taylor v. State*, 70 South. 949; *Woodson v. State*, 170 Ala. 87, 54 South. 191.

Affirmed.

HANCOCK v. STATE. (6 Div. 952.)

(Court of Appeals of Alabama. April 6, 1916.
Rehearing Denied May 30, 1916.)

1. CRIMINAL LAW \S 1167(5)—HARMLESS ERROR—RULING ON DEMURRER TO COMPLAINT.

Error, if any, in overruling a demurrer to several counts, was error without injury, where the court subsequently gave defendant the affirmative charge as to each of those counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3105, 3106; Dec. Dig. \S 1167(5).]

2. INDICTMENT AND INFORMATION \S 110(31)—FOLLOWING LANGUAGE OF STATUTE—SUFFICIENCY OF COMPLAINT.

A count of a complaint alleging that the complaining witness personally appeared and under oath deposed that he had probable cause for complaining and did complain that within 12 months of the making of the affidavit defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors, contrary to law, following the form provided by the statutes, Acts 1915, p. 30, \S 29½, for charging a violation of the prohibition law, covered every violation of law committed by defendant within 12 months prior to the commencement of the prosecution, whether such violation consisted of a sale, offering for sale, keeping for sale, giving away, or other disposition, contrary to section 32, or transporting such liquors along a street or highway for another, or in acting as agent for or in assisting another in procuring an unlawful sale of such liquors, contrary to section 33.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 291-294; Dec. Dig. \S 110(31).]

3. CRIMINAL LAW \S 878(2) — DEMURRER—GENERAL VERDICT—REVERSAL.

In a prosecution for a violation of the prohibition law where the charges embraced in the first count of the complaint included the separate charges made in subsequent counts, then, even if each of the latter counts was subject to the demurrer filed to it, the overruling of such demurrer would not work a reversal of a judgment of conviction following a general verdict not specifying the count under which it was found, as it would be referred to the good count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2099; Dec. Dig. \S 878(2).]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Ben Hancock was convicted of violating the prohibition law, and he appeals. Affirmed.

The following are the counts referred to in the opinion:

(1) Before me, T. L. Sowell, judge of the law and equity court of Walker county, in and for said county, personally appeared J. D. Estes, who, being duly sworn, deposes and says that he has probable cause for believing and does believe that within 12 months before the making of this affidavit, Ben Hancock, whose name is to the affiant unknown otherwise, sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors contrary to law.

(7) Affiant deposes and says that he has probable cause for believing, and does believe, that within 12 months before the making of this affidavit Ben Hancock transported over or along a public street or public highway spirituous liquors for another, whose name to affiant is unknown, said liquor so transported were trans-

ported from Jasper to South Lowell, both being in Walker county, Ala.

(8) Affiant further says that he has probable cause for believing and does believe that within 12 months before the making of this affidavit, and since January 27, 1915, Ben Hancock did receive or accept for delivery, or possessed or had in his possession at one time, more than one-half gallon of spirituous liquors, against the peace and dignity of the state of Alabama.

Leith & Gunn, of Jasper, for appellant. W. L. Martin, Atty. Gen., and J. P. Mudd, Asst. Atty. Gen., for the State.

PELHAM, P. J. The only questions raised by the record relate to the action of the court in overruling defendant's demurrer to each of the eight counts of the complaint upon which defendant was tried for a violation of the prohibition law.

[1] If there was error in overruling the demurrer as to the second, third, fourth, fifth, and sixth counts, it was error without injury, for it appears from the record that the court subsequently gave the defendant the affirmative charge as to each of these counts. There remain to be considered, therefore, only the first, seventh, and eighth counts.

[2] The first count followed the form provided by the statute for charging a violation of the prohibition law, and the demurrer to it was properly overruled. General Acts 1915, p. 30, paragraph 29½; Glover v. State, 11 Ala. App. 289, 66 South. 877; Spigener v. State, 11 Ala. App. 296, 66 South. 896. It covered any violation of the law committed by defendant within 12 months prior to the commencement of the prosecution (Glover v. State, supra), whether such violation consisted of a selling, offering for sale, keeping for sale, giving away, or other unlawful disposition (General Acts 1915, p. 32, par. 32), or transporting along a public street or highway for another, spirituous, vinous, or malt liquors (Hall v. State, 12 Ala. App. 210, 67 South. 714), or in acting as agent or assisting friend for another in procuring an unlawful sale of such liquors (General Acts 1915, p. 34, par. 33).

[3] The charges embraced in said count included, therefore, the separate charges made in counts 7 and 8; hence, even if each of these latter counts were subject to the demurrer filed to them, the overruling of such demurrer will not work a reversal of the judgment of conviction, because the verdict of conviction was a general one, not specifying the count under which it was found, and will be referred to the good count. Norman v. State, 69 South. 362. However, we may say in passing that we do not think either of the counts 7 or 8 subject to attack on any ground stated in the demurrer. Hall v. State, 12 Ala. App. 210, 67 South. 714; Spigener v. State, 11 Ala. App. 296, 66 South. 896, General Acts 1915, p. 44, par. 12.

Affirmed.

HERRING v. STATE. (4 Div. 383.)

(Court of Appeals of Alabama. April 18, 1916.
Rehearing Denied May 30, 1916.)

1. CRIMINAL LAW — 451(1)—EVIDENCE—CONCLUSION OR FACT.

In a prosecution for seduction, where the prosecutrix, after affirmatively stating that defendant had promised to marry her, testified that, when they were coming back from church, "he put in to begging me," and said they would marry, and nobody would ever know it, the statement was not a conclusion, but one of fact, which not only involved what the defendant said, but his manner, admissible under the rule that, when a fact cannot be reproduced a witness may describe the fact according to the effect produced upon his mind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1040; Dec. Dig. — 451(1).]

2. CRIMINAL LAW — 1169(9)—HARMLESS ERROR—ADMISSION OF EVIDENCE—SUBSEQUENT TESTIMONY.

Error in the admission of such testimony would be harmless where the witness in her subsequent testimony detailed the facts constituting and leading up to the transaction in question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3137, 3138, 3140; Dec. Dig. — 1169(9).]

3. SEDUCTION — 44—EVIDENCE—CONDUCT — CORRESPONDENCE.

In a prosecution for seduction it was admissible for the prosecution to show the relation between the accused and the prosecutrix, his conduct toward her, whether their association was frequent and of an intimate character, and the fact that accused corresponded with her, and its duration and character.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 78; Dec. Dig. — 44.]

4. SEDUCTION — 40—EVIDENCE—DESTRUCTION OF CORRESPONDENCE.

Where such correspondence was shown, it was permissible for the prosecution to show that some of the letters written by the accused to the prosecutrix were destroyed at his instance.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. — 40.]

5. SEDUCTION — 40—ELEMENTS OF OFFENSE—PREGNANCY.

The fact that pregnancy did not result from the act of sexual intercourse between the accused and prosecutrix, if, in fact, he had sexual intercourse with her, was not material; as pregnancy is not an element of the offense of seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. — 40.]

6. WITNESSES — 383—IMPEACHMENT—IMMATERIAL MATTERS.

In a prosecution for seduction, the contents of a warrant sworn out against defendant by the prosecutrix were not admissible to impeach her, since her pregnancy was an immaterial matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. — 383.]

7. WITNESSES — 345(1)—COMPETENCY—CONVICTION.

The fact that a witness had served a sentence on the streets was not admissible to impeach his testimony, unless it was for an offense involving moral turpitude.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1126; Dec. Dig. — 345(1).]

8. CRIMINAL LAW — 830 — INSTRUCTION — FORM.

In a prosecution for seduction, the use of the word "segregatory" for "segregately" justified the refusal of defendant's instruction that before the jury could convict each juror must separately and "segregatory" be satisfied beyond reasonable doubt of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. — 830.]

9. SEDUCTION — 46—CORROBORATION—SUFFICIENCY.

The uncorroborated evidence of the woman seduced does not authorize a conviction, but corroboratory evidence as to any material fact which satisfies the jury that she is worthy of belief is sufficient.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. — 46.]

10. CRIMINAL LAW — 811(5), 815(9) — INSTRUCTION—SINGLING OUT TESTIMONY.

The defendant's requested instruction that the jury could not convict him on the uncorroborated testimony of the prosecutrix was erroneous, as singling out her testimony and ignoring the corroborating evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1971, 1986; Dec. Dig. — 811(5), 815(9).]

11. CRIMINAL LAW — 829(12)—INSTRUCTIONS.

Such proposition was fully covered by the charge given for defendant that the corroborating evidence must be as to material matters, and tend to connect the accused with the crime, and to corroborate the evidence of prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. — 829(12).]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Will Herring was convicted of seduction, and he appeals. Affirmed.

The facts sufficiently appear in the opinion, except that the defendant proposed to show that about a week or more after the alleged act of intercourse the prosecutrix went before a justice of the peace and swore out a warrant for bastardy against the defendant, and to follow this up by proof that she was never, in fact, pregnant.

The following charges were refused to the defendant:

(1) Before the jury can convict the defendant each juror must separately and segregately be satisfied beyond a reasonable doubt from the testimony that the defendant is guilty, or they cannot find him guilty.

(2) Affirmative charge.

(3) The court charges the jury that they cannot convict the defendant on the uncorroborative testimony of the witness Annie Barnes.

Espy & Farmer, of Dothan, for appellant. W. L. Martin, Atty. Gen., and H. G. Davis, Asst. Atty. Gen., for the State.

BROWN, J. [1] The prosecutrix, while testifying as a witness, after giving an affirmative answer to the solicitor's question, "Did he at any time promise to marry you?" further stated in this connection:

"He promised to marry me that very night that he mistreated me, on Saturday night before the fourth Sunday in September of 1914. We were coming on from the church. As we went on to church he didn't say anything about

it, but, when we were coming on back, *he put in to begging me*, and he said we would marry, and nobody would ever know it."

The defendant's motion to exclude the words italicized was properly overruled. The statement was not a conclusion, but the statement of a fact, which not only involved what the defendant said, but his manner, tone, and facial expression.

"Where a fact cannot be reproduced and made apparent to the jury, a witness may describe the fact according to the effect produced on his mind." *Mayberry v. State*, 107 Ala. 67, 18 South. 219.

[2] Furthermore, the record shows that the witness, in her subsequent testimony, stated in detail the facts constituting and leading up to the transaction in question. *Fuller v. State*, 117 Ala. 39, 23 South. 688.

[3, 4] It was permissible for the prosecution to show the relation between the accused and the prosecutrix, his conduct toward her, whether their association together was frequent and of an intimate character, the fact of accused keeping up a correspondence with her, and its duration and character. *Underhill*, Criminal Evidence, § 388; *Bracken v. State*, 111 Ala. 68, 20 South. 636, 56 Am. St. Rep. 23. And, where such correspondence is shown, it was permissible for the prosecution to show that some of the letters written by the accused to the prosecutrix were destroyed at his instance. *Smith v. State*, 183 Ala. 10, 62 South. 864. It follows that it was not error for the court to admit the testimony of the prosecutrix that the letters offered in evidence were not all that she had received from him, and that the others were destroyed by her at defendant's request.

[5] The fact that pregnancy did not result from the act of sexual intercourse between the accused and prosecutrix, if, in fact, he had sexual intercourse with her, was not material, as pregnancy is not an element of the offense of seduction, and the fact that prosecutrix did not become pregnant did not tend in the least to contradict her testimony tending to show that the defendant through art, flattery, or promise of marriage induced her to surrender her virtue and submit to his embraces. It is a matter of common as well as scientific knowledge that such intercourse may occur without pregnancy resulting. Therefore, if the defendant had laid a proper predicate by showing the loss of the complaint made before the justice, and that

it could not be found after diligent search for it, its contents would not have been admissible to impeach the prosecutrix on immaterial matter. *Ragland v. State*, 125 Ala. 12, 27 South. 963.

[6] It is likewise a matter of common as well as scientific knowledge that pregnancy, in the regular course of nature, is the result of sexual intercourse, and therefore the fact of pregnancy tends to prove sexual intercourse. *Cunningham v. State*, 73 Ala. 51.

[7] The fact that the witness Cook had served a sentence on the streets was not admissible for the purpose of impeaching his testimony, unless it was for an offense involving moral turpitude, and this does not appear. *Gillman v. State*, 165 Ala. 135, 51 South. 722.

[8] The use of the word "segregatory" in the first refused charge appearing in the bill of exceptions for "segregately" justified its refusal. *Gaston v. State*, 161 Ala. 87, 49 South. 876.

[9] The uncorroborated evidence of the woman, seduced, under our statute, does not authorize a conviction, but corroboratory evidence as to any material fact which satisfies the jury that the woman is worthy of belief is sufficient. *Suther v. State*, 118 Ala. 88, 24 South. 43. There was corroboratory evidence in this case requiring the submission of the issues to the jury and the affirmative charge was properly refused.

[10, 11] The other refused charge complained of, while it asserts a correct abstract proposition, singles out the testimony of the prosecutrix, and ignores the corroborating evidence. Furthermore, this proposition was fully covered by charge 4 given at the instance of the defendant, which was more favorable to him than the rule above announced, in that it asserted that the corroborating evidence "must be as to material matters, and tend to connect the accused with the crime, and to corroborate the evidence of the prosecutrix," while the true rule is thus stated by *Brickell, C. J.*, in *Suther's Case*, supra:

"After a thorough consideration of the question the conclusion was reached and the rule announced that the corroboratory evidence is sufficient if it extends to a material fact, and satisfies the jury that the woman is worthy of credit."

We find no error in the record, and the judgment is affirmed.

Affirmed.

DANAL v. STATE. (2 Div. 146.)

(Court of Appeals of Alabama. May 30, 1916.)

1. CRIMINAL LAW —1159(2)—APPEAL AND ERROR—PRESUMPTIONS IN FAVOR OF JUDGMENT.

Under Acts 1915, p. 940, § 3, forbidding any presumption on appeal in favor of the judgment or conclusions of the court in misdemeanor cases tried without jury, the judgment in such cases will not be disturbed unless the facts are clearly and palpably insufficient to sustain it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. —1159(2).]

2. WEAPONS —10—UNLAWFULLY CARRYING WEAPONS—"CARRY."

The word "carry" in Acts 1909, p. 258, § 2, making it a misdemeanor for one to carry a pistol on premises not owned or controlled by him, means to bear such weapons, and does not necessarily import the idea of locomotion.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 9; Dec. Dig. —10.]

For other definitions, see Words and Phrases, First and Second Series, Carrying Weapons.]

3. WEAPONS —17(5)—CARRYING WEAPONS—INTENT—QUESTION OF FACT.

In a prosecution for unlawfully carrying a pistol on premises not owned or controlled by defendant contrary to Acts 1909, p. 258, § 2, intent is a question of fact for the jury or for the court sitting without a jury.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 30; Dec. Dig. —17(5).]

4. WEAPONS —17(4)—CARRYING WEAPONS—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support conviction by court without jury for unlawfully carrying a pistol contrary to Acts 1909, p. 258, § 2.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 29; Dec. Dig. —17(4).]

Appeal from Law and Equity Court, Hale County; Charles E. Waller, Judge.

Add Danal, alias Add Dahiel, was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

R. B. Evins, of Greensboro, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

EVANS, J. Appellant was indicted and convicted for carrying a pistol about his person on premises not his own or under his control, contrary to section 2 of an act approved August 26, 1909, entitled an act to regulate the right to carry a pistol in this state. Acts 1909, p. 258.

The testimony showed that appellant was standing in the store of Romley & Massengale in Akron, Hale county, with a pistol in his hand open to plain view, and that the premises in question were not appellant's nor under his control. Appellant admitted such to be the fact, but sought to justify himself by testifying that the pistol belonged to another, one Ed Williams, who was also present in the store at the time, and who had merely passed the pistol over to appellant for his inspection. Appellant further testified, in substance, that he did not carry the pistol to the store, had it in his hands but a few seconds, and while inspect-

ing it "did not move out of his tracks." Appellant excepted to the conclusion or finding of the court finding and adjudging appellant guilty.

[1] By a recent statute (Acts 1915, p. 939, § 3) it is made the duty of this court, in reviewing appeals in misdemeanor cases tried by the court without a jury, to review the same without indulging any presumption or intendment in favor of the conclusions and judgment of the trial court, thus extending the same ameliorating rule to findings of fact in misdemeanors hitherto obtaining only in the trial of civil cases without a jury.

When sitting without a jury, the conclusion of the trial court is in lieu of the verdict of a jury, and the conclusions and judgment of the trial court, after hearing oral testimony and observing the demeanor of witnesses, should not, it is held, be disturbed except on principles which govern nisi prius courts in setting aside verdicts of juries and granting new trials. It should palpably and clearly appear that the findings are not sustained by the facts before the court can be said to be in error and its judgment reversed. Louisville & Nashville R. R. Co. v. Solomon, 127 Ala. 189, 30 South. 491; Dargan v. Harris, 68 Ala. 144; Woodrow v. Hawving, 105 Ala. 240, 16 South. 720; Thompson v. Collier, 170 Ala. 469, 54 South. 493; City of Ensley v. Smith, 165 Ala. 387, 51 South. 343; Kimbell v. State, 165 Ala. 118, 51 South. 16; D. C. Finney v. Studebaker Corporation of America, 72 South. 54.

[2] The word "carry," as used in section 2 of said statute, prohibiting the carrying of a pistol, means the bearing of arms in contravention of the statute. Nichols v. State, 4 Ala. App. 115, 58 South. 681. One may "carry" or bear arms on his person "without moving out of his tracks"; it does not necessarily import or imply the idea of locomotion. Thomas v. State, 9 Ala. App. 67, 64 South. 192; Johnson v. State, 11 Ala. App. 301, 66 South. 875.

[3] The character or intent of one's manual possession of a pistol on premises of another not under his control is the gist and gravamen of the offense, and the surrounding and attendant circumstances present a question of fact for the determination of a jury or the court when sitting without a jury. Nichols v. State, supra.

The salutary and wholesome purpose of the statute was to interdict and inhibit the bearing of arms on premises of another or not under his control, and whether appellant carried or had the pistol on his person or in his hand with such intent in violation of the statute was a question the trial court was best qualified to answer, and give proper weight to the testimony after noting the demeanor of witnesses, their candor or dissimulation.

[4] Considering the probabilities of appellant's testimony, it may be that the court, sitting as a jury, attached small weight to his version of how he acquired or the intent with which he had the pistol.

We cannot say, from the evidence, that the court was in error in its conclusion. There being no error apparent upon the record, the judgment of the court below is accordingly affirmed.

Affirmed.

JACKSON v. STATE. (6 Div. 969.)

(Court of Appeals of Alabama. May 18, 1916.)

1. LARCENY \S 32(6)—AFFIDAVIT—OWNERSHIP OF PROPERTY.

An affidavit or sworn complaint, charging petit larceny by alleging that the ham and side of meat stolen were the personal property of the "Birmingham Packing Company, a corporation," was not insufficient as failing to show whether the owner of the property was a partnership or a corporation.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 86; Dec. Dig. \S 32(6).]

2. CRIMINAL LAW \S 252(3) — AFFIDAVIT — SUFFICIENCY—LANGUAGE OF STATUTE.

Under Code 1907, \S 6703, an affidavit or sworn complaint, charging petit larceny, setting forth that affiant has probable cause to believe, and does believe, following the language of the statute in the very words, is sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 526, 528, 529; Dec. Dig. \S 252(3).]

3. CRIMINAL LAW \S 252(1)—TRIAL—SCOPE—GOOD FAITH OF AFFIDAVIT.

The question of whether probable cause is shown by an affidavit or sworn complaint charging petit larceny is one addressed to the committing magistrate, and the trial cannot be converted into a trial of the good faith of the affiant, nor can any inquiry be made whether the facts in his knowledge or on which he based his belief constituted probable cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 526, 530, 534-536; Dec. Dig. \S 252(1).]

4. CRIMINAL LAW \S 252(3) — AFFIDAVIT—PROBABLE CAUSE—SUFFICIENCY OF AVERMENT.

An averment, in an affidavit or sworn complaint, that, in the opinion of affiant, he has probable cause for believing is faulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 526, 528, 529; Dec. Dig. \S 252(3).]

5. CRIMINAL LAW \S 400(8) — EVIDENCE—MATTERS SHOWN BY WRITING—STOCK LIST.

In a prosecution for petit larceny by stealing a ham and other meat, objection to a question, to an employe of the company from which the meat was stolen, whether he could tell from his stock list if any meat had been missed and, if so how, should have been sustained, where the stock list was not introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 879-886; Dec. Dig. \S 400(8).]

6. CRIMINAL LAW \S 444—EVIDENCE—STOCK LIST—VERIFICATION.

In a prosecution for petit larceny by stealing a ham and other meat, the stock list of the robbed corporation could not be introduced in evidence without the correctness of the original entries being authenticated or verified by

the clerk making them, or his handwriting proved in the event of his death, insanity, or absence from the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1028; Dec. Dig. \S 444.]

7. LARCENY \S 51(1) — EVIDENCE — RECENT POSSESSION OF GOODS.

Before evidence can be admitted of the recent possession of stolen chattels, the corpus delicti must be proven aliunde.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 144, 146; Dec. Dig. \S 51(1).]

Appeal from Criminal Court, Jefferson County; John H. Miller, Judge.

John Jackson was convicted of petit larceny, and he appeals. Judgment reversed, and cause remanded.

Omitting formal charging part, the affidavit is as follows:

F. M. Phillips, who has probable cause to believe, and does believe, who being duly sworn says, that John Jackson, whose name is otherwise unknown to affiant, within 12 months before making this affidavit in said county, did feloniously take and carry away one ham of the value of \$2.61, and one side of salt meat of the value of \$3, the personal property of the Birmingham Packing Company, a corporation.

The demurrers raise the point decided in the opinion.

McArthur & Howard, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and J. P. Mudd, Asst. Atty. Gen., for the State.

EVANS, J. [1-4] Appellant was convicted of petit larceny. His demurrers to the affidavit or sworn complaint are without merit. The first of these objects that:

"Said affidavit fails to show whether the alleged owner of said property, the Birmingham Packing Company, is a partnership or a corporation."

The language of the affidavit sufficiently answers, It is laid as "the personal property of the Birmingham Packing Company, a corporation." The second and third grounds of demurrer challenge the sufficiency of the averments of the affidavit as to probable cause. The affidavit sets forth that affiant "has probable cause to believe, and does believe," etc., following the language of the statute (Code 1907, \S 6703) *ipsisssimis verbis*, which is sufficient. *Malloy v. State*, 165 Ala. 117, 50 South. 1027; *Mazett v. State*, 11 Ala. App. 317, 66 South. 871. The question of whether probable cause is shown is one addressed to the committing magistrate, and the trial court is not, and cannot be, converted into a trial of the good faith of affiant, "nor can any inquiry be made whether the facts in his knowledge, or on which he based his belief, constituted probable cause, or were sufficient to generate a reasonable belief of the guilt of the accused." *Sullivan v. State*, 68 Ala. 525. A categorical averment that affiant "has probable cause for believing, and does believe," is, under the statute, a sufficient averment of probable cause; but an averment that in the opinion of affi-

ant he has probable cause for believing is faulty. *Butler v. State*, 130 Ala. 127, 30 South. 338.

[8, 8] On cross-examination of one Phillips, a state witness, the bill of exceptions recites as follows:

"I know this meat to be ours by the cut it has, as every packer knows his own meat by its cut. We keep a stock list, which shows the goods on hand in the place of business at the close of business on each day. It was part of my duty to examine this stock list every evening, and that is how I know that this property was missed by us and had been taken from the company. I can always tell from the stock list what has been regularly sold and that which has not been. I did not make out the stock list myself. We had other men working for us at the time, and one of them makes out the stock list each day, and I check over personally the stock on hand and compare the list and stock each day as to its correctness."

The witness was then asked this question by the court:

"Could you tell by your stock list if any meat had been missed and, if so, how?"

The defendant objected to the question on the ground that it "called for illegal, incompetent, and irrelevant testimony, as it was shown by the evidence that the witness did not make out the stock list," and duly excepted to the overruling of his objection. A motion was also made to exclude the answer on the same ground urged to the question and an exception reserved to the court's refusal so to do. The objection to the question was, in our opinion, well taken, and the learned trial court was in error in admitting the testimony called forth over defendant's objection. The stock list was not introduced in evidence, nor indeed could be without the correctness of the original entries being authenticated or verified by the clerk making them, or his handwriting proved in the event of his death, insanity, or being out of the state. *McDonald v. Carnes*, 90 Ala. 147, 7 South. 919; *Hart v. Kendall*, 82 Ala. 144, 8 South. 41; *Young v. State*, 9 Ala. App. 55, 64 South. 171; *Bolling v. Fannin*, 97 Ala. 619, 12 South. 59; *Walling v. Morgan County*, 126 Ala. 327, 28 South. 433; *Lane v. May & Thomas Hdw. Co.*, 121 Ala. 296, 25 South. 809; *Minge & Co. v. Barret Bros. Shipping Co.*, 70 South. 962. State's witness Phillips' testimony was based on the idea that a theft had occurred because the stock on hand did not tally or check correctly with an unauthenticated stock list which was not

in evidence. Had this stock list been properly authenticated and introduced in evidence it would then have been within the province of the jury to say whether from all the evidence a case had been made out beyond a reasonable doubt, but manifestly without such it was tantamount to permitting the witness to draw his own inferences as to guilt and, moreover, to prove the corpus delicti thereby.

[7] It is true that the other state's witness, Policeman Brown, testified to having found the meat at a house frequently resorted to by the defendant, but before evidence can be admitted of the recent possession of stolen chattels, the corpus delicti must be proven allunde. *Fuller v. State*, 48 Ala. 273.

For the error pointed out, the judgment must be reversed, and the cause remanded for another trial.

Reversed and remanded.

STURDIVANT v. STATE. (6 Div. 182.)
(Court of Appeals of Alabama. May 30, 1916.)
CRIMINAL LAW §1182—APPEAL—RECORD—AFFIRMANCE.

On an appeal from a conviction upon the record proper, where no bill of exceptions was presented within the time required by law, and where the Court of Appeals, reviewing the record, as required by Code 1907, § 6264, found that the proceedings and judgment entry were regular, and no error appeared, the judgment would be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.]

Appeal from Criminal Court, Jefferson County; W. E. Fort, Judge.

George Sturdivant was convicted of grand larceny, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

EVANS, J. This is an appeal from a judgment of conviction for grand larceny. No bill of exceptions was presented within the time allowed by law, and the appeal is on the record proper. In obedience to the mandate of the statute (section 6264, Code 1907), we have reviewed the record, and, it appearing therefrom that the proceedings and judgment entry are in all things regular, and no error appearing, the judgment of the court below is affirmed.

Affirmed.

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SMITH v. STATE. (6 Div. 179.)

(Court of Appeals of Alabama. May 18, 1916.)

CRIMINAL LAW \S 1208(4)—**COSTS—IMPRISONMENT.**

Under Code 1907, \S 7620, relating to sentences to hard labor, and section 7635, providing when additional hard labor may be imposed for costs, where the term of imprisonment imposed as punishment for an offense did not exceed two years, sentence to hard labor for the county was proper, though an additional sentence to hard labor was imposed for the payment of the costs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3283, 3284; Dec. Dig. \S 1208(4).]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Ramsey Smith was convicted of crime, and he appeals. Judgment affirmed.

W. L. Martin, Atty. Gen., and H. G. Davis, Asst. Atty. Gen., for the State.

BROWN, J. The term of imprisonment imposed as a punishment for the offense not exceeding two years, the sentence to hard labor for the county was proper (Code 1907, \S 7620); and this is true, notwithstanding an additional sentence to hard labor was imposed for the payment of the costs. Code 1907, \S 7635; *Evans v. State*, 109 Ala. 12, 19 South. 535.

The record and proceedings of the trial court appearing in all things regular and free from error, the judgment is affirmed.

Affirmed.

SIMMONS v. STATE. (3 Div. 223.)

(Court of Appeals of Alabama. May 18, 1916.)

CRIMINAL LAW \S 723(5), 1171(1)—**ARGUMENT OF SOLICITOR—APPEAL TO SYMPATHY—RACE PREJUDICE.**

In a prosecution for violating the prohibition law, the statement of the solicitor that "you must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was improper and prejudicial, as the fact that defendant was of the negro race did not deprive him of the equal protection of the law, or necessarily discredit his testimony, and should not be used to array the jury's prejudices against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1676, 3127; Dec. Dig. \S 723(5), 1171(1).]

Appeal from Circuit Court, Conecuh County; A. E. Gamble, Judge.

George Simmons was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

Page, McMillan & Brooks, of Evergreen, for appellant. W. L. Martin, Atty. Gen., and J. P. Mudd, Asst. Atty. Gen., for the State.

BROWN, J. The statement of the solicitor, "You must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was improper and calculated to prejudice the defendant before the jury, and the defendant's objection thereto should have been sustain-

ed. *James v. State*, 170 Ala. 72, 54 South. 494; *Tannehill v. State*, 159 Ala. 51, 48 South. 662. The fact that the defendant was of the negro race did not deprive him of the equal protection of the law, or necessarily discredit his testimony, and should not have been used in argument as a means of arraying the prejudices of the jury against him.

For this error the judgment is reversed, and the cause remanded.

Reversed and remanded.

DOUTHARD v. STATE. (7 Div. 347.)

(Court of Appeals of Alabama. June 8, 1916.)

CRIMINAL LAW \S 1182—**APPEAL—NECESSITY OF BILL OF EXCEPTIONS.**

Where an appeal is on the record proper without a bill of exceptions, and the Court of Appeals, as required by statute, examines the record filed and finds the judgment entry regular, together with proceedings in support thereof, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3203-3214; Dec. Dig. \S 1182.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Green Douthard was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Merrill & Walker, of Anniston, for appellant. W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was convicted of manslaughter in the first degree, and sentenced on the 1st day of April, 1915, to a term of imprisonment for two years.

The appeal is on the record proper, without a bill of exceptions. We have examined, as required by statute, the record filed herein, and the judgment entry being in all things regular, together with the proceedings had in support thereof, the judgment of the court below is accordingly affirmed. *Taylor v. State*, 70 South. 949.

Affirmed.

PRUDENTIAL CASUALTY CO. v. KERR.

(6 Div. 58.)

(Court of Appeals of Alabama. April 16, 1916.)

Rehearing Denied May 30, 1916.)

1. EVIDENCE \S 82—**PRESUMPTION—JUDICIAL ACTS—SIGNING MINUTES OF COURT.**

Under Code 1907, \S 5732, providing that the minutes of the court must be read each morning in open court and on adjournment signed by the judge, the court is presumed to have signed the minutes of the term at which a case was tried upon adjournment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 104; Dec. Dig. \S 82.]

2. COURTS \S 189(15)—**MUNICIPAL COURTS—JUDGMENTS—ALTERATION AFTER TERM.**

Where the term at which a case in the city court of Birmingham was tried had ended, under Loc. Acts 1911, p. 58, before motion to set aside the second judgment entry or to correct the same was made November 8, 1915, the court

could not alter or amend such second judgment entry except for clerical error or omission, on record evidence; parol evidence being inadmissible to alter, amend, or correct a record by amendment nunc pro tunc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 458; Dec. Dig. ~~63~~189(15).]

Appeal from City Court of Birmingham; A. H. Alston, Judge.

Action by J. W. Kerr against the Prudential Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Judgment by default was rendered on May 3, 1915. On November 13, 1915, an application was made to set aside the second judgment, and to restore the cause to the docket; the application being based upon the fact that no service of the summons and complaint or copy thereof was had on defendant, or on John Purifoy, secretary of state, and ex officio insurance commissioner for the state of Alabama, and on the further ground that no legal evidence was offered in support of said default judgment, and no evidence introduced at the time to prove or establish the fact that summons and complaint were served on an agent of defendant, or upon any one authorized by law to receive such service on behalf of defendant. The motion further contains the statement that at the time of the default judgment, the judge presiding made a bench note in words and figures as follows:

"May 3, 1915.

"Judgment for plaintiff by default for \$260.00. Trial by jury waived."

And that following the bench note, the clerk of the court in volume 34 B, p. 409, made the following minute entry:

"On this the 3d day of May, 1915, came plaintiff by his attorney, and waives a jury trial which was heretofore demanded by him, and defendant being now solemnly called, came not, but made default, and the court upon plaintiff's motion proceeds to hear and determine this cause, whereupon it is ordered and adjudged by the court that plaintiff have and recover, etc., his debt and damages as ascertained and assessed by the court upon the proof produced by plaintiff upon the trial of this cause."

It is further alleged that thereafterwards the clerk ran a pen through said order and struck it out, and proceeded erroneously to write up another judgment or minute entry, which was not the judgment of the court. This last minute entry shows satisfactory proof being made to the court that John Purifoy, upon whom service of the summons and complaint was had, was at the time of the said service the secretary of state and ex officio insurance commissioner for the state of Alabama, and, as such, duly authorized by law to receive service for said defendant corporation. The motion proceeds to assert that the first judgment entry was the only entry made by the court, and that no proof was made at the time of the rendition of

said judgment of service of summons and complaint upon said John Purifoy, or that he was the officer as shown by the second judgment entry. The motion for new trial was denied on the proof taken.

A. H. Alston, Jr., and David S. Anderson, both of Birmingham, for appellant. Goodwyn & Ross, of Bessemer, for appellee.

PELHAM, P. J. [1] The city court of Birmingham, at the time involved in this cause, held one regular term in each year, which commenced on the first Monday in October and ended on the last day of the succeeding September, unless the said last day be on Sunday, and if so, the term ended on the next day preceding. Acts 1911, p. 58. The first judgment entry in this case is dated the 3d day of May, 1915. The motion to set aside the second judgment entry, or to correct the same, which is dated the same day, does not appear to have been made until the 8th day of November, 1915, and was overruled on the 13th day of November, 1915. It therefore appears that the term at which the main case was tried had ended prior to the time the motion was made. The court is presumed to have signed the minutes of the term at which the main case was tried upon the adjournment of court. Code, § 5732.

[2] There is much strength in the argument that the first judgment entry, having been made in final form by the clerk, pursuant to the memoranda on the trial docket, became and was the judgment of the court until set aside by the court or changed or modified under the direction of the court, and that since Code, § 5732, is only directory and not mandatory, parol evidence should be looked to for the purpose of showing the circumstances under which the first entry was erased and the second entry made; but under similar circumstances the Supreme Court of Alabama has held, in the case of *Briggs v. Tennessee Coal, Iron & R. Co.*, 175 Ala. 130, 57 South. 882, that:

"When the judgment * * * as last formulated, was entered upon the minutes and the minutes were signed by the judge, it became the judgment of the court, and, after the adjournment of the term of the court, it was beyond the power of the judge to alter or amend the same, 'except for a clerical error or omission on evidence shown by the record,' and that 'parol testimony is not admissible in the proceeding to alter, amend, or correct a record by an amendment nunc pro tunc, which, according to the authorities cited and many others, must rest alone on matter apparent on the record.'"

We hold, therefore, that the judgment in this case as last formulated is the judgment of the court, and that the record evidence is not sufficient to amend the judgment nunc pro tunc.

The judgment of the court overruling the motion must be affirmed.

Affirmed.

KENNAMER v. STATE. (8 Div. 442.)

(Court of Appeals of Alabama. May 30, 1916.)

CRIMINAL LAW \hookrightarrow 1094—**APPEAL—BILL OF EXCEPTIONS—DISMISSAL.**

Where the time for presenting and signing a bill of exceptions had expired before the submission of the cause, and no reason was shown for not having the record filed, the Attorney General's motion to dismiss the appeal would be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. \hookrightarrow 1094.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Frank Kennamer was convicted of crime, and he appeals. Dismissed.

W. L. Martin, Atty. Gen., for the State.

BROWN, J. The time for presenting and signing a bill of exceptions having expired before the submission of the cause, and no reason being shown for not having the record filed, the motion of the Attorney General to dismiss the appeal is granted.

Appeal dismissed.

FRAZIER v. STATE. (6 Div. 89.)

(Court of Appeals of Alabama. May 18, 1916.)

CRIMINAL LAW \hookrightarrow 1090(14)—**APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—EXCEPTIONS—NECESSITY.**

A general affirmative charge requested in writing by defendant cannot be reviewed on appeal in the absence of a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 3204; Dec. Dig. \hookrightarrow 1090(14).]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

John Frazier was convicted of crime, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The general affirmative charge set out in the record as requested in writing by the defendant cannot be reviewed, as the record contains no bill of exceptions. Cobb v. State, 115 Ala. 18, 22 South. 506.

The record is regular and shows a judgment of conviction of the offense charged, and presents no reversible error. Taylor v. State, 70 South. 949.

Affirmed.

MARTIN v. STATE. (3 Div. 225.)

(Court of Appeals of Alabama. May 30, 1916.)

CRIMINAL LAW \hookrightarrow 1181(4)—**APPEAL AND ERROR—DISMISSAL—FAILURE TO PERFECT APPEAL.**

Where the certificate of appeal shows a conviction and notice of appeal in November, 1915, but no further steps were taken to perfect an appeal, it was subject to dismissal on motion in

May, 1916, after being regularly called and continued in December, 1915.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2974, 2976, 2977; Dec. Dig. \hookrightarrow 1131(4).]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

C. Martin was convicted of a violation of the liquor law, and appeals. Appeal dismissed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. This case is submitted on the motion of the Attorney General to dismiss the appeal. No transcript has been filed, but the certificate of appeal filed here on November 25, 1915, shows that the defendant was convicted of a violation of the prohibition laws on the 6th day of November, 1915, at which time he prayed for and obtained an appeal to this court. The case was regularly called in the division to which it belongs on December 16, 1915, and was continued, and on May 11, 1916, was submitted on motion of the Attorney General to dismiss the appeal. No further steps to perfect the appeal are shown to have been taken in this court, and the motion of the Attorney General is well taken and should be granted. Sanders v. State, 70 South. 949; Smith v. State, 70 South. 950.

Appeal dismissed.

NEELY v. STATE. (8 Div. 403.)

(Court of Appeals of Alabama. June 1, 1916.)

CRIMINAL LAW \hookrightarrow 1131(4)—**APPEAL—DISMISSAL—FAILURE TO PERFECT.**

Where after conviction and sentence accused entered a confession of judgment with sureties, and on November 16, 1915, appealed by filing a written signed statement, the case, having been passed on call on February 3, 1916, will be dismissed at next regular call in May, 1916; no further steps to perfect the appeal having been taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2974, 2976, 2977; Dec. Dig. \hookrightarrow 1131(4).]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Will Neely was convicted of crime, and he appeals. Appeal dismissed.

W. L. Martin, Atty. Gen., for the State.

PÉLHAM, P. J. The certificate of appeal in this case filed here on December 20, 1915, shows that the defendant was tried and convicted in the court below of petit larceny on the 4th day of November, 1915, and that he was duly and regularly sentenced on the 5th day of November, 1915, and entered a confession of judgment with sureties, and on the 16th day of November, 1915, took an appeal by filing a written, signed statement, as provided by statute. The case was regularly called on February 3, 1916, and continued,

and on the regular call of the case at the next call of this division, May 18, 1916, it was submitted on the motion of the Attorney General to dismiss the appeal. No further steps to perfect the appeal are shown to have been taken in this court, and the motion of the Attorney General is well taken and should be granted. *Sanders v. State*, 70 South. 949; *Smith v. State*, 70 South. 950.

Appeal dismissed.

MITCHELL v. STATE. (6 Div. 186.)

(Court of Appeals of Alabama. May 30, 1916.)

1. CRIMINAL LAW §1122(1) — APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

Where the record contains no bill of exceptions, and does not set out the oral charge of the trial court, as provided by Acts 1915, p. 815, the Court of Appeals cannot review the written charges requested by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940, 2944; Dec. Dig. § 1122(1).]

2. CRIMINAL LAW §814(3)—TRIAL—INSTRUCTIONS—ABSTRACTNESS.

Requests predicated on an hypothesis not raised by the evidence are properly refused as abstract.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. § 814(3).]

Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge.

Sis Mitchell, alias Sissy Mitchell, was convicted of crime, and appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. [1, 2] The record in this case contains no bill of exceptions. The transcript shows a certificate signed by the trial judge, stating that the time for tendering a bill of exceptions had expired and no bill had been tendered. The record contains the written charges given and refused that were requested by the defendant, but the general oral charge of the court is not set out, as provided by the act approved September 25, 1915 (Acts 1915, p. 815), and the record not setting out the oral charge of the court and containing no bill of exceptions (*Choate v. A. G. S. R. R. Co.*, 170 Ala. 590, 54 South. 507; *Ala. Construction Co. v. Wagnon Bros.*, 137 Ala. 388, 34 South. 352), the court is without the data upon which to intelligently review the charges. For aught we know, the charges set out do not relate to issues on which the case was tried, and if predicated on an hypothesis not raised by the evidence, were properly refused as abstract. Supreme Court rule 45 (61 South. ix) makes it incumbent upon an appellant to not only show error, but also that he was probably

injured thereby. *Henderson v. Tenn. C. & Ry. Co.*, 190 Ala. 126, 67 South. 414.

The record proper shows an indictment in regular form, charging the defendant with assault with intent to murder. The judgment entry is also regular, and shows a judgment of conviction in conformity with the finding of the verdict, finding the defendant guilty as charged in the indictment. An examination of the record shows the proceedings to be regular, and nothing authorizing a reversal, and an affirmance is therefore ordered.

Affirmed.

CLAY v. STATE. (6 Div. 158.)

(Court of Appeals of Alabama. May 30, 1916.)

CRIMINAL LAW §1122(1)—APPEAL AND ERROR—REVIEW—INSTRUCTION.

Where the transcript contained no bill of exceptions and did not set out the oral charge of the trial court, the Court of Appeals could not say whether a particular written charge set out for review was or was not covered by the oral charge, or whether, from the evidence, a particular written charge was properly given or refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940, 2944; Dec. Dig. § 1122(1).]

Appeal from Criminal Court, Jefferson County; W. E. Fort, Judge.

George Clay was convicted of crime, and he appeals. Judgment affirmed.

W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was indicted under section 7329, Code 1907, charged with having bought, received, concealed, or aided in concealing, stolen property belonging to one Brewster, not having the intent to restore it to the owner. From a judgment sentencing appellant to a term of five years' imprisonment, he prosecutes this appeal.

No bill of exceptions was presented within the time allowed by law, as appears from the transcript. The record proper sets out for our review a single written charge requested by the defendant which the court refused to give. When the transcript does not contain a bill of exceptions and does not set out the oral charge of the court, it is impossible for this court to say, in the absence of such data, whether a particular written charge was or was not covered by the oral charge of the court, or whether from the evidence a particular written charge was properly given or refused. *Sis Mitchell v. State*, 71 South. 982.

There being no error apparent on the record, the judgment of the court below is affirmed.

Affirmed.

CRAIG v. CITY OF BIRMINGHAM.
(6 Div. 162.)

(Court of Appeals of Alabama. May 30, 1916.)

MUNICIPAL CORPORATIONS \S 642(3)—**VIOLATION OF ORDINANCE—REVIEW.**

The prosecution for a violation of a municipal ordinance is statutory and quasi criminal in its nature; and Code 1907, \S 6264, obviating the necessity of assigning errors in criminal cases, has no application to quasi criminal appeals, as for the violation of an ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1414; Dec. Dig. \S 642(3).]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

H. E. Craig was convicted of a violation of a municipal ordinance, and he appeals, assigning no errors upon the record. Affirmed.

J. W. Davidson, of Birmingham, for appellant. W. A. Jenkins, of Birmingham, for appellee.

EVANS, J. This is an appeal from a judgment of conviction for the violation of a municipal ordinance. The appellant assigns no errors upon the record.

The prosecution for a violation of a municipal ordinance is statutory and quasi criminal in its nature. Section 6264, Code 1907, obviating the necessity of assigning errors in criminal cases, has no application to quasi criminal appeals, as for the violation of an ordinance of a municipal corporation. *Perry v. State*, 1 Ala. App. 253, 55 South. 1035; *Dreyfus v. City of Montgomery*, 4 Ala. App. 270, 58 South. 730; *Creel v. City of Jasper*, 69 South. 239.

Appellee's motion to affirm, it follows, is well taken, and the judgment of the court below is accordingly affirmed.

Affirmed.

MARKS v. STATE. (6 Div. 176.)

(Court of Appeals of Alabama. May 30, 1916.)

CRIMINAL LAW \S 1177—**APPEAL—HARMLESS ERROR—JUDGMENT ENTRY—RECITALS.**

Where the record recited that upon arraignment defendant pleaded not guilty, the fact that the judgment entry recited that upon arraignment he pleaded not guilty, and not guilty by reason of insanity, was unimportant, and not a matter of which defendant could complain, where the judgment entry showed that he had the benefit of both pleas.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3183-3189; Dec. Dig. \S 1177.]

Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge.

Eddie Marks was convicted of the statutory offense of carnally knowing, or abusing in the attempt to carnally know, a girl under the age of 12 years, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was indicted under section 7699, Code 1907, charged with carnally knowing, or abusing in the attempt to carnally know, a girl under the age of 12 years, which is, under our statute, punishable either by death or imprisonment in the penitentiary. From a judgment sentencing defendant to a term of ten years imprisonment, he appeals.

No bill of exceptions was presented within the time allowed by law, and no questions upon demurrers or charges are presented from an inspection of the record proper. The record recites that upon arraignment defendant pleaded not guilty, whereas the judgment entry recites that upon arraignment defendant pleaded not guilty, and not guilty by reason of insanity. This is unimportant, and not a matter of which the defendant can complain, as the judgment entry shows that defendant had the benefit of both pleas.

There is no error upon the record prejudicial to appellant, and the judgment of the court below is affirmed.

Affirmed.

EVERAGE v. STATE. (4 Div. 438.)

(Court of Appeals of Alabama. May 18, 1916.
Rehearing Denied May 30, 1916.)

1. CRIMINAL LAW \S 564(1)—**VENUE—EVIDENCE.**

In a prosecution for forgery of an injunction bond, it was not necessary to prove in express terms that the offense was committed in the county where the indictment was found; and evidence that the defendant lived in the county at the time of his execution of the bond, and that all the transactions in connection therewith were in that county, was a sufficient showing of venue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1277; Dec. Dig. \S 564(1).]

2. CRIMINAL LAW \S 304(16)—**JUDICIAL NOTICE—PLACE OF FILING INJUNCTION BOND.**

The court judicially knows where an injunction bond, approved by a special registrar, was filed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 711; Dec. Dig. \S 304(16).]

3. FORGERY \S 30—**INDICTMENT—"FORGE."**

It is not necessary to set out in what particular act the forgery consisted, because the word "forge" includes the false making of an instrument in whole or in part, and a statement of the particular acts constituting the particular offense.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. \S 82-84; Dec. Dig. \S 30.

For other definitions, see *Words and Phrases*, First and Second Series, *Forge*.]

4. CRIMINAL LAW \S 200(1)—**DOUBLE JEOPARDY—SINGLE CRIME.**

A single crime cannot be split up or subdivided into two or more indictable offenses, and, if the state elects to prosecute a crime in one of its phases, it cannot afterwards prosecute the same criminal act under color of another name.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 387; Dec. Dig. \S 200(1).]

5. FORGERY —4—WHAT CONSTITUTES.

Forgery at common law is the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or a foundation of a legal liability.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 1-3; Dec. Dig. —4.]

For other definitions, see Words and Phrases, First and Second Series, Forgery.]

6. FORGERY —7(1)—NATURE OF INSTRUMENT —INJUNCTION BOND.

An injunction bond in a suit to enjoin the enforcement of executions against him in the sheriff's hands imported on its face the creation of a pecuniary obligation, and was possessed of apparent legal efficacy and had capacity for the perpetration of a fraud, and hence was the subject of forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 2, 3, 8-9, 14; Dec. Dig. —7(1).]

7. FORGERY —14—ELEMENTS OF OFFENSE —INJURY.

That injury did or did not result from the forgery is immaterial, the capacity of the false and fraudulent writing to work injury being the material question.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 49; Dec. Dig. —14.]

8. CRIMINAL LAW —404(5)—EVIDENCE—COMPARISON OF HANDWRITING—STATUTE.

Under Laws 1915, p. 134, regulating the admission of evidence concerning disputed writings, the court, in a prosecution for forgery, properly permitted a comparison of the writing of a letter introduced in evidence and the signature to the instrument alleged to have been forged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 892, 1457; Dec. Dig. —404(5).]

9. CRIMINAL LAW —478(2)—ADMISSIBILITY—HANDWRITING.

In a prosecution for forgery of a name upon an injunction bond executed to prevent collection of executions against defendant, and approved by a special registrar, testimony of a witness, who stated that he knew the defendant's handwriting, and that in his judgment the signature to the bond was in his handwriting, was admissible; its weight and sufficiency being for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1066; Dec. Dig. —478(2).]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

Cleve Everage was convicted of forgery, and he appeals. Affirmed.

The indictment charges that Cleve Everage, with intent to injure or defraud, did falsely make, offer, or forge an instrument in writing in words and figures as follows: Here follows the regular injunction bond, executed by Everage to W. A. Campbell and others, to enjoin the enforcement and collection of three executions against the said Everage, then in the hands of the sheriff, issued by the Court of Appeals in favor of W. A. Campbell, and against the said Everage. The bond is signed C. O. Everage, J. W. Everage, and J. H. Fletcher. The bond was approved July 22, 1913, by J. L. Murphy, special registrar. The allegation is that he forged the

name of J. H. Fletcher to the bond. J. L. Murphy testified that he was special register in the case of C. O. Everage against W. A. Campbell, and that the bond was presented to him by Everage, just as it appears, then, and at the time of the trial, and that he approved it as special registrar. The witness Campbell being introduced, it was asked if he was familiar with the handwriting of Everage, and he answered, "Partially." He was later asked if he knew the handwriting of said Everage, and replied, "Well, I think I do." He was further asked, "Well, in your judgment, do you know it?" and answered, "Yes, sir." The witness was then permitted to state that, in his judgment, the signatures to the bond were in the handwriting of C. O. Everage. The same thing is true of the testimony of Rory Campbell, and also the testimony of Jim Head.

Parks & Prestwood, of Andalusia, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

PELHAM, P. J. Defendant was indicted for having forged an injunction bond approved by a special register.

The defendant requested the general charge upon the grounds that the crime had not been proven; that there was a variance, in that the indictment charged a forgery of the entire instrument while the evidence showed, if anything, nothing beyond the forgery of a signature to the bond; that the bond was not of legal efficacy.

[1, 2] The venue was sufficiently shown. "It is not necessary to prove in express terms that the offense was committed in the county where the indictment was found. Evidence from which the jury could so infer is sufficient." *Tinney v. State*, 111 Ala. 74, 20 South. 597; *Dupree v. State*, 148 Ala. 624, 42 South. 1004. The court judicially knows where the bond was filed; the defendant lived in the county at the time of the execution of the bond; the defendant's father was there at the time. All the transactions in connection with the bond were shown to have been had in Covington county. See *Powell v. State*, 5 Ala. App. 75, 59 South. 530.

[3] There is no material variance between the allegata and probata. The word "forge" includes the false making of an instrument in whole or in part. It is not necessary to set out in what particular act the forgery consists, because the word "forge" includes, in and of itself, a statement of the particular acts which constitute this particular offense. *State v. Greenwood*, 78 Minn. 211, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632, 635.

[4] Appellant inquires:

"Now could the defendant be put in jeopardy again under this instrument on an allegation that he forged the other two signatures, or either of them, to said bond?"

We answer he cannot, as the Supreme Court has said:

"A single crime cannot be split up, or subdivided into two or more indictable offenses. * * * If the state elects * * * to prosecute a crime in one of its phases, or aspects, it cannot afterwards prosecute the same criminal act under color of another name. * * * The state cannot split up one crime and prosecute it in parts." *Moore v. State*, 71 Ala. 307; *Brown v. State*, 105 Ala. 117, 16 South. 929; *Willis v. State*, 134 Ala. 450, 33 South. 226.

[5, 6] The next question for consideration is: Was the instrument the subject of forgery?

"In the opinion rendered in *Dixon v. State*, 81 Ala. 61, 1 South. 69, the court quoted with approval the following statement of Mr. Bishop: 'Forgery at the common law is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.' Any false instrument which is legally capable of effecting a fraud may be the subject of a charge of forgery. *Murphy v. State*, 118 Ala. 137, 23 South. 719; *Burden v. State*, 120 Ala. 388, 25 South. 190, 74 Am. St. Rep. 37." *Dudley v. State*, 10 Ala. App. 130, 135, 64 South. 534, 535.

In *Rembert v. State*, 53 Ala. 469, 25 Am. Rep. 639, the Supreme Court said:

"Certain writings—a promissory note, or bill of exchange, for illustration—import on their face the creation of a pecuniary liability. So of many other written instruments, if they import legal validity. That is, if the writing shows on its face, without reference to extrinsic facts, that, if genuine, it creates, discharges, increases, or diminishes a money liability, or transfers or incumbers property, or surrenders or impairs an existing valid claim to, or lien on, property, then the false making of such written instrument, with intent to defraud, is, without more, forgery, and will justify a conviction of that grave offense. To fall within the rule, however, which dispenses with the averment of extrinsic facts, the writing itself must show that, if genuine, it affects some existing property right, or legal liability; for otherwise it fails to show its false making or utterance could defraud any one. There must be both the intention and power to defraud, or the legal offense is not committed. This principle rests on the soundest reason, and the highest authority." *Williams v. State*, 90 Ala. 649, 650, 8 South. 825.

[7] This bond, like a promissory note or bill of exchange, for illustration, imports on its face the creation of a pecuniary obligation. It possesses apparent legal efficacy and has capacity for the perpetration of a

fraud. That injury did or did not result from its execution is immaterial. *Hobbs v. State*, 75 Ala. 1.

"Falsely making any writing, with a fraudulent intent, whereby another may be prejudiced, is forgery. It is not necessary that any prejudice should in fact have happened by reason of the fraud. The capacity of the false and fraudulent writing to work injury is the material question. If the writing has that capacity, the offense is committed." *Jones v. State*, 50 Ala. 161.

Having reached the conclusion that the instrument is the subject of forgery, it becomes unnecessary to pass upon the power of a special registrar to approve the bond.

[8] The court committed no error in permitting a comparison of the writing in the letter introduced in evidence and the signatures to the instrument alleged to have been forged. *General Acts 1915*, p. 134.

[9] The objections addressed to the introduction of the testimony of the witnesses Campbell and Head were not well founded. Their testimony was properly admitted. The weight and sufficiency of the evidence was a question for the jury. The rule as to the admissibility of such evidence is declared in *Karr v. State*, 106 Ala. 1, 17 South. 328, as follows:

"When it became necessary to prove handwriting, any person having a previous knowledge of the writing of the supposed writer may express an opinion that the writing in question was or was not written or signed by him. The frequency or infrequency of the opportunities of the witness to acquire knowledge rendering him capable of expressing an opinion, or the nearness or remoteness of such opportunities, in point of time to the time of his examination, are matters addressed to the credibility or weight, and not to the admissibility of the evidence, and are for the consideration of the jury. The testimony of the witness Glidewell shows that on two or three occasions, considerable lapse of time intervening, he had seen the defendant write the names of persons and places casually, and that there was in his handwriting a peculiarity attracting his attention, and the last of these occasions was several years before the trial. The testimony is not the highest and most satisfactory kind, but it was competent, and authorized the introduction of the writing in evidence, so far as its admissibility depended on proof of handwriting."

We find no reversible error in the record. Affirmed.

YARBROUGH v. STEWART et al.
(8 Div. 188.)

(Supreme Court of Alabama. April 20, 1916.
Rehearing Denied June 1, 1916.)

LOGS AND LOGGING \Leftrightarrow 3(7)—**SALE OF TIMBER**
—**TURPENTINING**—**CUT, REMOVE OR MANU-**
FACTURE.

The right of "turpentineing" is not embraced in the right to cut, remove, or manufacture timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 9; Dec. Dig. \Leftrightarrow 3(7).]

For other definitions, see *Words and Phrases*, Second Series, *Cut and Remove*.]

Appeal from Chancery Court, Autauga County; W. W. Whiteside, Chancellor.

Bill by E. E. Yarbrough against P. H. Stewart and others. From a decree for defendants, complainant appeals. Affirmed.

See, also, 67 South, 989.

W. A. Gunter, of Montgomery, and C. E. O. Timmerman, of Prattville, for appellant. Eugene Ballard, of Prattville, for appellees.

SOMERVILLE, J. The bill of complaint seeks to enjoin the respondents from the collection of a judgment for damages "for trespass upon land," recovered by them against complainant, and which was affirmed on appeal to this court. *Yarbrough v. Stewart*, 67 South, 989.

The basis shown for this relief is that respondents, as owners of the land in question, sold the merchantable timber thereon, with the right to enter, and cut, remove, and manufacture said timber for any lawful purpose, that these rights passed by mesne conveyances to one Gibbons, whose title and rights were, however, equitable only, by reason of a misdescription of the lands in one of the intermediate deeds, and that Gibbons leased to complainant "the turpentine rights" on said lands. The theory of the bill is that complainant's turpentine lease from Gibbons would have been a complete defense to the trespass suit but for the defect in Gibbons' legal title and rights to the timber; the equity being unavailable in such an action at law; and complainant now asserts in equity his equitable rights to defeat an inequitable judgment.

Conceding that Gibbons is invested with a perfect legal title to the timber and all the incidental rights originally granted by respondents to his predecessor, the bill of complaint is nevertheless without equity. Gibbons himself had no right to use the land for the purpose of taking turpentine from the trees thereon, and he could not authorize another to do what he could not do himself; for the right of "turpentineing" is not embraced in the right to cut, remove, or manufacture timber. *Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 South. 886; *Yarbrough v. Stewart*, 67 South, 989.

It is urged that, even so, complainant's en-

try upon the land was not unlawful, since he may be regarded as the agent or servant of Gibbons with respect to such entry; and hence, the trespass suit being for an unlawful entry, the establishment of Gibbons' legal rights by a corrected deed would render complainant's entry lawful, and would have defeated that suit.

There are two sufficient answers to this contention: (1) The bill does not show that complainant entered as the agent or servant of Gibbons, nor with respect to any purpose within the lawful rights of Gibbons in the premises, and hence does not bring complainant within the protection of that authority. *Yarbrough v. Stewart*, 67 South. 989. (2) The bill does not show that the trespass suit was only for an unlawful entry upon the land. Non constat, but it may have been for injuries to the grass, shrubbery, or small trees not embraced in the original grant of merchantable timber.

The demurrers to the bill of complaint were properly sustained, and the decree will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

COOK v. COOK. (8 Div. 806.)

(Supreme Court of Alabama. May 11, 1916.)

HUSBAND AND WIFE \Leftrightarrow 297—**SEPARATE MAINTENANCE.**

Evidence held sufficient to warrant reasonable allowance to wife for separate maintenance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1080; Dec. Dig. \Leftrightarrow 297.]

Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

Bill for separate maintenance by Jessie Cook against Sam Cook. Decree for defendant, and plaintiff appeals. Reversed and remanded.

McCord & Orr, of Albertville, for appellant. Street & Bradford, of Guntersville, for appellee.

SAYRE, J. This is a bill by the wife for separate maintenance. After a careful reading of the evidence the court is of the opinion that the wife (appellant) should have relief. The causes for which, on the surface of the record, appellee sent appellant back to her father, after they had been married for five months, fall far short of justifying his course. His real reason appears to have been that the wife proved persona non grata, and he expected entirely too much of her in her condition. From the circumstances of his offer to take her back, which, among other things, was made after this bill was filed, it does not appear to have been made for the bona fide purpose of mending the relations between them, but simply to avoid a

decree for separate maintenance. The evidence shows that he was entirely willing to be rid of her on his own terms. Considering the probable true origin of their alienation, the burden of bringing about a reconciliation in the future should not be left to rest entirely upon the wife, especially so in view of the fact that the wife cannot possibly have enough out of the husband's very limited estate to maintain her in ease or idleness. Any allowance should, of course, be determined with reference to the condition of the parties. The wife, a frail woman, is absolutely dependent upon her family. We assume that she has a child. She was pregnant when she was taken back to her father's house and when the testimony was taken. The husband's estate, on the other hand, is small, and he has the care of four young children, the offspring of a previous marriage. Let the court arrange for a reasonably monthly allowance to the wife, or for a sum in bulk in lieu thereof, if that seems preferable. Any decree for continued payments may, upon due notice, be amended or modified as justice and equity may require.

Reversed and remanded.

ANDERSON, C. J., and MCOLELLAN and GARDNER, JJ., concur.

CHAMBLESS v. JONES. (6 Div. 209.)

(Supreme Court of Alabama. May 11, 1916.)

1. BOUNDARIES — 48(6) — ESTABLISHMENT — ACQUIESCENCE OF PARTIES — PRESUMPTIONS.

Where a lot owner, after a survey, with the knowledge and consent of the adjoining owner, moved the boundary fence toward the adjoining lot, the acquiescence of the adjoining owner in the survey prima facie indicated its validity and raised a presumption of its correctness.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 240; Dec. Dig. 48(6).]

2. BOUNDARIES — 37(1) — ESTABLISHMENT — EVIDENCE—WEIGHT AND SUFFICIENCY.

In a suit to enjoin a trespass, evidence held to show that the boundary between adjoining lots was as claimed by complainant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-189, 192, 194; Dec. Dig. 37(1).]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill in equity by L. A. Chambless against T. A. Jones. From a decree dismissing the suit, plaintiff appeals. Reversed and rendered.

Thomas J. Wingfield, of Birmingham, for appellant. Gaston & Drennen, of Birmingham, for appellee.

GARDNER, J. Appellant, the owner of "lot 3, block 8 A. East Lake Land Company survey," in Birmingham, Ala., filed this bill against the appellee, who is the owner of "lot 4, block 8 A. East Lake Land Company survey," which lies adjacent to the lot owned

by appellant. The bill alleges that the respondent has placed on his said lot a building in such manner that the eaves of same project over lot 3, owned by complainant, and that the respondent has placed on the lot certain pipes connecting the said building with a sewer which passes in front of said lots; that complainant has never given respondent or any one else any right whatever to place said building on her premises or run any pipes through the same, but on the contrary has demanded that the respondent remove that part of the building on or over her premises and remove the pipes from her property. The prayer of the bill is for a mandatory injunction requiring this to be done.

Respondent answered the bill, denying the material averments thereof in respect to any of his property being on or over the premises of complainant, and setting up the statute of limitations of 10 years and adverse possession for a sufficient length of time to perfect his title up to the dividing line fence which was standing on the property at the time he purchased it. Upon submission of the cause for final decree on pleadings and proof, the chancellor denied complainant any relief and dismissed her bill. The equity of the bill is not brought into question on this appeal, the result of which rests upon the solution of a question of fact as to the true location of the boundary line between these parties. We need not discuss that phase of the answer setting up the question of the statute of limitations or that of adverse possession, as it is too clear from the evidence in the case that neither of these defenses is sustained by the proof. Nor does it appear to be insisted to the contrary by counsel for appellee.

[1] Appellee purchased his lot a short while before appellant bought hers, and there was a fence erected dividing the two lots at the time of the purchase. It is quite clear that appellee was under the impression that the fence was on the proper and correct dividing line between the lots, but it appears, also, that within a short time after the purchase notice was brought to him appellant questioned the correctness of the same, and in 1908 cautioned him in regard to the laying of the pipes, that they be not placed on her premises. In 1911 appellant had the property surveyed by one Meade. At that time she seems to have had the matter placed in the hands of her attorney. The survey by Meade, as shown by his testimony, established that the fence was not on the line, but was over on the property of appellant. This survey fixed the dividing line some ten inches at the front of the property toward the premises of respondent. Meade, who was a civil engineer of 17 years' experience, testified to the correctness of the line as established by him. He took as his starting

point a certain stone monument in the center of Seventy-Fifth street, placed there to indicate its center, and another point was an iron pipe on the west side of Seventy-Fifth street, placed to indicate a lot corner. His survey corresponded with the curb lines on the streets and it went by the map of East Lake, furnished by the East Lake Land Company, from which this property was purchased. Respondent's surveyor, Mr. Truss, testified that the stone monument was placed by him at the time he was establishing the center of the streets, and that it was a correct point. Complainant insists that respondent agreed to abide by the Meade survey, and this insistence finds support in the evidence. It clearly appears, however, that after the Meade survey respondent acquiesced therein and consented for the fence to be moved and erected on the line of said survey. Respondent said:

"I was consulted about the moving of the fence, and it was with my permission that the fence should be set over."

The fence was so moved by the appellant in March, 1911, with the knowledge and consent of the respondent, and it seems to have so remained without objection from that time. Such acquiescence in the Meade survey by the respondent would prima facie indicate its verity and thereby raise the presumption of its correctness. *Cooper v. Slaughter*, 175 Ala. 211, 57 South. 477; *Oliver v. Oliver*, 187 Ala. 340, 65 South. 373; *Smith v. Bachus*, 70 South. 281; 4 R. C. L. 69. True, respondent sought to explain such acquiescence by evidence to the effect that he merely consented to the removal of the fence to the line of the Meade survey in order to pacify the complainant; but this appears to have been but an uncommunicated motive, and his case must be judged by his acts and conduct.

[2] Before the filing of the bill counsel for the complainant requested the respondent to remove the eaves of the house and the pipes from complainant's premises, to which respondent replied, to quote the language of the witness:

"That he might, after thinking the matter over, decide to move them in preference to being a respondent in a lawsuit, and asked him that, in the event I did decide to remove them, that I be given permission to enter the property as claimed by the complainant for the purpose of moving the property."

No survey of the property seems to have been made by the respondent until after the testimony for the complainant was taken in January, 1915, after which time the property was surveyed for the respondent by one Truss. Mr. Truss in his testimony was as positive and sincere as was Mr. Meade as to the correctness of the line established by him, and the survey of the former established the original fence as the correct boundary line. Mr. Truss also was a surveyor of many years' experience. He testified to his familiarity with the East Lake survey and

the map thereof, and that he had surveyed in that community and was in fact at one time city engineer of East Lake. He testified that about 10 years previous he had surveyed a lot in the same block with those here under controversy, for a Mr. Sadler, and that he therefore took the Sadler lot as a starting point, assuming the previous survey to have been correct. Truss volunteers the information that at the time he made the Sadler survey its correctness was questioned by some of the old residents of East Lake; but he insists that they were men without experience in surveying or engineering, and that they were mistaken in their contention.

The deeds of the respective parties to these lots describe them as being rectangular, while the testimony of Truss seems to indicate that according to his survey they are not rectangular. Speaking to this question, the respondent, testifying in his own behalf, said:

"My deed called for a rectangle, 50 feet front, 200 feet deep. I was present when Mr. Truss, my witness, testified that the lot could not be rectangular. I am familiar with the line established for me, on my lot 4, by Mr. Truss. I could not state whether or not those lines make a rectangular lot. I do not know if the stakes placed by Mr. Truss make a rectangular lot; if they do not make a rectangular lot, it would not be according to my deed. If the other lots in that block are rectangular, it would create confusion."

It is thus seen that the question of fact as to the correctness of the boundary line is a matter of much difficulty of solution. Each of the surveyors is positive and sincere as to the correctness of his own survey; but we cannot but be impressed, from the record, that the starting point of the Meade survey appears to have been such as to more surely lead to a correct result. If, however, it be conceded that the evidence in this respect is equally balanced, we should not lose sight of the testimony heretofore referred to as to the conduct of the respondent, his acquiescence for several years in the Meade survey as the true boundary line. This acquiescence creates a presumption in favor of the correctness of that survey, and we are of the opinion suffices to turn the scale in favor of the contention of appellant. The fence was placed by the appellant upon the line established by the Meade survey and acquiesced in by appellee; and the decree dismissing her bill leaves her as holding to the line of the Meade survey, but without the power to enforce her rights thereto. There was no cross-bill by the respondent, seeking the establishment of the correct boundary line.

Upon a careful consideration of the evidence in this case we are persuaded that the appellant met the burden of proof necessary to entitle her to the relief she prayed. The undisputed evidence shows that, if the Meade survey be held to be correct, then the eaves of appellee's house extend over and onto the property of appellant, and so likewise do the

pipes. It therefore results that the decree of the court below will be reversed, and one will be here rendered granting to appellant the relief prayed in her bill.

Reversed and rendered.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

**BERTHOLD & JENNINGS LUMBER CO. v.
GEO. W. PHALIN LUMBER CO.**

(6 Div. 274.)

(Supreme Court of Alabama. June 1, 1916.)
CONTINUANCE \Leftrightarrow 40—DISCRETION OF COURT—
STATUTE.

Under Code 1907, § 2961, providing when complaint must be filed and the time of trial in attachment suits, where an action was instituted by attachment July 7th, and complaint was filed November 13th, three days before the first day of the term or six days before the return of the attachment or the time when the complaint was required to be filed, while defendant could have made demand on plaintiff for a bill of particulars at any time after suing out of the attachment, refusal of the court to grant defendant's motion for continuance, made November 18th, after having demanded bill of particulars, under section 5326, November 14th, was not an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 117, 124; Dec. Dig. \Leftrightarrow 40.]

Appeal from Circuit Court, Tuscaloosa County; Bernard Harwood, Judge.

Action by Geo. W. Phalin Lumber Company against Berthold & Jennings Lumber Company. There was judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under Act April 18, 1911 (Laws 1911, p. 450) § 6. Affirmed.

W. J. Monette, of Tuscaloosa, for appellant. H. A. & D. K. Jones, of Tuscaloosa, for appellee.

THOMAS, J. The plaintiff, appellee, instituted this action against the defendant, Berthold & Jennings Lumber Company, by attachment sued out in the circuit court on the 7th day of July, 1914. On that day the writ was levied on defendant's property in the county where the suit was instituted. On July 10, 1914, defendant executed a replevy bond for the property, and on the approval of the bond by the sheriff the property was, on July 11, 1914, returned to defendant. Three days before the first day of the court (November 13, 1914) plaintiff filed its complaint in the attachment suit. On November 14, 1914, defendant demanded a list of the items composing the account under section 5326 of the Code of 1907, and on November 18th thereafter, plaintiff filed in the cause and furnished defendant's counsel a specific list of the several items of the account, the foundation of the suit, aggregating 11,772 feet of lumber, of the aggregate value of \$364.93, and subsequently amended the list or account by the allowance of cred-

its which left the balance due thereon, as \$53.20. Of the same date (November 18th) is the defendant's motion, duly verified, asking for a continuance on the several grounds specified therein. The motion for a continuance was denied by the court; and the exception to this ruling, reserved by the defendant, is properly presented by bill of exceptions. *Hayes v. Woods*, 72 Ala. 92. And this ruling is the basis for the only assignment of error on this appeal. The statute under which the bill of particulars was demanded in this case (Code, § 5326) is as follows:

"No proof of a sealed instrument is required in pleading, but, at any time previous to the trial, the defendant may have inspection of the bond or other instrument sued on, upon notice to the attorney of the party; or when an account is the foundation of the suit, a list of the items composing it."

Obviously, the object of the statute was to prevent surprise and to acquaint the defendant with the matter of the claim against him (*Pollack v. Gunter et al.*, 162 Ala. 317, 50 South. 155, and, under the recent amendment thereof, to acquaint the plaintiff with the nature of the defendant's set-off, whether it be an "instrument relied on," or items composing a counter demand. Gen. Acts, 1915, p. 597. In the *Pollack* Case, supra, the object of the statute, it was declared, refuted the existence of a legislative purpose to make the requirements of the statute "more strict than the ordinary rules of pleading," and the effect of the ruling was to permit the dates set out in the bill of particulars to be varied by evidence on the trial of the true dates when the services were rendered or items furnished. So in *M. & B. R. Co. v. Worthington*, 95 Ala. 598, 10 South. 339, where the question was of the sufficiency of the bill of particulars furnished, Chief Justice Stone gave the statute a liberal construction, and it was held that the items, "corn, oats and bran, consumed," permitted proof of the necessity, in the construction of such trestling, to raise heavy timbers by the use of teams. A like liberal construction was given the statute in each of the cases of *Fountain v. Ware*, 56 Ala. 558, and *Robinson v. Allison*, 36 Ala. 525. The office of the bill of particulars and list comprising the items of the account the foundation of the suit is stated in 31 Cyc. 563, to be:

"To inform the opposite party and the court of the precise nature and character of the cause of action or defense for which the pleader contends in respect to any material or issuable fact in the case, and which is not specifically set out in his pleadings, and which cannot, in many cases, be proven in the pleadings without great perplexity. It is properly an amplification of the pleading, designed to make more specific general allegations appearing therein and thus avoid a surprise at the trial."

This statement of the rule is largely rested on the opinion of Mr. Justice Dowdell (later Chief Justice), in *Morrisette, Ex'r, v. Wood*,

128 Ala. 505, 508, 30 South. 630, and 3 Eng. Pl. & Pr. 519. This court has often held that the trial court will not be put in error because of its ruling upon a motion for a continuance unless gross abuse of discretion is shown. *McLaughlin v. Beyers*, 175 Ala. 544, 57 South. 716; *Kelly v. State*, 160 Ala. 48, 49 South. 535; *Ala. Co. v. Wrenn*, 136 Ala. 475, 34 South. 970; *White v. State*, 86 Ala. 69, 5 South. 674.

The statute required the plaintiff, within three days of the return of the attachment, to file his complaint, and when so filed, "the cause stands for trial at such return term," if the levy was made and notice thereof was given 20 days before the commencement of such term. Code 1907, § 2961. The record shows that the complaint was filed three days before the first day of the term, or some six days before the return of the attachment, or before the complaint was required to be filed. The cause had been long pending, and the defendant could, at any time after the suing out of the attachment on the 7th of July, have made demand on the plaintiff in attachment for the bill of particulars, and, failing in this, did not show any gross abuse of the discretion of the court in not granting his motion for a continuance. Any other rule would prevent the trial of attachment suits at the time to which they are made returnable by the statute. Code § 2961.

The cause is affirmed.

ANDERSON, O. J., and MAYFIELD and SOMERVILLE, JJ., concur.

TENNESSEE COAL, IRON & RAILROAD CO. v. RUTLEDGE. (6 Div. 163.)

(Supreme Court of Alabama. May 11, 1916.)

1. MASTER AND SERVANT — 302(1) — RESPONSIBILITY FOR SERVANT'S TORT.

The legal accountability of an employer for the wrongful acts of its employé or servant depends upon whether the servant committing the wrong was, at the time, acting in the line and scope of his authority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217, 1225; Dec. Dig. § 302(1).]

2. MASTER AND SERVANT — 330(2) — TORT OF SERVANT — EVIDENCE — DECLARATIONS — SHOWING OF AUTHORITY.

In an action for assault and battery committed by defendant's servant, testimony of declarations by the servant, made immediately preceding the alleged assault, going to show that the servant had "orders" to remove plaintiff from the premises, was admissible in connection with other facts and circumstances in evidence as tending to disclose the authority committed to the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1271; Dec. Dig. § 330(2).]

3. MASTER AND SERVANT — 216(2) — NEGLIGENCE OF FELLOW SERVANT — APPLICATION OF DOCTRINE.

The common-law doctrine of assumption of risk by one servant of injury consequent upon

the negligence of a fellow servant has no application to the case of a mine employé assaulted by the foreman, who has particular authority to eject him from the mine; the doctrine's effect being limited to risks incident to the common employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 568; Dec. Dig. § 216(2).]

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Action by Jesse Rutledge against the Tennessee Coal, Iron & Railroad Company. There was verdict for defendant, and from a ruling granting plaintiff's motion for new trial, defendant appeals. Affirmed.

Percy, Benners & Burr, of Birmingham, for appellant. Beddow & Oberdorfer, of Birmingham, for appellee.

MCCLELLAN, J. The appellee instituted this action against the appellant to recover damages for assault and battery alleged to have been committed upon the plaintiff by the defendant's "agent or servant, acting within the line and scope of his authority as such." Upon the conclusion of the evidence the court gave the general affirmative charge for the defendant. The plaintiff's motion for a new trial was granted, and from this ruling the appeal is prosecuted.

[1, 2] The legal accountability of the defendant for the wrongful acts of one in its employ or service depends, of course, upon whether the servant committing the wrong was, at the time, acting within the line and scope of his authority. *Case v. Hulsebush*, 122 Ala. 212, 217, 26 South. 155; *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653; *Id.*, 160 Ala. 50, 53 South. 794. Higgins, who committed the alleged assault, was in the employ of the defendant as a foreman. The witness Johnson testified to declarations by Higgins, made immediately preceding the alleged assault, which went to show that Higgins had authority, "orders," to remove the plaintiff from the premises. There does not appear to have been any questioning of the admissibility of the declarations attributed by the witness to Higgins. Doubtless, that testimony was admissible, in connection with other facts and circumstances shown by the evidence, as tending to disclose the authority committed to the foreman (Higgins) in the premises. *Pullman Co. v. Meyer*, 70 South. 763-765, and decisions therein cited.

[3] It is urged for appellant that, since the action does not seek to avail of the provisions of our *Employers' Liability Act* (Code, § 3910), the plaintiff should be and is concluded by the application of the common-law doctrine of assumption by one servant of risks, incident to the common employment, of injury consequent upon the negligence of a fellow servant. *Laughran v. Brewer*, 113 Ala. 509, 517, 21 South. 415. The doctrine's effect is at least limited to

risks incident to the common employment. Assuming that plaintiff bore, at the time the alleged assault was committed upon him, the relation of servant to the common master (*L. & N. R. R. Co. v. Chamblee*, 171 Ala. 188, 54 South. 681, Ann. Cas. 1913A, 977), it is manifest that if the testimony of the witness Johnson should be accepted as true by the jury, the foreman (Higgins) was not a fellow servant of the plaintiff, but was exercising, though abusing it may be, the particular authority conferred on him by the master to eject this plaintiff from the mine, an authority that, if conferred upon Higgins, and exercised, though abused, by him, necessarily negated an essential element of the common-law doctrine stated, viz., service by Higgins and plaintiff in the common employment of the defendant, in consequence of which service injury was inflicted upon plaintiff by Higgins. Indeed, the mentioned testimony of Johnson effected, if accepted, to disclose the authorization of Higgins to exclude plaintiff from defendant's service.

The court erred in giving the general affirmative charge for defendant, and hence did not err in granting the plaintiff's motion for a new trial.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

STATE, to Use of WINSTON COUNTY, v. TINGLE et al. (6 Div. 214.)

(Supreme Court of Alabama. May 11, 1916.)
TAXATION \Leftrightarrow 568(6) — COLLECTORS — LIABILITIES ON BONDS.

Where a tax collector authorized the county treasurer to apply taxes collected for a certain year on those due for the preceding year, or knowingly permitted such application without objection, he was guilty of conversion of the taxes collected, rendering him and his surety liable on his bond.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1110-1114; Dec. Dig. \Leftrightarrow 568(6).]

Appeal from Circuit Court, Winston County; John H. Miller, Judge.

Action by the State, to the Use of Winston County, against J. M. Tingle and another. From a judgment for plaintiff for a less amount than claimed, plaintiff appeals. Reversed and remanded.

Bankhead & Bankhead, of Jasper, for appellant.

SAYRE, J. Appellee Tingle, to whom we will refer as the defendant, succeeded himself in office as tax collector of Winston county on July 1, 1913, giving a new bond for the faithful discharge of the duties of his office during the term upon which he then entered. On February 23, 1914, being largely in arrears in his accounts with the state and county, he abandoned his office. The state, suing for the use of Winston county,

brought this action against the defendant and his sureties for the term above stated, and on March 23, 1915, recovered judgment for the sum of \$1,279.60. Evidence for the plaintiff limited the claim to a shortage on account of taxes that were collected, or should have been collected, for the county during the year 1913, by which we mean to say that the plaintiff made no effort to charge defendants with a shortage for any previous year. Aside from the controversy about the item to be presently mentioned, it appeared without serious dispute that at the time of the trial defendant was in default on account of taxes collected for the year 1913 in a sum approximating \$5,000, and by this appeal plaintiff complains that the verdict and judgment should have been for this amount. The contention here arises out of an item of \$3,658.06 paid by the defendant to the county treasurer on November 10, 1913. This sum was derived from tax collections for the current year. Defendant took a receipt for this payment in words and figures as follows:

"No. 104. November 10th, 1913. Received of J. M. Tingle \$3,658.06 account of balance due on county taxes for the year 1912 as per examiner's report."

With reference to this payment Sutherland, the county treasurer, testified as follows:

"On the 10th day of November, 1913, J. M. Tingle turned over to me as county treasurer the sum of \$3,658.06. It was turned over to me as tax money. Mr. Tingle was not given credit for that sum of \$3,658.06 for 1913 taxes. I suppose it was the county's tax money. He turned it over to me as tax collector, and I received it as county treasurer. * * * I don't know that that money was collected for 1913. It was after the tax year commenced. When Mr. Tingle paid the said sum of \$3,658.06 on the 10th day of November, 1913, he said he wanted to settle the balance due by him on 1912 taxes. For that reason he was not given credit for that payment on the 1913 taxes, because he made the request that it be credited on 1912 taxes, and it so appears on the receipt that I gave him for the money, and on the stub of the receipt. That closed up the taxes due for 1912, and I applied it just as he said."

The defendant, testifying as a witness, said:

"In November, 1913, when I paid Sutherland \$3,658.06, I never told him to put that on a former year. He suggested that when I paid him the money. As far as my knowledge is concerned, I didn't know I owed them anything. I told him I was going to pay him over some money for 1913. He said there is something they have you charged with for 1912 taxes, and we had better get that straight and commence on 1913. He went on then and placed it back there. I never told him to do it. He did it. That was after the collection for taxes for 1913 began. It was in November, and that money I had collected was for taxes for that year. I told Mr. Sutherland, the treasurer, that I was going to pay over some taxes that I had collected."

And on cross-examination the defendant testified:

"The report showed that it was for taxes for 1913. I told him that. When Mr. Sutherland

told me I owed some taxes for 1912 that hadn't been paid in. I didn't say anything to him. When he said that he was going to apply it to that year, I didn't say anything at all. I didn't tell him not to do it. That was taxes I had collected for the period this bond sued on here was executed. All the money I paid over while I was tax collector I paid over to Mr. Sutherland and took receipts."

The court left it with the jury to say whether on this evidence the defendant and the sureties, sued with him, were entitled to a credit for the amount of the payment in question, and it is entirely clear that the jury allowed the credit.

In our view of the case, the points of difference between the testimony of these witnesses should not have been submitted to the jury as of possible controlling importance in determining the amount of plaintiff's recovery; for, notwithstanding those differences, the fact remained without dispute that the payment was applied in acquittance of taxes collected for 1912, and this was an unlawful conversion of the money so applied, accomplished, if not by defendant's direction, at least with his full acquiescence and consent. In either case the sureties were liable.

The law directed the proper application of the payment, but the county, as a composite governmental agency, could not know and was under no duty to inquire, at its peril, from what source the money came. It was the duty of the defendant to see that a proper application was made. If the county treasurer was a party to the misappropriation, that did not lessen defendant's wrong in permitting it to be made nor excuse him and his sureties. The sureties were liable for all moneys received by their principal after their bond was given. They could not relieve themselves by showing that their principal used such moneys or any part thereof to satisfy past delinquencies. Highly favored as sureties generally are, their rights in the present case were limited by the positive law the observance of which by their principal their bond was intended to secure. To allow the credit did not correct the wrong that had been done nor fill the undisputed void in the county treasury, while, as for sureties, the course adopted merely shifted the burden of making good defendant's deficit

from one set of sureties to another. The defendant should not have been heard to claim a credit for the sum in question on his collections for 1913 after he had received a credit for the same sum on his collections for 1912. He consented at least to the unlawful misapplication of the payment when it was within his power and duty, as prescribed by law, to see that a proper application was made, and that should have been the end of his claim for a further credit of the same sum; should have been the end of the contention on the part of the sureties that the payment be credited to the fund on account of which it had been received by the defendant. If the defendant had simply delivered the sum in question to the treasurer, and without fault on his part it had been improperly credited on his collections for 1912, no doubt, the sureties would have been entitled to have its use adjudged in acquittance of the collections for 1913. Most likely the court below took the view of the law herein expressed, and our difference arises out of our different conclusion as to the effect of the evidence; but to us it seems that the undisputed testimony establishes the fact that defendant was at least a willing party to the misapplication of the payment, though he may not have suggested it in the first place, and afterwards allowed the credit to remain as it had been placed for such benefit as might thereby accrue to him. This was a conversion of the money. He had therefore no right to the credit claimed in this action, and to permit the sureties to have the payment credited against their liability would allow them to make a shield and a defense of the wrong of the officer whose faithful discharge of the duties of his office they had guaranteed. *State v. Sooy*, 39 N. J. Law, 539; *Walker County v. Fidelity & Deposit Co.*, 107 Fed. 851, 47 C. C. A. 15.

We have had no brief for appellees. We have inferred the nature of the defense from the authorities cited by appellant. Our best judgment is that the court erred in its action on the charges and in overruling the motion for a new trial.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

KEARNS v. MOBILE LIGHT & R. CO.
(1 Div. 930.)

(Supreme Court of Alabama. June 1, 1916.)

1. STREET RAILROADS \S 117(8) — **USE OF PROPERTY — SUFFICIENCY OF SIGNALS OR BARRIERS—QUESTION FOR JURY.**

The sufficiency of signals or barriers to give reasonable warning of or security against existing danger, especially with respect to their character, number, and arrangement, is generally a question of fact for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. \S 241, 242, 251, 252; Dec. Dig. \S 117(3).]

2. STREET RAILROADS \S 117(3) — **USE OF PROPERTY — EXCAVATION — SIGNALS — QUESTION FOR JURY.**

On the evidence in an action against a street railroad for damages to an automobile driven into an excavation, the question whether two rows of red lights about eight feet apart on each side of the track, between the rails of which there was an excavation, constituted a reasonable and sufficient warning to travelers not to pass along the car track between the lights, held for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. \S 241, 242, 251, 252; Dec. Dig. \S 117(3).]

3. STREET RAILROADS \S 110(2)—**INJURY ON TRACK—CONSTRUCTION OF PLEADING.**

Where the complaint in an action against a street railroad for damages to an automobile charged its negligent failure to guard an excavation with proper and sufficient danger signals, a plea alleging by way of conclusion that plaintiff "assumed the risk" of driving between the lights was necessarily to be regarded as simply a plea of the general issue.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. \S 224; Dec. Dig. \S 110(2).]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Robert J. Kearns against the Mobile Light & Railroad Company for damages for injuries to an automobile. Judgment for defendant on the pleadings, and plaintiff appeals. Transferred from Court of Appeals under section 6, p. 449, Acts 1911. Reversed, rendered, and remanded.

The second count of the complaint charges that defendant street railway company was repairing its track or roadbed on Government street in the city of Mobile, and had made large and dangerous holes and excavations therein, of which it became defendant's duty to warn travelers on the street of the nature and location of said excavation; that defendant wholly disregarded and negligently failed in said duty, and negligently failed to guard certain of said excavations with proper and sufficient danger signals, and as the proximate result of said negligence of said defendant an automobile then and there owned by said plaintiff, and being then and there driven over and upon, and then and there lawfully on and upon, the said Government street, while being driven in an easterly direction over and along said Government street in the nighttime, and without any fault on the part of the plaintiff, his said automobile was driven into the said holes

and excavations, etc., to the damage of said automobile, etc.

The third plea of defendant was as follows:

Defendant says that the excavation complained of was between the rails of one of defendant's tracks and within 20 inches on each side thereof, and that defendant had caused red lights to be set out in a row on each side of said excavation, one light at each end of the excavation and one light about the middle, which said two rows of lights were not more than eight feet apart, and which said two rows of lights plaintiff observed, and nevertheless undertook to drive his automobile between the said rows of red lights, and thereby voluntarily assumed the risk of so doing.

To this plea plaintiff replied specially as follows:

That the excavation by said plaintiff complained of was between the rails of defendant's track, and within 20 inches on each side thereof, and defendant did have three red lights stationed in a row on each side of said excavation, one at each end thereof, and one about the middle, which two said rows of red lights were eight feet apart. And plaintiff avers that defendant did have, and in addition to two said rows of red lights did station, have, and maintain, numerous other red lights on the south side of said excavation, and on the south side of Government street opposite the said excavation, and extending to the south curb of said Government street, so that by reason of the stationing and maintenance of the said lights as aforesaid it was made to appear that the whole of the south side of the said Government street opposite the said excavation was closed to traffic, and to vehicles being run and operated over and along the said street, and that the space of eight feet between the said two rows of red lights was unobstructed and safe for traffic and travel; that the plaintiff, in view of the said lights being stationed and maintained as aforesaid, did reasonably believe that the said space and opening between the two rows of lights eight feet apart was unobstructed and safe for traffic and travel, and did while exercising reasonable care and caution drive, or cause to be driven, his automobile between the said two rows of lights eight feet apart, as a result whereof the said plaintiff's automobile did drop and fall into the excavation made and maintained by the said defendant between the said two rows of red lights, and otherwise unguarded by the said defendant, causing thereby proximately the damage to the plaintiff's said automobile in his complaint complained of. And this the said plaintiff is ready to verify.

The court overruled plaintiff's demurrer to plea 3, and sustained defendant's demurrer to replication, and plaintiff took nonsuit, with bill of exceptions.

Stevens, McCorvey & McLeod and D. B. Goode, all of Mobile, for appellant. Harry T. Smith & Caffey, of Mobile, for appellee.

SOMERVILLE, J. The question of decisive importance in this case, as presented by the demurrer to defendant's third plea, is whether the nine red lights stationed as warning signals—three on each side of defendant's street railway track, with an open space of eight feet occupied by the track between them—were, as a matter of law, a sufficient warning to travelers in vehicles, who saw the lights, that the street way with-

in the two rows of lights was in a condition dangerous or impassable for vehicles.

[1] It must of course be conceded that, as a general rule, the sufficiency of signals or barriers to give reasonable warning of or security against existing danger, especially with respect to their character, number, and arrangement, is a question of fact for the jury. Counsel for appellant have collected a number of cases so holding: *Mayor, etc., of Baltimore v. Maryland*, 166 Fed. 641, 92 C. C. A. 335; *Meck v. Nebraska Tel. Co.*, 96 Neb. 539, 148 N. W. 325; *McMahon v. City of Boston*, 190 Mass. 388, 76 N. E. 957; *Gridler v. Jefferson Realty Co. (Ky.)* 116 S. W. 691; *Stockton Auto Co. v. Confer*, 154 Cal. 402, 97 Pac. 881; *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Donnelly v. City of Rochester*, 166 N. Y. 315, 59 N. E. 989. See, also, *Fox v. Wharton*, 64 N. J. Law, 453, 45 Atl. 793.

[2] We were at first of the opinion that, as a matter of simple, practical common-sense, the two rows of red lights, as shown by the plea, constituted a reasonable and sufficient warning to travelers, regardless of all other circumstances, not to pass along the car track between the lights; but, upon further consideration, we are of the opinion that that conclusion cannot be safely reached by the court, and that the question should be determined by the jury in the light of all the facts. It may be that the street lights made visible to plaintiff the excavations outside of the rails, but not those inside; and it is conceivable that two such rows of lights might be placed to guard outside excavations alone, with nevertheless a safe and unbroken passageway within. It does not appear how far the excavations extended along the track, nor how far apart the lights were in the rows—a circumstance which might favor conflicting inferences as to the significance of the lights as they appeared to plaintiff. It may well be that a jury would have no difficulty in finding that the lights were, under all the circumstances, a sufficient warning against the attempted passage, or that plaintiff was in any case guilty of contributory negligence. But we think the jury ought to pass on these questions. We hold, therefore, that the plea was subject to the demurrer, which should have been sustained.

[3] Although the plea alleges, by way of conclusion, that plaintiff "assumed the risk" of driving between the lights, the plea is necessarily to be regarded simply as a plea of the general issue, since it is in traverse of the complaint, which charges a negligent failure to guard the excavations with "proper and sufficient danger signals." If the signals were sufficient, plaintiff's case falls. If they were not sufficient, plaintiff did not, merely because he saw them, assume the risk of a danger which they did not fairly forecast.

The other special pleas were not subject to the demurrers assigned. For the error in overruling the demurrer to plea 3, the judgment will be reversed, and one here rendered sustaining the demurrer, and the cause will be remanded.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Ex parte HILL. (6 Div. 251.)

(Supreme Court of Alabama. May 4, 1916.)

1. JUDGES \Leftrightarrow 47(1) — DISQUALIFICATION — CHARGES AGAINST OFFICERS.

Under Acts Sp. Sess. 1909, p. 263, § 1, providing for the appointment of trial court stenographers by the judges thereof, and declaring that the stenographer shall be an officer of the court, and shall hold office for the term of the judge, provided that the judge shall have power to remove the stenographer on proper charges filed in writing, and duly sworn to, the judge may personally hear and determine the charges, though sworn to by himself.

[Ed. Note.—For other cases, see *Judges, Cent. Dig.* §§ 214-219, 223; *Dec. Dig.* \Leftrightarrow 47(1).]

2. COURTS \Leftrightarrow 57(1) — OFFICERS — STENOGRAPHERS—PLACE OF SERVICE.

Under Acts Sp. Sess. 1909, p. 263, providing for the appointment of trial court stenographers by the judge thereof, and providing in section 4 that the stenographer shall serve in the circuit for which he is appointed, the judge has no right to assign a court stenographer to serve in another circuit to which the judge is assigned to preside.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 198, 199; *Dec. Dig.* \Leftrightarrow 57(1).]

3. COURTS \Leftrightarrow 57(1)—OFFICERS—PROCEEDINGS FOR REMOVAL—PLACE OF TRIAL.

Where a judge files charges against a court stenographer of his own circuit, he must try such charged at some appropriate place within that circuit, and not in another circuit where he has been assigned to preside temporarily.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 198, 199; *Dec. Dig.* \Leftrightarrow 57(1).]

Petition by Charles F. Hill for prohibition to the Honorable James E. Blackwood, Judge of the Sixteenth Judicial Circuit, restraining him from trying charges against the petitioner as official stenographer. Writ granted in part.

The petition shows the following: Petitioner was appointed as official stenographer for said court by Judge Blackwood in 1911, under the act approved August 26, 1909 (Acts 1909, p. 263). Judge Blackwood was ordered by the Chief Justice of the Supreme Court to preside in the circuit court of Jefferson county, the Tenth judicial circuit, for eight weeks beginning January 3, 1916, and he forthwith ordered petitioner to appear at said time and place, to wit, Monday, January 3, 1916, at 10 o'clock a. m., in the Lyon-Terry Building, and take up his duties as official court reporter for his circuit. Petitioner declined to serve as reporter in Jefferson county in compliance with said order,

and after some correspondence between him and said judge the judge filed written charges under his own oath in the offices of the circuit clerk both of Jefferson and of Blount counties, the latter being in the Sixteenth circuit, and notified petitioner to appear and defend same, if he chose to do so, in the Lyon-Terry Building in Birmingham on January 10, 1916. The charges filed are that petitioner failed and refused to serve as reporter in Birmingham, as ordered by the judge, and that he has been guilty of misconduct in office in and about and pertaining to the duties of his office. In his answer to the rule the judge admits the facts alleged in the petition, but affirms the duty of petitioner to serve as directed by him, and affirms his own power and duty as judge to pass upon the charges made by himself as affiant. He affirms also his power to hear and determine the proceedings in Birmingham, though he avers that he would not have heard it outside of the Sixteenth circuit against petitioner's objection.

C. C. Nesmith and Luke P. Hunt, both of Birmingham, for appellant. J. E. Blackwood, of Gadsden, pro se.

SOMERVILLE, J. Section 1 of the act approved August 28, 1909 (Sp. Sess. Acts 1909, p. 263) provides for the appointment of trial court stenographers by the judges thereof, and declares:

"Said stenographer shall be an officer of the court and shall hold office for the term of the judge appointing him; provided, that the judge of said court shall, at any time, have power to remove such official stenographer upon proper charges filed in writing and entered of record duly sworn to, for incompetency, neglect of duty, insubordination, or misconduct, if, after hearing such charges and such proof as may be offered in support thereof and against the same, it shall appear that such charges are well founded and satisfactorily proven."

[1] A proceeding under this act for the removal of a court stenographer is somewhat analogous to a proceeding for contempt, and we think that, whether it is instigated by the judge or not, it was intended that he should personally hear and determine the case, and that the ordinary rule of disqualification does not apply. It is unnecessary to elaborate the reasons for this conclusion, since, by amendment of the act, court stenographers are now removable at the discretion of the judges who appoint them. Sess. Acts 1915, p. 859.

[2] Section 4 of the act referred to prescribes the territory within which a court stenographer shall serve, and this is very clearly the circuit for which he is appointed. He is an officer of the circuit court, and not an attaché of the judge, and we can discover no authority for his assignment to work outside of his proper circuit. It follows that the requisition made upon petitioner by the respondent judge was disobeyed without any breach of official duty.

We shall, of course, presume that, if petitioner has not otherwise given any cause for his just removal from office, the learned respondent judge will dismiss the proceeding in accordance with the views above expressed.

[3] We are of the opinion, however, that, since respondent can conduct this proceeding only as judge of the Sixteenth judicial circuit, he must necessarily do so at some appropriate place within the circuit, and not elsewhere.

It results that the prayer to restrain respondent from hearing and determining the removal charges against petitioner will be denied; but the prayer to perpetually restrain respondent from hearing the cause outside of the Sixteenth judicial circuit will be granted, and the proper writ to that end will forthwith issue.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

LOUISVILLE & N. R. CO. v. LOVELL. (6 Div. 290.)

(Supreme Court of Alabama. May 18, 1916.)

1. EVIDENCE ~~§~~547—EXAMINATION OF EXPERTS—DISCRETION OF TRIAL COURT.

The examination of a physician testifying as an expert as to the personal injuries alleged to have been received by the plaintiff was of necessity largely discretionary with the trial court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. ~~§~~547.]

2. EVIDENCE ~~§~~536 — EXPERT TESTIMONY — QUALIFICATION OF WITNESS.

A general knowledge of the department to which the specialty belongs is enough to qualify a witness to testify thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347; Dec. Dig. ~~§~~536.]

3. EVIDENCE ~~§~~546—DISCRETION OF TRIAL COURT—QUALIFICATION OF EXPERT.

The sufficiency of a witness' knowledge of the subject inquired about to qualify him to speak as an expert in the matter is addressed to the discretion of the trial court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. ~~§~~546.]

4. TRIAL ~~§~~252(9) — INJURY ON RAILROAD TRACK—INSTRUCTIONS—EVIDENCE.

In an action for injuries in a collision between defendant's train and plaintiff's team and wagon, where there was some evidence of conditions which would require the observance of the statute relating to lookout and signals at a crossing, there was no error in charging the jury thereon, or in refusing defendant's requested charge taking such evidence from the jury's consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. ~~§~~252(9).]

Appeal from Circuit Court, Cullman County; Robert C. Brickell, Judge.

Action by R. N. Lovell against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals under

section 6, p. 449, Act April 18, 1911. Affirmed.

Geo. H. Parker, of Cullman, and Eyster & Eyster, of New Decatur, for appellant. A. A. Griffith, of Cullman, and Callahan & Harris, of Decatur, for appellee.

MAYFIELD, J. This is an action to recover damages for injuries received in consequence of a collision between appellant's accommodation train, and appellee's team and wagon, in which collision two mules of appellee's were killed, and his wagon was demolished, and appellee himself, as he claims, received severe personal injuries; he being in the wagon and driving the team at the time of the collision.

The case was tried on the issues of negligence on the part of the defendant in the operation and management of the trains, in the failure to give the statutory signals, etc., and of contributory negligence on the part of the plaintiff in failing to stop, look, and listen, before attempting to cross the railroad track, and in failing to observe and avoid the danger.

Dr. Hays, a physician, testified as an expert as to the personal injuries alleged to have been received by plaintiff, in the particulars of extent, character, and probable cause.

[1, 2] There was no error in any of the rulings as to such evidence. The examination of such witnesses as to such matters is, of necessity, largely discretionary with the trial court, and we find no abuse of the discretion, nor any denial to the defendant of any of its rights in and to such examinations. A general knowledge of the department to which the specialty belongs is enough to qualify a witness to testify thereto, and if such one, in the opinion of the court, have special acquaintance with the immediate line of inquiry, he need not be thoroughly acquainted with the differentia of the specific specialty under consideration.

[3] The sufficiency of a witness' efficiency in knowledge of the subject inquired about to qualify him to speak as an expert in the matter is addressed to the discretion of the trial court and its rulings thereon can be disturbed only on its clearly appearing that the court's action was erroneous. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 627, 53 South. 162.

[4] Counsel for appellant are in error in treating the case as if the undisputed evidence showed the track to be straight for such distance, on either side of the point at which the collision occurred, as to take the case out of the influence of the statute which requires those operating locomotives and trains, as in this case, to keep a special lookout, and to sound signals of alarm, etc. It is true that the great weight of the evidence tends to show that the track was straight and free from obstructions as to view, etc.;

but there was some evidence of conditions which would require the observance of the statute, and therefore there was no error in charging the jury on this subject and phase of the case, as was done, nor in refusing requested charges to the defendant, which took from the jury the consideration of the evidence on this subject.

The evidence was in dispute as to each of the issues tried, and we are not prepared to say that the trial court erred in declining to set aside the verdict and award a new trial.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

MARTIN v. CANNON et al. (6 Div. 354)
(Supreme Court of Alabama. May 18, 1916.)

1. PLEADING \S 34(4)—DEMURRER—CONSTRUCTION.

A pleading assailed by demurrer must be construed more strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 66; Dec. Dig. \S 34(4).]

2. PARTITION \S 55(2)—BILL—REQUISITES—INTEREST OF COMPLAINANTS.

A bill for the sale of realty and a distribution of the proceeds among the owners, brought under Code 1886, \S 3253 et seq. (Code 1907, \S 5222 et seq.), alleging that respondent owned an undivided three-quarters interest, and that the three complainants owned a one-fourth interest, without averring the respective interests of the complainants, was defective, since the court could not know how to distribute the proceeds, and as the intentment that they owned the one quarter interest equally could not be indulged on demurrer.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 150, 152-156, 158, 182; Dec. Dig. \S 55(2).]

Appeal from Chancery Court, Cullman County; James E. Horton, Jr., Chancellor.

Bill by A. W. Cannon and others against W. G. Martin for the sale of realty and a distribution of the proceeds. Decree for complainants, and defendant appeals. Reversed, and decree rendered sustaining the demurrer, and cause remanded with leave to amend.

F. E. St. John, of Cullman, for appellant. A. A. Griffith, of Cullman, for appellees.

ANDERSON, C. J. [1, 2] The bill in this case seeks a sale of certain real estate and a distribution of the proceeds between the owners thereof. The bill alleges that the respondent owns an undivided three-fourths interest in the land, and that the three complainants own a one-fourth interest in said land. The bill does not aver, however, the respective interests of the complainants in and to the said undivided one-fourth interest, and, from aught that appears, their respective interests may be different and unequal, and pleading, when assailed upon demurrer, must be construed more strongly against the

pleader, and this identical point was made by ground 4 of the respondent's demurrer. From the averments of this bill, the court would not know how to distribute the proceeds of the sale as between the three complainants, as it does not show that they own equally the undivided one-fourth interest, and inferences and intendments that they do cannot be indulged in considering a demurrer to the bill. The case of *Hillens v. Brinsfield*, 108 Ala. 605, 18 South. 604, cited and relied upon by counsel in support of the sufficiency of the bill does hold that section 5205 of the Code of 1907, as to the contents of a petition for the division or partition of land in kind, does not apply to proceedings under subsequent sections for the sale of land for division, but we think that said case holds and directs that a petition or bill for a sale for distribution must set forth the respective interests of the owners of the land. We quote from the opinion:

"In all judicial proceedings, the essential facts constituting the cause of action must appear, in a way that an issue can be formed upon them, and so that the court can proceed, in an intelligent manner, to observe and enforce the rights of the parties. When we read and analyze the several provisions of the several sections of this system, we see plainly that no case would be stated upon which the court could intelligently act, which failed to show that there was a joint or common property, and what that property was; that there were joint or common owners thereof, who they were, and *their respective interests therein.*"

Again it was said in said opinion:

"We must not, however, be understood as holding that the statutory system for the sale of property for distribution, as embodied in sections 3253 to 3259, inclusive, supra, does not require the petition for a sale to set forth a proper description of the property to be sold, and to make the joint tenants, or tenants in common, parties thereto, *showing their respective interests in the property.*" (Italics supplied.)

We think that good pleading requires that the petition or bill should set forth the interest of each joint owner, and not leave it to conjecture or inference, which the present bill fails to do, and which said infirmity was pointed out by the respondent's demurrer, and the chancery court erred in overruling said demurrer.

The decree of the chancery court is reversed, and one is here rendered sustaining the demurrer, and the cause is remanded, and the complainants are given 30 days within which to amend said bill.

Reversed, rendered, and remanded.

McCLELLAN, SAYRE, and GARDNER, JJ., concur.

POE v. SOUTHERN RY. CO. (6 Div. 287.) (Supreme Court of Alabama. May 18, 1916.)

1. RAILROADS ⚡480(2) — SETTING FIRES — PRIMA FACIE CASE.

The mere fact that fire was communicated to plaintiff's property from a burning railroad

car or building on the railroad's right of way does not make out a prima facie case of negligence, as in cases of sparks from passing engines or locomotives.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1710, 1712, 1733; Dec. Dig. ⚡480(2).]

2. RAILROADS ⚡480(3) — SETTING FIRES — BURDEN OF PROOF.

Where an action is against a railroad company for setting a fire, and there is evidence tending to show that plaintiff's building was ignited by fire from a locomotive, the burden passes to the railroad to show at least prima facie that the fire was emitted without negligence in the engine's construction, equipment, or operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1711; Dec. Dig. ⚡480(3).]

3. RAILROADS ⚡480(1) — SETTING FIRES — BURDEN OF PROOF.

Where fire is communicated from a railroad right of way in consequence of a burning building or a burning car merely standing on the track, in the absence of statute the same rules of evidence prevail as to the burden of proof as in other cases of fire communicated from one building to another or one premises to another.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1709, 1716; Dec. Dig. ⚡480(1).]

4. NEGLIGENCE ⚡21 — FIRES — LIABILITY OF OWNER OF PREMISES.

Where an owner of property sets out fire upon his own premises for a lawful purpose and in a proper and careful manner and without negligence, or the fire accidentally starts without his fault, he is not liable for damages caused by its being communicated to the property or premises of another, unless he is thereafter guilty of negligence in failing to control or extinguish such fire before it spreads.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. ⚡21.]

Appeal from Circuit Court, Fayette County; Bernard Harwood, Judge.

Action by George W. Poe, Jr., against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Gunn & Powell, of Jasper, for appellant. Bankhead & Bankhead, of Jasper, for appellee.

MAYFIELD, J. The action is to recover damages for the destruction of a lot of lumber by fire. The lumber was placed on the defendant's right of way for shipment. Fire was communicated to it from a camp or commissary car used by the section hands of the defendant, stationed on a side track near plaintiff's lumber. The origin of the fire in the car, whether accident, negligence, or intentional act, is not shown. The fire was discovered about 10 o'clock at night, by the smoke's awakening those sleeping in or near the car. There were on the same switch track some bunk cars, in which the employes slept, a cook car, and the commissary car which burned. The other cars were removed or pushed away, and were not burned. The burning car was so far consumed and so hot when the fire was discovered that it could be

moved, or was moved, only a short distance. All the witnesses who were present testified that the car was not moved at all after the fire was discovered.

One of the main contentions of the plaintiff, appellant here, is that there were circumstances and conflicts in the evidence tending to show that the car was moved after the fire was discovered and left nearer plaintiff's lumber; and this is by appellant claimed to be the basis of the negligence and the proximate cause of the burning of his lumber. These circumstances were that the burned car was seen the evening before the fire, when it was several feet further from the lumber, than was the heap of ashes, iron, etc., which next morning indicated the point where it was consumed. The contradiction consists of evidence tending to show contradictory statements by some of the witnesses who testified that the car was not moved after the fire was discovered. Appellant claims that this made a question for the jury to say whether, if it had not been moved, it would probably not have ignited the lumber.

The trial court, after all the evidence was in, gave the affirmative charge for the defendant, and this is the only error insisted upon to reverse the judgment.

We are not of the opinion that the circumstances and apparent conflict above pointed out showed or tended to show any negligence in the moving of this car, or in the failure to move it after the fire was discovered. If it be conceded that the car was moved several feet between the time plaintiff and his witnesses saw it on the evening before and the time it was burned, there is nothing in this to show any actionable negligence or willful motive to jeopardize or burn the lumber. It may have been moved with the greatest possible care, whether moved before or after the fire was discovered; and the evidence introduced to show contradictory statements, if true, did not show or tend to show any actionable negligence, but rather tended to show the contrary; that is, that it was impossible to move it away from the point where it burned. We do not think that the facts shown, most of which are undisputed, make a case of *res ipsa loquitur*, to show actionable negligence on the part of the defendant. The undisputed facts no more show actionable negligence than they do unavoidable accident.

[1, 2] It is true that we have a line of cases somewhat like this—that is, cases against railroads for the destruction of property by fire communicated by agencies of the railroad—wherein the burden of proof is on the railroad company to go forward with evidence to rebut certain presumptions of negligence. These were cases, however, in which the fire was communicated by sparks from engines, locomotives, etc., but the rule of which has never been extended to cases like the one under consideration. In cases like this the mere fact that the fire was com-

municated to plaintiff's property from a burning car or building on the defendant's right of way does not make out a *prima facie* case of negligence as in cases of sparks from passing engines or locomotives. These rules and distinctions have been announced and made by this court in the following cases: *Sullivan T. Co. v. L. & N. R. R. Co.*, 163 Ala. 126, 50 South. 941, and *Ala. G. S. R. R. Co. v. Demoville*, 167 Ala. 292, 52 South. 406. Where the action is against a railroad company for setting out a fire, and there is evidence tending to show that plaintiff's building was ignited by fire from defendant's locomotive, the burden passes to the defendant to show at least *prima facie* that the fire was emitted without negligence in the construction, equipment, and operation of the locomotive. *Sullivan T. Co. v. L. & N. R. R. Co.*, *supra*; 7 Mayf. Dig. 779.

The burden of proof and the presumption of negligence are somewhat different in cases in which property is fired directly by sparks emitted from engines from cases in which the fire spread from other property on fire upon the right of way of the company. Mr. Elliott (*Railroads*, § 1242) says that, where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way, the authorities are pretty well agreed and settled. In such cases it is but just that the burden should rest upon the plaintiff; for the means of proof are as equally available to the plaintiff as to the defendant. *A. G. S. R. R. Co. v. Demoville*, *supra*; 7 Mayf. Dig., *supra*.

The Demoville Case is nearer in point than any of our cases. There the distinction between cases of fire communicated by sparks from engines and cases like this was recognized; but in that case there was evidence which tended to show negligence in the loading of cotton into the car, and that the cotton was either put into the car when on fire, or was negligently fired while being loaded by the railroad's agents. There is no such proof in this case, but, on the contrary, the whole tendency of the evidence is to show that the origin of the fire was an accident pure and simple; that it was not the result of any negligence or wrongful act on the part of the defendant or of its agents.

The case nearest in point which we have found is that of *So. Ry. Co. v. Power Fuel Co.*, 152 Fed. 917, 82 C. O. A. 65, 12 L. R. A. (N. S.) 472. The facts in that case were very similar to the facts in this case, with this difference: There there was some evidence to show negligence in the originating of the fire in the camp car, in that a drunken man was handling a lamp which ignited the car. The case was also governed by the laws of South Carolina, which state has a statute placing the burden of proof on railroad companies in all cases where fire is communicated from the railroad's right of way, whether sparks from passing engines, or from other

cause. In that case it was held that no liability was shown; but it was also held by a majority of the judges that the only acts of negligence shown or attempted to be shown were acts of persons not the agents of the defendant, or, if they were such, then they were done by such agents while not acting within the line or scope of their authority. In that case, however, the judgment of the trial court was reversed for its refusal to direct a verdict in favor of the defendant, notwithstanding the statute above referred to.

[3, 4] Where fire is communicated from a railroad right of way, in consequence of a burning building, or of a burning car merely standing on the track, as in the case at bar, in the absence of a statute, the same rules of evidence as to the burden of proof seem to prevail as in other cases of fire communicated from one building to another, or from one premises to another. This rule seems to be now settled in the United States to the effect that, where an owner of property sets out fire upon his own premises for a lawful purpose and in a proper and careful manner, and without negligence, or the fire accidentally starts thereon without his fault, he is not liable for damages caused by the fire's being communicated to the property or premises of another, unless he was thereafter guilty of negligence or actionable wrong in failing to control or extinguish it before it spread from his premises. *McNally v. Colwell*, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 501. In a note to this case the authorities are collected, and it is there said in conclusion:

"The destruction of property by fire, either upon the premises where it starts or is kindled or on other property to which it is communicated, does not raise a presumption of negligence either in the kindling or management of the fire. *Catron v. Nichols*, 81 Mo. 80, 51 Am. Rep. 222; *Lansing v. Stone*, 37 Barb. [N. Y.] 15; *Bryan v. Fowler*, 70 N. C. 596. In all such cases the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the party kindling the fire. *Sturgis v. Robbins*, 62 Me. 289; *Bachelder v. Heagan*, 18 Me. 32; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460; *Read v. Pennsylvania R. R. Co.*, 44 N. J. Law. 280; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584. Whether there was negligence is a question of fact for the jury to determine. *Powers v. Craig*, 22 Neb. 621 [35 N. W. 888]; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Jordan v. Lassiter*, 51 N. C. 130; *Dewey v. Leonard*, 14 Minn. 153 [Gil. 120]; *De France v. Spencer*, 2 G. Greene [Iowa] 462, 52 Am. Dec. 533."

This is, of course, subject to exception where the fire was communicated by sparks from engines, locomotives, etc., as we have above shown. The reason of this distinction we need not now discuss.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Ex parte PUGH. (6 Div. 333.)

(Supreme Court of Alabama. May 18, 1916.)

Certiorari to Court of Appeals.

Application by John C. Pugh for certiorari to the Court of Appeals, to annul or revise an order of that court (70 South. 973) awarding mandamus. Denied.

Richard H. Fries and W. A. Jenkins, both of Birmingham, for appellant.

MAYFIELD, J. This is an application for certiorari to the Court of Appeals, to annul or revise an order of that court awarding the petitioner a writ of mandamus to Judge John C. Pugh, of the city court of Birmingham, commanding him to allow the revivor of a once-pending action in that court.

The questions involved were before the Court of Appeals on an appeal by petitioner, reported as *Townley v. Burgin*, 69 South. 591, and from the judgment of the Court of Appeals in that case an application for certiorari to this court was made, and was denied. On the former appeal to the Court of Appeals it was held that an appeal would not lie, and that mandamus was the proper remedy, if any there was; and that ruling was in effect affirmed by this court on the former application for certiorari. Petitioner has pursued the remedy suggested. It does seem that he should have some relief, and that mandamus is appropriate, and that the Court of Appeals ruled correctly.

Application denied.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

MEMORANDUM DECISIONS

ALABAMA STEEL & WIRE CO. v. BUDWIG & MYERS FIRE BRICK CO. (6 Div. 220.) (Supreme Court of Alabama. April 20, 1916.) Appeal from City Court of Birmingham; Charles W. Ferguson, Judge. Kerr & Haley, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed on motion of appellee.

BIRMINGHAM RY., LIGHT & POWER CO. v. HARRIS. (6 Div. 198.) (Supreme Court of Alabama. April 6, 1916.) Appeal from City Court of Birmingham; Charles W. Ferguson, Judge. Tillman, Bradley & Morrow, of Birmingham, for appellant. Harsh, Harsh & Harsh, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed by agreement of parties.

BIRMINGHAM RY., LIGHT & POWER CO. v. VINZANT et al. (6 Div. 197.) (Supreme Court of Alabama. April 18, 1916.) Appeal from City Court of Birmingham; A. H. Alston, Judge. Tillman, Bradley & Morrow, of Birmingham, for appellant. Beddow & Oberdorfer, of Birmingham, for appellees.

PER CURIAM. Appeal dismissed by agreement of parties.

CONSUMERS' COAL & FUEL CO. v. DAVIS et al. (8 Div. 152.) (Supreme Court of Alabama. April 20, 1916.) Appeal from Chancery Court, Walker County; A. H. Benners, Chancellor. Davis & Fite, of Jasper, for appellees.

PER CURIAM. Appeal dismissed.

COOK v. LAMB et al. (6 Div. 191.) (Supreme Court of Alabama. April 20, 1916.) Appeal from Circuit Court, Jefferson County; E. O. Crowe, Judge. Tillman, Bradley & Morrow, and C. E. Rice, all of Birmingham, for appellees.

PER CURIAM. Appeal dismissed on motion of appellee.

HARDEN v. LOUISVILLE & N. R. CO. (6 Div. 153.) (Supreme Court of Alabama. April 18, 1916.) Appeal from Circuit Court, Cullman County; Robert C. Brickell, Judge. George H. Parker, of Cullman, for appellee.

PER CURIAM. Appeal dismissed on motion of appellee.

MATHIS v. MEADOWS. (5 Div. 619.) (Supreme Court of Alabama. April 20, 1916.) Appeal from Chancery Court, Russell County; W. R. Chapman, Chancellor. Glenn & De Grafenried, of Seale, for appellant. J. D. Norman, of Union Springs, for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

MONTGOMERY LIGHT & WATER POWER CO. v. NEW FARLEY NAT. BANK. (3 Div. 213.) (Supreme Court of Alabama. May 11, 1916.) Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge. Steiner, Crum & Weil, of Montgomery, for appellant. Rushton, Williams & Crenshaw, of Montgomery, for appellee.

PER CURIAM. Appeal dismissed by appellant.

RAY v. CARBON HILL BANKING CO. (6 Div. 127.) (Supreme Court of Alabama. April 20, 1916.) Appeal from Circuit Court, Walker County; J. J. Curtis, Judge. Bankhead & Bankhead, of Jasper, for appellee.

PER CURIAM. Appeal dismissed.

SCOTT v. STATE. (5 Div. 599.) (Supreme Court of Alabama. April 13, 1916.) Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed because of escape of appellant.

SWEENEY et al. v. SWEENEY et al. (1 Div. 896.) (Supreme Court of Alabama. April 4, 1916.) Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge. Boyles & Kohn, of Mobile, for appellants.

PER CURIAM. Appeal dismissed by appellant.

BELL v. STATE. (6 Div. 153.) (Court of Appeals of Alabama. May 30, 1916.) Appeal from Criminal Court, Jefferson County; A. H. Alston, Judge. Frank Bell was convicted of obtaining goods by means of false pretenses, and he appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The certificate of the trial judge set out in the transcript shows that the

time for tendering a bill of exceptions had expired and that no bill had been presented. The record containing no bill of exceptions, and showing an indictment in due form charging the defendant with having obtained goods by means of false pretenses, and a verdict of guilty and judgment and sentence of the court in conformity with the finding of the jury, and being in all other respects regular, and showing nothing authorizing a reversal of the judgment appealed from, an affirmance of the judgment of conviction is ordered. Affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. McDONOUGH. (6 Div. 930.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from City Court of Birmingham; C. W. Ferguson, Judge. Tillman, Bradley & Morrow, of Birmingham, for appellant. Gibson & Davis, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed by appellant.

CAIN v. STATE. (6 Div. 984.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Tuscaloosa County Court; H. B. Foster, Judge. Howard Cain was convicted of crime, and he appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

BROWN, J. This is an appeal on the record containing no bill of exceptions. The record and proceedings of the trial court have been examined and appear in all things regular, and the judgment must be affirmed. Affirmed.

COOK v. STATE. (3 Div. 244.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of Attorney General.

COPELAND v. CITY OF JASPER. (6 Div. 943.) (Court of Appeals of Alabama. April 18, 1916.) Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

PER CURIAM. Dismissed for want of prosecution.

DARDONE v. STATE. (6 Div. 872.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. Prosch & Prosch and M. H. Murphy, all of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Dismissed by appellant.

DAVIDSON v. ROBERTS. (6 Div. 145.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from City Court of Birmingham; H. A. Sharpe, Judge. Harsh, Harsh & Harsh, of Birmingham, for appellee.

PER CURIAM. Dismissed by agreement.

EDMONDSON et al. v. CLOPTON. (8 Div. 376.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Circuit Court, Morgan County; R. C. Brickell, Judge.

PER CURIAM. Appeal dismissed for want of prosecution.

ELLIOTT v. TARTT. (6 Div. 1.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from City Court of Birmingham; John C. Pugh, Judge. Patton & Patton, of Livingston, for appellee.

PER CURIAM. Affirmed on certificate.

FARLEY v. STATE. (1 Div. 212.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from City Court of Mobile; O. J. Semmes, Judge. Frank Farley was convicted, and appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was convicted of a violation of the prohibition law. The transcript certified here by the clerk of the trial court contains no bill of exceptions, nor does it appear from the record that any questions were reserved for our consideration by demurrers or otherwise. In obedience to the mandate of section 6264, Criminal Code, we have carefully reviewed the record and find no error apparent thereon. The judgment of the court below being regular, the same will accordingly be affirmed. Affirmed.

FIRST NAT. BANK OF LINDEN v. MARENGO COUNTY BANK. (2 Div. 134.) (Court of Appeals of Alabama. April 4, 1916.) Appeal from Law and Equity Court, Marengo County; Edward J. Gilder, Judge. I. I. Canterbury, of Linden, for appellant. William Cunningham, of Linden, for appellee.

PELHAM, P. J. Affirmed on motion of appellee for failure to assign errors. Affirmed.

FLEURON v. CITY OF MOBILE. (1 Div. 166.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from City Court of Mobile; O. J. Semmes, Judge. W. L. Martin, Atty. Gen., for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

FLEURON v. STATE. (1 Div. 167.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from City Court of Mobile; O. J. Semmes, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

FRYE v. STATE. (1 Div. 187.) (Court of Appeals of Alabama. April 13, 1916.) Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

GRAND BENEV. ASS'N et al. v. THOMAS et al. (7 Div. 391.) (Court of Appeals of Alabama. May 30, 1916.) Appeal from City Court of Talladega; Marion H. Sims, Judge. C. B. Powell, of Birmingham, for appellants. R. Williams, of Sylacauga, for appellees.

PER CURIAM. Appeal dismissed for want of prosecution.

HARKNESS v. STATE. (6 Div. 994.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Circuit Court, Blount County; J. E. Blackwood, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

HARRINGTON v. STATE. (3 Div. 221.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from City Court of Montgomery; Armstead Brown, Judge. John Harrington, alias Dago, was convicted of an offense, and appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

BROWN, J. This appeal is on the record without bill of exceptions, and we find no error in the record. The judgment must be affirmed. Taylor v. State, 70 South. 949; Hunter v.

State, 48 Ala. 272; Upshaw v. State, 11 Ala. App. 310, 66 South. 821. Affirmed.

HEADLEY v. STATE. (5 Div. 210.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant in writing.

IMPERIAL COAL & COKE CO. v. HUGHES. (6 Div. 910.) (Court of Appeals of Alabama. April 18, 1916.) Appeal from City Court of Birmingham; John H. Miller, Judge. Tillman, Bradley & Morrow, of Birmingham, for appellant. Hanby & Fisk, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed by appellant.

JACKSON v. STATE. (6 Div. 172.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Criminal Court, Jefferson County; A. H. Alston, Judge. Will Jackson was convicted of assault with intent to murder, and he appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

EVANS, J. Appellant was convicted of assault with intent to murder. No bill of exceptions was presented to the trial judge within the 90 days allowed by law and the appeal is on the record proper. It appearing upon an inspection of the record that the judgment and proceedings were regular, and no error being apparent thereon, the judgment in the lower court is affirmed. Affirmed.

JOHNSON v. STATE. (4 Div. 347.) (Court of Appeals of Alabama. Feb. 1, 1916.) Appeal from Circuit Court, Barbour County; M. Solie, Judge. W. L. Martin, Atty. Gen., for the State.

THOMAS, J. Appeal dismissed on authority of Tice v. State, 70 South. 967.

JONES v. STATE. (6 Div. 173.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge. Wm. Jones was convicted of crime, and he appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

BROWN, J. This appeal is upon the record, without bill of exceptions, and the proceedings of the trial court appear in all things regular and free from error. Affirmed.

KEY v. STATE. (4 Div. 432.) (Court of Appeals of Alabama. June 8, 1916.) Appeal from Circuit Court, Covington County; A. B. Foster, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

LEE v. STATE. (6 Div. 175.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from Criminal Court, Jefferson County; J. E. Blackwood, Judge. George D. Finley, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

MCBRIDE v. STATE. (6 Div. 962.) (Court of Appeals of Alabama. June 1, 1916.) Appeal from Tuscaloosa County Court; H. B. Foster, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

McGINNIS v. STATE. (2 Div. 138.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from Law and Equity Court, Marengo County; Edward J. Gilder, Judge. Proceedings between Alex. McGinnis, Jr., and the State. From the judgment, McGinnis appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The motion of the Attorney General to dismiss the appeal because no written statement of appeal was filed in compliance with Supreme Court rule 43 (61 South. viii) is not well taken. *Rivers v. State*, 69 South. 387. The appeal is on the record without a bill of exceptions. The judgment was rendered on the 24th day of March, 1915, and the time for presenting and having signed a bill of exceptions having expired when the case was submitted here on February 10, 1916, and the record being regular and showing no error authorizing reversal, an affirmance is ordered. Affirmed.

MAHONING POTTERY CO. v. COX et al. (7 Div. 398.) (Court of Appeals of Alabama. May 30, 1916.) Appeal from Circuit Court, Calhoun County; Hugh D. Merrill, Judge.

PER CURIAM. Appeal dismissed for want of prosecution.

MORGAN v. CITY OF TUSCALOOSA. (6 Div. 865.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from Tuscaloosa County Court; H. B. Foster, Judge. Brown & Ward, of Tuscaloosa, for appellee.

PER CURIAM. Dismissed for want of prosecution.

MURPHREE v. ALLEN. (6 Div. 854.) (Court of Appeals of Alabama. April 18, 1916.) Appeal from City Court of Birmingham; H. A. Sharpe, Judge. Hugh Lester, of Birmingham, for appellee.

PER CURIAM. Dismissed for want of prosecution.

PUGH v. STATE. (4 Div. 425.) (Court of Appeals of Alabama. April 20, 1916.) Appeal from Circuit Court, Crenshaw County; A. E. Gamble, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

SAMPLE v. STATE. (2 Div. 137.) (Court of Appeals of Alabama. April 4, 1916.) Appeal from Law and Equity Court, Marengo County; Edward J. Gilder, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of Attorney General.

SEEBERG S. S. LINE v. WILLIS. (1 Div. 175.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge. Francis J. Inge, of Mobile, for appellant.

PER CURIAM. Appeal dismissed for want of prosecution.

STUDERVANT v. STATE. (6 Div. 122.) (Court of Appeals of Alabama. May 30, 1916.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. George Studervant was convicted of crime, and appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The appeal in this case is on the record proper, without a bill of exceptions. The proceedings and judgment of the

court are regular and show a sentence imposed in due form. The certificate of appeal of the clerk of the court below shows that the time for filing a bill of exceptions has expired and that no bill has been filed. The record is regular, and shows nothing authorizing a reversal of the judgment appealed from, and an affirmance of the same is ordered. Affirmed.

SWEAT v. STATE. (4 Div. 453.) (Court of Appeals of Alabama. June 8, 1916.) Appeal from Circuit Court, Covington County; A. B. Foster, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

TARVER v. STATE. (3 Div. 196.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from City Court of Montgomery; C. P. McIntyre, Judge. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. Appeal dismissed on motion of the Attorney General.

THOMAS v. STATE. (4 Div. 350.) (Court of Appeals of Alabama. Feb. 1, 1916.) Appeal from Circuit Court, Barbour County; M. Sollie, Judge. W. L. Martin, Atty. Gen., for the State.

BROWN, J. Appeal dismissed on authority of *Jasper Tice v. State*, 70 South. 967.

TIDWELL v. STATE. (4 Div. 433.) (Court of Appeals of Alabama. June 8, 1916.) Appeal from Circuit Court, Covington County; A. B. Foster, Judge. Baldwin & Murphy, of Andalusia, for appellant. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by agreement.

T. S. FAULK & CO. v. WILLIAMS. (4 Div. 445.) (Court of Appeals of Alabama. June 8, 1916.) Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

PER CURIAM. Settled between the parties and appeal dismissed.

WASHINGTON v. STATE. (3 Div. 228.) (Court of Appeals of Alabama. May 11, 1916.) Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

WEBB v. STATE. (3 Div. 227.) (Court of Appeals of Alabama. May 11, 1916.) Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

WESTERN UNION TELEGRAPH CO. v. JUSTICE. (2 Div. 148.) (Court of Appeals of Alabama. May 18, 1916.) Appeal from Law and Equity Court, Marengo County; Edward J. Gilder, Judge. Albert T. Benedict, of New York City, and Rushton, Williams & Crenshaw, of Montgomery, for appellant. William Cunningham, of Linden, for appellee.

BROWN, J. Appeal dismissed.

WYLAR, ACKARLAND & CO. v. CENTRAL ALABAMA DRY GOODS CO. (1 Div. 199.) (Court of Appeals of Alabama. April 6, 1916.) Appeal from Circuit Court, Wash-

ington County; Ben D. Turner, Judge. Granade & Granade, of Chatom, for appellant. William D. Dunn, of Grove Hill, for appellee. **PER CURIAM.** Affirmed on certificate.

ABBOTT v. BAILEY. (Supreme Court of Florida. May 10, 1918.) Error to Circuit Court, Alachua County; J. T. Wills, Judge. Action between W. L. Abbott and Annie E. Bailey, for the use of Thomas W. Fielding. From the judgment, Abbott brings error. Affirmed. Williams & Hardee, of Gainesville, for plaintiff in error. W. S. Broome, of Gainesville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error her costs by her in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

ATLANTIC COAST LINE R. CO. v. RYALS. (Supreme Court of Florida. Feb. 23, 1918.) Error to Circuit Court, Hillsborough County; F. M. Robles, Judge. Action between the Atlantic Coast Line Railroad Company, a corporation, and H. Ryals. From the judgment, the Railroad Company brings error. Affirmed. Sparkman & Carter, of Tampa, for plaintiff in error. H. C. Gordon and Victor H. Knight, both of Tampa, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WHITFIELD, J., absent by reason of illness.

CARLTON et al. v. MALLOY et al. (Supreme Court of Florida. April 18, 1918.) Appeal from Circuit Court, Taylor County; M. F. Horne, Judge. Suit in equity between W. R. Carlton and others and D. G. Malloy and others. From the decree, Carlton and others appeal. Affirmed. Wm. T. Hendry, of Perry, for appellants. Davis & Diamond, of Perry, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the

same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellants their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

CENTRAL NAT. BANK OF ST. PETERSBURG v. FILLMON et al. (Supreme Court of Florida. April 12, 1918.) Appeal from Circuit Court, Pinellas County; O. K. Reaves, Judge. Suit in equity between the Central National Bank of St. Petersburg and J. C. Fillmon and others. From the judgment, the Bank appeals. Affirmed. Cook, Spear & Dishman, of St. Petersburg, for appellant. James Booth, of St. Petersburg, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

CITY OF KEY WEST v. PAGE et al. (Supreme Court of Florida. April 12, 1918.) Error to Circuit Court, Monroe County; H. Pierre Branning, Judge. Action between the City of Key West and Andrew J. Page and others. From the judgment, the City brings error. Affirmed. E. M. Semple, of Key West, for plaintiff in error. W. H. Malone, of Key West, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendants in error do have and recover of and from the plaintiff in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

DANNELLEY v. JENNINGS NAVAL STORES CO. (Supreme Court of Florida. April 5, 1918.) Error to Circuit Court, Walton County; J. Emmet Wolfe, Judge. Action between A. W. Dannelley and the Jennings Naval Stores Company. From the judgment, Dannelley brings error. Affirmed. Daniel Campbell, of De Funiak Springs, for plaintiff in error. D. Stuart Gillis, of De Funiak Springs, and Blount & Blount & Carter, of Pensacola, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore

considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

DAVIS v. FLORIDA POWER CO. (Supreme Court of Florida. May 9, 1916.) Error to Circuit Court, Citrus County; W. S. Bullock, Judge. Action between James T. Davis and the Florida Power Company. From the judgment, Davis brings error. Affirmed. See, also, 68 Fla. 127, 66 South. 563. Geo. W. Scofield, of Inverness, W. K. Zewadski, of Ocala, and B. G. Langston, of Chipley, for plaintiff in error. Anderson & Anderson, of Ocala, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

HARLEE v. MANATEE TITLE GUARANTEE CO. et al. (Supreme Court of Florida. April 11, 1916.) Appeal from Circuit Court, Manatee County; F. M. Robles, Judge. Action between Alice B. Harlee and the Manatee Title Guarantee Company and another. From an order, Alice B. Harlee appeals. Affirmed. W. B. Shelby Crichlow, of Bradentown, for appellant. John B. Singeltary, of Bradentown, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the order aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said order. It is therefore considered, ordered, and adjudged by the court that the said order of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

IDEAL LUMBER CO. v. WRIGHT et al. (Supreme Court of Florida. April 28, 1916.) Appeal from Circuit Court, Pinellas County; O. K. Reaves, Judge. Suit between the Ideal Lumber Company and A. C. Wright and another. From the decree, the Lumber Company appeals. Affirmed. Davis, Pierce & Sellers, of St. Petersburg, for appellant. James Booth, of St. Petersburg, for appellees.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been

seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

INGRAM-DEKLE LUMBER CO. v. HART LUMBER CO. (Supreme Court of Florida. March 2, 1916.) Error to Circuit Court, Hillsborough County; F. M. Robles, Judge. Action between the Ingram-Dekle Lumber Company and the Hart Lumber Company. Judgment for the Hart Lumber Company, and the Ingram-Dekle Lumber Company brings error. Affirmed. K. I. McKay, of Tampa, for plaintiff in error. C. B. Parkhill, of Tampa, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WHITFIELD, J., absent on account of illness.

JOHNSON et al. v. OHESHIRE. (Supreme Court of Florida. Feb. 15, 1916.) Error to Circuit Court, Taylor County; M. F. Horne, Judge. Action between A. J. Johnson and another, partners as Johnson & Lipcomb, and A. G. Cheshire. From the judgment, the parties first mentioned bring error. Affirmed. Davis & Diamond, of Perry, for plaintiffs in error. Wm. T. Hendry and H. W. Whitnell, both of Perry, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiffs in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

McMILLAN v. FIDELITY BANK OF NEW SMYRNA et al. (Supreme Court of Florida. April 5, 1916.) Appeal from Circuit Court, Putnam County; J. T. Wills, Judge. Action between D. H. McMillan and the Fidelity Bank of New Smyrna and others. From the judgment, McMillan appeals. Affirmed. McNeill & Butler, John C. Cooper & Son and L. W. Strum, all of Jacksonville, for appellant. C. M. Cooper,

Chas. P. & J. J. G. Cooper, and El. J. L'Engle, all of Jacksonville, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

MANATEE COUNTY et al. v. WHITAKER et al. (Supreme Court of Florida. April 25, 1916.) Error to Circuit Court, Manatee County; F. A. Whitney, Judge. Action between Manatee County and others and H. V. Whitaker and another. From the judgment, Manatee County and others bring error. Affirmed. Chas. T. Curry, of Bradentown, for plaintiffs in error. O. T. Stanford, of Bradentown, and J. F. Burket, of Sarasota, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendants in error do have and recover of and from the plaintiff in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

MOORE et al. v. MOORE et al. (Supreme Court of Florida. April 25, 1916.) Appeal from Circuit Court, St. Lucie County; James W. Perkins, Judge. Suit between William Prince Moore and others and Frances Goode Moore and others. From the decree, William Prince Moore and others appeal. Affirmed. F. W. Butler, of Jacksonville, for appellant. Fred Fee, A. D. Penney, and F. L. Hemmings, all of Ft. Pierce, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decrees aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decrees. It is therefore considered, ordered, and adjudged by the court that the said decrees of the circuit court be and the same are hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellants their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

NATHANSON v. HOLDER. (Supreme Court of Florida. Feb. 23, 1916.) Error to Circuit Court, Duval County; Daniel A. Simmons, Judge. Action between Martin Nathanson and J. Oscar Holder. From the judgment, Nathanson brings error. Affirmed. Powell & Pelot, of

Jacksonville, for plaintiff in error. Robert R. Milam, of Jacksonville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WHITFIELD, J., absent by reason of illness.

HEWITT v. VIRGINIA-CAROLINA CHEMICAL CO. (Supreme Court of Florida. May 10, 1916.) Error to Circuit Court, Alachua County; J. T. Wills, Judge. Action between R. T. Hewitt and the Virginia-Carolina Chemical Company. From the judgment, Hewitt brings error. Affirmed. Hilburn & Merryday, of Palatka, for plaintiff in error. W. S. Broome and Thos. W. Fielding, both of Gainesville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

NEWMAN et al. v. BAGDAD LAND & LUMBER CO. (Supreme Court of Florida. Feb. 15, 1916.) Appeal from Circuit Court, Santa Rosa County; A. G. Campbell, Judge. Suit between J. F. Newman and another and the Bagdad Land & Lumber Company, a corporation. From the decree, the parties first mentioned appeal. Affirmed. W. W. Clark, of Milton, for appellants. Blount & Blount & Carter, of Pensacola, for appellee.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellee do have and recover of and from the appellants its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

NOBLE et al. v. YOUNG. (Supreme Court of Florida. April 27, 1916.) Appeal from Circuit Court, Duval County; D. A. Simmons, Judge. Suit between Fred B. Noble, as trustee of the estate of W. B. Owen, bankrupt, and

others, and Charles A. Young. From the decree, Noble and others appeal. Affirmed. Geo. C. Bedell, J. A. Yates, Stanton Walker, W. M. Bostwick, Jr., and Alex St. Clair-Abrams, all of Jacksonville, for appellants. Reynolds & Rogers, of Jacksonville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellee do have and recover of and from the appellants his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

ONLEY v. ONLEY. (Supreme Court of Florida. April 25, 1916.) Appeal from Circuit Court, Duval County; D. A. Simmons, Judge. Suit between John E. Onley and Lenora Onley. From the decree, John E. Onley appeals. Affirmed. McGill & McGill, of Jacksonville, for appellant. James M. Peeler, of Jacksonville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the orders aforesaid and argument of counsel for appellant, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said orders. It is therefore considered, ordered, and adjudged by the court that the said orders of the circuit court be and the same are hereby affirmed. It is further ordered by the court that the appellee do have and recover of and from the appellant her costs by her in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

PENNIMAN v. THOMPSON et ux. (Supreme Court of Florida. April 12, 1916.) Appeal from Circuit Court, Dade County; Daniel A. Simmons, Judge. Suit in equity between Mary J. Penniman, a feme sole, and Charles H. Thompson and wife. From the decree, Mary J. Penniman appeals. Affirmed. Hudson, Wolfe & Cason, of Miami, for appellant. Rand & Kurtz, of Miami, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

RICHARDSON et al. v. FLORIDA FIRE & CASUALTY INS. CO. (Supreme Court of Florida. April 5, 1916.) Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge. Action between Bainbridge Richardson and others and the Florida Fire & Casualty Insurance

Company. From the judgment, Richardson and others appeal. Affirmed. McNeill & Butler, Powell & Pelot, C. M. Cooper, and Chas. P. & J. J. G. Cooper, all of Jacksonville, for appellants. H. L. Anderson and Reynolds & Rogers, all of Jacksonville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the orders aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there are no errors in the said orders. It is therefore considered, ordered, and adjudged by the court that the said orders of the circuit court be and the same are hereby affirmed. It is further ordered by the court that the appellee do have and recover of and from the appellants its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

SECURITY CO. v. WARRINGTON. (Supreme Court of Florida. April 12, 1916.) Error to Circuit Court, Duval County; George Couper Gibbs, Judge. Action between the Security Company and Walter C. Warrington. From the judgment, the Security Company brings error. Affirmed. Bisbee & Bedell, of Jacksonville, for plaintiff in error. Cockrell & Cockrell and Carl Noble, all of Jacksonville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

SMITH v. JACKSON et ux. (Supreme Court of Florida. April 28, 1916.) Appeal from Circuit Court, Suwannee County; M. F. Horne, Judge. Suit between James Smith and G. W. Jackson and wife. From the decree, Smith appeals. Affirmed. J. B. Johnson, of Live Oak, for appellant. Humphreys & Blackwell, of Live Oak, for appellees.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decrees aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decrees. It is therefore considered, ordered, and adjudged by the court that the said decrees of the circuit court be and the same are hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

STRINGFELLOW v. RICE. (Supreme Court of Florida. Feb. 15, 1916.) Appeal from Circuit Court, Alachua County; J. T. Wills, Judge. Suit between Thornton B. Stringfellow and Emma J. Rice. From the decree, String-

fellow appeals. Affirmed. W. S. Broome, of Gainesville, for appellant. Hampton & Hampton, of Gainesville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decrees aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decrees of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the appellee do have and recover of and from the appellant her costs by her in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

THOMAS v. GRANGER et al. (Supreme Court of Florida. April 25, 1916.) Appeal from Circuit Court, Marion County; W. S. Bullock, Judge. Suit between J. M. Thomas, trustee in bankruptcy of the estate of E. P. Rentz, and Harvey Granger and another, doing business under the name and style of Granger & Lewis. From the decree, Thomas appeals. Affirmed. Hocker & Martin and H. M. Hampton, all of Ocala, for appellant. P. H. Odom and Reynolds & Rogers, all of Jacksonville, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the decrees aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decrees. It is therefore considered, ordered, and adjudged by the court that the said decrees of the circuit court be and the same are hereby affirmed. It is further ordered by the court that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

THOMAS v. HAMPTON. (Supreme Court of Florida. May 10, 1916.) Error to Circuit Court, Alachua County; J. T. Wills, Judge. Action between William M. Thomas and W. W. Hampton. From the judgment, Thomas brings error. Affirmed. Robert E. Davis, of Gainesville, for plaintiff in error. W. S. Broome, of Gainesville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error

in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WESTER et al. v. LOUISVILLE & N. R. CO. (Supreme Court of Florida. April 27, 1916.) Error to Circuit Court, Jackson County; D. J. Jones, Judge. Action between S. Catherine Wester and husband and the Louisville & Nashville Railroad Company. From the judgment, said Westers bring error. Affirmed. James H. Finch, of Marianna, for plaintiffs in error. Paul Carter, of Marianna, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiffs in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

YOUNG et al. v. POSTON et al. (Supreme Court of Florida. Feb. 15, 1916.) Error to Circuit Court, Santa Rosa County; A. G. Campbell, Judge. Action between D. C. Young and others and Ella Poston and another. From the judgment, the parties first mentioned bring error. Affirmed. J. T. Wiggins, of Milton, and F. B. Carter, of Pensacola, for plaintiffs in error. McGeachy & Lewis, of Milton, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the said defendants in error do have and recover of and from the plaintiffs in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABANDONMENT.

See Action, Ⓔ70; Appeal and Error, Ⓔ805;
Divorce, Ⓔ37; Homestead, Ⓔ166; Hus-
band and Wife, Ⓔ318.

ABATEMENT AND REVIVAL

See Ejectment, Ⓔ30; Election of Remedies;
Parties, Ⓔ80; Pleading, Ⓔ110, 131.

II. ANOTHER ACTION PENDING.

Ⓔ9 (La.) Where an appeal taken against de-
fendant by inadvertence or otherwise was never
a real appeal as against him, and no attempt
was made to maintain it against him, his excep-
tion of lis pendens in a suit making him a party
defendant before the dismissal of the former
appeal was without merit.—Commercial Nat.
Bank v. Sanders, 71 So. 891.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) Abatement or Survival of Action.

Ⓔ48 (Ala.App.) At common law, in either
real or personal actions, the death of either party
put an end to the action.—State v. Pearce,
71 So. 656.

Ⓔ50 (Ala.App.) Code 1907, §§ 2496, 2497,
2499, relating to the survival of personal and
real actions, and their revival, being in pari
materia, must be considered together.—State v.
Pearce, 71 So. 656.

Ⓔ53 (Ala.App.) Under Code 1907, §§ 2496,
2497, and 2499, action on contract survives
plaintiff's death in favor of the personal rep-
resentative.—State v. Pearce, 71 So. 656.

(B) Continuance or Revival of Action.

Ⓔ71 (Ala.App.) If the cause of action sur-
vived, a new suit might be brought in the case
of the death of the plaintiff by his personal rep-
resentative, and the right to revive and continue
an original suit is statutory.—State v. Pearce,
71 So. 656.

Ⓔ72(3) (Ala.App.) Under Code, 1907, §§ 2496,
2497, and 2499, action to try title or to recover
possession of lands on the death of the plaintiff
survives in favor of the heirs, as well as the
personal representative.—State v. Pearce, 71
So. 656.

Ⓔ72(6) (Ala.App.) Under Code 1907, §§ 2496,
2497, and 2499, action on contract survives
plaintiff's death in favor of the personal repre-
sentative, who is the only proper or necessary
party.—State v. Pearce, 71 So. 656.

VI. WAIVER OF GROUNDS OF ABATE- MENT AND TIME AND MANNER OF PLEADING IN GENERAL.

Ⓔ84 (La.) Exception or plea of prematurity
cannot be considered, unless filed before answer
to the merits.—Lurie v. Titcomb, 71 So. 200.

ABDUCTION.

See Seduction.

ABSENTEES.

Ⓔ3 (La.) Code Prac. art. 737, authorizing
appointment of attorney to represent absent
mortgagor and have foreclosure proceeding in
rem prosecuted contradictorily against him, held
valid.—Richardson v. McDonald, 71 So. 934.

Ⓔ7 (La.) The only remedy of defendant in
executory proceedings, who complains that
there was not sufficient authentic evidence to
warrant order of seizure and sale, is appeal.—
Richardson v. McDonald, 71 So. 934.

ACADEMIES.

See Schools and School Districts, Ⓔ2.

ACCEPTANCE.

See Chattel Mortgages, Ⓔ67; Sales, Ⓔ179.

ACCESSION.

See Fixtures.

ACCIDENT INSURANCE.

See Insurance, Ⓔ530.

ACCOMMODATION PAPER.

See Bills and Notes, Ⓔ226.

ACCOMPLICES.

See Criminal Law, Ⓔ511, 780.

ACCORD AND SATISFACTION.

See Compromise and Settlement; Payment;
Release.

ACCOUNT.

See Account Stated; Guardian and Ward, Ⓔ
62.

ACCOUNT STATED.

Ⓔ20(1) (Miss.) Where, in an action on ac-
count stated, it appeared that the goods cov-
ered thereby were ordered, delivered, and received
by defendant or his agent, and account was
unpaid, peremptory instruction for defendant at
close of plaintiff's evidence was error.—Ragland
v. Ross, 71 So. 879.

ACKNOWLEDGMENT.

See Homestead, Ⓔ119.

II. TAKING AND CERTIFICATE.

Ⓔ25 (Fla.) Gen. St. 1906, § 2462 (Comp.
Laws 1914, § 2462), requiring separate acknowl-
edgment by wife, was intended to furnish a
means whereby, not only might the wife's rights
be guarded, but an unquestionable transfer of
her right be secured.—Bank of Jennings v. Jen-
nings, 71 So. 31.

III. OPERATION AND EFFECT.

⚡55(1) (Fla.) The officer's certificate to an acknowledgment of a deed or mortgage, when made as required by law, is, in the absence of fraud or duress, conclusive as to the facts stated in it.—*Bank of Jennings v. Jennings*, 71 So. 31.

⚡55(2) (Fla.) Where a married woman signs a mortgage in the presence of witnesses, the officer's certificate of due acknowledgment by her separate from her husband will prevail if sustained by evidence and not overcome by convincing testimony.—*Bank of Jennings v. Jennings*, 71 So. 31.

ACQUIESCENCE.

See Appeal and Error, ⚡154; Boundaries, ⚡48; Estoppel, ⚡82.

ACTION.

See Equity, ⚡149; Pleading, ⚡110.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

⚡53(2) (Miss.) Under Code 1906, § 717, the assignee of part of an employee's claim for personal injury is a necessary party plaintiff in the employee's action in order to prevent the splitting of the cause of action.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

⚡70 (La.) Act No. 107 of 1898, providing that a party failing to prosecute his suit for five years shall be deemed to have abandoned same, held inapplicable to either litigant, where a seizure under executory process was stayed by injunction and the judge delayed his decision for five years.—*Barton v. Burbank*, 71 So. 134.

ADJOINING LANDOWNERS.

See Boundaries.

ADJOURNMENT.

See Criminal Law, ⚡649.

ADJUSTMENT.

See Insurance, ⚡575, 576.

ADMINISTRATION.

See Executors and Administrators.

ADMISSIONS.

See Criminal Law, ⚡406-409; Evidence, ⚡230; Mandamus, ⚡162; Pleading, ⚡110, 214.

ADOPTION.

⚡21 (La.) In the absence of other forced heirs, a child adopted under Rev. Civ. Code, art. 214, becomes a forced heir entitled to one-third of the foster parent's estate under article 1493.—*Succession of Hawkins*, 71 So. 492.

ADVANCEMENTS.

See Descent and Distribution, ⚡109.

ADVANCES.

See Agriculture, ⚡11.

ADVERSE POSSESSION.

See Limitation of Actions; Tenancy in Common.

I. NATURE AND REQUISITES.**(B) Actual Possession.**

⚡14 (La.) Civil possession evidenced only by an indicated intent to possess cannot be the

basis for the ten-year prescription under Civ. Code, art. 3478, unless commenced with physical possession.—*Gilmore v. Frost-Johnson Lumber Co.*, 71 So. 536.

It is essential to the right of the holder of a tax title to maintain a plea of three-year prescription under Act No. 105 of 1874, § 5, that he shall have had actual possession.—*Id.*

⚡14 (La.) Texas statutes of limitation in real actions run only in favor of persons having peaceable and adverse possession, that is, actual and visible appropriation of land.—*Klump v. Howcott*, 71 So. 353.

⚡16(1) (La.) That claimant of land under Texas statutes of limitation made survey, marked boundaries, paid taxes, and excluded trespassers, will not constitute actual possession.—*Klump v. Howcott*, 71 So. 353.

(D) Distinct and Exclusive Possession.

⚡38 (La.) In an action for a strip of land claimed by defendant by the prescription of 30 years, evidence held not to show that the possession of defendant's predecessors, inclosing it and using it for pasturage, was not sufficiently public and unequivocal to establish a prescription.—*Beugnot v. New Orleans Land Co.*, 71 So. 947.

(E) Duration and Continuity of Possession.

⚡41 (Miss.) Possession under color of a tax title open, notorious, and adverse from 1900 until 1911 is sufficient to establish title by adverse possession.—*Marx v. Smith*, 71 So. 563.

⚡45 (Miss.) Where, before holding possession for ten years, plaintiff sued to confirm his tax title, defendant's cross-bill filed after plaintiff had held for ten years did not relate back to the commencement of the plaintiff's suit.—*Marx v. Smith*, 71 So. 563.

(F) Hostile Character of Possession.

⚡63(7) (Ala.) Title to wild lands by adverse possession for 10 years under agreement of the owner to convey to the claimant cannot be aided by prescription, converting an equitable title into a legal title, since that presumption arises only in support of a peaceable possession under claim of title for 20 years.—*Franklin v. Snow*, 71 So. 93.

⚡76 (La.) Designation of attorney appointed to represent absent mortgagor as "curator ad hoc" instead of "attorney for absentee," is merely informality, cured by five years' prescription.—*Richardson v. McDonald*, 71 So. 934.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡114(1) (Ala.) Although acts of ownership on wild land under color of title need not be frequent or extensive, mere removal of sawlogs and rails, in the absence of a showing of frequency or time of removal, is insufficient to establish title by adverse possession, though coupled with testimony of two witnesses that, so far as they knew, claimant had sole possession.—*Franklin v. Snow*, 71 So. 93.

AFFIDAVITS.

See Attachment, ⚡114; Bills and Notes, ⚡485; Executors and Administrators, ⚡227; Pleading, ⚡290; Records, ⚡6.

AGE.

See Criminal Law, ⚡421; Rape.

AGENCY.

See Principal and Agent.

AGGRAVATION.

See Damages, ⚡182.

AGRICULTURE.

⚡11 (La.) Act No. 66 of 1874 authorizes pledging of growing crops only for advances and gives factor making advance no right to appropriate proceeds of crops for any other debt.—*Swift & Co. v. Bonvillain*, 71 So. 849.

⚡12 (La.) Act No. 66 of 1874, §§ 1-3, authorizes planter to pledge growing crop for advances required for its production by contract duly recorded, and declares pledge perfect where products are consigned to consignee.—*Swift & Co. v. Bonvillain*, 71 So. 849.

⚡15½ (La.) One who purchases agricultural products from a farmer does not thereby make himself personally liable for debts of farmer secured by unrecorded lien on crop.—*Union Seed & Fertilizer Co. v. J. Supple's Sons Planting Co.*, 71 So. 949.

ALIENS.**I. DISABILITIES.**

⚡12(4) (Miss.) The period pending a premature suit by the state to escheat land held by an alien should not be counted part of the 20-year period allowed by Code 1906, § 2768.—*State v. Scottish American Mortgage Co.*, 71 So. 291.

The time land owned by an alien was in possession of a resident under contract of purchase subsequently rescinded should be excluded from the 20 years allowed the alien to sell the land under Code 1906, § 2768.—*Id.*

An alien who rescinds a contract selling land to residents does not thereby become a purchaser at a sale to enforce the payment of a debt within Code 1906, § 2768.—*Id.*

ALIMONY.

See Divorce, ⚡239-245; Husband and Wife, ⚡297.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

⚡5(2) (Miss.) A note given for value received is materially altered by the insertion of words indicating that it was given as purchase money for land, thereby raising a vendor's lien upon the land.—*Bank of Lauderdale v. Cole*, 71 So. 260.

⚡8 (Fla.) Under Gen. St. 1906, § 3046, indorsement of payment on instrument promising to pay money has no more effect than receipt, and does not vitiate instrument.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡11(1) (Miss.) In order that the makers of a note may avail themselves of a material alteration it must appear that it was made with fraudulent intent.—*Bank of Lauderdale v. Cole*, 71 So. 260.

⚡23 (Miss.) Where a material alteration is made in a note after delivery to the payee with evidence of fraudulent intent, the original payee and his assignee can recover neither on the note nor on the original indebtedness.—*Bank of Lauderdale v. Cole*, 71 So. 260.

⚡25 (Miss.) Although the answer fails to allege specifically that a material alteration of a promissory note was made with fraudulent intent, it sufficiently alleges such intent, where it discloses that the alteration was made for the purpose of enabling the payees to establish a vendor's lien on property, in violation of an agreement waiving the lien.—*Bank of Lauderdale v. Cole*, 71 So. 260.

AMBIGUITIES.

See Statutes, ⚡190.

AMENDMENT.

See Equity, ⚡275; Pleading, ⚡236; Statutes, ⚡138, 141.

ANCILLARY JURISDICTION.

See Equity, ⚡35.

ANIMALS.

See Carriers, ⚡209-230; Railroads, ⚡415-446; Statutes, ⚡118.

⚡12 (La.) Acts Extra Sess. 1870, No. 8, § 3, making it unlawful to feloniously mark or brand any animal, is not ambiguous, but applies only to marking of animals belonging to third persons.—*State v. Dickerson*, 71 So. 347.

In Acts Extra Sess. 1870, No. 8, § 3, making it unlawful to feloniously mark any animal, "feloniously" refers to act done with intent to commit crime.—*Id.*

⚡50(2) (Ala.) On appeal from ruling in the contest of a stock law election, the validity of the petition and order for the election prescribed by Code 1907, § 5882, and of the proceedings in the commissioners' court, in view of section 455, are matters not properly presented on the contest.—*Browning v. St. Clair County*, 71 So. 108.

The remedy for determining the validity of a stock law election was by certiorari to quash the proceedings.—*Id.*

Under Code 1907, § 3312, giving court of county commissioners original jurisdiction in respect to stock law districts, proceedings on orders for stock law election containing all necessary and jurisdictional averments would not be quashed upon petition for certiorari, on ground of irregularities in the subsequent proceedings.—*Id.*

⚡50(2) (Miss.) That territory of proposed stock law district is one or more townships, or less than 36 square miles, or a part or parts of the county separated by natural boundaries, are jurisdictional facts, which must affirmatively appear of record before order of board of supervisors declaring the stock law in force in a supervisor's district is valid.—*Henry v. Board of Sup'rs of Sunflower County*, 71 So. 742.

⚡74(5) (Miss.) In an action for damages for injuries sustained by being bitten by a dog owned and kept by defendants on their premises, evidence held to sustain a judgment for plaintiff.—*White v. McRee*, 71 So. 804.

APPEAL AND ERROR.

See Certiorari; Clerks of Courts, ⚡24; Criminal Law, ⚡1006-1188; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⚡16 (La.) Where judgment decrees nullity of title set up by defendant, but also decrees revival of mortgage under which defendant claims and directs resale under mortgage, plaintiff has no right to separate appeal from that part of judgment in accordance with his petition nor to suspend execution of any part of judgment obtained by plaintiff in reconviction, on bond for costs.—*State ex rel. John T. Moore Planting Co. v. Howell*, 71 So. 529.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

⚡21 (Ala.) Under Code 1907, § 2841, giving of affirmative charge on the trial of a plea in abatement that alleged ground for attachment did not exist can be reviewed with the consent of the opposite party or his attorney, which consent is jurisdictional.—*Temple v. Dooley*, 71 So. 683.

⚡22 (Ala.) The question of the sufficiency of the judgment or decree in the lower court to support an appeal is jurisdictional, and cannot be waived.—*Temple v. Dooley*, 71 So. 683.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

☞78(3) (Miss.) A judgment sustaining a demurrer, in the absence of an application to amend, is a final judgment, so far as the interests of the demurrant are concerned.—*Dickerson v. Western Union Telegraph Co.*, 71 So. 385.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

☞150(1) (La.) Unless third persons appealing from judgment annulling election on prohibition question allege and prove direct pecuniary interest, not a future, contingent, and speculative interest, the appeal will be dismissed.—*City of Alexandria v. Police Jury of Rapides Parish*, 71 So. 923.

☞150(6) (La.) Where a judgment against a garnishee is appealed from by persons, who, although appealing as creditors of defendants, argue in the Supreme Court that they are creditors, not of defendants, but of the succession of the deceased husband of one of the defendants and father of the other defendants, and that the garnished funds belong to the succession, and nothing shows that the funds received by the garnishee as belonging to defendants did not belong to them, the appeal will be dismissed.—*Brinson v. Scott*, 71 So. 763.

(B) Estoppel, Waiver, or Agreements Affecting Right.

☞154(1) (La.) That plaintiff pending his appeal from a suit to annul an oil and mineral lease, sold an interest in the oil and minerals under a part of the land subject to the lease, *held* not to require dismissal of the appeal on the ground of acquiescence.—*Saunders v. Busch-Everett Co.*, 71 So. 153.

"Acquiescence" in a judgment such as will authorize dismissal of an appeal implies consent, and is not the same as an "admission" of the correctness of the judgment.—*Id.*

That plaintiff pending his appeal from adverse judgment in suit to annul a recorded oil and mineral lease specified in a conveyance to a third person that the land was leased to defendant and that the sale was made subject to the lease, *held* not to show a ratification of the judgment.—*Id.*

An acquiescence such as will take away the right of appeal must be unconditional, voluntary, and absolute, and have been made with intent to acquiesce and abandon the right of appeal.—*Id.*

☞154(4) (La.) Under Code Prac. art. 567, party in whose favor judgment has been rendered in accordance with his own prayer cannot appeal.—*State ex rel. John T. Moore Planting Co. v. Howell*, 71 So. 529.

☞158(1) (Miss.) A defendant against whom a money judgment has been rendered may pay it and afterwards appeal.—*Currie v. Bennett*, 71 So. 324.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

☞173(6) (La.) As an allegation of the registry of a waiver of homestead was an allegation of a matter of fact, and not of a conclusion of law, where the intervenor, in its pleadings and during trial, admitted and conceded that the waiver was recorded, it was estopped to deny the registry on appeal.—*Iberville Bank & Trust Co. v. Dupuy*, 71 So. 206.

(B) Objections and Motions, and Rulings Thereon.

☞192(2) (Ala.) In a suit to foreclose a mortgage securing a note, where defendant's only contention was that the documents had been altered and the amounts increased, complainant,

having met that contention, cannot complain of such evidence on appeal because the answer was not verified.—*Brackin v. Owens Horse & Mule Co.*, 71 So. 97.

☞231(7) (Ala.) A ruling of the court on objections to showing plaintiff his answers to interrogatories cannot be reviewed where no reasons were stated.—*Russell v. Bush*, 71 So. 397.

☞231(7) (Ala.App.) Where a motion to exclude testimony otherwise competent failed to raise the point that it was not responsive to the question, the motion being merely general and not specifying any grounds, that the answer was unresponsive could not avail the moving party on appeal.—*Dunaway v. Roden*, 71 So. 70.

☞232(1) (Ala.) An argument on appeal as to the sufficiency of a replication not made on grounds raised by the demurrer thereto will not be considered.—*Beatty v. Palmer*, 71 So. 422.

☞232(2) (Ala.) An objection to a proper question does not authorize a review of a volunteered statement by the witness to which no objection or motion to exclude was made.—*Russell v. Bush*, 71 So. 397.

☞242(1) (Ala.) An objection to the remarks of opposing counsel which invoked no ruling of the court afforded no basis for an assignment of error with respect thereto.—*Headley v. Harris*, 71 So. 695.

(C) Exceptions.

☞268(4) (Ala.) On the trial of a cause without a jury either party may by bill of exceptions present for review the judgment of the trial court on the evidence without an exception thereto.—*Wallace v. Crosthwait*, 71 So. 666.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

☞344 (Miss.) In action against two telegraph companies, plaintiff's appeal, petition and appeal bond being filed August, 1915, after judgment, on trial for the second company, in April, 1915, was not open to dismissal as to the first company as not having been prosecuted within two years, where the court sustained the first company's demurrer to the declaration May 16, 1913.—*Dickerson v. Western Union Telegraph Co.*, 71 So. 385.

☞345(2) (Fla.) Filing and presentation of petition for rehearing in chancery does not extend time for appeal from final decree beyond that prescribed by Gen. St. 1906, § 1904.—*Gasque v. Ball*, 71 So. 329.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

☞369 (Fla.) Gen. St. 1906, § 1698, providing that no writ of error shall be granted to original plaintiff, unless he shall first pay all costs incurred up to time when writ of error shall be presented, is for benefit of defendant and may be waived.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

☞380 (La.) Surety company qualified under Act No. 41 of 1894, § 6, when appeal bond was executed, *held* a sufficient surety, notwithstanding subsequent retirement from the state leaving deposit with treasurer in accordance with Act No. 71 of 1904.—*Franek v. Brewster*, 71 So. 213.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(H) Transmission, Filing, Printing, and Service of Copies.

☞627(3) (Ala.App.) Where a case was tried and determined May 1, 1915, appeal taken May 12, 1915, and notice of appeal served May 13, 1915, while the certificate was filed in the Court of Appeals November 25, 1915, appellee's motion to affirm must be granted.—*Long v. Baltimore Bargain House*, 71 So. 75.

(I) Defects, Objections, Amendment, and Correction.

⚡635(1) (La.) Where important records and documents alleged to have been made parts of original petition have been omitted from transcript, and no effort has been made by appellants to supply them, appeal will be dismissed.—*Kid v. Currie*, 71 So. 947.

⚡661 (Ala.) On contest of stock law election, where probate court upon certiorari certified as part of the record omitted from the transcript a copy of the petition calling for a stock law election, part of the proceedings in the cause, the petition might be considered as part of record.—*Browning v. St. Clair County*, 71 So. 108.

XI. ASSIGNMENT OF ERRORS.

⚡725(2) (Ala.) Where some of several pleas were not subject to any grounds of demurrer assigned, the assignment of error that the trial court erred in overruling demurrers to all such several pleas must fail.—*Brown v. Shorter*, 71 So. 103.

⚡737 (Fla.) Where single assignment of error attacks ruling on demurrer to two or more pleas, assignment will be overruled, if ruling is correct as to any one of the pleas.—*Eaton v. Hopkins*, 71 So. 922.

⚡747(2) (Fla.) Appellee's complaints could not be heard where there was no assignment of cross-errors.—*Harvey v. Hayes*, 71 So. 282.

XII. BRIEFS.

⚡773(4) (Fla.) Where a defendant, separately appealing from a final decree, fails to file brief, the decree may be affirmed as to him.—*Betts Naval Stores Co. v. Whitton*, 71 So. 231.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⚡780(2) (La.) That a person buying plaintiff's interest pending his appeal from an adverse judgment could have prevented plaintiff from further prosecuting the suit, *held* not to entitle defendant to a dismissal of the appeal because of the sale.—*Saunders v. Busch-Everett Co.*, 71 So. 153.

⚡781(2) (La.) Where the right to appeal from the dissolution of an injunction had lapsed, an appeal from a judgment, finding surety on bond given for injunction appeal to be insufficient, will be dismissed; the matter being moot.—*Moniotte v. Bouanchaud*, 71 So. 735.

⚡781(4) (La.) Appeal from judgment dismissing application to compel secretary of state to place name on official ballot will be dismissed where appellant makes no appearance in Supreme Court, and attention is not called to appeal until after election.—*Kelly v. Millsaps*, 71 So. 844.

⚡781(7) (La.) That the lessor, pending his appeal from the judgment in the lessee's suit to annul the lease, relet the premises, and in a separate suit recovered judgment for rent admitted to be due, *held* not such an acquiescence in the judgment annulling the lease as to authorize dismissal of the appeal.—*Henry Rose Mercantile & Mfg. Co. v. Smith*, 71 So. 487.

⚡786 (La.) Under Code Prac. art. 907, an objection that an appeal was taken for delay is not ground for dismissal.—*National City Bank of Chicago v. Barringer*, 71 So. 894.

⚡792 (Ala.) If there is no valid judgment from which an appeal may be taken, the court will of its own motion dismiss it.—*Temple v. Dooley*, 71 So. 683.

⚡805 (La.) That plaintiff pending his appeal from adverse judgment in suit to annul a recorded oil and mineral lease specified in a conveyance to a third person that the land was leased to defendant, and that the sale was made subject to the lease, *held* not to show an abandonment

of the appeal.—*Saunders v. Busch-Everett Co.*, 71 So. 153.

⚡805 (La.) Where appellants had filed no brief and made no appearance in the Supreme Court and had apparently abandoned the case, the judgment of the lower court would be affirmed.—*Salassi v. Dougherty*, 71 So. 194.

XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

⚡810 (La.) Appeal of citizens and taxpayers of a parish from judgment annulling, at suit of a city, election voting prohibition in the parish, involves a public interest entitling it to be transferred to the preference docket.—*City of Alexandria v. Police Jury of Rapides Parish*, 71 So. 928.

XVI. REVIEW.**(A) Scope and Extent in General.**

⚡843(1) (Miss.) Where determination of a single issue on appeal necessitates reversal of the decree other questions presented by the record need not be considered.—*Marx v. Smith*, 71 So. 563.

⚡843(2) (Ala.) Where all parties to suit to remove settlement of estate from probate to chancery court were sui juris and before the court, and no objection was taken to the part of the decree granting relief under the cross-bill, and no material error assigned or insisted upon as to the part ordering sale for distribution among the parties, the court will not determine the propriety of such part of the decree.—*Watkins v. Chapman*, 71 So. 473.

⚡856(5) (Fla.) Where the trial court grants a new trial on a motion containing several grounds, without stating any ground on which the ruling was based, the order will be affirmed when authorized by any ground of the motion.—*Mizell Live Stock Co. v. Pollard*, 71 So. 31.

⚡867(1) (Ala.) On appeal from denial of new trial by the probate court, the circuit or Supreme Court can consider affidavits presented to the probate court on motion for new trial only for the purpose of determining whether a new trial should be granted, and not for their evidentiary weight.—*Bell v. Bell*, 71 So. 465.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

⚡874(5) (Fla.) Where no appeal was taken from final decree, and order denying rehearing, appealed from, cannot be considered without reviewing final decree, it will be affirmed.—*Gasque v. Ball*, 71 So. 329.

(C) Parties Entitled to Allege Error.

⚡882(13) (Miss.) In action against carrier for damages to shipment of horses, where carrier's instructions on measure of damages, stated by court below, were given, it could not on appeal question the correctness of such measure of damages.—*Illinois Cent. R. Co. v. Mahon Live Stock Co.*, 71 So. 802.

(E) Presumptions.

⚡900 (Fla.) The burden rests on one appealing from an order or decree of the circuit court to overcome the presumption as to the correctness of such order or decree.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

⚡907(2) (Ala.) Where the contents of letter referred to in record on appeal do not appear, it will be assumed that they tend to support trial court's conclusion.—*O'Rear v. American Trust & Savings Bank*, 71 So. 106.

⚡931(1) (Ala.) Under Code 1907, § 6955, subsec. 1, and section 6072, the Supreme Court will determine the facts as to fraud or neglect

of assignee for benefit of creditors without any presumption as to the correctness of the findings of the register or chancellor.—*Horst v. Pake*, 71 So. 430.

(F) Discretion of Lower Court.

⇒970(4) (La.) The trial court's ruling on the motion to open the case after all parties have announced that the testimony is closed will not be disturbed unless clearly erroneous and prejudicial.—*Succession of Lefort*, 71 So. 215.

(G) Questions of Fact, Verdicts, and Findings.

⇒999(3) (La.) In absence of error or mistake, determination by jury as to negligence or due care will not be disturbed.—*Boylan v. New Orleans Ry. & Light Co.*, 71 So. 360.

⇒1003 (Fla.) Where evidence is legally insufficient to support verdict, judgment thereon will be reversed.—*Charlotte Harbor & N. Ry. Co. v. Buchan*, 71 So. 842.

⇒1003 (La.) Verdict and judgment manifestly against weight of evidence will be set aside.—*Dixon v. Vicksburg, S. & P. Ry. Co.*, 71 So. 527.

⇒1006(2) (Ala.) The order denying new trial after two trials with the same result will not be reversed unless, after allowing all reasonable presumptions of its correctness, the preponderance of evidence against the verdict clearly shows it to be unjust.—*Metropolitan Life Ins. Co. v. Goodman*, 71 So. 409.

⇒1009(3) (Miss.) The chancellor's finding resolving a conflict in the evidence is not subject to review.—*Bank of Lauderdale v. Cole*, 71 So. 280.

⇒1011(1) (Ala.App.) Action of trial court, in case tried without a jury, in passing on conflicting evidence of witnesses, held not reviewable, when supported by evidence.—*Stedham v. Robertson*, 71 So. 62.

⇒1012(1) (Ala.) When an issue, triable without jury, is so tried on viva voce testimony to the court, the finding will not be reversed unless so manifestly against the evidence that a nisi prius judge would set aside the jury's verdict on the same testimony.—*Bell v. Bell*, 71 So. 465.

⇒1015(2) (Ala.) In ejectment, where there was a conflict in the evidence as to the defense of payment of the mortgage debt, through foreclosure of which plaintiff claimed, and defense of adverse possession, the overruling of the motion for new trial after verdict for plaintiff was proper.—*Phillips v. Shotts*, 71 So. 94.

⇒1022(4) (Fla.) Finding of chancellor on testimony before examiner will not be given same effect as verdict, and if evidence before examiner clearly shows that conclusions of chancellor were incorrect, they will be reversed.—*McGill v. Chappelle*, 71 So. 836.

(H) Harmless Error.

⇒1027 (Ala.App.) In detinue by a chattel mortgagee, error in refusing to permit defendant mortgagor to be asked regarding a custom of mortgagee's trade, which could not have affected the result of the litigation, was harmless.—*Wertheimer Bag Co. v. Hill*, 71 So. 618.

⇒1032(1) (Ala.App.) Under rule 45 (175 Ala. xxi, §1 South. ix), in order to require reversal it is not only necessary to show error, but prejudice or injury must also appear.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

⇒1033(3) (Ala.) In ejectment the admission of evidence tending to show that defendant exercised acts of ownership over the land was harmless as to him.—*Phillips v. Shotts*, 71 So. 94.

⇒1033(3) (Ala.) In an action by a passenger hurt in alighting, where the carrier contended that she was drunk, it cannot complain of the receipt of testimony that the passenger did not know what she was talking about.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

⇒1040(6) (Ala.) In a servant's action for compensation after wrongful discharge, where matter of reduction of recovery on account of the possibility of having obtained other employment was litigated under general issue, error in sustaining demurrer to plea setting up such matter was harmless.—*People's Shoe Co. v. Skally*, 71 So. 719.

⇒1040(15) (Ala.) Overruling a demurrer to passenger's special replication to two pleas held not reversible error, where the replication was good as to one, though as to the other plea plaintiff might have had the benefit of all such matters under general replication.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

⇒1040(15) (Ala.App.) Error, if any, in overruling demurrers to a replication which was made in a number of counts, is harmless where some portion of the replication was valid, and plaintiff could have recovered under it.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

⇒1042(2) (Ala.) Where part of a plea is good only in reduction of damages, but not as a defense in bar, the matter is available under the general issue, and its elimination from the plea by motion to strike is harmless.—*People's Shoe Co. v. Skally*, 71 So. 719.

Error in striking special pleas is harmless when the matters contained therein are available under the general issue.—*Id.*

⇒1042(4) (Ala.) Erroneous refusal of trial court to strike plea on demurrer is harmless, where the same evidence was admissible under another plea good as against demurrer.—*Martin v. Walker*, 71 So. 667.

⇒1050(1) (Ala.) In a suit for loss of goods by carrier, the admission in evidence of the declaration of a depot agent that the goods were short and would arrive held not reversible error.—*Louisville & N. R. Co. v. Lynne*, 71 So. 338.

⇒1050(1) (Ala.) Allowance of plaintiff's question to a witness eliciting repetition of former testimony, admitted without objection, held harmless to defendant.—*Alabama Great Southern R. Co. v. Taylor*, 71 So. 676.

⇒1050(1) (Ala.App.) In an action for compensation for boring a well, where the original contract was modified, and its terms, as modified, were in dispute, the erroneous admission of testimony to show the value of the mule which defendant originally agreed to pay for the work did not justify the Court of Appeals in reversing, under Rule 45 of the Supreme Court (175 Ala. xxi).—*Dunaway v. Roden*, 71 So. 70.

⇒1050(3) (Ala.App.) Any error in admitting in evidence agreement between plaintiff and defendant under which nothing was done, held harmless.—*Wertheimer Bag Co. v. Hill*, 71 So. 618.

⇒1057(1) (Ala.) In ejectment, where the undisputed evidence showed that defendant was in possession of land other than that in dispute at a particular time, the exclusion of evidence relating to his possession of such other land, if erroneous, was harmless, as merely cumulative on a fact not in dispute.—*Phillips v. Shotts*, 71 So. 94.

⇒1057(2) (Ala.) Where the facts sought to be established were conceded, the erroneous exclusion of evidence was harmless.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

⇒1058(1) (Ala.) Where the evidence was subsequently received its erroneous exclusion was harmless.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

⇒1058(1) (Fla.) Any error in excluding evidence affecting title of payee of note, which would put on holders burden of proving that they acquired title in due course, may be harmless, where proof is made that plaintiff is holder in due course.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡1058(2) (Ala.) Error in the exclusion of testimony upon a witness' direct examination may be cured by his answers to the same effect upon cross-examination.—*Phillips v. Shotts*, 71 So. 94.

⚡1058(2) (Ala.) Error cannot be predicated on the court's refusal to allow a question to a witness where it appeared that the witness subsequently answered the question and the answer was received without objection.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

⚡1058(2) (Ala.) Exclusion of secondary evidence of contents of receipt held harmless if erroneous, where defendant was allowed to testify concerning the payment; his testimony showing all of the essentials of the receipt.—*Porter v. Watkins*, 71 So. 687.

⚡1060(2) (Ala.) Improper exclamation of plaintiff's counsel while witness for defendant was testifying to the effect that some one might be indicted for perjury, held not prejudicial, where such exclamation in no wise affected the witness' testimony.—*Headley v. Harris*, 71 So. 695.

⚡1066 (Ala.) Giving of an instruction stating that plaintiff testified that he derived from the telegram incorrectly transmitted, and delivered by defendant, that his wife had been operated upon, held to require a reversal where it appeared that he did not so testify.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡1066 (Fla.) Error in charge on burden of proof becomes harmless where undisputed evidence establishes the point on which court erroneously charged concerning burden of proof.—*Eaton v. Hopkins*, 71 So. 922.

⚡1068(5) (Ala.App.) Where the plaintiff was entitled to an affirmative charge, it was unnecessary on appeal to consider refused special charges requested by defendant.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

(I) Error Waived in Appellate Court.

⚡1078(1) (Ala.) Assignments of error, not argued by counsel's brief, must be treated as waived.—*Brown v. Shorter*, 71 So. 103.

⚡1078(3) (Ala.) Objections raised by demurrer below, but not argued in the brief on appeal, need not be considered.—*Beatty v. Palmer*, 71 So. 422.

⚡1078(3) (Ala.App.) Where a ground of demurrer to a complaint is not insisted on in the brief on appeal, no question in regard thereto is presented.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

(K) Subsequent Appeals.

⚡1097(1) (Ala.) Under Code 1907, § 5965, on an appeal from an award of damages in condemnation proceedings, the Supreme Court must reconsider its former ruling as to the right to condemn, and, if erroneous, overrule it.—*Louisville & N. R. Co. v. Western Union Telegraph Co.*, 71 So. 118.

⚡1099(7) (Ala.) Where, on former appeal, the court held that new trial should have been granted on the ground of newly discovered evidence, it was unnecessary to decide the sufficiency of the evidence to support the judge's finding, and an opinion thereon was dictum.—*Bell v. Bell*, 71 So. 465.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

⚡1129 (Fla.) Where on motion to strike bill of exceptions because all the evidence is not shown as demanded by defendant in error, the court fully considers the merits of the cause and concludes that no reversible error appears, the judgment may be affirmed.—*Miller v. Pace*, 71 So. 276.

(C) Modification.

⚡1153 (La.) Where, in mandamus to compel recognition of land warrants, it is probable that material evidence not adduced on the trial may hereafter be procured, a judgment rejecting the application will, on appeal, be amended to one of dismissal as in case of nonsuit, and so affirmed.—*State ex rel. Albritton v. Grace*, 71 So. 203.

(D) Reversal.

⚡1167 (Miss.) Though damages for breach of contract was the only relief sought by bill in equity, held that, under Const. 1890, § 147, a decree overruling a demurrer will not be reversed.—*Dinsmore v. Hardison*, 71 So. 567.

⚡1167 (Miss.) Under Const. § 147, where in a doubtful case a demurrer to a bill because not within equitable jurisdiction is overruled, and the court has jurisdiction of the parties, the Supreme Court will not reverse because the complainant misjudged his forum.—*Metzger v. Joseph*, 71 So. 645.

⚡1170(1) (Miss.) Under Const. 1890, § 147, the court will not reverse for the sole reason that plaintiff has misjudged his forum.—*White v. Willis*, 71 So. 737.

⚡1172(5) (Miss.) Where verdict for personal injuries is grossly inadequate, the judgment will be reversed, and the case remanded for a new trial on the question of damages only, under rule 13 of the Supreme Court (59 South. ix).—*White v. McRee*, 71 So. 804.

⚡1175(7) (Ala.) If error is discovered in judgment of court on the evidence in cause tried without a jury, the Supreme Court may render such judgment as the trial court should have rendered.—*Wallace v. Crosthwait*, 71 So. 666.

(F) Mandate and Proceedings in Lower Court.

⚡1195(1) (Miss.) Decree of chancellor on trial after remand, involving issue of undue influence of defendant upon her intestate, held erroneous, as contradictory to the law of the case decided on appeal.—*Cochran v. Latimer*, 71 So. 316.

APPLICATION.

See Payment, ⚡39-46.

APPOINTMENT.

See Executors and Administrators, ⚡14, 20.

APPORTIONMENT.

See Death, ⚡101.

APPRAISAL.

See Insurance, ⚡575; Judicial Sales, ⚡6.

APPROPRIATION.

See States.

ARBITRATION AND AWARD.

See Insurance, ⚡576.

ARGUMENT OF COUNSEL.

See Appeal and Error, ⚡1060; Criminal Law, ⚡701, 723, 1171; Trial, ⚡110, 127.

ARMY AND NAVY.

See Domicile, ⚡4.

ARREST.

See Bail.

IL ON CRIMINAL CHARGES.

⚡62 (Ala.App.) The charter provision of the city of Bessemer does not authorize arrest with-

out warrant, but merely authorizes passage of an ordinance granting such authority.—*Sherrod v. State*, 71 So. 78.

ARSON.

⚡37(1) (Miss.) Proof that the fire originated through a criminal agency is necessary to establish the corpus delicti of arson.—*Barron v. State*, 71 So. 374.

ASSAULT AND BATTERY.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

⚡2 (La.) Damages will be allowed where preponderance of evidence shows that defendant without provocation destroyed sight of plaintiff's eye with blow of fist.—*Burnecka v. O'Neal*, 71 So. 395.

(B) Actions.

⚡38 (La.) Where a stronger man, without sufficient provocation, assaults a weaker one, the latter, though not seriously injured, may recover for injury to his feelings.—*Trahan v. Benoit*, 71 So. 893.

ASSESSMENT.

See Damages, ⚡208, 216; Eminent Domain, ⚡215; Municipal Corporations, ⚡413-571; Taxation, ⚡317-485.

ASSETS.

See Executors and Administrators, ⚡88.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ⚡725-747.

ASSIGNMENTS.

See Chattel Mortgages, ⚡203; Counties, ⚡187; Fraudulent Conveyances; Judgment, ⚡683.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

⚡24(2) (Miss.) Instrument, whereby plaintiff, in consideration of legal services, assigned an interest in a cause of action against defendant for personal injury, *held* valid.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

III. RIGHTS AND LIABILITIES OF PARTIES.

⚡92 (Miss.) After notice to the employer of an employee's assignment of a part interest in his claim for personal injury, the assignee is not bound by any settlement by the employer with the assignor.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

IV. ACTIONS.

⚡121 (Miss.) Instrument, whereby plaintiff, in consideration of legal services, assigned an interest in a cause of action against defendant for personal injury, *held* valid, and suit might be maintained in the name of the assignee.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

⚡129 (Miss.) Under Code 1906, § 717, the assignee of part of an employee's claim for personal injury was a proper and necessary party to the employee's suit against the employer.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Banks and Banking, ⚡78.

V. RIGHTS AND REMEDIES OF CREDITORS.

(B) Presentation, Proof, and Payment of Claims.

⚡320 (Ala.) An assignee should declare dividends only when the collections suffice for a substantial reduction of the indebtedness with some regard for the cost and inconvenience of distribution.—*Horst v. Pake*, 71 So. 430.

⚡321 (Ala.) An assignee cannot excuse delay in paying dividends on the ground that creditors have not resorted to compulsory proceedings against him.—*Horst v. Pake*, 71 So. 430.

ASSOCIATIONS.

See Insurance, ⚡723-825.

ASSUMPSIT, ACTION OF.

See Account Stated; Work and Labor.

ASSUMPTION OF RISKS.

See Master and Servant, ⚡204-216, 288.

ATTACHMENT.

See Continuance, ⚡40; Execution; Exemptions; Garnishment; Homestead; Landlord and Tenant, ⚡229½.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

⚡2 (Miss.) Code 1906, § 536, authorizing an attachment in chancery against property of non-resident, *held* constitutional (Const. 1890, § 159, subd. "f.").—*Dinwiddie v. Glass*, 71 So. 745.

⚡12 (Miss.) Under Code 1906, § 536, chancery court, on bill against nonresident partner, seeking personal decree against him for his individual debt, *held* to have jurisdiction to issue an attachment against his realty in Mississippi.—*Dinwiddie v. Glass*, 71 So. 745.

III. PROCEEDINGS TO PROCURE

(B) Affidavits.

⚡114 (La.) Under Code Prac. art. 240, par. 4, when affidavit for attachment charges intent to give unfair preference, it is not necessary to add intent to defraud, and in neither case is it necessary to charge insolvency of debtor.—*Swift & Co. v. Bonvillain*, 71 So. 849.

(C) Security.

⚡131 (La.) Under Code Prac. art. 245, a bond for attachment must be in a sum equal to plaintiff's claim, including interest to date of filing of suit.—*Red Cross Lumber Co. v. Frank I. Abbott Lumber Co.*, 71 So. 191.

⚡138 (La.) An attachment bond insufficient in amount, cannot be made good by a subsequent remittitur of part of plaintiff's claim.—*Red Cross Lumber Co. v. Frank I. Abbott Lumber Co.*, 71 So. 191.

The rule de minimis does not apply to a deficiency of \$17.10 in an attachment bond.—*Id.*

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

⚡249 (La.) It is only where evidence adduced by defendant in attachment is sufficient to rebut prima facie case made by affidavit that plaintiff is required to support affidavit.—*Swift & Co. v. Bonvillain*, 71 So. 849.

⚡279 (Miss.) Though a suit begun by attachment in chancery was maliciously brought and without probable cause, attorney's fees cannot

be allowed defendant on dismissal of the bill.—*D. Rosenbaum's Sons v. Davis & Andrews Co.*, 71 So. 388.

VIII. CLAIMS BY THIRD PERSONS.

§287 (Ala.) A surety on a replevy bond who before forfeiture and according to its terms delivered the property to the sheriff notwithstanding any interest in the property which he may have had, might then assert any claim which he could have asserted before the bond was executed.—*Brothers v. Russell & Duke*, 71 So. 450.

Under Code 1907, §§ 6038-6043, complainant, the mortgagee of cotton, not claiming primary ownership thereof, could intervene in attachment suit to enforce a landlord's lien, only to assert a lien paramount to the landlord's lien.—*Id.*

ATTORNEY AND CLIENT.

See Assignments, §24, 121, 129; Constitutional Law, §248, 309; Contempt, §9; Criminal Law, §641, 701; District and Prosecuting Attorneys; Evidence, §82; Judges, §47; Trial, §110, 127; Trusts, §75; Witnesses, §204.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

§32 (Ala.) Publications criticizing the action of the court and attacking its integrity held to show prima facie improper conduct of attorney.—*In re Mitchell*, 71 So. 467.

II. RETAINER AND AUTHORITY.

§104 (Ala.) Where a husband notified his creditor's attorney that his wife owned land title to which stood in his name, but it did not appear when the notice was given, such notice is not notice to the creditor of the wife's equity.—*Marshall v. Lister*, 71 So. 411.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§168 (Miss.) In a suit by an attorney for the balance of his fee against several defendants, plaintiff held entitled to decree only against the bank in which the money had been deposited.—*Bank of Collins v. Miller*, 71 So. 12.

(B) Lien.

§182(4) (Ala.) Code 1907, § 3011, made no change in the rule that an attorney has no lien on the real estate of his client.—*Harton v. Amason*, 71 So. 180.

§186 (Ala.) A solicitor who approved a settlement agreement calling for conveyance to his client or a corporation, cannot claim that conveyance to the corporation was in fraud of his rights to his fee.—*Harton v. Amason*, 71 So. 180.

An attorney's consent to a settlement agreement held to waive his lien, if any, under Code 1907, § 3011, on land conveyed to the client in consideration of the settlement.—*Id.*

§189 (La.) Act No. 124 of 1906, authorizing recovery of compensation by attorney under written contract to receive a portion of property recovered, does not prevent dismissal by client, in view of provisions for stipulation against dismissal.—*Succession of Carbajal*, 71 So. 774.

Where contract between attorney and client for contingent fee contains no stipulation against compromise or discontinuance, client may compromise or discontinue at will, leaving attorney to remedy by action on quantum meruit.—*Id.*

AUCTIONS AND AUCTIONEERS.

§2 (La.) Act No. 163 of 1910, relating to auctioneers, did not repeal Act No. 46 of 1904,

imposing duty on auction sales for benefit of Charity Hospital in New Orleans.—*Board of Administrators of Charity Hospital v. Richhart*, 71 So. 735.

AUTHENTICATION.

See Criminal Law, §444.

AUTOMOBILES.

See Counties, §113; Evidence, §536; Municipal Corporations, §703, 705.

BAIL.

See Habeas Corpus, §92.

II. IN CRIMINAL PROSECUTIONS.

§49 (Fla.) On an application for bail, held that, though the indictment for rape was not conclusive of the guilt of accused, the burden was on him to show that the proof was not evident and the presumption was not great.—*Russell v. State*, 71 So. 27.

On application for bail under an indictment for a capital crime, the question is not whether the evidence establishes guilt beyond a reasonable doubt, but whether it shows evident guilt or great presumption of guilt.—*Id.*

BAILMENT.

See Innkeepers; Warehousemen.

BALLOTS.

See Elections, §22, 180, 181.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) Officers and Agents.

§50 (Miss.) Code 1906, § 923, imposing personal liability on directors for paying dividends when the corporation is insolvent, is not penal, but remedial.—*Metzger v. Joseph*, 71 So. 645.

Code 1906, § 923, imposing personal liability on directors for paying dividends when the corporation is insolvent, is not repealed as to banks by the state banking law.—*Id.*

§54(3) (Miss.) Although under the express terms of Code 1892, § 851, it was unlawful for a bank of deposit to lend more than one-fifth of its capital stock to any one person or firm, the directors assenting to such loan were not individually liable.—*Bramlette v. Joseph*, 71 So. 643.

§55(3) (Miss.) A creditor or party suing to recover upon the statutory liability of a bank director must bring himself within the express terms of the statutes.—*Bramlette v. Joseph*, 71 So. 643.

§55(4) (Miss.) A complaint against bank directors charging upon information and belief that notes representing loans in excess of one-fifth the bank's capital, made to a director after his resignation, were either signed or delivered while he was a director, or that the loan had been agreed on while he was a director, and the notes subsequently executed, is not sufficient to show liability under Code 1906, § 922.—*Bramlette v. Joseph*, 71 So. 643.

(E) Insolvency and Dissolution.

§77(3) (Ala.) State superintendent of banks, as receiver having acted in the matter of compromising a debt to the bank, and his action having been approved by the court and parties in interest, could not set up the invalidity of

his acts.—Walker v. Mutual Alliance Trust Co., 71 So. 697.

§77(4) (Ala.) Chancery court, administering business of embarrassed bank, *held* empowered to enforce a lien in favor of bank's creditor, secured by notes and mortgages held by bank against its debtor, as against property received from such debtor in settlement.—Walker v. Mutual Alliance Trust Co., 71 So. 697.

Proceeding in chancery, administering the business of an embarrassed bank by a creditor of the bank to enforce a lien against property received from bank's debtor, *held* a ratification of such settlement.—Id.

§77(6) (Ala.) Under Acts 1911, p. 83, proceeding to enforce lien of bank's creditor upon property received in settlement of debt to bank might be maintained in county where state superintendent of banking was administering the bank's business, and in the court for which he was quasi receiver.—Walker v. Mutual Alliance Trust Co., 71 So. 697.

§78 (Ala.) The removal of an assignee to enable the appointment of a more disinterested trustee to prosecute certain suits does not deprive the assignee of his right to compensation.—Horst v. Pake, 71 So. 430.

Under Code 1907, § 6071, the burden is on the creditors to prove that an assignee of a bank for benefit of creditors was guilty of such fraud or neglect as to be denied all compensation.—Id.

Evidence *held* not to show such fraud or gross neglect by an assignee in paying certain preferred claims as to deprive him of compensation.—Id.

Under Code 1907, § 6071, an assignee is not entitled to commission on securities hypothecated to other banks and collected by them.—Id.

The claim by the assignee to commission to which he was not entitled does not, in the absence of fraud, require the disallowance of all compensation.—Id.

Under Code 1907, § 6074, an assignee under an assignment authorizing him to retain reasonable compensation cannot be charged with interest on commissions retained without specific authority of court.—Id.

An assignee cannot be charged with the attorney's fee for the recovery of wrongful payments made by him in the absence of fraud or a showing that strict compliance with the law would have prevented the payments.—Id.

In determining whether the assignee should be charged with interest on undistributed funds, the courts can look to the whole record as well as to the register's report.—Id.

The assignee is not chargeable with interest on funds pending an appeal by him from a decree removing him in which supersedeas was granted.—Id.

The assignee of a bank for the benefit of creditors is not chargeable with interest on funds retained with permission of the court which gave a liberal, but not unreasonable, margin to meet undisputed claims.—Id.

Creditors do not, by accepting the payment of a dividend from the assignee, waive their right to claim that the payment was unnecessarily delayed so as to charge the assignee with interest thereon.—Id.

Under Code 1907, § 6069, the assignee *held* chargeable with interest on 10 per cent. dividends which he could have paid 7 and 13 months before he paid a 20 per cent. dividend.—Id.

An assignee, removed because of his acts, should not be allowed a commission on funds turned over to his successor.—Id.

§82(3) (Miss.) A suit by a receiver of an insolvent bank against directors whose negligence has caused the insolvency, may be brought in equity.—Ventress v. Wallace, 71 So. 636.

§82(3) (Miss.) A court of equity, because of its jurisdiction over fraud and accountings, had jurisdiction of an action by the receiver of an insolvent bank to recover from directors a dividend disbursed in violation of the express terms

of Code 1906, § 923.—Metzger v. Joseph, 71 So. 645.

§82(4) (Miss.) Where all the directors of a bank were grossly negligent during a number of years, resulting in the bank's insolvency, the principles of concealed fraud and trust relationship applied to prevent running of limitations against an action by the receiver of the bank to recover from the directors for losses caused by such negligence.—Ventress v. Wallace, 71 So. 636.

§82(5) (Miss.) A receiver of an insolvent bank is the proper plaintiff in a suit against directors for their gross negligence causing the insolvency though the caption of the bill states that suit is "for benefit of all creditors."—Ventress v. Wallace, 71 So. 636.

§82(5) (Miss.) The receiver of an insolvent bank may maintain a suit as representative of all the creditors to recover an illegal dividend from assenting directors under Code 1906, § 923.—Metzger v. Joseph, 71 So. 645.

§82(6) (Miss.) In a suit by the receiver of an insolvent bank to recover from assenting directors a dividend illegally paid under Code 1906, § 923, the bill sufficiently alleges the interests of creditors if it charges that, when the dividend was declared, the bank's stock was entirely worthless, and its assets entirely insufficient to pay creditors.—Metzger v. Joseph, 71 So. 645.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§109(3) (La.) Pledge of assets of bank by cashier without authority of resolution of directors is invalid as against other creditors, though pledgee may be recognized as ordinary creditor.—Sims v. Athens Bank, 71 So. 525.

BAR.

See Dower; Judgment, §570-589.

BASTARDS.

See Death, §32.

BATTERY.

See Assault and Battery.

BAYOUS.

See Navigable Waters, §41, 43.

BENEFICIAL ASSOCIATIONS.

See Insurance, §723-825.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, §398-404; Evidence, §159-187.

BILL BOARDS.

See Municipal Corporations, §780, 809.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Alteration of Instruments, §5, 11, 23, 25; Counties, §167; Evidence, §445; Novation, §5; Partnership, §146; Trial, §191.

III. MODIFICATION, RENEWAL, AND RESCISSION.

§139(1) (Miss.) Extension of time for payment of note, granted after its execution on consideration of indorsement by third person, is valid.—Boyd v. Kelley, 71 So. 897.

IV. NEGOTIABILITY AND TRANSFER.**(A) Instruments Negotiable.**

⚡166 (Ala.App.) Under Laws Sp. Sess. 1909, p. 128, the fact that an instrument retains title to property as security for its payment does not destroy its negotiability.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(A) Indorsement Before Delivery to or Transfer by Payee.**

⚡226 (La.) Credit to maker of note is consideration sufficient to bind accommodation indorser.—*Schaffter v. Irwin*, 71 So. 241.

(B) Indorsement for Transfer.

⚡301 (La.) The payee's extension of time granted on a principal note did not release the accommodation indorsers on a collateral note, as what was done or not done in connection with the principal note did not concern them.—*Commercial Nat. Bank v. Sanders*, 71 So. 891.

(D) Bona Fide Purchasers.

⚡342 (Fla.) Under Gen. St. 1906, § 2965, knowledge afforded by mere indorsements of partial payment on negotiable note as of date of issue does not make purchase of note amount to bad faith.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡356 (Ala.App.) A bank discounting a note and depositing the proceeds to the payee's credit is not a purchaser for value unless the funds are absorbed by antecedent indebtedness or entirely exhausted by withdrawal.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

⚡356 (Fla.) If mere credit on bank book does not amount to payment of valuable consideration for note, withdrawal by check of substantial part of amount credited is such payment.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡375 (Ala.App.) A contract declared void by the statute will not be enforced in favor of an innocent purchaser, but a negotiable contract not declared void will be enforced in favor of an innocent purchaser.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

Notes payable to a foreign corporation which had not complied with Code 1907, §§ 3642-3649, 3651-3653, will be enforced in favor of an innocent purchaser.—*Id.*

The innocent holder of notes given a foreign corporation in an interstate transaction can recover though the corporation subsequently does business within the state illegally.—*Id.*

⚡375 (Fla.) Laws 1907, c. 5717, § 4, does not make negotiable note taken by foreign corporation which has failed to comply with act void in hands of bona fide holder for value and without notice.—*Commercial Nat. Bank v. Jordan*, 71 So. 760.

Where note taken by foreign corporation before compliance with Laws 1907, c. 5717, passes into hands of indorsee in good faith, without notice, before maturity, and for value, it is not subject in his hands to defenses available against payee.—*Id.*

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

⚡394 (Ala.) Under Code 1907, § 5025, as to presentment of a note, if money for its payment awaits the holder at the time and place for payment, this is the equivalent of a tender.—*Moore v. Altom*, 71 So. 681.

⚡398 (Ala.) Where the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his money, but only the cost of collecting it elsewhere.—*Moore v. Altom*, 71 So. 681.

VII. PAYMENT AND DISCHARGE.

⚡432 (Ala.) Where lessees of a mine, who gave the lessor notes to secure back royalties, transferred to a company which assumed the notes and defaulted, the lessor recovering judgment, including the amount of the notes, and the company had property which came to the lessor satisfying his judgment, he could not recover against the original lessees on the notes.—*Brown v. Shorter*, 71 So. 103.

⚡439 (Ala.) Where the transferee of lessees of a coal mine assumed payment of the lessees' notes to the lessor, and satisfied the debt, the lessor could not recover against the lessees on a note.—*Brown v. Shorter*, 71 So. 103.

VIII. ACTIONS.

⚡473 (Ala.App.) A plea, alleging that the note sued on is not a commercial negotiable paper, but embodying a copy of the note which shows it to be negotiable, is demurrable.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

⚡478 (Ala.App.) A plea in an action on notes payable to a foreign corporation *held* not to show that the corporation transacted business within the state.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

⚡478 (La.) In an allegation that plaintiff and maker of note conspired to procure indorsement, "conspire" does not necessarily connote evil intention.—*Schaffter v. Irwin*, 71 So. 241.

⚡485 (Ala.) Where name of payee was indorsed on note, and neither execution nor assignment was denied by sworn plea as required by Code 1907, § 5332, note was properly admitted in evidence without other proof.—*O'Rear v. American Trust & Savings Bank*, 71 So. 105.

⚡489(3) (Ala.) Lessees of a coal mine, who gave the lessor notes to secure back royalties owing by former lessees, and who transferred to a coal company which assumed the notes, the lessor assenting, but reserving his rights, *held* entitled, under issues framed by special pleas in the lessor's suit on a note, to prove the value of improvements made by them on the property and not sold by the lessor under execution against defendants' transferee, but taken by him.—*Brown v. Shorter*, 71 So. 103.

⚡494 (La.) In suit on note, party alleging that transaction was *contra bono mores*, against public policy, and amounted to suppression of commission of felony has burden of proof.—*Schaffter v. Irwin*, 71 So. 241.

⚡497(1) (Fla.) Where there is no evidence of defect in title of payee to negotiable note, presumption exists in favor of indorsee as holder in due course.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡497(2) (Ala.App.) Where the transferee of notes alleges that he purchased for value without notice, he assumes the burden of proving those issues.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

⚡511 (Ala.) In suit on a note by the lessor of a mine against lessees who gave notes to secure back royalties and transferred to a company which assumed payment, the lessor suing such company upon default and partially satisfying judgment, including the amount of the notes, it was proper to show the value of a compressor in the mine, equitable title to which was in the company, in connection with evidence that the lessor took possession of it.—*Brown v. Shorter*, 71 So. 103.

⚡525 (Ala.) That note, after negotiation to plaintiff, was seen in hands of lawyer, was not evidence that plaintiff was not holder in due course.—*O'Rear v. American Trust & Savings Bank*, 71 So. 105.

⚡525 (La.) In action against accommodation indorser on notes, evidence *held* insufficient to sustain allegations that plaintiff knew that notes were forged or fraudulently issued, or

amounted to suppression of commission of felony.—*Schaffter v. Irwin*, 71 So. 241.
 ¶537(2) (Miss.) In suit on a note given for the price of land, question whether defendant executed the note *held* for the jury under plaintiff's evidence.—*Wilder v. Ferguson*, 71 So. 324.

BOARDS.

See Levees, ¶9, 11.

BOARDS OF HEALTH.

See Health.

BONA FIDE PURCHASERS.

See Bills and Notes, ¶342-375; Vendor and Purchaser, ¶226, 239.

BONDS.

See Bail; Corporations, ¶482; Counties, ¶96, 99, 184; Municipal Corporations, ¶931; Principal and Surety; Taxation, ¶568.

BOUNDARIES.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

¶37(1) (Ala.) Evidence *held* to show that boundary between adjoining lots was as claimed by complainant.—*Chambless v. Jones*, 71 So. 987.

¶48(6) (Ala.) Acquiescence of lot owner in survey and moving of boundary fence raised presumption of correctness of survey.—*Chambless v. Jones*, 71 So. 987.

¶54(1) (Fla.) Where the circumstances connected with a government survey show an intent to limit the grant to actual traverse lines, these must be treated as definite boundaries.—*Lord v. Curry*, 71 So. 21.

¶54(4) (Fla.) Where the issue was whether the land in controversy was included in a particular government lot, and the official government plat showed that the lot contained a certain acreage, and it appeared from the plat and field notes that the surveyor stopped at what he called a "lagoon" and did not intend to make the banks of the lagoon the boundary of the lot, the lot did not include land which lay beyond the point at which the survey stopped.—*Lord v. Curry*, 71 So. 21.

BRANDS.

See Animals, ¶12.

BREACH OF THE PEACE.

See Disorderly Conduct.

BRIBERY.

¶1(2) (Fla.) Knowledge by accused of the official character of the person to whom the bribe is offered and value in the thing offered, and an intention to influence official action, are essential elements of bribery, though not mentioned in Gen. St. 1906, § 3476.—*Colson v. State*, 71 So. 277.

¶6(1) (Fla.) An information *held* insufficient to charge an offense under Gen. St. 1906, § 3476, where it charged that defendant offered a juror a gift of money and failed to allege knowledge by defendant of the juror's official character, and that the thing offered was of value.—*Colson v. State*, 71 So. 277.

BRIDGES.

See Highways, ¶90; Statutes, ¶123.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

¶9(1) (Miss.) Under Laws 1912, c. 196, § 13, the county can recover from a drainage dis-

trict the cost of replacing bridges over natural water courses dredged by the district prior to the enactment of that statute.—*Northern Drainage Dist. v. Bolivar County*, 71 So. 390.

II. REGULATION AND USE FOR TRAVEL.

¶37 (Fla.) Building and maintenance of roads and bridges are no less duties of state because delegated to officers of political subdivisions acting as agents for public at large.—*Keggin v. Hillsborough County*, 71 So. 372.

A county, being mere governmental agency, cannot be sued *ex delicto* for injuries in crossing a bridge which the county has permitted to become unsafe.—*Id.*

BRIEFS.

See Appeal and Error, ¶743.

BROKERS.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

¶32 (Ala.) A broker employed by defendant to sell its cotton seed oil is not the agent of one purchasing through such broker.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

IV. COMPENSATION AND LIEN.

¶49(1) (La.) Where a broker has not found a purchaser or made a sale, he is not entitled to commission.—*Guerard v. Howard*, 71 So. 501.

¶65(6) (Ala.) A broker is entitled to compensation for selling property to the government, though he used improper means, where the government to avoid a defect in the title condemned the property for the contract price.—*Russell v. Bush*, 71 So. 397.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

¶91 (Ala.) A "broker" is one authorized to buy and sell, and secret instructions, conflicting with his apparent powers, are not binding on persons who deal with him in good faith.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

BUILDING REGULATIONS.

See Municipal Corporations, ¶601.

BUILDINGS.

See Mechanics' Liens, ¶184.

BULLETIN BOARDS.

See Railroads, ¶232.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

¶41(4) (Miss.) Evidence only that the lock of the door out of which accused came had been tampered with *held* insufficient to establish breaking and entry within Code 1906, § 1073.—*Griffin v. State*, 71 So. 572.

BUSINESS.

See Guardian and Ward, ¶62.

CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

¶1 (La.) Bringing suit to dissolve a contract creates no new right nor removes any, but merely enforces those already existing.—*Watson v. Feibel*, 71 So. 585.

II. PROCEEDINGS AND RELIEF.

↯35(3) (Ala.) On bill to foreclose mortgage executed by J. and others, and a later mortgage executed by M., as amended, to seek cancellation of a conveyance by M. and J. to the son and heir of M., such grantee was a necessary party respondent.—*Mitchell v. Gudd*, 71 So. 660.

↯59 (La.) Where immediate performance of a contract pending suit is impossible, the court may, by direct provision of Civ. Code, art. 2047, allow a reasonable time for performance.—*Watson v. Feibel*, 71 So. 585.

CAPTION.

See Municipal Corporations, ↯105.

CARRIERS.

See Commerce, ↯8, 34; Eminent Domain, ↯10; Evidence, ↯121; Trial, ↯253.

II. CARRIAGE OF GOODS.**(C) Custody and Control of Goods.**

↯76 (Fla.) Consignor has right to bring action for delay in shipment of perishable goods without alleging ownership especially when declaration shows that consignee was to receive and sell goods for consignor.—*Aultman v. Atlantic Coast Line R. Co.*, 71 So. 283.

(D) Transportation and Delivery by Carrier.

↯94(3) (Fla.) Evidence in action against carrier for failure to transport and deliver perishable freight held insufficient to sustain verdict for plaintiff.—*Charlotte Harbor & N. Ry. Co. v. Buchan*, 71 So. 842.

(F) Loss of or Injury to Goods.

↯131 (Fla.) Under Interstate Commerce Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, pars. 11, 12, giving action to lawful holder of bill of lading, declaration by shipper for loss of goods is not demurrable for failure to allege that he holds bill of lading.—*Aultman v. Atlantic Coast Line R. Co.*, 71 So. 283.

↯135 (La.) The ascertainment of loss or damage to freight in transit is a matter resting on the ordinary rules of evidence.—*Planters' Cotton Oil Co. v. Texas & P. Ry. Co.*, 71 So. 306.

Where railroad has been condemned to make good damage to carload of seed, plaintiff cannot recover freight charges paid nor any part thereof.—*Id.*

Damages to carload of cotton seed delivered at way station in heated and rotten condition may be determined by expert inspection and appraisal after notice to railroad company.—*Id.*

(D) Connecting Carriers.

↯177(4) (Ala.) The Carmack Amendment does not abrogate or impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions.—*Louisville & N. R. Co. v. Lynne*, 71 So. 338.

↯185(1) (Ala.) In an action against the terminal carrier for loss of goods, the burden is on plaintiff to show that his goods were lost or diverted while in defendant's custody.—*Louisville & N. R. Co. v. Lynne*, 71 So. 338.

By showing defendant railroad's delivery to plaintiff of a part of the original shipment, a presumption arises of its receipt by defendant in the same condition as when delivered to the initial carrier, which imposes upon defendant the burden of showing that missing goods were not lost while in its custody.—*Id.*

↯185(3) (Ala.) In suit against terminal carrier for loss of goods, testimony of checking clerk that at point of delivery to defendant the car was found short the goods complained of held insufficient to overcome a presumption that the

missing goods came into defendant's possession, where the clerk did not see the car opened.—*Louisville & N. R. Co. v. Lynne*, 71 So. 338.

(J) Charges and Liens.

↯196 (Miss.) The right of action of an interstate carrier for an undercharge will be barred by the state statute of limitations which affects the remedy, though the carrier be entitled by federal laws to recover the difference between the amount charged and the rates fixed by the Interstate Commerce Act.—*Yazoo & M. V. R. Co. v. Willis*, 71 So. 563.

(K) Discrimination and Overcharge.

↯200 (La.) A carrier, having exacted, in the face of a protest, an excessive rate, cannot defeat the shipper's recovery on the ground that, if he is reimbursed, there will be discrimination, contrary to Const. art. 286, against others who paid without protest; but, if the rate is illegal, all who paid it must be reimbursed.—*McAdams v. Wells Fargo & Co. Express*, 71 So. 945.

Under Const. art. 286, as amended by Act No. 14 (Ex. Sess.) of 1907, where the carrier sues to set aside a rate established by order of the commission, without asking injunction to suspend such rate, the rate remains in force, and if the carrier exacts the old rate which is paid under protest, it can be compelled to refund the excess over the new rate.—*Id.*

III. CARRIAGE OF LIVE STOCK.

↯209 (Miss.) Shipper of live stock may for a cheaper rate bind himself to accept less commodious car if full opportunity is given him to choose from a list of different cars.—*Covington v. Yazoo & M. V. Ry. Co.*, 71 So. 821.

↯218(2) (Miss.) For a cheaper rate extended to a shipper of live stock the road's liability as to the value of the stock can be limited.—*Covington v. Yazoo & M. V. Ry. Co.*, 71 So. 821.

↯218(3) (Miss.) Under bill of lading limiting the carrier's liability for a shipment of live stock and requiring notice of injuries within ten days, held, that the provision as to notice was unenforceable, it not being supported by consideration.—*Yazoo & M. V. R. Co. v. Bell*, 71 So. 272.

↯218(5) (Miss.) Provisions of bill of lading covering shipment of mules touching acceptance by shipper of condition of cars and nonliability except for gross negligence held void as indirect effort of road to contract against liability for negligence.—*Covington v. Yazoo & M. V. Ry. Co.*, 71 So. 821.

↯219(5) (Miss.) Carmack Amendment to Interstate Commerce Law, held not to deprive shipper of common-law action against terminal carrier receiving live stock in one state in good condition and delivering it in another state in a damaged condition.—*Illinois Cent. R. Co. v. Mahon Live Stock Co.*, 71 So. 802.

↯228(1) (Miss.) Proof that cattle delivered in good condition were received injured casts on carrier burden of showing injuries were not caused by its negligence, and to escape liability it must account for shipment during whole time it was in its charge.—*Yazoo & M. V. R. Co. v. Bell*, 71 So. 272.

↯228(1) (Miss.) In action for damages to shipment of horses, showing that defendant, a connecting carrier, received them in good condition and that it was badly damaged upon arrival, held to raise a presumption of negligence, requiring defendant, to relieve itself from liability, to show how shipment was handled.—*Illinois Cent. R. Co. v. Mahon Live Stock Co.*, 71 So. 802.

↯228(5) (Miss.) Where delay caused unusual shrinkage in a shipment of cattle, recovery may be had upon proof, showing the normal shrink-

age and weight of the cattle when shipped and when received.—*Yazoo & M. V. R. Co. v. Armstrong & Co.*, 71 So. 905.

⚡229(3) (Miss.) Where a shipment of cattle was negligently delayed, the shipper may recover the difference between the price the cattle would have brought had they reached their destination within a reasonable time and the price they actually brought.—*Yazoo & M. V. R. Co. v. Armstrong & Co.*, 71 So. 905.

⚡230(12) (Miss.) In action for injuries to shipment of mules, instruction that jury could not consider any damages caused by condition of car held erroneous as calculated to lead jury away from issue of exposure by delay in defective car.—*Covington v. Yazoo & M. V. Ry. Co.*, 71 So. 821.

IV. CARRIAGE OF PASSENGERS.

(C) Performance of Contract of Transportation.

⚡265 (Miss.) Where it was the annual custom of a railroad to run an excursion train and stop at a station on flag held that by established custom plaintiff had right to take passage on train at the station, and cause of action existed for denial of the right.—*Gulf & S. I. R. Co. v. Dixon*, 71 So. 906.

⚡277(6) (Miss.) An award of \$100 actual and punitive damages to a passenger who failed to protest when compelled to ride, together with her friends, in a baggage coach for a distance of 8 miles, held not warranted.—*Illinois Cent. R. Co. v. Shackelford*, 71 So. 298.

⚡277(6) (Miss.) Where a female passenger was negligently carried beyond her station, being forced to walk back in the cold and mud so that her sore eyes were aggravated, an award of \$450 was justified.—*Yazoo & M. V. R. Co. v. Hearn*, 71 So. 561.

⚡277(6) (Miss.) An award of \$500 in favor of a female passenger, who was carried beyond her station, held excessive by \$400, it appearing she suffered no ill effects save fatigue and the loss of a meal.—*Yazoo & M. V. R. Co. v. Smithart*, 71 So. 562.

⚡278(1) (Miss.) In an action by a passenger for damages for being carried beyond her station, the question of the railroad company's negligence held properly submitted to the jury.—*Yazoo & M. V. R. Co. v. Hearn*, 71 So. 561.

(D) Personal Injuries.

⚡280(1) (Ala.App.) A carrier of passengers for hire is not an insurer, but his duty is relative, commensurate with the highest degree of care, and, to make it liable for injury, it must be shown that it or its servants were guilty of some negligence.—*Alabama Great Southern R. Co. v. Johnson*, 71 So. 620.

⚡280(3) (Ala.) The law requires the highest degree of care and skill by those engaged as carriers of passengers by street cars, known to careful, diligent, and skillful persons, engaged in such business, consistent with the practical operation of the road.—*Birmingham Ry., Light & Power Co. v. Gray*, 71 So. 689.

⚡281 (Miss.) Carrier held not negligent in permitting a window to be open or for allowing an insane person to jump or throw himself through the window while his caretaker occupied the next seat in front.—*Boyd v. Alabama & V. Ry. Co.*, 71 So. 164.

⚡295(8) (Miss.) Carrier, which did not know that insane passenger jumping or falling from window was seriously hurt or injured, which allowed his relative to leave train to go back to his assistance, and which could not have prevented passenger's death or relieved his suffering by going back to take him up, was under no duty to do so.—*Boyd v. Alabama & V. Ry. Co.*, 71 So. 164.

⚡314(1) (Ala.) Counts which allege that the defendant was a common carrier of passengers, that plaintiff was a passenger, and that defend-

ant so negligently conducted itself in her carriage that at a certain time and place plaintiff was thrown or caused to fall from car, are sufficient.—*Birmingham Ry., Light & Power Co. v. Gray*, 71 So. 689.

⚡314(2) (Ala.) Counts in passenger's complaint held to charge wanton negligence, and not to be objectionable as charging both wanton and simple negligence.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

⚡314(2) (Ala.App.) A count, setting out the relationship of passenger and averring that plaintiff was injured by reason of and as a proximate cause of the defendant's negligence, without specifying, was sufficient.—*Alabama Great Southern R. Co. v. Johnson*, 71 So. 620.

Count in passenger's action for injury from falling over a suit case in the aisle of a street car, alleging that defendant's servants negligently permitted the aisle of the car to be obstructed, held to sufficiently aver a breach of duty.—Id.

⚡314(5) (La.) In action for injuries by unexpected movement of passenger car while plaintiff was alighting, petition must allege that it was duty of employee of carrier to look out for plaintiff's safety as passenger or employee.—*Mills v. St. Tammany & New Orleans Ry. & Ferry Co.*, 71 So. 511.

⚡318(3) (Ala.App.) The mere fact that a suit case projected in the aisle of a street car, and that plaintiff fell over it, did not make out a prima facie case of negligence for the jury.—*Alabama Great Southern R. Co. v. Johnson*, 71 So. 620.

⚡321(14) (Ala.) Instructions, in passenger's action against carrier for injuries while alighting alleged to be due to its negligence, held proper.—*Birmingham Ry., Light & Power Co. v. Gray*, 71 So. 689.

(E) Contributory Negligence of Person Injured.

⚡331(5) (La.) Passenger who attempts to stand on step of fast moving street car, which is wet with rain and falls and is injured, cannot recover from railway, being negligent.—*Viator v. New Orleans Ry. & Light Co.*, 71 So. 733.

⚡347(11) (Ala.) The court held not able to declare as a matter of law that a passenger was negligent in voluntarily alighting from moving train.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

CARRYING WEAPONS.

See Weapons.

CAUSE OF ACTION.

See Action.

CERTAINTY.

See Execution, ⚡222.

CERTIFICATE.

See Acknowledgment, ⚡55.

CERTIORARI.

See Animals, ⚡50; Appeal and Error, ⚡661.

I. NATURE AND GROUNDS.

⚡5(1) (La.) Case involving overruling by trial court of exceptions to manner in which citation was served is appealable, so that certiorari will not lie.—*Wilson v. Yazoo & M. V. R. Co.*, 71 So. 931.

II. PROCEEDINGS AND DETERMINATION.

⚡68 (Ala.) The Supreme Court will not issue certiorari to review the decision of the Court of Appeals on the facts, or in the appli-

cation of the law to the facts, but will only revise the holding of such court on a question of law.—Postal Telegraph-Cable Co. v. Minderhout, 71 So. 91.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Venue, ¶46.

CHARACTER.

See Criminal Law, ¶377-379: Homicide, ¶188; Witnesses, ¶338, 345, 358.

CHARGE.

For transportation, see Carriers, ¶196, 200; Commerce, ¶34.

To jury, see Criminal Law, ¶778-830; Trial, ¶191-296.

CHARITIES.

See Taxation, ¶241.

CHASTITY.

See Husband and Wife, ¶813; Rape, ¶59.

CHATTEL MORTGAGES.

See Criminal Law, ¶448.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

¶40 (Fla.) Whether written instrument is chattel mortgage is question of law for court, and it is error to submit it to jury.—Georgia Home Ins. Co. v. Hoskins, 71 So. 285.

(B) Form and Contents of Instruments.

¶41 (Fla.) No particular form of words is necessary to constitute chattel mortgage.—Georgia Home Ins. Co. v. Hoskins, 71 So. 285.

(C) Execution and Delivery.

¶66 (Ala.App.) Delivery of chattel mortgage is essential to its validity.—Wertheimer Bag Co. v. Hill, 71 So. 618.

¶67 (Ala.App.) Acceptance of chattel mortgage is essential to its validity.—Wertheimer Bag Co. v. Hill, 71 So. 618.

(D) Validity.

¶73 (Miss.) Where defendant gave a deed of trust on personalty to secure a promise by the beneficiaries not to prosecute him for obtaining goods under false pretenses, the contract is in violation of public policy, and the trust deed is void.—Munn v. Potter, 71 So. 315.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

¶104 (Ala.App.) Where mortgagee, upon delivery of chattel mortgage, gave mortgagor, who accepted, a receipt to effect that mortgage was payable \$10 each month, the instruments together evidenced the agreement, and the receipt was admissible in evidence.—Wertheimer Bag Co. v. Hill, 71 So. 618.

(D) Lien and Priority.

¶138(1) (Ala.) A recorded prior chattel mortgage is superior to a lien for automobile repairs given by the express terms of Code 1907, § 4785, although the repairs were authorized by the owner then and at time of suit in lawful possession of the car; the mortgagee not expressly or impliedly authorizing the repairs.—J. C. Walden Auto Co. v. Mixon, 71 So. 694.

¶138(3) (Fla.) Written lease providing that time should run from date in past, executed subsequently to bringing on lots of personal property which was immediately mortgaged to secure balance of price, will not be given retroactive effect to defeat superiority of mortgage lien over lien for rent.—Ruge v. Webb Press Co., 71 So. 627.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶172(5) (Ala.App.) Under Code 1907, §§ 3789, 3791, 4899, in detinue by chattel mortgagee, mortgagor could make proof of tender of installment of mortgage debt, payable by installments, made after suit brought.—Wertheimer Bag Co. v. Hill, 71 So. 618.

¶172(8) (Miss.) Where property replevied under deed of trust to secure payment of debt was of value greater than debt, jury should under Code 1906, § 4233, be instructed as to trustee's interest; it having been retained by giving of a bond, or payment of trustee's interest.—Hill v. Petty, 71 So. 910.

¶172(9) (Miss.) Where property replevied under deed of trust to secure payment of debt was of value greater than debt, judgment should be for return of the property to the trustee; it having been retained by giving of a bond or payment of trustee's interest.—Hill v. Petty, 71 So. 910.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

¶203 (Miss.) Where tenant of farm to secure advances gave a deed of trust on his crops and live stock, and, the account not being paid in full, the balance due was by agreement paid by his landlord, and the security transferred to him, the deed of trust was enforceable in the hands of the landlord.—Coon v. Patterson, 71 So. 824.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(B) Criminal Responsibility.

¶234 (Ala.App.) In prosecution for selling cotton seed subject to unsatisfied mortgage lien, charges held properly refused as involved and confusing.—Wilson v. State, 71 So. 971.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶235 (Miss.) Under Code 1906, § 2782, payment extinguishes mortgages or trust deeds.—Munn v. Potter, 71 So. 315.

¶237 (Ala.App.) Under Code 1907, § 5334, in detinue by a chattel mortgagee, mortgagor must keep good his tender of an installment of mortgage debt by delivering money to clerk of court.—Wertheimer Bag Co. v. Hill, 71 So. 618.

¶240 (Miss.) Where the highest value placed upon mules, etc., taken by defendant, who had a mortgage thereon, was \$450, the evidence did not support a finding that they were worth \$495, and that defendant should be charged with that amount.—Tinsley v. Lovett, 71 So. 817.

X. REDEMPTION.

¶294 (Ala.) Complainant, after his claim suit to enforce mortgage lien on cotton had failed by reason of a superior landlord's lien, held entitled to bring a bill in equity to redeem from the landlord and to foreclose against the tenant as to the excess.—Brothers v. Russell & Duke, 71 So. 450.

¶300 (Ala.) On a bill by the mortgagee of cotton to redeem from a prior landlord's lien and to foreclose as to the excess against the tenant, where the tenant's interest had not been determined and it could not be said that he

had no interest, the tenant was a necessary party.—*Brothers v. Russell & Duke*, 71 So. 450.

CHEAT.

See Fraud.

CHILDREN.

See Adoption; Guardian and Ward; Infants; Negligence, 633; Railroads, 378.

CHOSE IN ACTION.

See Assignments.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens.

CLAIMS.

See Assignments for Benefit of Creditors; Attachment, 287; Executors and Administrators, 221-228; Garnishment.

CLASS LEGISLATION.

See Constitutional Law, 208.

CLERKS OF COURTS.

See Jury, 72.

67 (Ala.) Under Laws 1909 (Sp. Sess.) p. 339, § 6, amended by an act approved March 17, 1915 (Loc. Laws 1915, p. 62), considered with an act passed February 11, 1915 (Loc. Laws 1915, p. 20), *held*, that at the time of the approval of the amendatory act the person occupying the position of circuit clerk was still ex officio clerk of the law and equity court.—*Dawson v. State*, 71 So. 722.

23 (Miss.) Laws 1914, c. 209, amending Laws 1912, c. 144, requiring clerks of circuit and chancery courts to make and retain copies of the transcripts of records certified by them to the Supreme Court, does not contemplate an allowance of fees to such clerks for such copies, but only for such copies as are necessary in the Supreme Court.—*J. J. White Lumber Co. v. McComb City Turpentine Co.*, 71 So. 643.

24 (Miss.) Under rule 2 (101 Miss. 904, 59 South. vii), unless appellant requests in writing that other matters than those enumerated in the rule be included, the clerk cannot have fees for including the summons and return, the certificate of mailing summons, or notice to stenographer to transcribe notes.—*Standard Oil Co. v. Goldstein*, 71 So. 570.

It being necessary to style and number the case, and include the citation to the Supreme Court, fees therefor may be allowed the clerk for the actual number of words, but not on a page basis.—*Id.*

The clerk cannot be allowed fees for including his fee bill in the transcript; it being necessary only to collect the fees.—*Id.*

Since only 10 cents per 100 words may be allowed the clerk for making the transcript, he cannot have a flat rate of 30 cents per page.—*Id.*

CLUBS.

See Taxation, 241.

COLLATERAL ATTACK.

See Judgment, 474, 495; Records, 20.

COLLATERAL SECURITY.

See Bills and Notes, 166.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLECTION.

See Corporations, 624; Executors and Administrators, 87, 93; Taxation, 568, 604.

COLOR OF TITLE.

See Adverse Possession.

COMMERCE.

I. POWER TO REGULATE IN GENERAL.

8 (Miss.) Code 1906, § 4853, making delivering carriers presumptively liable for damage if that section is not complied with, *held* superseded as to interstate shipments by the Carmack Amendment, and evidence as to nonliability was erroneously excluded.—*Louisville & N. R. Co. v. Price*, 71 So. 161.

8 (Miss.) In a suit for damages for a mistake in the transmission of a telegram between points in the state under a contract made in the state before Act Cong. June 18, 1910, § 7, including telegraph companies in the public service agencies under federal control, was governed by the law of the state.—*Western Union Telegraph Co. v. Bassett*, 71 So. 750.

II. SUBJECTS OF REGULATION.

27 (Ala.) Where plaintiff was engaged as a railroad foreman in a crew making up interstate trains, and was injured during temporary lull in the work, he was engaged in interstate commerce when injured, and his case is properly brought within the federal Liability Act.—*Alabama Great Southern R. Co. v. Skotzy*, 71 So. 335.

34 (Miss.) A shipment of logs between two points within the state without intention of shipping them without the state, *held* to be an intrastate shipment, though they were reshipped to a point without the state where the freight charges were paid by the consignee, and hence rates fixed by the State Railroad Commission under Code 1906, §§ 4839, 4840, were applicable.—*Batesville Southwestern R. Co. v. Mims*, 71 So. 827.

40(1) (Ala.App.) The sale and delivery of a machine and acceptance of notes by a foreign corporation *held* interstate commerce and not "doing business" within the state.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

40(1) (Fla.) Right to enforce payment for goods sold in interstate commerce is essential to such commerce, and imposition of unreasonable conditions operates as restraint on interstate commerce.—*American Mercantile Co. v. Circular Advertising Co.*, 71 So. 607.

40(2) (Fla.) Where resident of one state sends agent into another who makes contract with resident of latter as to making and sale of marketable article of which contract contemplates actual transportation to another state, transaction is interstate commerce.—*American Mercantile Co. v. Circular Advertising Co.*, 71 So. 607.

III. MEANS AND METHODS OF REGULATION.

64 (La.) Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, relating to license for trading stamps, is not violative of Const. U. S. art. 1, § 8, relating to interstate commerce.—*State v. Underwood*, 71 So. 513.

80 (Ala.App.) Under Code 1907, § 3650, a foreign corporation engaged only in interstate commerce within the state can sue therein without complying with the requirements to do business in the state.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Public Service Commission.

COMMISSIONS.

See Banks and Banking, ¶78.

COMMITTEE.

See Statutes, ¶18.

COMMON LAW.

See Marriage, ¶18.

¶11 (Fla.) Common law is in force, except where modified by competent governmental authority.—Ingram-Dekle Lumber Co. v. Geiger, 71 So. 552.

¶14 (Ala.) Where action for death of plaintiff's minor son was brought under Homicide Act, but was founded on defendant's common-law wrong in employing a minor at dangerous work without parent's consent, common-law principles govern.—Garrett v. Louisville & N. R. Co., 71 So. 685.

COMMON SCHOOLS.

See Schools and School Districts, ¶48, 180.

COMMUNITY PROPERTY.

See Husband and Wife, ¶272, 273.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶100, 101.

COMPENSATION.

See Assault and Battery, ¶38; Attorney and Client, ¶168-189; Brokers, ¶65; Clerks of Courts, ¶23, 24; Eminent Domain, ¶69-155; Master and Servant, ¶69; Set-Off and Counterclaim, ¶41; Statutes, ¶102.

COMPETENCY.

See Evidence, ¶155, 536, 546; Jury, ¶88; Witnesses, ¶37-204.

COMPLAINT.

See Criminal Law, ¶252; Indictment and Information; Pleading, ¶53.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPOUNDING FELONY.

See Bills and Notes, ¶494.

COMPRESS COMPANIES.

See Warehousemen, ¶24.

COMPROMISE AND SETTLEMENT.

See Criminal Law, ¶408; Executors and Administrators, ¶87; Payment; Release; Vendor and Purchaser, ¶104.

¶6(2) (Ala.) Where defendant, contending that the amount of a note and mortgage to secure same had been fraudulently increased, paid complainant the amount he admitted, complainant, having accepted such amount, cannot claim any excess.—Brackin v. Owens Horse & Mule Co., 71 So. 97.

COMPUTATION.

See Interest, ¶39; Limitation of Actions, ¶100, 104; Time.

CONCEALMENT.

See Principal and Surety, ¶42.

CONCLUSION.

See Criminal Law, ¶448-451; Evidence, ¶472; Pleading, ¶8.

CONCLUSIVENESS.

See Acknowledgment, ¶55; Appeal and Error, ¶999; Criminal Law, ¶1159; Eminent Domain, ¶243; Evidence, ¶591; Judgment, ¶649-735; Records, ¶20; Stipulations, ¶18; Taxation, ¶446.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Contracts, ¶264; Mines and Minerals, ¶58; Vendor and Purchaser, ¶92, 98, 116.

CONDONATION.

See Divorce, ¶49.

CONDUCT.

See Witnesses, ¶346.

CONFESSION.

See Criminal Law, ¶516-535.

CONFLICT OF LAWS.

See Contracts, ¶2; Death, ¶8; Telegraphs and Telephones, ¶27.

CONNECTING CARRIERS.

See Carriers, ¶177, 185, 219.

CONSENT.

See Appeal and Error, ¶21; Rape, ¶9.

CONSIDERATION.

See Bills and Notes, ¶139, 226, 356; Compromise and Settlement; Contracts, ¶56; Deeds, ¶19.

CONSPIRACY.**I. CIVIL LIABILITY.****(B) Actions.**

¶15 (Miss.) A complaint for fraudulent conspiracy in obtaining goods belonging to plaintiff, with a prayer for discovery and for an accounting, shows a case coming within the jurisdiction of equity.—J. K. Orr Shoe Co. v. Edwards, 71 So. 816.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, ¶84-64. Special and local laws, see Statutes, ¶76-102. Subjects and titles of statutes, see Statutes, ¶113-125.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶26 (Fla.) State Constitution does not grant particular legislative powers, but contains spe-

cific limitations of general law-making power.—*Stone v. State*, 71 So. 634.

☞43(1) (Fla.) G. S. 1906, § 2677, permitting execution against stockholders, will not be held unconstitutional in behalf of one who moves to quash and declines to proceed to protect his rights under section 1624 for illegality of execution.—*Coe v. Armour Fertilizer Works*, 71 So. 374.

☞43(1) (La.) Trustees of academy holding under Act No. 195 of 1860, cannot assail validity of that act.—*School Board of Caldwell Parish v. Meredith*, 71 So. 209.

☞48 (Fla.) A duly enacted statute will not be declared invalid, unless it is clearly contrary to some express or implied prohibition of the Constitution.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

A statute, not shown to be unconstitutional beyond a reasonable doubt, should be upheld.—*Id.*

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

☞50 (Ala.) Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county, etc., held not invalid under Const. 1901, §§ 42, 43, as improperly commingling the powers of the various governmental departments.—*Dunn v. Dean*, 71 So. 709.

☞50 (Fla.) Great latitude should be accorded to the Legislature in the exercise of its proper powers.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

The Legislature should be accorded wide discretion in the interest of the public welfare.—*Id.*

(B) Judicial Powers and Functions.

☞70(3) (Ala.) Code 1907, § 3867, having declared the public policy as to the condemnation of property already devoted to public use, courts cannot, in determining the right to condemn such property be influenced by considerations of public interest.—*Louisville & N. R. Co. v. Western Union Telegraph Co.*, 71 So. 118.

☞70(3) (Fla.) The reasonableness, justice, wisdom, or motive promoting the enactment of a constitutional statute, being for the Legislature, will not be reviewed by the courts.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

It is the province of the courts not to regulate, but to effectuate, the policy of the law as shown in valid statutes.—*Id.*

(C) Executive Powers and Functions.

☞80(3) (La.) Const. arts. 16, 17, and Civ. Code, art. 3042, amended and re-enacted by Act No. 225 of 1908, held not to deprive municipal corporations of their right to determine, within the limits of other statutes, the character of security to be given by those operating jitneys or to make that question a judicial one.—*City of New Orleans v. Le Blanc*, 71 So. 248.

IV. POLICE POWER IN GENERAL.

☞81 (La.) The constitutional grant of all legislative power to the General Assembly includes all of the police power.—*City of New Orleans v. Le Blanc*, 71 So. 248.

☞81 (La.) In its broader sense, term "police power" of state is convertible with term "sovereign power."—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

V. PERSONAL CIVIL AND POLITICAL RIGHTS.

☞89(1) (Fla.) All parties are free to make what contracts they please so long as no fraud

or deception is practiced and contracts are legal in all respects.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

VI. VESTED RIGHTS.

☞101 (La.) Acts No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of license to do business in state, is not unconstitutional as divesting vested rights.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

☞130 (La.) Act No. 295 of 1914 requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to officers of the fire departments of cities, towns, and villages, under penalty of \$500 or revocation of their license to do business in state, is not unconstitutional as impairing obligation of contracts.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

☞208(16) (Miss.) Acts 1912, c. 141, §§ 1, 2, imposing a penalty in a reasonable attorney's fee upon every manufacturer, failing to pay his employees once in each calendar month, recoverable by suit after demand, held invalid, as an arbitrary and unreasonable classification.—*Sorenson v. Webb*, 71 So. 273.

X. EQUAL PROTECTION OF LAWS.

☞209 (La.) Where a statute denies to persons within the state's jurisdiction the equal protection of the law, it violates Const. U. S. Amend. 14, and is void.—*City of New Orleans v. Le Blanc*, 71 So. 248.

☞210 (Fla.) All parties litigant who are sui juris, including insurance companies and insured, stand on equal footing entitled to equal rights and protection, and none to special privileges.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

☞211 (La.) A classification, having some reasonable basis, does not violate Const. U. S. Amend. 14, guaranteeing equal protection, merely because it is not made with mathematical nicety or results in some inequality.—*City of New Orleans v. Le Blanc*, 71 So. 248.

Where a classification in a police law can be sustained on any state of facts which may reasonably be conceived, the existence of that state of facts must be assumed.—*Id.*

One who assails the classification made in a police law must prove that it does not rest on any reasonable basis, but is arbitrary.—*Id.*

☞212 (La.) Const. U. S. Amend. 14, guaranteeing equal protection, does not deprive the state of power to classify in adopting police laws, but permits wide discretion.—*City of New Orleans v. Le Blanc*, 71 So. 248.

☞230(2) (La.) Rev. St. 1870, § 145, as amended by Act No. 53 of 1882 and Act No. 46 of 1904, imposing charge on auction sales for benefit of Charity Hospital in New Orleans, does not make arbitrary classification or discrimination.—*Board of Administrators of Charity Hospital v. Richhart*, 71 So. 735.

☞230(3) (La.) Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, relating to license for dealing in trading stamps, is not a deprivation of equal protection of laws in violation of Const. U. S. Amend. 14.—*State v. Underwood*, 71 So. 513.

☞248 (Miss.) Acts 1912, c. 141, §§ 1, 2, imposing a penalty in a reasonable attorney's fee upon every manufacturer for failure to pay employees once in every calendar month, recoverable by suit after demand, violate Const. U. S. Amend. 14, and Const. Miss. 1890, § 14, by

denying the equal protection of the laws.—*Sorenson v. Webb*, 71 So. 273.

⚡249 (Ala.) Equal protection having reference to substance and not form, does not require that the privilege of localizing actions shall be conferred alike on resident and nonresident defendants.—*Jefferson County Savings Bank v. Carland*, 71 So. 128.

XI. DUE PROCESS OF LAW.

⚡284(1) (Fla.) Means prescribed for valuation of property for taxation must be substantially observed, or assessment will be invalid and the taking of property without due process of law.—*Graham v. City of West Tampa*, 71 So. 926.

⚡305 (Ala.) Due process having reference to substance and not form, does not require that the privilege of localizing actions shall be conferred alike on resident and nonresident defendants.—*Jefferson County Savings Bank v. Carland*, 71 So. 128.

⚡309(1) (La.) Code Prac. § 737, authorizing appointment of attorney to represent absent mortgagor and have foreclosure proceeding in rem prosecuted contradictorily against him, did not deprive mortgagor of property without due process of law in violation of Const. art. 2, nor Const. U. S. Amend. 14.—*Richardson v. McDonald*, 71 So. 934.

CONSTRUCTION.

See Chattel Mortgages, ⚡104, 138; Contracts, ⚡155-211; Counties, ⚡166; Deeds, ⚡99, 114; Equity, ⚡153; Evidence, ⚡461; Franchises; Insurance, ⚡164; Landlord and Tenant, ⚡48; Mortgages, ⚡151-169; Pleading, ⚡34; Release, ⚡33; Sales, ⚡71; Statutes, ⚡181-225½; Stipulations, ⚡14; Taxation, ⚡204, 775; Trial, ⚡295, 296; Vendor and Purchaser, ⚡73; Wills, ⚡456-688.

CONSTRUCTIVE TRUSTS.

See Trusts, ⚡95.

CONTEMPT.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

⚡9 (Ala.) An attorney publishing a criticism upon an action of the court in pending proceedings renders himself liable to answer whether he knew of the pendency of the cause, and whether his attack was made with the intent of intimidating or influencing the court.—*In re Mitchell*, 71 So. 467.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

⚡58(4) (Ala.) Respondent in contempt proceedings who filed answer disclaiming any intention of influencing or intimidating the court by his publication of criticism of its opinion in a pending cause, and satisfactorily qualifying and withdrawing the expressions and apologizing for same, discharged.—*In re Mitchell*, 71 So. 467.

CONTEST.

See Elections, ⚡151-154, 270.

CONTINUANCE.

See Criminal Law, ⚡589, 1151.

⚡40 (Ala.) Under Code 1907, § 2961, in attachment suit, refusal of defendant's motion for continuance, made after he demanded bill of particulars, under section 5326, held not an abuse of court's discretion.—*Berthold & Jennings Lumber Co. v. Geo. W. Phalin Lumber Co.*, 71 So. 989.

CONTRA BONOS MORES.

See Bills and Notes, ⚡494.

CONTRACTS.

See Account Stated; Assignments; Bills and Notes; Cancellation of Instruments; Chattel Mortgages; Compromise and Settlement; Constitutional Law, ⚡89, 130; Corporations, ⚡667; Counties, ⚡113, 121; Covenants; Fixtures, ⚡27; Frauds, Statute of; Guaranty; Insurance; Interest; Landlord and Tenant; Leases, ⚡16; Limitation of Actions, ⚡39; Logs and Logging; Master and Servant, ⚡3; Mechanics' Liens; Mines and Minerals, ⚡58; Municipal Corporations, ⚡365; Partnership; Payment; Principal and Surety; Reformation of Instruments; Release; Sales; Specific Performance; Stipulations; Usury; Vendor and Purchaser; Warehousemen; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

⚡2 (Ala.) A contract is ordinarily governed, where no contrary intent appears, by the law of the place where it is made.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

(D) Consideration.

⚡56 (Ala.) While one promise is sufficient consideration for another, no consideration can be established, where the promise of one party, owing to defective signature to the contract, is not enforceable against him.—*Wood v. Lett*, 71 So. 177.

(E) Validity of Assent.

⚡94(5) (Ala.) A contract executed by one in reliance upon false representations as to its contents is not binding upon the party deceived if he elects to avoid it, although he could read and had an opportunity to read it before signing it.—*Commercial Finance Co. v. Cooper Bros.*, 71 So. 684.

(F) Legality of Object and of Consideration.

⚡103 (La.) A contract is unlawful when forbidden by law, contrary to good morals or contrary to public order.—*State v. American Sugar Refining Co.*, 71 So. 137.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡155 (Miss.) An instrument is to be construed most strongly against person who draws it.—*Home Mut. Fire Ins. Co. v. Pittman*, 71 So. 739.

⚡161 (Miss.) An instrument will be construed to give effect to every part, unless in conflict, and, if possible, every clause will be harmonized with every other clause.—*Home Mut. Fire Ins. Co. v. Pittman*, 71 So. 739.

⚡170(1) (Ala.) Where the parties to a contract have given it a particular construction, such construction should usually be adopted by the courts.—*Jefferson Plumbers & Mill Supply Co. v. Peebles*, 71 So. 413.

⚡170(1) (Ala.) There being nothing to the contrary in its language, the parties may, by mutual consent, interpret ambiguous provisions in a contract for themselves, in which event the court must enforce the contract according to such interpretation.—*Birmingham Waterworks Co. v. Hernandez*, 71 So. 443.

⚡171(3) (Ala.) Where plaintiff's contract to drive a well was entire, and he failed to substantially perform, he could not, without more, recover on the contract.—*Hartsell v. Turner*, 71 So. 658.

⚡176(1) (Ala.App.) The construction of a contract is for the court only when it is in writing

or its terms not in dispute.—*Dunaway v. Roden*, 71 So. 70.

⚡176(9) (Ala.App.) In an action for compensation for boring a well, whether it was the intention of the parties, after modifying the original contract, that defendant should still pay for casing and the removal of plaintiff's machinery, as originally agreed, *held* for the jury.—*Dunaway v. Roden*, 71 So. 70.

In an action for compensation for boring a well, question whether the contract obligated plaintiff merely to "get water," or to get enough water to supply defendant's family and live stock, *held* for the jury.—*Id.*

(B) Parties.

⚡187(4) (La.) Where a contract required the purchaser to assume the vendor's notes held by a third person, such third person was not a party to the contract in the absence of acceptance of the new obligation by him.—*Watson v. Feibel*, 71 So. 585.

⚡187(4) (Miss.) A grantee who as part of the consideration for a deed assumes payment of the grantor's debt to his vendor becomes personally liable to vendor, who may recover the same.—*Barnes v. Jones*, 71 So. 573.

(D) Place and Time.

⚡211 (La.) Time of performance is of the essence of the contract when it is of such importance that the parties would not have contracted without it.—*Watson v. Feibel*, 71 So. 585.

III. MODIFICATION AND MERGER.

⚡236 (Ala.App.) Parties to an executory contract may alter it at their pleasure and in any particular they see fit upon no other consideration than mutual consent.—*Dunaway v. Roden*, 71 So. 70.

⚡241 (Ala.App.) Where the party who had contracted for a well, agreeing to pay so much a foot, before the well was bored to such a depth as to procure the water called for, desired to stop the contractor, he had the right to do so, provided the contractor consented.—*Dunaway v. Roden*, 71 So. 70.

⚡247 (Ala.App.) In an action for compensation for boring a well, where the original contract calling for the giving of a mule in payment was modified to call for a cash payment of so much per foot, its exact terms being in dispute, plaintiff's evidence as to the value of the mule *held* properly admitted.—*Dunaway v. Roden*, 71 So. 70.

⚡248 (Ala.App.) In an action for compensation for boring a well, whether the contractor for the work was told by the other party, after water was reached, to work one more day and quit, was a question for the jury.—*Dunaway v. Roden*, 71 So. 70.

IV. RESCISSION AND ABANDONMENT.

⚡252 (La.) The resolutive condition must be expressly reserved, and is not implied.—*Watson v. Feibel*, 71 So. 585.

⚡264 (La.) Civ. Code, art. 1912, making putting in default prerequisite to rescission of the contract, applies only to contracts whereof time is not of the essence.—*Watson v. Feibel*, 71 So. 585.

Putting in default, before rescission of the contract, as required by Civ. Code, art. 1912, is not necessary in suits for rescission for fraud or error or lesion beyond moiety, or for any cause of nullity.—*Id.*

Putting in default under a contract containing the express resolutive condition has no analogy to putting in default where such condition is only implied and takes place only after decree.—*Id.*

V. PERFORMANCE OR BREACH.

⚡275 (Fla.) Plaintiff may not recover on contract based on acts on his part which were neither performed nor waived.—*Ottstott v. Merryman*, 71 So. 278.

⚡277(1) (La.) The act of putting in default, by demand for performance, merely creates a legal situation of default, but does not otherwise affect the rights of the parties.—*Watson v. Feibel*, 71 So. 585.

⚡277(2) (La.) The function of the act of putting the debtor in default by demand that he perform is simply to warn him that damage for delay in performance will be demanded, and that time of performance is required to be strictly complied with.—*Watson v. Feibel*, 71 So. 585.

⚡301 (La.) Though the debtor has been in default, he may perform pending suit, since until the contract is judicially dissolved, it is in existence, and not only permits, but calls, for performance.—*Watson v. Feibel*, 71 So. 585.

⚡305(1) (Ala.) Where time is of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made, as where he recognizes the contract as still in force after the time for performance is past.—*Lowy v. Rosengrant*, 71 So. 439.

⚡317 (Ala.) A party to a contract, upon breach by the other party, must elect between treating the contract as dissolved in toto and insisting on further performance.—*Lowy v. Rosengrant*, 71 So. 439.

⚡323(1) (Ala.App.) In an action for compensation for boring a well under a contract obligating plaintiff merely to "get water," question, whether the 12 or 14 two-gallon buckets every 12 hours actually produced met the requirement *held* for the jury.—*Dunaway v. Roden*, 71 So. 70.

VI. ACTIONS FOR BREACH.

⚡333(6) (Ala.App.) In an action for compensation for boring a well, where, under the contract for the work, as modified, the stipulation as to the quantity of water plaintiff was to get was changed, and he was obligated only to bore the well so as to reach water, which he did, he could recover on the special count pleading the modified contract.—*Dunaway v. Roden*, 71 So. 70.

⚡353(10) (Ala.App.) In an action for compensation for boring a well, the contract in suit having been modified, an instruction on plaintiff's right of recovery for moving his machinery and casing the well *held* properly refused as calculated to mislead and positively confusing.—*Dunaway v. Roden*, 71 So. 70.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ⚡80-101.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Assignments; Assignments for Benefit of Creditors; Deeds; Fraudulent Conveyances; Mortgages; Navigable Waters, ⚡46.

CORPORATIONS.

See Banks and Banking; Bills and Notes, ⚡375; Carriers; Commerce, ⚡40, 80; Constitutional Law, ⚡43, 101, 130; Eminent Domain, ⚡10; Insurance; Jury, ⚡88; Limitation of Actions, ⚡35; Municipal Corporations; Partnership, ⚡41; Principal and Surety, ⚡54; Railroads; Schools and School Districts, ⚡2; Set-Off and Counterclaim, ⚡41; Statutes, ⚡113; Street Railroads; Taxation, ⚡406; Waters and Water Courses, ⚡194.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

—80(5) (Ala.) Where a bill to enforce a shareholder's liability on a subscription contract averred insolvency of corporation, the fact that it showed a release of the contract by a majority of the shareholders did not render it demurrable.—*Hundley v. Hewitt*, 71 So. 419.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

—370(1) (La.) Under Const. 1879, arts. 235, 237, corporations must so conduct their business as not to infringe the equal rights of individuals or the general well-being of the state.—*State v. American Sugar Refining Co.*, 71 So. 137.

—396 (Ala.) Under Code 1907, § 4105, a corporation is not liable for failure to furnish a statement of a defendant's ownership of corporate stock to an officer levying execution, where it did not appear that defendant owned any stock whatsoever.—*Roe v. Durham*, 71 So. 100.

(B) Representation of Corporation by Officers and Agents.

—399(4) (La.) Where directors of business corporation authorized president to appoint managers, clerks, and other necessary employes, and to fix compensation, where such president and another owned all the stock, the other cannot complain of president's acts under such authority, unless circumstances be unusual.—*Ballard v. Thompson*, 71 So. 505.

(D) Contracts and Indebtedness.

—482(5) (La.) Under Code Prac. arts. 732, 733, *held*, that where a trustee sued out executory process to enforce a mortgage and pledge securing bonds, and the petition alleged that all the bonds had become due under a declaration by the trustee, such declaration was sufficiently proven by recitals in a writing under corporate seal and signed by the vice president and secretary of the corporation and attached to the petition for executory process, where authentic evidence of the declaration was impossible.—*Colonial Trust Co. v. St. John Lumber Co.*, 71 So. 147.

(F) Civil Actions.

—503(1) (Miss.) Under Code 1906, §§ 707, 708-711, 3927, 3982, *held*, that suit against domestic corporation, not of the classes specified in the statute, must be begun at its domicile, so that process on agent of domestic corporation domiciled in H. county made on its agent in A. county did not give the circuit court of that county jurisdiction.—*Plummer-Lewis Co. v. Francher*, 71 So. 907.

—503(3) (Miss.) The right to a change of venue is not given to a corporation.—*Plummer-Lewis Co. v. Francher*, 71 So. 907.

—507(11) (Miss.) Default judgment against corporation whose local agent was served with notice, but which received no notice mailed by the clerk as required by Code 1906, § 920, *held* erroneous.—*Eminent Household of Columbian Woodmen v. Lundy*, 71 So. 18.

VIII. INSOLVENCY AND RECEIVERS.

—542(4) (La.) Mortgage by corporation of property to secure debt of another composed of same members will be presumed fraudulent as to creditors, unless at its making it had, over and above its debts, more than twice amount of mortgage.—*Pilsbery v. Fricke*, 71 So. 349.

—547(4) (La.) While creditor of corporation may follow its assets into possession of another corporation to which they have been illegally transferred, he cannot obtain payment

from assets of latter corporation to prejudice of its creditors.—*Pilsbery v. Fricke*, 71 So. 349.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

—604 (Ala.) A court of equity cannot decree dissolution of a solvent corporation on the ground that its business could not be conducted with profit where it still had large assets, and in the last year its income exceeded its expenses.—*Phinizy v. Anniston City Land Co.*, 71 So. 409.

—613(1) (La.) The state is a necessary party to a proceeding against a corporation either for its dissolution or for ouster.—*State v. American Sugar Refining Co.*, 71 So. 137.

Under Const. 1898, art. 190, as enlarged by Const. 1913, and Rev. St. § 181, the Attorney General or district attorney is a proper officer to institute proceedings by the state for dissolution or ouster of a corporation.—*Id.*

—624 (Ala.) Under Code 1907, §§ 3509, 3744, a receiver of an insolvent corporation, which had been dissolved, may sue to enforce liability on subscription contracts, though creditors had not recovered judgment on which execution had been returned unsatisfied.—*Hundley v. Hewitt*, 71 So. 419.

Where a resolution of stockholders canceling a stock subscription was subject to impeachment by creditors, *held*, that the corporation having become insolvent and been dissolved, the receiver might sue to enforce liability on such contract.—*Id.*

—630(1) (Ala.) Where a corporation was dissolved by agreement of shareholders under Code 1907, § 3510, *held*, that despite section 3511 it continued as a body corporate under section 3516 for 5 years, and so was properly joined in action to hold it under section 4105 for failure to deliver to officer levying execution a statement of defendant's stock.—*Roe v. Durham*, 71 So. 100.

XII. FOREIGN CORPORATIONS.

—631 (Miss.) A foreign corporation can do business in the state, unless prohibited by statute or public policy.—*State v. Scottish American Mortgage Co.*, 71 So. 291.

—642(3) (Ala.App.) The execution and delivery to the agent of a foreign corporation within the state of notes for a machine previously ordered and shipped into the state is not "transacting business" by the foreign corporation.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

—642(4) (Ala.App.) Unpacking disconnected parts of a machine and putting them in place, when done by the agent of a foreign corporation within the state, is not assembling the machine.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

—651 (La.) Where a foreign corporation commits acts dangerous to the public, forbidden by its charter or a general rule of law, the state may ask for revocation of its license to do business within the state.—*State v. American Sugar Refining Co.*, 71 So. 137.

—657(1) (La.) Where the plaintiff had not complied with Const. art. 264, Act No. 54 of 1904, § 1, as amended by Act No. 254 of 1908, as amended and re-enacted by Act No. 243 of 1912, and Act No. 54, of 1904, § 2, a contract made with the defendant was not null or unenforceable; the statute merely imposing penalties.—*Thomas Cusack Co. v. Ford*, 71 So. 196.

—657(3) (Ala.App.) Const. 1901, § 232, and Code 1907, §§ 3642-3644, 3645-3649, 3653, 6628, 6629, do not render void in their inception contracts by foreign corporations made outside the state, but to be performed within the state.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

State courts will refuse to aid a foreign corporation not entitled to do business in enforce-

ing a contract made outside the state, but to be performed by doing business within the state.—*Id.*

A contract made within the state by a foreign corporation not entitled to do business therein will not be enforced by the state courts at the corporation's instance.—*Id.*

A contract by a foreign corporation not entitled to do business, not declared void by the statute, will be enforced against the corporation.—*Id.*

§657(3) (Fla.) The purpose of Laws 1907, c. 5717, is to render contracts of foreign corporations prior to compliance with act unenforceable in the hands of corporation, or its assigns, but enforceable against it or them.—*Commercial Nat. Bank v. Jordan*, 71 So. 760.

§661(1) (Miss.) A foreign corporation can sue in the state, unless prohibited by statute or public policy.—*State v. Scottish American Mortgage Co.*, 71 So. 291.

§668(1) (La.) Where copy of citation addressed to foreign corporation through authorized local agent was personally served on person who had never been agent of corporation, such service was null as to defendant and agent intended to be served.—*Teal v. Philadelphia & G. S. S. Co.*, 71 So. 364.

CORPUS DELICTI.

See Criminal Law, §535.

CORROBORATION.

See Criminal Law, §511, 535; Seduction, §46.

COSTS.

See Appeal and Error, §369; Executors and Administrators, §46, 511; Guardian and Ward, §162.

IX. IN CRIMINAL PROSECUTIONS.

§302 (Fla.) Laws 1907, c. 5651 (Comp. Laws 1914, § 4072), requiring that committing magistrates take security for costs, or affidavit, does not apply to violations of the local option law.—*Simmons v. State ex rel. Tew*, 71 So. 278.

COTENANCY.

See Tenancy in Common.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Animals, §50; Evidence, §10; Exemptions, §48; Fines, §21; Jury, §31; Officers, §121; Process, §19; Statutes, §8½, 13, 64, 75, 76, 89, 93, 101, 102, 120, 125; Taxation, §25, 44, 317.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§1 (Fla.) A county is a political subdivision of state, created for administrative purposes, is representative of sovereignty of state and auxiliary to it, and constitutes machinery through which powers of state are exercised.—*Keggin v. Hillsborough County*, 71 So. 372.

II. GOVERNMENT AND OFFICERS.

(D) Officers and Agents.

§61 (Ala.) Gen. Acts 1915, p. 348, abolishes the office of county treasurer in all counties of a population of 50,000 or less, and does not merely suspend the existence of the office of such counties.—*State v. Bugg*, 71 So. 699.

§96 (Ala.) The fact that the county treasurer's bond was made payable to the state of Alabama, instead of to the county of Cullman, was of no importance or bearing in the county's ac-

tion on the bond.—*Searcy v. Cullman County*, 71 So. 664.

§99 (Ala.) Under Code 1907, §§ 210, 211, and 1500, held, that obligation of sureties on general official bond of county treasurer included the assurance of his fidelity with respect to a special county fund received subsequent to the execution of the bond.—*Searcy v. Cullman County*, 71 So. 664.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§113(1) (Ala.) In performing their statutory duties in the location, erection, repair, removal, or furnishing of the county buildings, bridges, and roads, the county commissioners or boards of revenue exercise a function that is quasi legislative, and have a discretion that cannot be exercised for them by any other officer or directed by any court, unless their acts are fraudulent.—*Ensley Motor Co. v. O'Rear*, 71 So. 704.

Under Gen. Acts 1915, p. 573, §§ 1, 5, 9, commissioners' court of county has authority to purchase automobile to maintain and inspect roads and bridges of county, and, a proper warrant having issued, it should be duly registered and paid by the county treasurer, as required by law.—*Id.*

§113(1) (La.) Though assessor may not, without special authority, increase expense of office, police jury has authority to incur expense in performance of mandatory duty in administration of affairs of the parish.—*Haynes v. Police Jury of Ouachita Parish*, 71 So. 244.

§113(6) (La.) Contention that contract of police jury employing person experienced in estimating timber and land areas to aid in review of assessments is merely employment of assistants to assessors is not well founded.—*Haynes v. Police Jury of Ouachita Parish*, 71 So. 244.

§121 (Miss.) A contract by the county board of supervisors not made by an order spread on the minutes is invalid.—*Northern Drainage Dist. v. Bolivar County*, 71 So. 380.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§149 (Ala.) No officer can charge a county with the payment of any claim due him, however meritorious, or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication authorized by law.—*Ensley Motor Co. v. O'Rear*, 71 So. 704.

The power of the board of revenue of a county or court of county commissioners to expend funds is not confined strictly to claims enumerated by statute.—*Id.*

§151 (Ala.) Issuance of interest-bearing warrant to pay for public buildings, etc., is not issuance of bond within Const. 1901, § 222, and such warrant may be issued, unless restrained by section 224, limiting indebtedness.—*Littlejohn v. Littlejohn*, 71 So. 448.

"Bonds," as used in Const. 1901, § 222, requiring the submission of the question of issuance to popular vote, signifies obligation in writing to pay money, commonly bearing no designation of person or entity in whose favor promise runs.—*Id.*

§166 (Ala.) County warrant is command of one officer to another to pay from county funds specific sum to person whose claim has been allowed by commissioners.—*Littlejohn v. Littlejohn*, 71 So. 448.

§167 (Ala.) County warrant is not commercial paper, and is not assignable, and will not support action by transferee.—*Littlejohn v. Littlejohn*, 71 So. 448.

§184 (Ala.) Bonds issued by agency of government are commercial paper capable of assignment, and succeeding owner may found action thereon.—*Littlejohn v. Littlejohn*, 71 So. 448.

⚡190(2) (Ala.) In Const. 1901, § 215, limiting the rate of taxation, terms "debt" and "liability" comprehend engagement for payment of interest and recognize power to incur obligation to be discharged in the future.—*Littlejohn v. Littlejohn*, 71 So. 448.

⚡195 (Ala.) Under Const. 1901, § 215, application of proceeds of special levy to discharge debt or liability for public roads, the payment of interest is not a diversion of such proceeds.—*Littlejohn v. Littlejohn*, 71 So. 448.

COUNTY BOARDS.

See Counties, ⚡113.

COURTS.

See Appeal and Error; Clerks of Courts; Constitutional Law, ⚡70; Contempt; Criminal Law, ⚡92-101; Equity, ⚡35; Evidence, ⚡32, 82, 83; Habeas Corpus, ⚡92, 93; Infants, ⚡18; Judges, ⚡47; Judgment, ⚡474; Justices of the Peace; Municipal Corporations, ⚡63; Process, ⚡19; Taxation, ⚡639; Venue, ⚡46.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

⚡57(1) (Ala.) Under Acts Sp. Sess. 1909, p. 263, § 4, judge has no power to assign court stenographer to serve in another circuit in which judge is assigned to preside.—*Ex parte Hill*, 71 So. 904.

Where judge has filed charges against court stenographer, he must try them in circuit for which stenographer was appointed.—*Id.*

(C) Rules of Court and Conduct of Business.

⚡82 (Miss.) The trial court has the power, and should always exercise it, to relax or suspend all court rules to assure a full and fair hearing.—*Wilson v. Peacock*, 71 So. 296.

(D) Rules of Decision, Adjudications, Opinions, and Records.

⚡92 (La.) Where the court in a case wherein the defendant had not been put in default, stated in its opinion, without inquiry as to its soundness that tender after default was too late, such expression was obiter dictum and of no weight.—*Watson v. Feibel*, 71 So. 585.

⚡99(2) (La.) In an action for the balance due on a note adverse holding in a suit on the same note against other defendants as to the claim that there was no cause of action because the petition did not allege that notice of dishonor was served on defendants as indorsers was the law of the case.—*Commercial Nat. Bank v. Sanders*, 71 So. 891.

⚡104 (Ala.) Under Acts 1915, p. 595, amending Code 1907, § 5999, questions presented by the charges refused to defendant in his trial for homicide, involving no new principle of law, require no separate treatment in the opinion on appeal.—*Madison v. State*, 71 So. 706.

⚡107 (La.) Though the language of a decision apply generally to all contracts, it must be construed together with the facts of the case decided.—*Watson v. Feibel*, 71 So. 585.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

⚡189(15) (Ala.App.) City court of Birmingham held without authority after adjournment of term under Loc. Acts 1911, p. 58, to alter or amend a second judgment entry except for clerical error or omission, on record evidence, parol testimony being inadmissible to alter, amend, or correct a record by amendment nunc pro tunc.—*Prudential Casualty Co. v. Kerr*, 71 So. 979.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

⚡224(3) (La.) Under Const. art. 95, as amended by Act No. 137 of 1904, an appeal from a judgment on incidental demand lies to the court having jurisdiction of the main demand.—*Jung & Sons Co. v. Troclair*, 71 So. 524.

⚡224(11) (La.) Under Act No. 137 of 1904, amending Const. art. 95, an appeal from a judgment on a reconventional demand should be to the court having jurisdiction of the main demand.—*National City Bank of Chicago v. Barringer*, 71 So. 894.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⚡485 (La.) Judges of the Supreme Court and of the Courts of Appeal may, instead of dismissing, transfer cases appealed to the wrong court.—*National City Bank of Chicago v. Barringer*, 71 So. 894.

COVENANTS.

IV. ACTIONS FOR BREACH.

⚡111 (Fla.) Action for breach of warranty in deed to two or more persons in common may be brought by any one or more of grantees.—*Eaton v. Hopkins*, 71 So. 922.

⚡121(2) (La.) Judgment of eviction in another state concludes warrantor, unless he can show that on notice he could have proven new facts or filed exceptions which would have produced different result.—*Klump v. Howcott*, 71 So. 353.

⚡130(1) (Fla.) Where vendor conveys property a second time with knowledge that he had previously conveyed, and latter purchaser takes paramount title, measure of damages for breach of warranty is compensation for actual injury, including costs and expenses incident to defense of title.—*Eaton v. Hopkins*, 71 So. 922.

⚡137 (Fla.) In action by one or more grantees in common for breach of warranty, plaintiffs may recover only so far as their own interests extend.—*Eaton v. Hopkins*, 71 So. 922.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Evidence, ⚡588; Trial, ⚡140; Witnesses, ⚡311-393.

CREDIT.

See Bills and Notes, ⚡226.

CREDITORS.

See Appeal and Error, ⚡150; Assignments for Benefit of Creditors.

CRIMINAL LAW.

See Arrest; Arson; Bail, ⚡49; Bribery; Burglary; Chattel Mortgages, ⚡234; Contempt; Costs; Disorderly Conduct; District and Prosecuting Attorneys; Fines; Forgery; Grand Jury; Homicide; Husband and Wife, ⚡313; Indictment and Information; Infants; Intoxicating Liquors; Justices of the Peace, ⚡30; Landlord and Tenant, ⚡253; Larceny; Malicious Prosecution, ⚡18-35; Municipal Corporations, ⚡639-642; Officers; Rape; Seduction; Statutes, ⚡118; Weapons; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

☞21 (Fla.) While all common-law crimes consist of criminal act or omission and criminal intent, legislature may dispense with necessity for criminal intent and punish particular acts without regard thereto.—*Smith v. State*, 71 So. 915.

III. PARTIES TO OFFENSES.

☞80 (La.) One aiding and abetting may be separately indicted as principal.—*State v. Ashworth*, 71 So. 860.

IV. JURISDICTION.

☞92 (Ala.App.) Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment.—*Sherrod v. State*, 71 So. 76.

☞99 (Ala.App.) Where complaint was made against the accused and warrant of arrest issued, and the defendant was arrested and admitted to bail, and return of the warrant made to the city court, its jurisdiction over the offense and the person was complete, under Code 1907, § 7350, providing that a prosecution may be commenced by finding an indictment, issuing a warrant or binding over the defendant.—*Sherrod v. State*, 71 So. 76.

☞100(1) (Ala.App.) That city police officers were authorized by statute or ordinance to arrest offenders without warrant and commit them to jail does not, in the absence of a formal accusation, constitute exercise of the jurisdiction of the recorder's court over the offense prior to his appearance and pleading, whether the offense be denounced by statute or ordinance.—*Sherrod v. State*, 71 So. 76.

☞100(3) (Ala.App.) Where two courts have concurrent jurisdiction, that which first takes cognizance of the case may retain it to the exclusion of the other, and no other court can interfere.—*Sherrod v. State*, 71 So. 76.

Where complete jurisdiction appears in the city court, the burden is then on the defendant, who seeks to oust its jurisdiction, to show the jurisdiction of the offense in another court prior to the attaching of the jurisdiction of the city court.—*Id.*

Where the defendant's pleas in the city court show that no formal complaint or charge was made in the recorder's court, and that he was not called to appear, nor to plead until after he had been arrested and admitted to bond in the city court, the recorder's court had no jurisdiction, and his remedy was to plead therein the pendency of the prosecution in the city court.—*Id.*

That the accused was not arrested under process of the city court until after he had been arrested by city police and had given bond for his appearance before the recorder, does not, in the absence of proof of filing of formal accusation in the recorder's court, deprive the city court of jurisdiction.—*Id.*

☞101(2) (La.) A prosecution, commenced in a court having jurisdiction, cannot, either directly or indirectly, be transferred to a court of concurrent jurisdiction.—*State v. Milano*, 71 So. 131.

☞101(2) (La.) When prosecution is commenced in court of competent jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction, and prosecuting officer should not be permitted to do so indirectly.—*State v. Abraham*, 71 So. 769.

☞101(4) (La.) Prosecuting attorney cannot, by entering nol pros and lodging charge in another court, transfer cause from court first seized of jurisdiction.—*State v. Abraham*, 71 So. 193.

VII. FORMER JEOPARDY.

☞195(1) (Ala.) To have been in former jeopardy a defendant must have been put upon tri-

al for the same offense, or one of the same species, supportable by the same evidence, or else the one crime must be an essential ingredient of the other, and the improper introduction on former trial of evidence now used to support the present charge does not constitute a former jeopardy.—*Brown v. City of Tuscaloosa*, 71 So. 672.

☞196 (Ala.) A former acquittal is no bar to a subsequent prosecution, unless defendant could have been convicted upon the first indictment upon proof of the facts averred in the second.—*Brown v. City of Tuscaloosa*, 71 So. 672.

☞200(1) (Ala.App.) A single crime cannot be split up or subdivided into two or more indictable offenses, and if the state elects to prosecute a crime in one of its phases, it cannot afterwards prosecute the same criminal act under color of another name.—*Everage v. State*, 71 So. 983.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

☞252(1) (Ala.App.) Question whether probable cause is shown by affidavit or sworn complaint charging petit larceny is addressed to committing magistrate, and trial cannot be converted into trial of good faith of affiant, nor can inquiry be made whether he had probable cause.—*Jackson v. State*, 71 So. 977.

☞252(3) (Ala.App.) Under Code 1907, § 6703, affidavit or sworn complaint, charging petit larceny, setting forth that affiant has probable cause to believe, and does believe, following language of statute, is sufficient.—*Jackson v. State*, 71 So. 977.

Averment, in affidavit or sworn complaint, that, in opinion of affiant, he has probable cause for believing, is faulty.—*Id.*

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

☞292(1) (Ala.) In a criminal case, where defendant's special pleas averred that he had been formerly put in jeopardy and tried for the same offense now charged, he was not entitled to discharge on the ground that, though the pleas were insufficient in their averments, the evidence sustained them as framed.—*Brown v. City of Tuscaloosa*, 71 So. 672.

☞302(1) (La.) Where several of a large number of prosecutions for the same offense have resulted in acquittals, the district attorney should not enter a nolle prosequi in the remaining cases, and renew prosecutions for the same offense in another court of concurrent jurisdiction merely to have them tried by the other judge.—*State v. Milano*, 71 So. 131.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

☞304(12) (Ala.App.) While courts take judicial notice of public statutes conferring authority upon municipalities to pass ordinances, they do not take judicial notice of ordinances or proceedings of the municipal court in the exercise of such power.—*Glenn v. City of Prattville*, 71 So. 75.

☞304(12) (Ala.App.) Courts will not take judicial notice of the existence of municipal ordinances in the absence of proper averments and proof thereof.—*Sherrod v. State*, 71 So. 76.

☞304(16) (Ala.App.) The court judicially knows where an injunction bond, approved by a special register, was filed.—*Everage v. State*, 71 So. 983.

(B) Facts in Issue and Relevant to Issues and Res Gestae.

☞351(8) (Ala.App.) On a larceny trial it is proper for the state to ask its witness if defendant made any statements to him about

the stolen property or made any threats about the witness testifying in the case.—*Bufford v. State*, 71 So. 614.

⚡366(1) (Ala.) The statement of deceased at the time of the shooting that "they got [him] from behind the barrel" is admissible in a prosecution for murder as *res gestæ*.—*White v. State*, 71 So. 452.

(C) Other Offenses, and Character of Accused.

⚡369(1) (Ala.App.) Where accused was not indicted for violation of Code 1907, § 6419, requiring butchers to keep a record of every cow killed, it is error to allow the solicitor on cross-examination of accused over his objection to show the latter did not keep such record.—*Lewis v. State*, 71 So. 617.

⚡369(2) (Ala.App.) Testimony as to acts of accused in the transaction in question is admissible, although showing that he had violated a statute for which violation he was not being tried.—*Lewis v. State*, 71 So. 617.

⚡377 (La.) The only evidence of good character of defendant admissible in criminal prosecution, where credibility as witness has not been attacked, is that relating to traits involved in crime charged.—*State v. Banks*, 71 So. 194.

⚡378 (Miss.) The general reputation of defendant as a law-abiding citizen *held* not put in issue by defendant by asking a question thereon and receiving a denial of knowledge by the witness, and evidence thereof by the state was error.—*Webb v. State*, 71 So. 738.

⚡379 (La.) Reputation at any time after charge published or other controversy begun is not admissible.—*State v. Murray*, 71 So. 510.

(D) Materiality and Competency in General.

⚡382 (Fla.) In a murder case, evidence that accused was permitted by a justice of the peace to give bond awaiting the action of the grand jury, *held* properly excluded as immaterial.—*Jackson v. State*, 71 So. 41.

(E) Best and Secondary and Demonstrative Evidence.

⚡398(1) (Fla.) Where evidence is primary or original in character, it should not be excluded because there might be other primary evidence corroborative or stronger and more conclusive.—*Smith v. State*, 71 So. 915.

⚡398(2) (Fla.) Secondary evidence of contents of records may be given when such records are destroyed.—*Smith v. State*, 71 So. 915.

⚡400(8) (Ala.App.) In prosecution for larceny by stealing meat, objection to question to employé of company from which meat was stolen whether he could tell from stock list if any meat had been missed and, if so, how, should have been sustained, where list was not introduced.—*Jackson v. State*, 71 So. 977.

⚡404(5) (Ala.App.) Under Laws, 1915, p. 134, regulating the admission of evidence concerning disputed writings, the court, in a prosecution for forgery, properly permitted a comparison of the writing in a letter and the alleged forged signature.—*Everage v. State*, 71 So. 983.

(F) Admissions, Declarations, and Hearsay.

⚡406(1) (Ala.) There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts and confessions or admissions in the nature of confessions of actual guilt.—*Read v. State*, 71 So. 96.

⚡408 (Ala.App.) Offers of compromise or to make restitution of property which has been the subject of a crime, made by accused, are not admissible in evidence for or against him.—*Spinks v. State*, 71 So. 623.

⚡409 (Ala.) Defendant's conversations with the state's witnesses who were introduced against him, and which were in the nature of inculpatory admissions of collateral facts, and not confessions of guilt, *prima facie* voluntary, were admissible without a predicate of voluntariness.—*Read v. State*, 71 So. 96.

⚡419, 420(2) (Fla.) Testimony that witness was present when statement was made is not hearsay.—*Stone v. State*, 71 So. 634.

⚡421(8) (Fla.) Age of child may be testified to as matter of family history.—*Stone v. State*, 71 So. 634.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

⚡444 (Ala.App.) In prosecution for petit larceny by stealing ham, stock list of robbed corporation could not be introduced without correctness of original entries being authenticated by clerk who made them, or his handwriting proved in event of his death, insanity, or absence.—*Jackson v. State*, 71 So. 977.

(I) Opinion Evidence.

⚡448(1) (Ala.App.) In prosecution for selling cotton seed upon which there was unsatisfied mortgage lien, question to servant of defendant *held* formally objectionable as calling for witness' conclusion.—*Wilson v. State*, 71 So. 971.

⚡449(1) (Ala.) A witness need not be an expert on blood to testify that fresh marks and spots on accused's hands and clothing were made by blood stains.—*Lightner v. State*, 71 So. 469.

⚡451(1) (Ala.App.) In a prosecution for seduction, testimony of prosecutrix that when they were coming back from church "he put in to begging me," and he said they would marry, *held* not a conclusion, but a statement of fact.—*Herring v. State*, 71 So. 974.

⚡476 (Ala.) Where one accused of murder defended on the ground that the deceased was killed by falling against a railroad rail and not by a blow from a blunt instrument as charged, he should have been permitted to ask physicians as expert witnesses whether the blow which caused the death could have been inflicted by falling on the rail.—*Wilson v. State*, 71 So. 115.

⚡476 (Ala.App.) A physician's opinion as to the cause of death is competent evidence.—*Murphy v. State*, 71 So. 967.

⚡478(2) (Ala.App.) In a prosecution for forgery of a name on an injunction bond testimony of a witness, who stated that he knew the defendant's handwriting, and that in his judgment the signature to the bond was in the handwriting of defendant, was admissible; its weight and sufficiency being for the jury.—*Everage v. State*, 71 So. 983.

⚡483 (Ala.) In examination of expert witnesses, the range of the examination is largely within the discretion of the trial court.—*Wilson v. State*, 71 So. 115.

⚡485(1) (Ala.) On cross-examination of expert witnesses, hypothetical questions need not be based on facts proven in that particular case, but may rest on an assumed state of facts, for the purpose of getting opinion on all possible theories of the case, and of testing the value and accuracy thereof.—*Wilson v. State*, 71 So. 115.

(J) Testimony of Accomplices and Codefendants.

⚡511(1) (Ala.) Under Code 1907, § 7897, evidence in prosecution for murder *held* to warrant conviction independently of accomplice testimony.—*Read v. State*, 71 So. 96.

(K) Confessions.

⚡516 (Ala.) There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts and confessions or

admissions in the nature of confessions of actual guilt.—*Read v. State*, 71 So. 96.

☞517(4) (Fla.) Evidence that a dead body identified as that of S. was found with holes in it, made by shot, *held* sufficient proof of the corpus delicti to admit defendant's confession that he killed S.—*Edwards v. State*, 71 So. 331.

☞518(2) (Fla.) A voluntary confession is not inadmissible because made by one who is in custody and has not been warned against self-incrimination.—*Edwards v. State*, 71 So. 331.

☞531(3) (Ala.App.) In a larceny trial a proper predicate for the admission of defendant's confession *held* laid where a witness thereto before testifying said that no one had threatened defendant nor promised nor made inducements.—*Bufford v. State*, 71 So. 614.

☞531(3) (Fla.) That defendant called the officer to whom he confessed "friend" did not show that the confession was induced improperly.—*Edwards v. State*, 71 So. 331.

☞535(2) (Miss.) In a prosecution for arson, evidence of the criminal agency in starting the fire *held* not sufficient to render a confession admissible.—*Barron v. State*, 71 So. 374.

(M) Weight and Sufficiency.

☞561(1) (Ala.App.) If conduct of defendant, upon reasonable hypothesis, is consistent with his innocence, jury must acquit.—*Wilson v. State*, 71 So. 971.

☞564(1) (Ala.App.) In a prosecution for forgery of an injunction bond, evidence that the defendant lived in the county at the time of the execution of the bond, and that all the transactions in connection therewith were in the county was a sufficient showing of venue.—*Everage v. State*, 71 So. 983.

XI. TIME OF TRIAL AND CONTINUANCE.

☞589(5) (Ala.) Under section 32 of the jury law, variance in name of venireman, as noted in copy served on defendant, in absence of proof to contrary, *held*, presumed a mistake, and no ground for continuance.—*Read v. State*, 71 So. 96.

XII. TRIAL.

(A) Preliminary Proceedings.

☞631(4) (Ala.App.) Under Acts 1909 (Sp. Sess.) p. 317, § 32, providing for the summoning of a jury on indictment for capital felony on the first day of the term or as soon as practicable and for service of the list on the defendant, where a former act required service one day before the trial, service in five days was a compliance with the statute.—*Daniel v. State*, 71 So. 79.

(B) Course and Conduct of Trial in General.

☞641(1) (La.) Where accused refused to accept the clerk's offer to assign counsel to defend him, and elected to act as his own lawyer, he could not complain that he was not represented by counsel.—*State v. Fulco*, 71 So. 134.

☞649(1) (Ala.App.) Where the order of the court in a homicide case fixed the date of trial, if the business of the court required it, it was within its discretion to pass the case until a succeeding day of the term.—*Daniel v. State*, 71 So. 79.

(C) Reception of Evidence.

☞678(1) (Miss.) It is error, in a prosecution for unlawful sale of intoxicating liquors, to require the prosecution to elect as to the particular sale on which conviction would be sought, three sales having been charged and proved.—*State v. Gray*, 71 So. 206.

☞683(1) (La.) Testimony by defendant, accused of shooting with intent to kill, of specific overt act by prosecuting witness may be rebutted when not testified to by the latter when he was examined.—*State v. Murray*, 71 So. 510.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

☞696(5) (Ala.) Where no objection to the competency of a witness was made before he stated that marks on accused were made by blood, the objection by motion to exclude was too late.—*Lightner v. State*, 71 So. 460.

☞698(1) (La.) Unless defendant objects to evidence that offense was committed on another day than that stated in indictment or information, he waives such objection.—*State v. Smith*, 71 So. 734.

(E) Arguments and Conduct of Counsel.

☞701 (Ala.App.) Where defendant has affirmatively waived his right to argue to jury, it is not error for the court later to decline to allow him such argument.—*Cole v. State*, 71 So. 616.

☞723(5) (Ala.App.) In a prosecution for violating the prohibition law, the statement of the solicitor that "you must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was improper.—*Simmons v. State*, 71 So. 979.

(F) Province of Court and Jury in General.

☞744 (Ala.App.) In a trial for unlawful sale of liquors, where defendant introduced no evidence, and the only inference from the state's evidence was that of defendant's guilt, the general charge for the state *held* not error.—*Cole v. State*, 71 So. 616.

☞755½ (Ala.) Instruction on self-defense in prosecution for murder *held* not to invade the province of jury.—*White v. State*, 71 So. 452.

An instruction invading the province of the jury is properly refused.—*Id.*

☞755½ (Fla.) Charge on law applicable to facts is not charge on the facts.—*Stone v. State*, 71 So. 634.

☞761(6) (Ala.) Instruction on self-defense in prosecution for murder *held* properly refused as assuming that deceased assaulted defendant.—*White v. State*, 71 So. 452.

☞761(9) (Ala.App.) The court's assumption in an instruction that accused inflicted wounds on the deceased is not error, where such fact is not disputed.—*Murphy v. State*, 71 So. 967.

(G) Necessity, Requisites, and Sufficiency of Instructions.

☞778(4) (Ala.) Defendant's requested instruction on burden of proof and presumption of innocence *held* faulty, as capable of misleading the jury to conclude that he could not be convicted, unless they were absolutely convinced of his guilt.—*Martin v. State*, 71 So. 693.

☞780(4) (Ala.) In prosecution for homicide, instruction that there was sufficient corroborative evidence of the accomplice to submit the question of guilt, and that the question whether such evidence had been sufficiently corroborated to warrant a conviction was for the jury, *held* proper.—*Read v. State*, 71 So. 96.

☞782(9) (Ala.) In a criminal prosecution, a requested charge that, "You cannot find the defendant guilty unless you believe him guilty beyond all reasonable supposition" was properly refused; supposition having no legitimate sphere in judicial administration.—*Dawson v. State*, 71 So. 722.

☞789(4) (Ala.) Defendant's requested instruction that the jury must construe every reasonable doubt in his favor was properly refused, as it stated no proposition of law; it not being possible to "construe" a reasonable doubt.—*Martin v. State*, 71 So. 693.

☞789(4) (Ala.App.) In a homicide case, an instruction that a presumption of innocence surrounds the defendant throughout the trial and the jury must be convinced to a moral certainty and beyond a reasonable doubt that the defendant was not without guilt was properly refused,

as the words "not without guilt" were calculated to confuse.—*Daniel v. State*, 71 So. 79.

↯789(5) (Ala.App.) In a homicide case, an instruction, that no proof of guilt will satisfy the demands of the law if it does not convince the jury beyond reasonable doubt that the defendant is necessarily guilty, was properly refused, as the use of the word "necessarily" in effect asserted that the evidence must exclude all doubt of guilt.—*Daniel v. State*, 71 So. 79.

↯798(1) (Ala.) Defendant's requested instruction on reasonable doubt of one juror held properly refused.—*Martin v. State*, 71 So. 693.

↯807(1) (Ala.) Argumentative charges were properly refused.—*Madison v. State*, 71 So. 706.

↯807 (1) (Ala.App.) Charges held argumentative.—*Wilson v. State*, 71 So. 971.

↯807(2) (Ala.) Requested instruction in prosecution for homicide on duties of jurors to stand by their individual convictions held properly refused as argumentative.—*White v. State*, 71 So. 452.

↯809 (Ala.) Instruction in prosecution for murder held properly refused as confusing and misleading.—*White v. State*, 71 So. 452.

↯809 (Ala.App.) A charge, "Then a strong presumption arises there was no felonious intent," was elliptical and misleading for the omission of "that" after "arises."—*Spinks v. State*, 71 So. 623.

↯811(2) (Ala.) Requested charges, giving undue prominence to a portion of the evidence, were properly refused.—*Madison v. State*, 71 So. 706.

↯811(5) (Ala.App.) Instruction held erroneous, as singling out her testimony.—*Herring v. State*, 71 So. 974.

↯814(1) (Fla.) Charges may properly be refused when they are inapplicable.—*Gorey v. State*, 71 So. 328.

↯814(3) (Ala.App.) Instructions held properly refused as abstract.—*Mitchell v. State*, 71 So. 982.

↯815(9) (Ala.App.) Instruction held erroneous as ignoring evidence.—*Herring v. State*, 71 So. 974.

↯823(5) (Ala.App.) An instruction held not prejudicial, in view of other portions of the charge.—*Murphy v. State*, 71 So. 967.

(H) Requests for Instructions.

↯824(12) (Ala.) One accused of murder must request a definition of the doctrine of reasonable doubt in relation to other specific charges.—*White v. State*, 71 So. 452.

↯825(1) (Ala.App.) Where an instruction correctly states the law, but accused fears it may mislead the jury, he should request an explanatory charge.—*Murphy v. State*, 71 So. 967.

↯829(1) (Ala.) Requested charges, substantially covered by special charges given, were properly refused.—*Madison v. State*, 71 So. 706.

↯829(1) (Ala.App.) In a homicide case, it was not error to refuse an instruction fully covered by other instructions.—*Daniel v. State*, 71 So. 79.

↯829(1) (Ala.App.) Under Acts 1915, p. 815, it is not error to refuse requested instructions adequately covered by other portions of the charge.—*Murphy v. State*, 71 So. 967.

↯829(1) (Fla.) Charges may properly be refused when they are covered by other charges.—*Gorey v. State*, 71 So. 328.

↯829(1) (Fla.) It is not error to refuse charge in substance sufficiently covered by charge given.—*Stone v. State*, 71 So. 634.

↯829(12) (Ala.App.) Defendant's requested charge on corroboration held fully covered by the charge given for defendant.—*Herring v. State*, 71 So. 974.

↯830 (Ala.App.) The use of the word "segregately" for "segregately" justified the re-

fusal of defendant's instruction that before the jury could convict each juror must separately and "segregately" be satisfied beyond reasonable doubt of his guilt.—*Herring v. State*, 71 So. 974.

↯830 (Fla.) Charges may properly be refused when they are incorrect.—*Gorey v. State*, 71 So. 328.

(J) Custody, Conduct, and Deliberations of Jury.

↯858(4) (Fla.) Where charges are indorsed as refused because covered by other charges, it is not error to permit them to be taken to jury room where no harm reasonably could have resulted.—*Stone v. State*, 71 So. 634.

↯863(2) (Ala.) Where the jury merely requested further instructions as to justification of deceased in firing on defendant when he discovered him on his premises late at night, it was unnecessary to define the doctrine of reasonable doubt.—*White v. State*, 71 So. 452.

(K) Verdict.

↯878(2) (Ala.App.) Overruling of demurrer to counts subject to demurrer would not work a reversal of a judgment of conviction following a general verdict not specifying the count under which it was found as the verdict would be referred to a good count.—*Hancock v. State*, 71 So. 973.

↯892 (La.) Verdict indorsed on indictment and signed by foreman of jury will be accepted in preference to verdict as recorded by clerk.—*State v. Murray*, 71 So. 510.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

↯939(1) (La.) New trial should not be granted for newly discovered evidence of witnesses whose testimony could have been produced on first trial, where defendant knew they were in possession of facts which they propose to testify.—*State v. Paillet*, 71 So. 951.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

↯982 (La.) Under Act No. 74 of 1914, § 7, authorizing suspension of sentence in certain cases, a defendant charged with misdemeanor may, after conviction, show that he had not theretofore been convicted of any felony or misdemeanor.—*State v. Defatta*, 71 So. 195.

XV. APPEAL AND ERROR AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

↯1005 (Ala.App.) Code 1907, § 6256, as amended by the act approved September 22, 1915 (Acts 1915, p. 708), specifically authorizing omission from transcript on appeal of order for special venire to be drawn as in case of capital felonies, took effect from and after its passage as to all matters to be reviewed on appeal, irrespective of date of trial.—*Price v. State*, 71 So. 972.

↯1020 (La.) In sentence to pay fine exceeding \$300, and in default of payment to be imprisoned, fine is "actually" imposed within Const. art. 85, conferring on Supreme Court appellate jurisdiction.—*State v. Abraham*, 71 So. 769.

(D) Record and Proceedings Not in Record.

↯1086(14) (Ala.App.) Where the bill of exceptions does not disclose the grounds of accused's objection to testimony, nothing is presented for review.—*Murphy v. State*, 71 So. 967.

↯1088(18) (Ala.App.) Although the judgment showed that a demurrer to the complaint was overruled, where the demurrer itself was not in the record but appeared only in the bill of ex-

ceptions, the questions sought to be raised by it were not presented for review.—*Glenn v. City of Prattville*, 71 So. 75.

☞1090(14) (Ala.App.) A general affirmative charge requested in writing by defendant cannot be reviewed on appeal in absence of bill of exceptions.—*Frazier v. State*, 71 So. 981.

☞1091(1) (La.) Notation by clerk of court in criminal case that defendant excepted and reserved bill cannot be considered a "bill of exceptions."—*State v. Matassa*, 71 So. 190.

☞1091(9) (Ala.App.) In order to have the refusal of requested instructions reviewed, the bill of exceptions need not affirmatively show their presentation to the court before the jury retired.—*Murphy v. State*, 71 So. 967.

☞1094 (Ala.App.) A record proper showing a regular conviction on an indictment charging the offense for which defendant was convicted, but containing no bills of exceptions, after the expiration of the time for filing such bills, presented no error requiring reversal.—*Douglas v. State*, 71 So. 614.

☞1094 (Ala.App.) Where the time for presenting and signing a bill of exceptions had expired before the submission of the cause, and no reason was shown for not having the record filed, the Attorney General's motion to dismiss the appeal would be granted.—*Kenamer v. State*, 71 So. 981.

☞1104(3) (La.) When a transcript of appeal in criminal case does not contain bill of exceptions or assignment of errors, judgment will be affirmed.—*State v. Matassa*, 71 So. 190.

☞1120(1) (Ala.) Error cannot be predicated upon the asking of a question which the record fails to show was asked and objected to or excepted to.—*Wilson v. State*, 71 So. 115.

☞1122(1) (Ala.App.) Where transcript contained no bill of exceptions and did not set out the oral charge, Court of Appeals cannot say whether particular written charge was covered by oral charge, or whether, from evidence, particular written charge was properly given or refused.—*Clay v. State*, 71 So. 982.

☞1122(1) (Ala.App.) Where the transcript contains no bill of exceptions and does not set out the oral charge, as provided by Acts 1915, c. 815, Court of Appeals cannot review written charges requested by defendant.—*Mitchell v. State*, 71 So. 982.

☞1124(1) (La.) Grounds for new trial based on facts which are not brought up cannot be considered on appeal.—*State v. Ashworth*, 71 So. 860.

(F) Dismissal, Hearing, and Rehearing.

☞1131(4) (Ala.App.) Where the certificate of appeal shows a conviction and notice of appeal in November, 1915, but no further steps were taken to perfect an appeal, it was subject to dismissal on motion in May, 1916.—*Martin v. State*, 71 So. 981.

☞1131(4) (Ala.App.) Where appeal was taken in November, 1915, held that no further steps to perfect same having been taken, appeal may be dismissed on regular call in May, 1916.—*Neely v. State*, 71 So. 981.

(G) Review.

☞1134(3) (Ala.) On appeal from a conviction, the court, when reversal is required on other grounds, need not consider improper argument of counsel, since that would not arise on another trial.—*Wilson v. State*, 71 So. 115.

☞1134(3) (La.) The Supreme Court's jurisdiction is limited to questions of law.—*State v. Fulco*, 71 So. 133.

☞1134(4) (Ala.App.) Where an appeal was taken and bill of exceptions signed before amendment of the Code to authorize appeals from ruling on motion for new trial in criminal cases, the appeal was governed by the pre-existing rule, and the court on appeal could not consider

the ruling for new trial.—*Sherrod v. State*, 71 So. 76.

☞1134(4) (La.) The Supreme Court, having no jurisdiction of questions of fact in criminal prosecution, cannot reverse ruling on motion for new trial where bill of exceptions does not present distinct question of law.—*State v. Matassa*, 71 So. 191.

☞1134(6) (Ala.App.) Where an objection to a question was properly sustained, the court would not be put in error because the ground of objection urged was improper.—*Daniel v. State*, 71 So. 70.

☞1137(6) (Ala.App.) Defendant, who rejected court's offer to permit him to make proof of offer of restitution, after proper predicate had been laid, cannot complain of original exclusion of the evidence.—*Spinks v. State*, 71 So. 623.

☞1144(2) (La.) Presumption is that grand jury was duly organized.—*State v. Dorr*, 71 So. 500.

☞1144(9) (La.) Under Rev. St. § 667, sickness or necessary absence of coroner will be presumed where deputy coroner has acted in holding inquest unless bill of exceptions shows the contrary.—*State v. Ashworth*, 71 So. 800.

☞1144(12) (Ala.App.) The introduction of a letter against objection by defendant will on appeal be presumed proper, where neither the letter nor its contents, are included in the transcript.—*Bufford v. State*, 71 So. 614.

☞1151 (La.) The discretion of the court in ruling on a motion for a continuance will not ordinarily be disturbed where it does not appear that accused was prejudiced thereby.—*State v. Fulco*, 71 So. 133.

☞1153(4) (Ala.) In examination of expert witnesses, the range of the examination is largely within the discretion of the trial court, which in the absence of prejudice will not be revised.—*Wilson v. State*, 71 So. 115.

☞1159(2) (Ala.App.) Under Acts 1915, p. 940, § 3, forbidding any presumption on appeal in favor of the judgment or conclusions of the court in misdemeanor cases tried without jury, the judgment in such cases will not be disturbed unless the facts are clearly and palpably insufficient to sustain it.—*Danal v. State*, 71 So. 976.

☞1160 (Fla.) A verdict, supported by some evidence and concurred in by the judge by denying a new trial, will not be disturbed, in the absence of a showing that the jurors were improperly influenced by matters outside the evidence.—*Jackson v. State*, 71 So. 41.

☞1167(8) (Ala.App.) Under rule 45 (175 Ala. xxi, 61 South. ix), the mere fact that a plea was erroneously disposed of on motion to strike rather than on demurrer, is insufficient to require reversal if no substantial right of the defendant was probably injuriously affected.—*Sherrod v. State*, 71 So. 76.

☞1167(5) (Ala.App.) Any error in overruling a demurrer to several counts was error without injury, where the court subsequently gave defendant the affirmative charge as to each of those counts.—*Hancock v. State*, 71 So. 973.

☞1169(3) (Ala.) The admission of evidence was not prejudicial to accused, where the same fact was testified to by numerous other witnesses without objection and admitted by defendant.—*Lightner v. State*, 71 So. 469.

☞1169(3) (Ala.App.) In a larceny trial a witness identifying defendant's handwriting is properly qualified by later testimony of defendant that the witness "is familiar with my handwriting; we have had a number of letters pass between us."—*Bufford v. State*, 71 So. 614.

☞1169(9) (Ala.App.) Any error in the admission of the prosecuting witness' conclusion was harmless, where in her subsequent testimony she detailed the facts constituting the

transaction in question.—*Herring v. State*, 71 So. 974.

⚡1169(12) (Fla.) Technical error in admitting testimony as to statements or confessions by accused while in custody is not ground for reversal when there is other evidence of confessions and there is evidence to sustain verdict.—*Gorey v. State*, 71 So. 328.

⚡1170(4) (Ala.App.) Where the question, "Do you know what Mr. D. was doing?" was improperly ruled out, but the witness later testified fully as to the conduct of the parties immediately before and during the affray, the error was harmless.—*Daniel v. State*, 71 So. 79.

In a homicide case, where the question, "Did D. strike the first lick?" was improperly ruled out, but the witness later testified that the deceased struck the first blow and that the defendant "struck back," the error was harmless.—*Id.*

⚡1171(1) (Ala.App.) In a prosecution for violating the prohibition law, the statement of the solicitor that "you must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was prejudicial error.—*Simmons v. State*, 71 So. 979.

⚡1171(1) (La.) It is not every idle or irrelevant remark by district attorney during trial which will cause case to be remanded.—*State v. Murray*, 71 So. 510.

⚡1172(1) (Ala.App.) Reversal, will not be granted for a merely misleading charge, unless it clearly prejudiced the accused.—*Murphy v. State*, 71 So. 967.

⚡1177 (Ala.App.) Where the record recited that upon arraignment defendant pleaded not guilty, that the judgment entry recited that he pleaded not guilty, and not guilty by reason of insanity, was unimportant, where the judgment entry showed that he had the benefit of both pleas.—*Marks v. State*, 71 So. 983.

⚡1178 (Ala.) On appeal of a criminal case after finding on questions insisted upon by counsel in his argument of the case, it is the duty of the court to give careful consideration to all other questions presented by the record.—*Dawson v. State*, 71 So. 722.

(H) Determination and Disposition of Cause.

⚡1182 (Ala.App.) Where the time for presenting and having signed a bill of exceptions had expired and the transcript contained no bill of exceptions, and the proceedings shown by the record proper were regular and showed no reversible error, *held*, a conviction will be affirmed.—*Gibson v. State*, 71 So. 614.

⚡1182 (Ala.App.) Where the transcript contained a certificate of the trial judge that the time for tendering a bill of exceptions had expired, and that no bill had been tendered within the time allowed by law, and the record proper showed that the proceedings were regular and contained no reversible error, *held* a conviction will be affirmed.—*Woods v. State*, 71 So. 614.

⚡1182 (Ala.App.) On an appeal from a conviction upon the record proper, where no bill of exceptions was duly presented, and the court reviewing the record, as required by Code 1907, § 6264, found that the proceedings and judgment entry were regular, and no error appeared, the judgment will be affirmed.—*Sturdivant v. State*, 71 So. 978.

⚡1182 (Ala.App.) Where an appeal is on the record proper without a bill of exceptions, and the Court of Appeals, as required by statute, has examined the record filed and finds the judgment entry regular, together with proceedings in support thereof, the judgment will be affirmed.—*Douthard v. State*, 71 So. 979.

⚡1182 (Fla.) Where there is ample evidence to sustain verdict and nothing to indicate that jury were not governed by evidence, and no

material errors appear, judgment will be affirmed.—*Stone v. State*, 71 So. 634.

⚡1182 (La.) Where transcript contains no bill of exception and there has been no assignment of error and no error is patent on face of record, conviction will be affirmed.—*State v. Tuminello*, 71 So. 190.

⚡1188 (Fla.) Where Gen. St. 1906, § 4012, providing, in case of sentence to fine and imprisonment, for additional period of imprisonment in default of payment of fine and costs, is not complied with, judgment will be reversed and cause remanded for proper sentence.—*Smith v. State*, 71 So. 915.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⚡1208(4) (Ala.App.) Under Code 1907, § 7620, providing when court may sentence to hard labor, and section 7635, providing when additional hard labor may be imposed for costs, where term of imprisonment imposed did not exceed two years, sentence to hard labor for county was proper, though additional sentence to hard labor was imposed for payment of costs.—*Smith v. State*, 71 So. 979.

CROPS.

See Agriculture, ⚡11, 12.

CROSS-ERRORS.

See Appeal and Error, ⚡747.

CROSS-EXAMINATION.

See Witnesses, ⚡288-289.

CROSSINGS.

See Railroads, ⚡95, 99, 800-851.

CRUELTY.

See Divorce, ⚡27.

CURATIVE ACTS.

See Public Lands, ⚡61.

CURTESY.

See Dower.

CUSTODY.

See Divorce, ⚡298.

CUSTOMS AND USAGES.

See Waters and Water Courses, ⚡194.

DAMAGES.

See Assault and Battery, ⚡38; Attachment, ⚡279; Carriers, ⚡135, 229, 277; Chattel Mortgages, ⚡240; Covenants, ⚡130; Eminent Domain, ⚡124; Insurance, ⚡530; Municipal Corporations, ⚡399, 706; Sales, ⚡418; Telegraphs and Telephones, ⚡68-70; Trespass, ⚡52.

II. NOMINAL DAMAGES.

⚡12 (Ala.) In absence of data to determine amount of damages to railroad employé resulting from permanent injuries for which road is liable, such employé is entitled to nominal damages.—*Alabama Great Southern R. Co. v. Taylor*, 71 So. 676.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

⚡30 (Ala.) Where a railroad is liable for its servant's permanent injuries, damnifying consequences resulting from such injuries are of

elements of recoverable damages.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

(B) Aggravation, Mitigation, and Reduction of Loss.

⇒62(4) (Ala.App.) In action for breach of contract for rental of land on shares, although relation was that of tenants in common, and not a contract for hire, under Code 1907, § 4743, measure of damages, *held* to be on half value of probable crops, less one-half fertilizer, and what plaintiff did or could have received in similar employment.—T. L. Farrow Mercantile Co. v. Riggins, 71 So. 963.

⇒62(4) (La.) Where a lessee abandons the premises, the lessor should, if possible, minimize the prospective loss by finding tenants.—Henry Rose Mercantile & Mfg. Co. v. Smith, 71 So. 487.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⇒132(1) (La.) An award of \$1,500 for dislocated shoulder to man in prime of life is excessive, and will be reduced to \$1,000.—Jones v. Tremont Lumber Co., 71 So. 862.

⇒132(15) (Miss.) Verdict of \$100 in action for bite of a dog *held* so grossly inadequate as to indicate prejudice or reckless disregard of the testimony.—White v. McRee, 71 So. 804.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

⇒154 (Ala.) The question of the recoverability of claimed elements of damages should be raised by objection to the admission of evidence or to the instructions or by motion to strike, rather than by a plea.—Western Union Telegraph Co. v. Favish, 71 So. 183.

⇒157(2) (Ala.) Matter in mitigation of damages is admissible under the general issue.—People's Shoe Co. v. Skally, 71 So. 719.

(B) Evidence.

⇒182 (Ala.App.) In an action for breach of contract of rental of land on shares, evidence of financial condition of the plaintiff at time of breach, *held* admissible on question whether he could have minimized damages.—T. L. Farrow Mercantile Co. v. Riggins, 71 So. 963.

(C) Proceedings for Assessment.

⇒208(1) (Miss.) In action for damages to a shipment of horses, defendant's motion at the conclusion of plaintiff's evidence for a peremptory instruction *held* properly overruled, where plaintiff was entitled at least to nominal damages.—Illinois Cent. R. Co. v. Mahon Live Stock Co., 71 So. 802.

⇒208(3) (Ala.) Whether plaintiff was permanently injured *held* for jury.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

⇒216(6) (Ala.) Instruction advising jury on hypothesis that there was evidence warranting finding of compensatory damages for permanent injuries *held* warranted by evidence, though mortality tables were not offered.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

DEATH.

See Abatement and Revival, ⇒48-72; Common Law, ⇒14.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⇒8 (Miss.) The law of the state where the plaintiff's intestate was killed must govern in an action for his wrongful death, brought by the administrator in Mississippi.—Wheeler v. Southern Ry. Co., 71 So. 812.

⇒16 (Fla.) Action by administrator under federal Employers' Liability Act will lie, though death followed immediately upon injury inflicted.

—Louisville & N. R. Co. v. Rhoda, 71 So. 369.

⇒18(1) (Fla.) Under federal Employers' Liability Act, as amended by Act April 5, 1910, administrator has option to sue for loss to estate of intestate generally, or particular loss to special beneficiary named in statute.—Louisville & N. R. Co. v. Rhoda, 71 So. 369.

⇒27 (Miss.) Under the wrongful death statute (Code 1906, § 721), there can be no recovery for death caused by injuries for which deceased recovered judgment while living.—Harris v. Illinois Cent. R. Co., 71 So. 878.

⇒32 (Miss.) Under Shannon's Code Tenn. §§ 4025, 4106, the mother of an illegitimate child is the next of kin, and as such might maintain an action by the administrator for damages for her son's wrongful death.—Wheeler v. Southern Ry. Co., 71 So. 812.

(E) Damages, Forfeiture, or Fine.

⇒101 (Miss.) Widow of railroad employé suing for his death under Code 1906, § 721, who sought to enlarge her recovery on account of the existence of children by decedent's former marriage, *held* unable to claim entire proceeds of litigation on ground that such children were, in fact, illegitimate.—Howard v. Kelly, 71 So. 391.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors.

DECEIT.

See Fraud.

DECLARATIONS.

See Evidence, ⇒268.

DECREE.

See Equity, ⇒419-428.

DEEDS.

See Covenants; Estoppel, ⇒25; Evidence, ⇒419; Execution, ⇒319; Fraudulent Conveyances; Mortgages; Taxation, ⇒761-788; Vendor and Purchaser, ⇒254.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

⇒19 (Miss.) Failure to support a grantor as promised, as consideration for his deed, does not entitle him to have the deed canceled.—Lowrey v. Lowrey, 71 So. 309.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇒99 (Ala.) To be admissible, a supplemental writing, not referred to in a deed, must be written contemporaneously with the deed; must be physically before the grantor when he executes the deed; must be delivered; and must not contradict the deed or be inconsistent with that part of it which it purports to supplement.—Kyle v. Jordan, 71 So. 417.

A supplemental writing on a separate piece of paper, containing matter of description additional to that in the deed, but contradicting the deed both as to parties and consideration, *held* not properly received in evidence as a part of the deed.—Id.

The rule is not absolute that a deed and a supplemental paper claimed to be a part of it shall, on their face, indicate a reference to each other and in some cases parol evidence of contemporaneous facts may be admissible to show their connection, if there is proof of identity and unity.—Id.

(B) Property Conveyed.

⇒114(3) (La.) Although seller intended to sell entire area, where her act of sale fixed the

north or lake side boundary line as a line bounded by another tract, including the strip in dispute, her sale must necessarily be so limited.—*Beugnot v. New Orleans Land Co.*, 71 So. 947.

A sale of an area bounded by fences along the south and west side, the ends of which were projected into the water, and by a bayou on the east side and a canal on the north side, serving to hold cattle pastured therein, was a sale per aversionem, with the canal as one of the boundaries.—*Id.*

DE FACTO OFFICERS.

See Judges, ¶6; Justices of the Peace, ¶6.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Contracts, ¶264, 277; Insurance, ¶349; Judgment, ¶180-178; Vendor and Purchaser, ¶169, 185.

DELAY.

See Contracts, ¶301; Sales, ¶170; Vendor and Purchaser, ¶185-187.

DELEGATION OF POWER.

See Eminent Domain, ¶10; Taxation, ¶29.

DELIVERY.

See Carriers, ¶94; Chattel Mortgages, ¶66; Sales, ¶117-176.

DEMAND.

See Bills and Notes, ¶394, 398; Contracts, ¶277.

DE MINIMIS NON CURAT LEX.

See Attachment, ¶138.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ¶404.

DEMURRER.

See Criminal Law, ¶1187; Pleading, ¶194-222.

DEPARTURE.

See Pleading, ¶180.

DEPOSITS IN COURT.

See Tender, ¶24.

DEPUTY CLERKS.

See Jury, ¶72.

DESCENT AND DISTRIBUTION.

See Adoption, ¶21; Dower; Executors and Administrators; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(B) Advancements.

¶109 (La.) Debt due by way of interest, but alleged to have been remitted, is subject to colation as any other debt.—*Rizan v. Rizan*, 71 So. 581.

(C) Debts of Intestate and Incumbrances on Property.

¶119(1) (Miss.) Suit by a receiver of an insolvent bank cannot be maintained against heirs of a deceased director for the latter's gross

negligence as director, his remedy, if any, being to have an administrator of the estate appointed.—*Ventress v. Wallace*, 71 So. 636.

DESCRIPTION.

See Deeds, ¶114; Execution, ¶222; Forgery, ¶28; Insurance, ¶164; Taxation, ¶421, 764.

DESERTION.

See Divorce, ¶37.

DETINUE.

See Replevin.

¶6 (Ala.) The mortgage of property alleged to have been wrongfully obtained is not the foundation of a suit in detinue, although the right to possession may rest wholly on the mortgage, but the gist of the action is the detention.—*Knight v. Garden*, 71 So. 715.

¶17 (Ala.) In detinue for a mule, the general issue being nondetinet, an averment that the allegations of the complaint are untrue is a plea of the general issue, which puts in issue plaintiff's right to recover, and renders evidence negating the right of either plaintiff or defendant admissible; so that, when the mule was claimed under a mortgage, the mortgagor should have been permitted to testify whether he signed the mortgage.—*Knight v. Garden*, 71 So. 715.

Where the plaintiff in detinue introduces a mortgage, under which he claimed, the defendant may under a plea of general issue, defeat such prima facie right of possession, by showing an outstanding title in a third person, or proving payment or showing that the mortgage has been rendered nugatory, or that the property was a gift, or that the plaintiff is estopped to deny defendant's right of possession.—*Id.*

DIRECTING VERDICT.

See Criminal Law, ¶1188; Trial, ¶170-178.

DISCHARGE.

See Bills and Notes, ¶301, 439; Compromise and Settlement; Principal and Surety, ¶100; Release.

DISCLOSURE.

See Garnishment.

DISCOVERED PERIL.

See Railroads, ¶338.

DISCOVERY.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

¶70 (Ala.) Under Code 1907, § 4055, it was not error to refuse a motion insisting that a nonsuit be granted for plaintiff's failure to answer interrogatories fully.—*Russell v. Bush*, 71 So. 397.

DISCRETION OF COURT.

See Appeal and Error, ¶970; Criminal Law, ¶1151, 1153; Evidence, ¶546; New Trial, ¶6; Pleading, ¶236; Trial, ¶68.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶780-792; Courts, ¶485; Criminal Law, ¶1131; Discovery, ¶70; Evidence, ¶368; Judgment, ¶570.

I. VOLUNTARY.

☞7(3) (Fla.) Taking nonsuit immediately after motion for directed verdict for defendant is granted is compliance with statute, requiring nonsuit to be taken before jury retires from box.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

☞19(2) (La.) Plaintiff against whom defendant has asserted demand in reconvention may discontinue his own demand, but cannot thereby put defendant out of court or prejudice his position.—*State ex rel. John T. Moore Planting Co. v. Howell*, 71 So. 529.

Where plaintiff asserts title and claims damages from defendant's possession of property and defendant reconvenes asserting his title, but, in alternative, praying for resale under mortgage under which he claims, plaintiff cannot withdraw issues presented by defendant by discontinuing his case.—*Id.*

☞43(2) (Ala.) Where order of discontinuance was through inadvertence entered against defendant, the court, the order not having been made of record, might properly set it aside and allow plaintiff to proceed against defendant.—*Porter v. Watkins*, 71 So. 687.

☞43(7) (Ala.) No discontinuance was effected, where court, having through inadvertence of counsel discontinued action as to defendant, set aside order before it was entered of record.—*Porter v. Watkins*, 71 So. 687.

DISORDERLY CONDUCT.

☞11 (Ala.App.) Evidence in prosecution for disorderly conduct held to sustain the refusal of the court to give an affirmative charge for the defendant.—*Sherrod v. State*, 71 So. 76.

DISQUALIFICATION.

See Judges, ☞47.

DISSOLUTION.

See Corporations, ☞604-630; Schools and School Districts, ☞2.

DISTRIBUTION.

See Descent and Distribution.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ☞723, 1171.

☞8 (Fla.) While, under Const. art. 5, § 15, duties of state attorneys are statutory and there must be state attorney in each judicial district, Constitution does not require duties of such officer to be confined to judicial district in which he is appointed.—*Stone v. State*, 71 So. 634.

DISTRICTS.

See Drains; Highways, ☞90; Taxation, ☞29.

DITCHES.

See Drains.

DIVORCE.

See Witnesses, ☞64, 195.

II. GROUNDS.

☞27(2) (La.) Reciprocal wrongs or solitary instance of ill treatment during long cohabitation will not warrant judgment of separation from bed and board.—*Primeaux v. Comeaux*, 71 So. 845.

☞30 (La.) Confidential statement by husband to relatives and friends as to relations between himself and wife, when made in good faith, will not be considered public defamation.—*Primeaux v. Comeaux*, 71 So. 845.

☞37(16) (Ala.) Under Code 1907, § 3793, subd. 3, wife's separation enforced by the hus-

band was not a "voluntary" abandonment, and husband's reassociation with wife for about a month many years afterwards, terminated without her fault, did not exonerate him from the consequences of his previous conduct.—*Dabbs v. Dabbs*, 71 So. 696.

A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him as by going from their former residence and leaving her there, and not permitting her to live with him.—*Id.*

III. DEFENSES.

☞49(2) (La.) Wife's forbearance and patience in enduring husband's abusive treatment and overtures of love to other women for four years held not condonation.—*Lynch v. Lynch*, 71 So. 195.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) Jurisdiction, Venue, and Limitations.

☞62(6) (La.) One having domicile in Louisiana, who marries in another state and, after 30 years' absence in army service, returns and establishes actual residence, may maintain suit for separation a mensa et thoro by substituted service, though the parties have never lived in the state.—*Stevens v. Allen*, 71 So. 936.

(C) Pleading.

☞93(3) (La.) Petition by wife, alleging abusive treatment and that husband made love to women visiting his store, held sufficient, notwithstanding omission of particulars.—*Lynch v. Lynch*, 71 So. 195.

(G) Appeal.

☞182 (Ala.) Where there was a final decree of divorce and alimony, an appeal fully perfected removed the entire proceeding to the appellate court, and mandamus will not lie to compel allowance of temporary alimony pending appeal.—*Ex parte Farrell*, 71 So. 462.

☞186 (Ala.) On reversing decree for divorce granted on husband's bill and dismissing the bill, cause remanded, so that wife, filing cross-bill for permanent alimony in case the divorce was allowed, might amend and proceed as advised.—*Dabbs v. Dabbs*, 71 So. 696.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

☞239 (Ala.) The question of the amount of compensation to be awarded for plaintiff's attorneys may properly be referred to the register; such fees being allowable to the wife in her suit for alimony.—*Johnson v. Johnson*, 71 So. 415.

☞240(3) (Ala.) Where there is evidence that the husband received money for the sale of land, and that his earning power is a given sum, it cannot be said that there is no basis for a decree of alimony.—*Johnson v. Johnson*, 71 So. 415.

☞240(5) (Ala.) Where a wife, although not entirely free from fault, secured a divorce from her husband for cruelty, and the husband was a healthy man, 48 years old, successful in business, with a personal estate of \$5,000 or more, an award of \$1,200 permanent alimony and \$100 attorney's fees was not excessive.—*Farrell v. Farrell*, 71 So. 661.

☞245(1) (Ala.) Proceedings for the award of alimony should always be kept within control of the court so that proper changes to conform with the circumstances may be made.—*Johnson v. Johnson*, 71 So. 415.

VI. CUSTODY AND SUPPORT OF CHILDREN.

☞298(3) (La.) In suit by husband, several years after obtaining divorce on ground of adultery, for possession of child, evidence taken in

divorce suit is not enough to prove mother still unworthy of care of child.—State ex rel. Henry v. Lyons, 71 So. 507.

DOCKETS.

See Appeal and Error, ¶810.

DOCUMENTS.

See Criminal Law, ¶444; Evidence, ¶344, 368.

DOING BUSINESS.

See Corporations, ¶642.

DOMICILE.

See Divorce, ¶62; Venue.

¶4(1) (La.) One having domicile in Louisiana, who is appointed cadet at West Point and remains in army until voluntary retirement 30 years later, does not forfeit domicile.—Stevens v. Allen, 71 So. 936.

¶5 (La.) Where one having domicile in Louisiana marries in another state, his wife has no other domicile than his, and, save for just cause, can acquire no other.—Stevens v. Allen, 71 So. 936.

DONATIONS.

See Gifts.

DOWER.

See Homestead, ¶145.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

¶49(1) (Ala.) By joining with the heirs of her deceased husband in the execution of a mortgage of decedent's lands after his death, the widow estopped herself, as against the mortgagee, to assert dower or quarantine rights.—Todd v. Interstate Mortgage & Bond Co., 71 So. 661.

DRAINS.

See Bridges, ¶9.

I. ESTABLISHMENT AND MAINTENANCE.

¶2(1) (Miss.) A drainage district is a creature of the Legislature, and the Legislature can prescribe the terms of its organization.—Northern Drainage Dist. v. Bolivar County, 71 So. 380.

¶14(3) (Miss.) False recital in order of supervisors that petition praying formation of drainage district was signed by necessary landowners does not confer jurisdiction on the board to organize the district; inquiry into the legality of the proceedings being expressly authorized by Laws 1912, c. 198, § 5.—Commissioners of Camp Creek Drainage Dist. v. Johnston, 71 So. 320.

Under Laws 1912, c. 198, § 5, providing procedure in formation of drainage districts, even if the board of supervisors may continue hearing objections from day to day or from term to term, the exercise of such power is not mandatory.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, ¶284-309.

DURESS.

See Taxation, ¶541.

DYING DECLARATIONS.

See Homicide, ¶203, 204.

EARNST MONEY.

See Vendor and Purchaser, ¶98, 384.

EJECTION.

See Criminal Law, ¶678.

EJECTMENT.

I. RIGHT OF ACTION AND DEFENSES.

¶14 (Miss.) In ejectment the plaintiff can recover only by strength of his own title, and not by estoppel of defendant, as tenant, to deny the title of plaintiff as landlord.—Wilson v. Peacock, 71 So. 296.

¶30 (Ala.App.) Under Code 1907, §§ 2496, 2497, and 2499, actions to try title or to recover possession of lands on the death of the plaintiff survives in favor of the heirs, as well as the personal representative.—State v. Pearce, 71 So. 656.

ELECTION OF REMEDIES.

¶1 (Ala.) To make a case for the application of the principle by which a party concludes himself by an election between remedies, he must have actually at command two inconsistent remedies.—Todd v. Interstate Mortgage & Bond Co., 71 So. 661.

ELECTIONS.

See Counties, ¶151; Ejectment, ¶30; Statutes, ¶101.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

¶5 (Miss.) The right to vote is one which, under both federal and state Constitutions, can be bestowed on some and denied to others, and can be reasonably regulated by the Legislature with reference to the conduct of elections.—McKenzie v. Boykin, 71 So. 382.

¶22 (La.) The General Assembly has the power to prescribe an official ballot, which shall conform to the requirements of the law, including the placing thereon of the names of the candidates selected according to law, and an election without the use of the official ballot is no election.—Maggiore v. Lochbaum, 71 So. 727.

¶27 (Miss.) Code 1906, § 4160, relating to mode of voting on death of candidate, which was a rescript of a section of the election ordinance adopted by the constitutional convention, cannot be held to violate Const. 1890, § 250.—McKenzie v. Boykin, 71 So. 382.

IV. QUALIFICATIONS OF VOTERS.

¶73 (La.) Const. 1913, art. 197, § 1, providing that removal from one precinct to another in parish does not deprive one of right to vote in precinct from which he removed, until six months thereafter, voter who has removed has right within the six months to register as well as vote in former precinct.—State ex rel. Powell v. Montgomery, 71 So. 768.

V. REGISTRATION OF VOTERS.

¶105 (Ala.) Under Registration Law, § 15, a qualified citizen can be registered as a voter only between November 15th and after January 5th in succeeding year.—State v. Davisoa, 71 So. 678.

¶105 (Ala.) Under the Registration Law, a qualified citizen may only be registered as a voter between November 15th and January 5th in the following year.—State v. Herring, 71 So. 679.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

☞151 (La.) In Act No. 152 of 1898, § 55, requiring persons contesting nomination to notify parties affected thereby, term "party" does not mean political party, but individual whose right is contested.—State ex rel. Labbe v. Millsaps, 71 So. 496; State ex rel. Elfer v. Same, Id. 499.

☞153 (La.) Under Act No. 152 of 1898, § 55, contest board has jurisdiction to decide contest of nomination of candidate by any person and is not limited to contests by candidates claiming same nomination.—State ex rel. Labbe v. Millsaps, 71 So. 496; State ex rel. Elfer v. Same, Id. 499.

☞154(1) (La.) Under Act No. 152 of 1898, § 55, as amended by Act No. 132 of 1900, decision of majority of contest board in contest of right of candidate to nomination of political party is not subject to review by courts.—State ex rel. Labbe v. Millsaps, 71 So. 496; State ex rel. Elfer v. Same, Id. 499.

☞159 (La.) Though a name is not placed upon the ballot under any emblem, an elector may vote for the bearer by writing the name himself.—Maggiore v. Lochbaum, 71 So. 727.

☞159 (Miss.) Code 1906, § 4160, when construed with the statutes for nominating non-partisan candidates and with Code 1906, § 4175, authorizes a voter to write on the official ballot the name of a candidate only when a candidate has died.—McKenzie v. Boykin, 71 So. 382.

VII. BALLOTS.

☞180(1) (La.) Where a name has been properly and legally placed on the ballot, an elector may vote for the bearer without committing himself to the party under whose emblem the name appears.—Maggiore v. Lochbaum, 71 So. 727.

☞181 (La.) One nominated at the primaries on the Democratic ticket, whose name has been placed upon the official ballot in defiance and disregard of law, cannot be validly elected to an office as an Independent by the electors writing his name on the ballots.—Maggiore v. Lochbaum, 71 So. 727.

VIII. CONDUCT OF ELECTION.

☞198 (La.) The General Assembly has the power to prescribe the manner in which an election shall be conducted, and an election not conducted as prescribed is no election.—Maggiore v. Lochbaum, 71 So. 727.

IX. CONTESTS.

☞270 (La.) Act No. 198 of 1912, § 6, relating to election contests, held not unconstitutional, so that, where plaintiff contested defendant's nomination as the Democratic candidate for town marshal, pending which the election occurred and defendant received a majority vote as an Independent, the dismissal of suit was erroneous.—Maggiore v. Lochbaum, 71 So. 727.

ELECTRICITY.

See Municipal Corporations, ☞680, 681.

ELEVATORS.

See Innkeepers, ☞10.

EMINENT DOMAIN.

See Brokers, ☞65; Constitutional Law, ☞70.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

☞3 (Ala.) Const. 1901, § 23, prohibiting abridgement of the right of eminent domain, did not deprive the Legislature of power to enact Code 1907, § 3867, exempting property devoted to public use from condemnation except

when actually necessary.—Louisville & N. R. Co. v. Western Union Telegraph Co., 71 So. 118.

☞10(1) (Fla.) Under Gen. St. 1906, § 2892, term "common carrier" includes company operating terminal or union depots, but does not alter obligations of such company, nor confer power of eminent domain.—State v. Jacksonville Terminal Co., 71 So. 474.

☞47(3) (Ala.) The amendment embodied in Code 1907, § 3867, and the repeal of Code 1896, §§ 1244, 1246, limited the right of a telegraph company to condemn an easement along a railroad right of way to the cases provided for by section 3867.—Louisville & N. R. Co. v. Western Union Telegraph Co., 71 So. 118.

Code 1907, § 3867, does not authorize a telegraph company to condemn an easement along a railroad right of way merely because it is more convenient or less expensive.—Id.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

☞69 (La.) The Legislature is without power to impose an additional servitude upon the land abutting a navigable bayou, but if land is desired in addition to that provided for in Rev. St. § 3371, requiring roads to be 25 feet wide, for the purpose of constructing a sidewalk or for beautification or adornment, it must be expropriated after compensation paid.—Village of Moreauville v. Boyer, 71 So. 187.

(C) Measure and Amount.

☞124 (Ala.) Compensation to be paid by the railroad for land condemned must be fixed by the valuation of the property as of the date of the petition for condemnation.—Smith v. Jeffcoat, 71 So. 717.

(D) Persons Entitled and Payment.

☞155 (Ala.) One who acquires a leasehold right in land, against which condemnation proceedings have been filed, takes it subject to the rights of the condemning parties, and can have no compensation for the alleged interest in the land.—Smith v. Jeffcoat, 71 So. 717.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

☞167(5) (La.) Civ. Code, art. 2632, permitting no peremptory challenges of jurors in expropriation suits, is not repugnant to Code Prac. art. 511, allowing four challenges in all civil cases, within Rev. St. § 592, providing that Code of Practice prevails over repugnant provisions of Civil Code.—Orleans-Kenner Electric Ry. Co. v. Christina, 71 So. 770.

☞215 (La.) Freeholder is not necessarily disqualified on account of bias from serving as juror in expropriation suit because he favors building of railroad by plaintiff and voted for tax in aid thereof, nor because road may in future extend through his land.—Orleans-Kenner Electric Ry. Co. v. Christina, 71 So. 770.

It being presumed, unless contrary appears, that married persons lived under régime of community, acquisition of property in name of wife is sufficient to qualify husband as "freeholder" and as juror in expropriation suit.—Id.

☞243(2) (Ala.) If possession of plaintiff, which defendant invaded and attempted to justify under a probate decree in eminent domain, was acquired prior to filing the condemnation proceedings and plaintiff was not a party, he was not bound by the decree and was not divested of whatever title he had.—Smith v. Jeffcoat, 71 So. 717.

☞254 (Ala.) Where the party condemning takes possession of the property and pays the award, he is estopped from objecting thereto and waives his right of appeal.—Russell v. Bush, 71 So. 397.

☞255 (Ala.) On appeal from a decree in condemnation proceedings, the Supreme Court can

be expected to pass only on questions raised in the court below.—*Louisville & N. R. Co. v. Western Union Telegraph Co.*, 71 So. 118.

IV. REMEDIES OF OWNERS OF PROPERTY.

⚡266 (Ala.) In entering for the reasonable assertion of rights conferred by the statute and a decree of the probate court condemning land in pursuance thereof, defendant, as the duly authorized agent of the railroad, which condemned the land, was not guilty of a trespass.—*Smith v. Jeffcoat*, 71 So. 717.

⚡293(1) (Ala.) Allegations of replications, where plaintiff sought damages for trespass against his leasehold interest by a railroad which sought to justify, under probate deed in eminent domain, was insufficient for failure to show the precise character, time of beginning, and duration of his interest.—*Smith v. Jeffcoat*, 71 So. 717.

⚡293(2) (Ala.) Plea justifying trespass under probate decree in eminent domain, held demurrable for failing to show that the land taken had been compensated for before the trespass, under Code 1907, § 3882.—*Smith v. Jeffcoat*, 71 So. 717.

V. TITLE OR RIGHTS ACQUIRED.

⚡320 (Ala.) If the railroad compensates the owner for land taken by eminent domain, its right and title vests upon such payment, and, as against intervening rights, relates back to the filing of the petition for condemnation.—*Smith v. Jeffcoat*, 71 So. 717.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Commerce, ⚡27; Death, ⚡16, 18.

ENCROACHMENT.

See Constitutional Law, ⚡70, 80.

ENTRY.

See Judgment, ⚡131.

ENTRY, WRIT OF.

See Ejectment.

EQUALIZATION.

See Taxation, ⚡448, 449.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, ⚡209-249.

EQUITABLE ESTOPPEL.

See Estoppel, ⚡56-114.

EQUITABLE LIENS.

See Vendor and Purchaser, ⚡254.

EQUITY.

See Appeal and Error, ⚡1009-1015; Attachment, ⚡12; Banks and Banking, ⚡82; Cancellation of Instruments; Discovery; Fraudulent Conveyances; Injunction; Partition; Reformation of Instruments; Specific Performance; Taxation, ⚡604; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⚡35 (Miss.) Where the affairs of a defunct bank were being administered in chancery and

the receiver, suing to recover alleged overdrafts, was not in a position to have personal knowledge of a deposit account which he alleges defendants refused to disclose, held that the chancery court had jurisdiction.—*White v. Willis*, 71 So. 737.

III. PARTIES AND PROCESS.

⚡105 (Miss.) A defrauded purchaser may properly join with himself as party plaintiff the bank which had discounted his note for the purchase, in a suit to rescind the contracts involved in the transaction.—*Island City Nat. Bank v. Bank of Inverness*, 71 So. 565.

IV. PLEADING.

(A) Original Bill.

⚡138 (Ala.) That a bill contains a prayer for specific relief not authorized by the facts averred will not destroy its equity where there is a prayer under which relief may be granted.—*Todd v. Interstate Mortgage & Bond Co.*, 71 So. 681.

⚡149 (Miss.) All of several railroads, separately entitled to action to enjoin the bringing of a multitude of suits against it for a statutory penalty, could join as complainants in one suit.—*Guice v. Illinois Cent. R. Co.*, 71 So. 259.

⚡150(3) (Ala.) Bill to foreclose mortgage, executed by J. and others, and a later mortgage, executed by M., and as incidental to such relief to cancel a conveyance by M. and J. to the son and heir of M., held not multifarious.—*Mitchell v. Cudd*, 71 So. 660.

⚡153 (Ala.) In suit by mortgagee against mortgagors, widow and her husband's heirs, concession by complainant that mortgagors had option to disaffirm sale en masse under power, held to fix widow's right, to benefit of proper foreclosure of the two parcels of land separately, etc., of which she could not be deprived by amendments or dismissal of bill.—*Todd v. Interstate Mortgage & Bond Co.*, 71 So. 661.

(F) Amended and Supplemental Pleadings and Revivor.

⚡275 (Miss.) Where an amended bill asked that it be taken as part of the original bill, relief to be granted upon hearing both bills together, both bills together constitute the bill in the case.—*Ventress v. Wallace*, 71 So. 636.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

⚡373 (Miss.) Where complainant, within the time allowed by law for taking testimony, sets down the cause for hearing on bill and answer, the answer is under Code 1906, § 603, to be taken as true.—*New Standard Club v. McRaven*, 71 So. 289.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

⚡401 (Ala.) The denial of compensation to a trustee for fraud or neglect should be determined by the chancellor without the necessity of reference to the register.—*Horst v. Pake*, 71 So. 430.

X. DECREE AND ENFORCEMENT THEREOF.

⚡419 (Miss.) Although defendant's motion asking for additional time to plead under Code 1906, § 601, was not filed until after return day, which motion was overruled and a pro confesso and final decree entered, the court's action in overruling the motion to set aside the decree, accompanied by a sworn answer stating a complete defense, was an abuse of discretion.—*Grand Lodge Colored K. P. v. Yelvington*, 71 So. 576.

⚡427(3) (Ala.) In a mortgagee's suit against the mortgagors, a widow and her husband's heirs, for whom she was surety, to require defendants to affirm or disaffirm sale under power, it was proper for the court, on suggestion made at bar or ex mero, to decree a sale of the two parcels of land in order suggested by fact widow was a surety, though her cross-bill, in relation to the matter, prayed only general relief.—*Todd v. Interstate Mortgage & Bond Co.*, 71 So. 661.

⚡428 (Fla.) Under chancery rule 87 final decree may be recorded immediately on being signed by chancellor, and entry is completed when it is recorded in minutes of court; no formal enrollment being required.—*Gasque v. Ball*, 71 So. 329.

XI. BILL OF REVIEW.

⚡446 (Miss.) A bill in the nature of a bill of review, setting forth the pleadings in a partition suit and that the mortgagee of the one-half interest of complainant's cotenant received under the decree a greater sum than complainant, held to state a cause of action, showing error apparent on the face of the record.—*American Bank & Trust Co. v. Johnson*, 71 So. 808.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Homestead, ⚡81; Landlord and Tenant; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL

See Appeal and Error, ⚡882; Constitutional Law, ⚡43; Criminal Law, ⚡1137; Dower; Ejectment, ⚡14; Homestead, ⚡145; Insurance, ⚡141, 390; Landlord and Tenant, ⚡63.

II. BY DEED.

(A) Creation and Operation in General.

⚡25 (La.) Strangers to a deed cannot avail themselves of an estoppel arising from it.—*Saunders v. Busch-Everett Co.*, 71 So. 153.

III. EQUITABLE ESTOPPEL

(A) Nature and Essentials in General.

⚡56 (La.) An alleged admission by plaintiff of the correctness of the judgment from which he had appealed could not be a basis for estoppel where it was never acted on by defendant.—*Saunders v. Busch-Everett Co.*, 71 So. 153.

⚡57 (Ala.) To come within rule that party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded upon the same subject-matter, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded.—*Todd v. Interstate Mortgage & Bond Co.*, 71 So. 661.

⚡59 (Miss.) The failure of a bank to inform another, to which it transferred a second trust deed as security, of the existence of the first trust deed, held to estop the bank from claiming under the first deed.—*First Nat. Bank of Nashville, Tenn., v. Bennett*, 71 So. 169.

(B) Grounds of Estoppel.

⚡65 (Fla.) Where owner of land left widow and two children, half-sisters, by slave marriages, and widow died before enactment of Acts 1899, c. 4749, legalizing offspring of slave marriages, parties claiming under one half-sister cannot insist that land was inherited by widow and at her death escheated to state, to defeat bill for partition by other half-sister.—*Christopher v. Mungen*, 71 So. 625.

⚡92(2) (La.) The grantor's acceptance of payment made to keep invalid option in force, when both parties thought it in force, held not to prevent him from having it decreed void.—*Norris v. Snyder & McCormick*, 71 So. 522.

⚡92(2) (La.) Grantor's acceptance of consideration for keeping indefinite, and therefore invalid, option in force, when both parties considered it in force, does not prevent grantor's demanding that it be decreed null thereafter.—*Williams v. McCormick*, 71 So. 523.

⚡92(2) (La.) The grantor's acceptance of a payment made to keep invalid option in force, when both parties thought it in force, held not to prevent him from having it decreed void.—*Parrott v. Kirschler*, 71 So. 524.

(C) Persons Affected.

⚡98(1) (Miss.) The receiver of an insolvent bank which was estopped to claim under a first trust deed against a subsequent trust deed, held likewise estopped.—*First Nat. Bank of Nashville, Tenn., v. Bennett*, 71 So. 169.

(E) Pleading, Evidence, Trial, and Review.

⚡114 (La.) It is not necessary to plead an estoppel in avoidance of a defense alleged by answer.—*City of Shreveport v. Chatwin*, 71 So. 791.

EVIDENCE.

See Criminal Law, ⚡304-564; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚡678, 683; Trial, ⚡41-92.

I. JUDICIAL NOTICE.

⚡10(1) (Miss.) Circuit court cannot take judicial notice of boundary lines of supervisor's districts of a county.—*Henry v. Board of Sup'rs of Sunflower County*, 71 So. 742.

⚡32 (La.) Supreme Court has no knowledge that recorder's court of city of New Orleans was created by commission council and not by Legislature, since it cannot take notice of ordinances.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

II. PRESUMPTIONS.

⚡69 (Miss.) Where a railroad company had occupied and operated its railroad over a tract of land for 40 or 50 years, it will be presumed that it properly acquired the land for railroad purposes at the time the road was built.—*Alabama & V. Ry. Co. v. Stingily*, 71 So. 376.

⚡71 (Ala.) There is a presumption that a letter, mailed with postage prepaid, is duly received by the addressee, though that presumption may be rebutted.—*Holmes v. Bloch*, 71 So. 670.

⚡78 (Ala.) The intentional destruction of a letter creates a presumption that its contents were detrimental, which cannot be rebutted by secondary evidence.—*Russell v. Bush*, 71 So. 397.

⚡80(2) (La.) Where the laws of Texas as to the running of limitations against some of the indorsers living in that state where the limitation is two years were not proved, the presumption was that they were same as the law of this state.—*Commercial Nat. Bank v. Sanders*, 71 So. 891.

⚡82 (Ala.) In the absence of tangible indication to the contrary, good faith of counsel will be presumed.—*Beatty v. Palmer*, 71 So. 422.

⚡82 (Ala.App.) Under Code 1907, § 5732, providing that minutes of court must be read each morning and on adjournment signed by judge, court is presumed to have signed minutes

of term at which case was tried upon adjournment.—*Prudential Casualty Co. v. Kerr*, 71 So. 979.

⇒83(1) (La.) Under Const. art. 141, it is presumed that the recorder's court was created by New Orleans' City Charter, § 21.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) *Res Gestæ*.

⇒121(2) (Ala.App.) In action against telegraph company for personal injuries by being run into by its messenger boy on a bicycle, refusal of messenger at the time of the accident to give his name on request and his statement that he was delivering a message, *held* admissible as a part of the "*res gestæ*."—*Postal Telegraph-Cable Co. v. Minderhout*, 71 So. 89.

⇒121(12) (Ala.App.) In passenger's action for personal injury from falling over a suit case, full length upon the floor of a car, claiming special damages for mortification, evidence that when plaintiff fell the other passengers were much amused *held* admissible as part of the *res gestæ*.—*Alabama Great Southern R. Co. v. Johnson*, 71 So. 620.

⇒123(11) (Ala.) In an action against a railroad company for the running down of plaintiff's intestate, evidence of a statement by the engineer after the accident that deceased ought to have been killed, though engineer denied it, is inadmissible; the statement not being part of *res gestæ*.—*Southern Ry. Co. v. Fricks*, 71 So. 701.

In action for the running down of plaintiff's intestate, statements made by those in charge of the train some time after the accident are inadmissible, not being admissions binding on a railroad company because not *res gestæ*.—*Id.*

(E) Competency.

⇒155(1) (Ala.) Where, in an action for defendant's breach of agreement to sell cotton seed oil, the court allowed defendant to prove its broker's offer to sell to another at a price in excess of the contract price as claimed by plaintiff, it was error to decline to allow plaintiff to show answer, and the error was reversible.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

⇒155(1) (Ala.) Defendant, who pleads a release from liability for injuries in a crossing accident negotiated by the agent of an indemnity company in which she was insured, could not complain when the plaintiff's attorney inquired whether she was insured in such a company, having opened up that issue herself.—*Beatty v. Palmer*, 71 So. 422.

⇒155(4) (Ala.) In a suit for trover for fixtures removed, where a lease did not provide what was to become of houses erected by the lessee after its termination, and lessee introduced evidence that the houses were trade fixtures, *held*, the lessor could show an agreement that the houses were not removable.—*Middleton v. Alabama Power Co.*, 71 So. 461.

⇒155(8) (Ala.) In action for defendant's breach of its agreement to sell cotton seed oil where sale was made through a broker, defendant having introduced a telegram as evidence of broker's efforts to sell the oil to third persons, plaintiff was entitled to introduce the answer to the telegram as bringing out all that was done in that connection.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

V. BEST AND SECONDARY EVIDENCE.

⇒159 (Ala.) It was not error to overrule an objection to a question asked plaintiff as a witness whether he had made any copy of a letter

which he destroyed to avoid producing it in court.—*Russell v. Bush*, 71 So. 397.

⇒178(1) (Ala.) The intentional destruction of a letter creates a presumption that its contents were detrimental, which cannot be rebutted by secondary evidence.—*Russell v. Bush*, 71 So. 397.

⇒181 (Ala.) Every reasonable effort which might have resulted in production of missing paper must be shown to have been made without avail, before secondary evidence can be received.—*Porter v. Watkins*, 71 So. 687.

⇒183(3) (Ala.) In an action on a fraternal benefit certificate, where the defense was suicide, the showing of the loss of a note found in assured's clothing *held* sufficient to authorize secondary evidence of its contents.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

⇒185(4) (Ala.) Secondary evidence of the contents of a document is not admissible, where the notice to produce it as required by Code 1907, § 4058, did not give sufficient time to procure it from where it had been sent.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

⇒187 (Ala.) Where plaintiff intentionally destroyed a letter, it was error to require him to state only so much of the contents as was material to the issues.—*Russell v. Bush*, 71 So. 397.

VII. ADMISSIONS.

(C) By Grantors, Former Owners, or Privies.

⇒230(5) (La.) Statements of deceased vendor out of presence of vendee, in regard to sale, attacked as fraudulent, simulated, or disguised donation, are admissible to show vendor's attitude toward transaction, though not of themselves sufficient to prove fraud.—*Rizan v. Rizan*, 71 So. 581.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒268 (Ala.) Expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible in action for personal injuries; but the rule does not include declarations as to the cause of the pain or narrations of past conditions.—*Birmingham Ry., Light & Power Co. v. Gray*, 71 So. 689.

While it might be error to permit one to testify as to what he said or did indicative of pain, it would be proper for him to testify whether he suffered pain.—*Id.*

IX. HEARSAY.

⇒317(2) (Ala.) In a suit for loss of goods, the declaration of a depot agent that the goods were short and would arrive is but hearsay, and not a verbal act within the scope of duty then being performed.—*Louisville & N. R. Co. v. Lynne*, 71 So. 338.

⇒317(8) (Ala.) In an action on a fraternal benefit certificate, where the defense was suicide, testimony that "they said he died from taking carbolic acid" was properly excluded as hearsay.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

⇒344 (Miss.) In action for injuries resulting from obstruction of crossing by railroad train, exclusion of certified copy of ordinance prohibiting trains from standing on crossings for more than five minutes *held* error.—*Parker v. Southern Ry. Co. in Mississippi*, 71 So. 912.

(D) Production, Authentication, and Effect.

⚡368(12) (Ala.) Under Code 1907, § 4058, nonsuit cannot be rendered against plaintiff for failure to produce a letter intentionally destroyed by him, no notice to produce which was given.—*Russell v. Bush*, 71 So. 397.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

⚡419(2) (La.) Where a deed recites that price is \$500 and other valuable considerations, evidence of full consideration is admissible.—*Klump v. Howcott*, 71 So. 353.

(B) Invalidating Written Instrument.

⚡434(11) (Ala.) In action for price of goods sold under contract, where testimony showed that the contract of sale signed by the buyer was not the one made by him and was signed upon the misrepresentations of the seller's salesman, testimony of the buyer as to what articles he contracted to purchase was relevant.—*Commercial Finance Co. v. Cooper Bros.*, 71 So. 684.

(C) Separate or Subsequent Oral Agreement.

⚡441(4) (Ala.) A written lease dealing with the subject of fixtures cannot be varied by oral agreement as to fixtures.—*Middleton v. Alabama Power Co.*, 71 So. 461.

⚡441(9) (Miss.) The buyer, under a sales contract providing for discount for cash on a certain date, could not defeat recovery of the entire account, having failed to pay on that date, on the ground that the agreement was for a trade discount, since that would merely be a modification of a written contract by parol evidence.—*Hickman Ebbert Co. v. Asa W. Allen Co.*, 71 So. 310.

⚡445(6) (La.) In suit by principal against agent for accounting, it is competent for agent to prove by oral evidence instruction subsequent to written power of attorney, referring to expenses of principal which were paid by agent.—*Levy v. Levy*, 71 So. 507.

⚡445(9) (Miss.) Evidence of extension of time for payment of note on consideration of indorsement does not violate rule excluding parol evidence varying written contract.—*Boyd v. Kelley*, 71 So. 897.

(D) Construction or Application of Language of Written Instrument.

⚡461(1) (Fla.) It is error to admit testimony of party who executed written instrument as to what was intended thereby.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

⚡472(11) (Ala.) A statement by a physician that assured committed suicide *held* a statement as to the material fact in inquiry and was properly excluded.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

(C) Competency of Experts.

⚡536 (Ala.) Where a witness has given special attention to tracking automobiles by the marks of their tires, the admission of his opinion as to the identity of an automobile which he tracked is not error.—*Beatty v. Palmer*, 71 So. 422.

⚡536 (Ala.) A general knowledge of the department to which a specialty belongs qualifies a witness to testify thereto.—*Louisville & N. R. Co. v. Lovell*, 71 So. 995.

⚡546 (Ala.) The sufficiency of a witness' knowledge of the subject inquired about to qualify him to speak as an expert is addressed to the

discretion of the trial court.—*Louisville & N. R. Co. v. Lovell*, 71 So. 995.

(D) Examination of Experts.

⚡547 (Ala.) The extent of the examination of a physician testifying as an expert as to the personal injuries alleged to have been received by the plaintiff was largely discretionary with the trial court.—*Louisville & N. R. Co. v. Lovell*, 71 So. 995.

XIV. WEIGHT AND SUFFICIENCY.

⚡588 (La.) In an action for the death of a trespasser struck by a train, testimony of the engineer, fireman, and station agent, that deceased could not have been seen in time to avert the accident could not be disregarded on a hypothesis of visibility based on the location of the wound on the side of the head of deceased.—*Mercier v. Yazoo & M. V. R. Co.*, 71 So. 150.

⚡588 (Miss.) In an action for death of a child on railroad track, testimony of the engineer of a fast train that he did not see the child even as an object until within 150 feet is not necessarily rendered incredible by measurements after the accident, showing that an engineer could have seen the small child a distance of 500 feet.—*Yazoo & M. V. R. Co. v. Huff*, 71 So. 757.

⚡591 (Ala.) Where defendant in statutory ejectment held under a default judgment against plaintiff, plaintiff's introduction of a decree for a tax sale reciting due notice to him, in anticipation of a defense under a tax title, did not divest him of the right to show that decree was without the court's jurisdiction.—*Gilliland v. Armstrong*, 71 So. 700.

EXAMINATION.

See Criminal Law, ⚡483, 485; Evidence, ⚡547; Schools and School Districts, ⚡130; Witnesses, ⚡236-289.

EXCEPTIONS.

See Appeal and Error, ⚡268; Pleading, ⚡228.

EXCEPTIONS, BILL OF.

See Criminal Law, ⚡1090-1104; Time, ⚡8, 9.

II. SETTLEMENT, SIGNING, AND FILING.

⚡41(6) (Ala.) That the bill of exceptions was presented to the presiding judge within the 90 days required by Code 1907, § 3018, is attested by the fact that it shows it was signed by him within that period.—*Brannan v. Sherry*, 71 So. 106.

EXCESSIVE DAMAGES.

See Damages, ⚡132.

EXCHANGE OF PROPERTY.

See Husband and Wife, ⚡187.

EXCUSABLE HOMICIDE.

See Homicide, ⚡116-118.

EXCUSE.

See Judgment, ⚡143; Vendor and Purchaser, ⚡186.

EXECUTION.

See Attachment; Exemptions; Homestead; Justices of the Peace, ⚡135; Sheriffs and Constables.

I. NATURE AND ESSENTIALS IN GENERAL.

⚡15 (La.) Writ of seizure and sale *held* addressed to property therein specified, and no other, while writ of *fi. fa.* is to be satisfied out

of property of the debtor indiscriminately.—*Lisso v. Williams*, 71 So. 365.

VII. SALE.

(A) **Manner, Conduct, Validity, and Confirming or Vacating.**

⚡219 (La.) Sale of 65 acres in indivision under *feri facias* under which one-third interest in 739 acres was seized *held* not invalid; it amounting to a sale of $\frac{65}{739}$ of the entire tract.—*Lisso v. Williams*, 71 So. 365.

That land, undivided one-third interest in which was seized under *fi. fa.*, consisted of different tracts, *held* not to render invalid sale of 65 acres in indivision.—*Id.*

⚡222(3) (La.) Description of property sold under *fi. fa.* as 65 acres undivided in 739 acres *held* not uncertain or indefinite.—*Lisso v. Williams*, 71 So. 365.

(B) **Title and Rights of Purchaser.**

⚡290 (Miss.) The sale of property at execution sale by a sheriff in his official capacity does not prevent his purchasing it thereafter as an individual from the purchaser at such sale, where such purchase is not in pursuance of fraud, collusion, or prearrangement.—*Myers v. Drago Grain Co.*, 71 So. 874.

(D) **Conveyance to Purchaser.**

⚡319 (Fla.) In ejectment, sheriff's deed based on judgment void on its face is inadmissible as muniment of title.—*Smith v. Wilson*, 71 So. 919.

EXECUTIVE POWER.

See Constitutional Law, ⚡80.

EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival, ⚡72; Descent and Distribution; Ejectment, ⚡30; Specific Performance, ⚡105; Trusts; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡14 (La.) Under Civ. Code, arts. 1469, 1721, a testament, appointing as executor the priest of testator's church, without naming him, will be construed to mean the priest at the time of testator's death.—*Succession of Lefort*, 71 So. 215.

⚡20(10) (La.) Executors are included in the words, "or other administrators of successions," as used in Code Prac. art. 1059, and hence judgments appointing them become provisionally executory when rendered, and are not subject to suspension by appeal.—*Succession of Lefort*, 71 So. 215.

⚡35(19) (La.) Executors are included in the words "or other administrators of successions," as used in Code Prac. art. 1059, and hence judgments removing them become provisionally executory when rendered, and are not subject to suspension by appeal.—*Succession of Lefort*, 71 So. 215.

III. ASSETS, APPRAISAL, AND INVENTORY.

⚡38 (Miss.) Where stock belonging to deceased was sold under order of court to a corporation by which he had been employed, and which subsequently made a gift of money to the widow of deceased, in recognition of his services, it was error to charge her with the gift in favor of the estate.—*Currie v. Bennett*, 71 So. 830.

⚡46 (Miss.) Costs of the administration of the estate of one named as beneficiary in a mutual benefit certificate who predeceased insured *held* not payable out of the proceeds in the hands of her administrator, who was also the administrator of the insured.—*Sykes v. Armstrong*, 71 So. 262.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) **In General.**

⚡87 (Miss.) Administrator's compromise of claim or debt in good faith *held* valid and binding without previous authorization from chancery court or chancellor under Code 1906, § 2065.—*Montgomery v. Mutual Life Ins. Co. of New York*, 71 So. 162.

⚡93(1) (La.) A testamentary executor cannot carry on indefinitely a mercantile business for the account of his minor ward.—*Succession of Hawkins*, 71 So. 492.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) **Liabilities of Estate.**

⚡221(1) (Ala.) Plaintiff suing an executrix, by joining issue on the plea of statute of non-claim, assumes the burden of proof of presentation of claim in the time and manner required by Code 1907, §§ 2590, 2593.—*Brannan v. Sherry*, 71 So. 106.

(B) **Presentation and Allowance.**

⚡222(3) (Ala.) Actual formal presentation of a claim against a decedent's estate, and by one having right to make it, is necessary to prevent bar; and mere knowledge by executrix of its existence is not enough.—*Brannan v. Sherry*, 71 So. 106.

⚡227(3) (Ala.) While under Code 1907, § 2593, presentation of a claim against a decedent's estate need not be to executor personally and by filing in probate court, claim must in either case be verified.—*Brannan v. Sherry*, 71 So. 106.

⚡228(2) (Ala.) Presentation of a claim against decedent's estate by the attorneys of executrix, to whom claimant presented it, is not a presentation to her authorized by Code 1907, § 2593; they not being persons authorized to make the presentation.—*Brannan v. Sherry*, 71 So. 106.

⚡228(3) (Ala.) Presentation of a claim against decedent's estate to the attorneys of executrix is not a presentation to her authorized by Code 1907, § 2593.—*Brannan v. Sherry*, 71 So. 106.

X. ACTIONS.

⚡438(9) (La.) The holder of a note secured by mortgage may proceed against the maker's successor, contradictorily with the administrator, notwithstanding subsequent transactions in which the heirs co-operate with the administrator in borrowing money from such holder to carry on the plantation, constituting the main assets of the succession covered by the mortgage.—*Barton v. Burbank*, 71 So. 134.

XI. ACCOUNTING AND SETTLEMENT.

⚡511(3) (La.) Court costs incurred in obtaining a final accounting from a testamentary executor must be borne by him personally when due to his illegal acts and unwillingness to render an account.—*Succession of Hawkins*, 71 So. 492.

EXEMPLARY DAMAGES.

See Telegraphs and Telephones, ⚡69.

EXEMPTIONS.

See Homestead; Taxation, ⚡204-251.

I. NATURE AND EXTENT.

(C) **Property and Rights Exempt.**

⚡48(2) (Miss.) A county warrant, issued in favor of persons who worked a road under contract at a rate per mile is not exempt from execution as the wages of a laborer.—*Lewis v. Harrison*, 71 So. 5.

EXPERT TESTIMONY.

See Criminal Law, ¶449, 476-485; Evidence, ¶536-547.

EXPLOSIVES.

See Negligence, ¶27.

EXPULSION.

See Corporations, ¶651.

FACTORY INSPECTION.

See Health, ¶7.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ¶27; Death, ¶16, 18; Master and Servant, ¶180, 204.

FEES.

See Clerks of Courts, ¶23, 24; Schools and School Districts, ¶180.

FELLOW SERVANTS.

See Master and Servant, ¶177-198.

FILING.

See Justices of the Peace, ¶164.

FINDINGS.

See Appeal and Error, ¶931, 1022.

FINES.

See Justices of the Peace, ¶30.

¶20 (Ala.) Under Code 1907, §§ 6664, 6666, witness fee certificate issued by foreman of grand jury, with indorsement of clerk of court, held to show that payment should be made by county treasurer out of fine and forfeiture fund.—*Ryan v. Collins*, 71 So. 690.

Though a local improvement act provided that all convicts of Morgan county should be worked on public roads, held that, under Code 1907, § 6888, fines paid by convicts sentenced to road work go to the fine and forfeiture fund and may be devoted to payment of state witness fees.—*Id.*

¶21 (Miss.) Under Laws 1912, c. 124, a county is not liable for a reward of one-third the fine imposed upon two persons convicted of unlawful liquor selling until the fine has been collected.—*Grenada County v. Little*, 71 So. 871.

FIRE APPARATUS.

See Street Railroads, ¶85.

FIRE DEPARTMENT.

See States, ¶119.

FIRES.

See Arson; Landlord and Tenant, ¶101; Negligence, ¶21; Railroads, ¶480.

FISH.

¶9 (Fla.) A local act, prohibiting fishing "in" the waters of a county (Laws 1915 c. 7120, amending Laws 1913, c. 6806), applies to some portion of a river within that county when the middle of that river is made the boundary line and a portion of the river on both sides of the boundary line is expressly excepted from the act.—*Ex parte Perry*, 71 So. 174.

FIXTURES.

See Evidence, ¶155; Trespass, ¶20; Trover and Conversion, ¶16.

¶21 (Miss.) As between the vendor and vendee of land, a storehouse building erected on a solid foundation consisting of brick and wooden pillars and extending onto plaintiff's property for a distance of nine feet constituted a fixture, and the vendor had no right to remove the same against the protest of plaintiff, a successor in interest of the vendee.—*McLeod v. Clark*, 71 So. 11.

¶27(1) (Ala.) Parties may by contract make trade fixtures a part of the land on which they stand.—*Middleton v. Alabama Power Co.*, 71 So. 461.

A reservation of a fixture or the right to remove it at the expiration of a lease may be made by oral agreement.—*Id.*

¶35(2) (Ala.) Where houses are erected upon land of another, prima facie they become part of the realty, except where the builder reserves the right of removal.—*Middleton v. Alabama Power Co.*, 71 So. 461.

If improvements are what is termed "trade fixtures," they do not become prima facie part of the land on which they stand.—*Id.*

FOLLOWING TRUST PROPERTY.

See Trusts, ¶357.

FORBEARANCE.

See Bills and Notes, ¶301.

FORECLOSURE.

See Mortgages, ¶335-575.

FOREIGN CORPORATIONS.

See Commerce, ¶80; Constitutional Law, ¶101, 130; Corporations, ¶631-668.

FOREIGNERS.

See Aliens.

FOREIGN INSURANCE COMPANIES.

See Insurance, ¶18.

FOREIGN LAWS.

See Evidence, ¶80.

FORFEITURES.

See Insurance, ¶349-367, 755.

FORGERY.

See Criminal Law, ¶404, 478, 564.

¶4 (Ala.App.) Forgery, at common law, is the false making, or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or a foundation of a legal liability.—*Everage v. State*, 71 So. 983.

¶7(1) (Ala.App.) An injunction bond in a suit to enjoin the enforcement of executions held the subject of forgery.—*Everage v. State*, 71 So. 983.

¶14 (Ala.App.) That injury did or did not result from the forgery is immaterial, the capacity of the false and fraudulent writing to work injury being the material question.—*Everage v. State*, 71 So. 983.

¶28(4) (Fla.) Indictment for forgery of bank check is not fatally defective in calling check an order for money.—*Miller v. State*, 71 So. 280.

¶30 (Ala.App.) It is not necessary to set out in what particular act the forgery consisted, because the word "forge" includes the false making of an instrument in whole or in part, and

a statement of the particular acts constituting the particular offense.—*Everage v. State*, 71 So. 983.

⚡44(2) (Fla.) Conviction of forgery will be set aside where there is no evidence that accused ever had possession of forged instrument, or that he could write at all.—*Miller v. State*, 71 So. 280.

FORMER JEOPARDY.

See Criminal Law, ⚡292.

FORMER RECOVERY.

See Death, ⚡27.

FRANCHISES.

See Municipal Corporations, ⚡680, 681.

⚡2 (Ala.) Ambiguous provisions in the grant of a public franchise will be construed in favor of the public.—*Birmingham Waterworks Co. v. Hernandez*, 71 So. 443.

FRAUD.

See Compromise and Settlement; Contracts, ⚡94; Evidence, ⚡434; Fraudulent Conveyances; Insurance, ⚡250-282, 723; Landlord and Tenant, ⚡229½; Limitation of Actions, ⚡100; Principal and Surety, ⚡42; Trusts, ⚡85.

II. ACTIONS.

(U) Evidence.

⚡50 (Ala.) The law does not presume fraud, and, when a charge of fraud is made, it must be established by the evidence before relief can be had.—*Wallace v. Crosthwait*, 71 So. 666.

FRAUDS, STATUTE OF.

See Specific Performance, ⚡43.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.

⚡49 (Miss.) A contract for the delivery of 90,000 logs at the rate of 200 each day, held within the statute of frauds as an oral contract which could not be performed within one year.—*Mrs. K. Edwards & Sons v. Farve*, 71 So. 12.

⚡50(2) (Miss.) Under the statute of frauds, providing that contracts not to be performed within one year must be in writing, the possibility of the death of the promisor within the year does not take the contract out of the statute unless such death leaves the contract fully performed.—*Mrs. K. Edwards & Sons v. Farve*, 71 So. 12.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⚡71 (Ala.) The great controlling purpose of the statute of frauds is the requisition of written evidence of all contracts for the sale of lands.—*Kyle v. Jordan*, 71 So. 417.

⚡72(4) (Miss.) A storehouse 30 feet wide and 100 feet long resting on brick and wooden pillars constitutes a part of the realty, and a parol reservation by the owner of the land on his conveyance of the part of the land occupied by the building of a right to remove such building was void under the statute of frauds as to the grantee and his successors in interest.—*McLeod v. Clark*, 71 So. 11.

IX. OPERATION AND EFFECT OF STATUTE.

⚡119(1) (Ala.) The statute of frauds does not avoid parol contracts, but merely lays down a rule of evidence of which contracts must be established, thus rendering them voidable at the

election of the nonsubscribing party.—*Wood v. Lett*, 71 So. 177.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(C) Property and Rights Transferred.

⚡52(1) (Ala.App.) A judgment debtor may sell his homestead, regardless of his creditors.—*Stovall v. Hamilton*, 71 So. 63.

(H) Preferences to Creditors.

⚡121 (La.) Where pledgor has shipped or is about to ship to factor greater proportion of crop than will be required to pay for money and supplies advanced for its production, this constitutes preference which may be set aside at suit of another creditor.—*Swift & Co. v. Bonvillain*, 71 So. 849.

(I) Retention of Possession or Apparent Title by Grantor.

⚡138 (La.) Save in cases especially provided by law, contract to pledge movables without delivery to pledgee leaves property subject to seizure for debts of pledgor by attachment, without revocatory action.—*Swift & Co. v. Bonvillain*, 71 So. 849.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

⚡172(2) (Ala.) A conveyance claimed to be fraudulent by a creditor of grantor cannot for that cause be annulled as between the parties to it.—*Moore v. Altom*, 71 So. 681.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

⚡208 (La.) A creditor cannot complain of alienation of property by debtor before creation of his debt.—*Pilsbery v. Fricke*, 71 So. 349.

(B) Remedies on Ground of Nullity of Transfer.

⚡229 (Ala.App.) Indebtedness of garnishee to judgment debtor held subject to garnishment, although the judgment debtor had caused the garnishee to give a note to a third person as a subterfuge to escape payment of the judgment.—*Stovall v. Hamilton*, 71 So. 63.

(E) Parties and Process.

⚡255(1) (Ala.) In a suit to set aside a fraudulent conveyance, one who has joined with defendant in the execution of the note on which complainant is a creditor, and whose liability is joint and several, is not a necessary party.—*Moore v. Altom*, 71 So. 681.

In a suit to set aside a fraudulent conveyance, it is not necessary to join as defendant the grantor's wife, who, though joining in the conveyance, is charged with no fraud.—*Id.*

(F) Pleading.

⚡260 (Ala.) In a suit to set aside a fraudulent conveyance in order to enforce a note, the complaint need not state that the note was presented for payment at the time and place where payable, nor deny that funds awaited it there.—*Moore v. Altom*, 71 So. 681.

(J) Judgment or Decree and Execution.

⚡313(2) (Ala.) In a suit to set aside a fraudulent conveyance, held, the court in its discretion may order selling in parcels.—*Moore v. Altom*, 71 So. 681.

(K) Disposition of Property or Proceeds.

⚡324 (Ala.) If land conveyed in fraud of creditors is sold to satisfy their claims, the re-

mainder of the fund produced thereby goes to the fraudulent grantee, or those claiming under him.—*Moore v. Altom*, 71 So. 681.

GAME.

See Fish.

GARNISHMENT.

See Attachment; Fraudulent Conveyances, ¶229.

VIII. CLAIMS BY THIRD PERSONS.

¶205 (Ala.App.) Where a judgment debtor on selling land requires payment of the price by note and mortgage to his son, simultaneously with transfer of title to the purchaser, the purchaser was not indebted to the judgment debtor, nor subject to garnishment, and need not ask in the garnishment proceedings that the judgment debtor be brought in to determine the person to whom he owed the money.—*Stovall v. Hamilton*, 71 So. 68.

GIFTS.

I. INTER VIVOS.

¶41 (La.) Since a donation inter vivos is irrevocable under Rev. Civ. Code, art. 1468, the donor's request in his will that the donee divide with other legatees was only a precatory suggestion without legal force.—*Succession of Hawkins*, 71 So. 492.

GOOD FAITH.

See Bills and Notes, ¶525.

GRAND JURY.

See Indictment and Information.

¶2 (La.) Act No. 98 of 1890, § 3, providing that grand jury for parish of Orleans consists of 16 members, 12 of whom constitute quorum, was superseded by Const. 1898, art. 117 (retained in Const. 1913), providing that grand jury consists of 12 members, 9 of whom must concur to find indictment.—*State v. Paillet*, 71 So. 951.

GRANTS.

See Public Lands.

GUARANTY.

See Judgment, ¶649; Principal and Surety.

IV. REMEDIES OF CREDITORS.

¶86 (Miss.) A plea of the surety whose contract provided for liability until terminated in writing, that the creditor expressly agreed to cancel the contract of suretyship and release the surety, states a good defense, and is not demurrable.—*Julius Levy Sons Co. v. Orlansky*, 71 So. 571.

GUARDIAN AND WARD.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

¶62 (La.) Where a tutor conducts a business with merchandise inherited by his ward, he must account for the value thereof to the minor with legal interest from time he took possession.—*Succession of Hawkins*, 71 So. 492.

Where a tutor for his personal account carries on a mercantile business in his minor ward's building, he must pay the ward rent therefor.—*Id.*

V. ACTIONS.

¶130 (La.) Petition in a suit by one suing individually and as tutrix of her minor children to enjoin a seizure and sale, held not to state a cause of action on behalf of the children, where it did not state their names or their interest, or pray that their claims be recognized.—*Clarke v. Natal*, 71 So. 149.

VI. ACCOUNTING AND SETTLEMENT.

¶162 (La.) Court costs incurred in obtaining a final accounting from a tutor must be borne by him personally when due to his illegal acts and unwillingness to render an account.—*Succession of Hawkins*, 71 So. 492.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

¶4 (Miss.) Judgment of justice of peace, on preliminary trial of felony charge, binding over defendant to await action of grand jury, was preliminary decision, not appealable, restraining defendant in his liberty, and habeas corpus will lie to determine whether such restraint is wrongful.—*Ex parte Tillman*, 71 So. 910.

¶30(2) (Fla.) An information may be attacked by writ of habeas corpus only when it does not charge crime by reason of unconstitutionality of statute or failure to allege crime under any statute.—*Jackson v. State*, 71 So. 332.

On habeas corpus, information will be upheld as charging malpractice in office when it alleges that county commissioner received money for purchasing property for county, though it does not state that it was corruptly done.—*Id.*

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶92(1) (Fla.) In habeas corpus to secure admission to bail, the court may look to the indictment to determine whether that phase of rape is charged in which the elements of force and consent are material.—*Russell v. State*, 71 So. 27.

¶93 (Miss.) Where a wife filed a bill for divorce, the chancellor denying the relief sought and dismissing the bill had power on the father's habeas corpus proceedings to award the custody of the infant child.—*Miles v. Miles*, 71 So. 295.

¶99(3) (Miss.) While the law gives the father a preference, the courts have always limited the general rule of the common law whenever it was found that the moral and physical welfare of the child required the mother to have its custody.—*Miles v. Miles*, 71 So. 295.

¶109 (Fla.) Where on habeas corpus it appears that petitioner is held under illegal sentence, he may be remanded for proper sentence, having his right to bail pending imposition of legal sentence.—*Faison v. Vestal*, 71 So. 759.

HANDWRITING.

See Wills, ¶295.

HARMLESS ERROR.

See Appeal and Error, ¶1027-1068; Criminal Law, ¶1167-1177; Homicide, ¶340.

HEAD OF FAMILY.

See Homestead, ¶18.

HEALTH.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

¶7(1) (Miss.) Under Laws 1914, c. 163, construed with Code 1906, § 3456, state factory inspector holds office for four years.—*State v. McDowell*, 71 So. 867.

The board of health can remove the state factory inspector only for good cause, upon charges, notice, and opportunity to be heard.—*Id.*

¶7(1) (Miss.) Under Code 1906, §§ 2490, 2491, 2494, 2509, 2516, held that county health officer was a public officer not removable by the state board of health without reason, notice, or hearing.—*Ware v. State*, 71 So. 868.

II. REGULATIONS AND OFFENSES.

↪32 (La.) City ordinance, providing for rat-proofing all buildings and structures to check bubonic plague, is constitutional and valid exercise of police power in interest of health of people.—City of New Orleans v. Beck, 71 So. 883.

↪32 (La.) Validity of rat-proofing ordinance, requiring foundations to be of certain materials, cannot be challenged on ground that it forbids use of equally impenetrable materials by one who has not attempted to use such material.—City of New Orleans v. Mangiarisina, 71 So. 886.

That ordinance requires premises to be rat-proofed whether or not they are in sanitary condition does not render it invalid as not being based on health considerations.—Id.

Ordinance requiring rat-proofing is not invalid because of failure to name city among property holders required to rat-proof premises.—Id.

HEARSAY EVIDENCE.

See Criminal Law, ↪419-421; Evidence, ↪317.

HEIRS.

See Abatement and Revival, ↪72; Descent and Distribution; Wills, ↪506.

HIGHWAYS.

See Bridges; Municipal Corporations, ↪647-706; Railroads, ↪95, 99; Statutes, ↪123.

II. HIGHWAY DISTRICTS AND OFFICERS.

↪90 (Fla.) Laws 1911, c. 6208 (Comp. Laws 1914, §§ 884a-884q), authorizing the creation of special road and bridge districts, held not violative of Const. art. 8, §§ 1, 2, providing that the state shall be divided into counties.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, 71 So. 42.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

↪122 (Fla.) Laws 1907, c. 5762, relative to construction and repair of roads and bridges and raising revenue therefor, was not repealed by Laws 1911, c. 6208 (Comp. Laws 1914, §§ 884a-884q); there being no such conflicts in the two statutes but that they can stand together and each be operative.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, 71 So. 42.

Laws 1911, c. 6208 (Comp. Laws 1914, §§ 884a-884q), relative to roads and bridges and revenue for maintenance and repair of same, held not violative of Const. art. 9, §§ 3, 5, relative to taxation.—Id.

There is no such conflict in Sp. Laws 1913, c. 6078, as amended by Sp. Laws 1915, c. 7145, and Laws 1911, c. 6208 (Comp. Laws 1914, §§ 884a-884q), as amended by Laws 1915, c. 6870, relating to various phases of the subject of roads and bridges and revenue for construction and maintenance of same, that such chapters cannot stand together and each be operative.—Id.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

↪166 (Fla.) The Legislature exercises plenary control over public county roads.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, 71 So. 42.

HOLOGRAPHIC WILLS.

See Wills, ↪130.

HOMESTEAD.

See Fraudulent Conveyances, ↪52; Partition, ↪12.

I. NATURE, ACQUISITION, AND EXTENT.**(B) Persons Entitled.**

↪18 (Miss.) The head of the household has the right to choose the homestead.—Tanner v. Tanner, 71 So. 749.

(C) Acquisition and Establishment.

↪46 (La.) Act No. 114 of 1880, requiring a registry of a declaration of the homestead exemption under Const. 1879, arts. 219, 220, remained in force in the parish of Orleans under Const. 1898, art. 247, and Const. 1913, art. 247.—Clarke v. Natal, 71 So. 149.

↪55 (La.) The right to acquire homestead exemption by recording the declaration required by Act No. 114 of 1880 is not of itself an exemption, and does not affect the rights of those becoming creditors of the owner of the homestead before registry of the declaration.—Clarke v. Natal, 71 So. 149.

(D) Property Constituting Homestead.

↪60 (Miss.) Whether land constitutes a homestead depends on whether it is used for homestead purposes; the statutory exemption being not of land generally but of land actually occupied as a homestead.—Tanner v. Tanner, 71 So. 749.

↪70 (La.) Homestead exemption cannot extend to two distinct and separate parcels of land.—McKethan v. Currie, 71 So. 346.

↪81 (Miss.) Ownership of land in fee simple is not essential to impress the estate with the homestead character.—Tanner v. Tanner, 71 So. 749.

II. TRANSFER OR INCUMBRANCE.

↪118(3) (Fla.) Under Const. art. 10, §§ 1, 4, and Gen. St. 1908, § 2462 (Comp. Laws 1914, § 2462), a mortgage executed by husband and wife, sufficient to create a lien on homestead realty of the husband, must be duly executed by the husband and wife.—Bank of Jennings v. Jennings, 71 So. 31.

↪119 (Fla.) Under Const. art. 10, §§ 1, 4, and Gen. St. 1908, § 2462 (Comp. Laws 1914, § 2462), a mortgage executed by husband and wife must be acknowledged by the wife.—Bank of Jennings v. Jennings, 71 So. 31.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

↪145 (Ala.) By joining with heirs of deceased husband in execution of mortgage on his lands after his death, the widow estopped herself, as against the mortgagee, to assert her homestead rights, under Code 1907, § 4197, in the property.—Todd v. Interstate Mortgage & Bond Co., 71 So. 661.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

↪166 (La.) A marginal inscription of a waiver of homestead in favor of the plaintiff bank on the page upon which a mortgage in favor of the plaintiff was recorded was not a registry of the waiver.—Iberville Bank & Trust Co. v. Dupuy, 71 So. 206.

↪171 (La.) Waiver of homestead rights in property described in a mortgage was general in its terms, the reference to the mortgage being for the purpose of identifying the property.—Iberville Bank & Trust Co. v. Dupuy, 71 So. 206.

↪175 (La.) Under Civ. Code, § 2645, concerning purchasers of credit, a secured note did not

lose the benefit of waiver of homestead when negotiated.—*Iberville Bank & Trust Co. v. Dupuy*, 71 So. 206.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

⚡214 (Miss.) Evidence that the owner occasionally took wood for household purposes from a 40-acre tract of wild and unfenced land, separated by three-quarters of a mile from the land on which he resided, is insufficient to show use as a homestead.—*Tanner v. Tanner*, 71 So. 749.

HOMICIDE.

See Criminal Law, ⚡366, 476, 511, 517, 755½, 780, 789, 807, 824, 829.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚡116(6) (Ala.App.) Threats of violence accompanied by an overt act may justify one assaulted in acting more promptly on the appearance of things under the doctrine of "apparent imminent peril."—*Daniel v. State*, 71 So. 79.

⚡117 (Fla.) Self-defense is not shown where defendant killed deceased before using all reasonable means in his power and consistent with his own safety to avoid danger and avert necessity of taking life.—*Doke v. State*, 71 So. 917.

⚡118(1) (Ala.) The fact that the defendant at the time of the shooting was in a public road made no change in the rule as to his duty to retreat.—*Madison v. State*, 71 So. 706.

⚡118(2) (Ala.) Where it is clearly shown that the party slain made a sudden and entirely unprovoked murderous attack upon the defendant with a deadly weapon, and was in the act of affecting upon the defendant such murderous purpose, no duty to retreat rests on the defendant.—*Madison v. State*, 71 So. 706.

VII. EVIDENCE.

(B) Admissibility in General.

⚡158(1) (La.) Charge of manslaughter negatives premeditation or malice, and, where there were several eye witnesses, evidence of previous threats of accused is inadmissible, whether offered to prove intent to provoke difficulty or to show who was aggressor.—*State v. McGarrity*, 71 So. 780.

⚡160 (Ala.) The fact that one accused of murder had in his possession cut shells is admissible in connection with evidence of the character of deceased's wound.—*White v. State*, 71 So. 452.

Possession of cut shells and a shotgun by one accused of murder is admissible to evidence intention to depredate deceased's store, in doing which he shot deceased when discovered.—*Id.*

⚡174(7) (Ala.App.) Where the state does not show a flight by accused, his testimony that he did not flee is inadmissible.—*Murphy v. State*, 71 So. 967.

⚡188(1) (Ala.App.) Under an issue of self-defense in a murder trial, testimony as to deceased having lawsuits is inadmissible.—*Murphy v. State*, 71 So. 967.

Under an issue of self-defense in a murder trial, testimony whether the witness had heard of deceased having "any trouble" over immaterial matters is inadmissible.—*Id.*

Under an issue of self-defense in a murder trial, testimony as to deceased's reputation for being a "fussy, disagreeable man" is inadmissible.—*Id.*

Under a self-defense issue in a murder trial, testimony as to deceased's character for peace and quiet *held* admissible.—*Id.*

⚡188(5) (Ala.App.) Under an issue of self-defense in a murder trial, deceased's character cannot be shown by testimony as to what a particular individual said about him.—*Murphy v. State*, 71 So. 967.

Under an issue of self-defense in a murder trial, testimony that a witness thought he knew

deceased's character for peace and quiet, and that it was good, is admissible.—*Id.*

⚡191 (La.) In prosecution for shooting with intent to kill, testimony of oppressive or harsh acts of prosecuting witness towards accused at times other than at commission of crime charged is inadmissible.—*State v. Murray*, 71 So. 510.

⚡195 (Ala.) Where one accused of murder testified that he was an innocent traveler, passing to his home late at night, and shot deceased in self-defense, evidence that he took a circuitous and unusual and long route home is admissible.—*White v. State*, 71 So. 452.

(C) Dying Declarations.

⚡203(1) (Ala.) The accusing statement of the deceased, made when he was conscious that he could not recover, designating the defendant as his assailant, *held* admissible.—*Martin v. State*, 71 So. 693.

⚡203(5) (Ala.) A request that a doctor be called *held* to indicate only a hope for relief from suffering, and not to render inadmissible the dying declaration.—*Lightner v. State*, 71 So. 469.

⚡204 (Ala.) Statements of the deceased, who survived the shooting about 18 hours, made when he was conscious that he could not recover, that defendant had shot him, *held* admissible as dying declarations.—*Martin v. State*, 71 So. 693.

(E) Weight and Sufficiency.

⚡237 (Fla.) Evidence in a homicide case *held* not to show that accused was insane.—*Edwards v. State*, 71 So. 331.

⚡250 (Fla.) Evidence *held* to sustain conviction of manslaughter.—*Doke v. State*, 71 So. 917.

VIII. TRIAL.

(C) Instructions.

⚡300(2) (Ala.) Instruction on self-defense in prosecution for murder *held* correct.—*White v. State*, 71 So. 452.

⚡300(3) (Ala.App.) In a homicide case, instructions that a person can remain in his place of business and need not retreat therefrom when attacked, were properly refused, as they ignored the doctrine of freedom from fault.—*Daniel v. State*, 71 So. 79.

⚡300(7) (Ala.) Evidence in a trial for homicide *held* to afford no ground for defendant's instructions on the theory of his abandonment of the difficulty, though he might have been at fault in bringing it on.—*Madison v. State*, 71 So. 706.

⚡300(7) (Ala.App.) In a homicide case, an instruction, that the law allows a defendant who is without fault and attacked by a person of known violent dangerous character to act more quickly in defense of his life or limb, was properly refused as abstract; the record containing no evidence that the deceased was a person of that character.—*Daniel v. State*, 71 So. 79.

In a homicide case, instructions that a person can remain in his place of business and need not retreat therefrom when attacked were properly refused in view of a conflict with evidence as to where the affray occurred.—*Id.*

⚡300(12) (Ala.) Instruction in prosecution for murder *held* properly refused for predicated acquittal without appropriate reference to accused's freedom from fault in bringing on the difficulty, and his inability to retreat as required by law.—*White v. State*, 71 So. 452.

Instruction in prosecution for murder *held* properly refused for failing to hypothesize the negative of the possible fact that the defendant was not the aggressor, and was not engaged in an unlawful enterprise before or at the time of the killing.—*Id.*

Instruction on self-defense in prosecution for murder *held* properly refused as failing to negative the possible fact that accused was unlaw-

fully purposed and engaged just before and at the time of the killing.—Id.

↪300(13) (Ala.) Instruction on self-defense in prosecution for murder *held* properly refused as premitting to negative in the hypothesis that defendant was the assailant.—White v. State, 71 So. 452.

Instruction in prosecution for murder *held* properly refused as improperly excluding from consideration unlawful acts of defendant just previous to the shooting.—Id.

↪300(13) (Ala.) Charges failing to hypothesize defendant's freedom from fault in bringing on the difficulty were properly refused.—Madison v. State, 71 So. 706.

↪300(15) (Ala.) Requested charges, based on the theory of self-defense, premitting the duty to retreat, were faulty.—Madison v. State, 71 So. 706.

↪309(5) (Ala.) Instruction in prosecution for murder *held* properly refused as permitting conviction for manslaughter, where the only defense was a complete justification, so that defendant was either guilty of murder or innocent of any crime.—White v. State, 71 So. 452.

X. APPEAL AND ERROR.

↪329 (Ala.) On appeal from a conviction of murder, the court must act with great caution on the question whether proper evidence was excluded.—Wilson v. State, 71 So. 115.

↪340(1) (Ala.App.) A murder trial instruction that defendant's malice "may be inferred from the shooting," unless the evidence relating to the shooting shows the contrary, does not constitute reversible error for failing to add that such inference is rebuttable.—Murphy v. State, 71 So. 967.

HOTCHPOT.

See Descent and Distribution, ↪109.

HOTELS.

See Innkeepers.

HUMANITARIAN DOCTRINE.

See Railroads, ↪338.

HUSBAND AND WIFE.

See Acknowledgment, ↪55; Divorce; Domicile, ↪5; Dower; Homestead, ↪118-145; Infants, ↪85; Marriage; Mechanics' Liens, ↪184; Specific Performance, ↪35; Trusts, ↪81; Vendor and Purchaser, ↪334; Witnesses, ↪64, 195.

V. WIFE'S SEPARATE ESTATE.

(D) Conveyances and Contracts to Convey.

↪187 (Ala.) Where a contract for the exchange of land between married women bears the signature of the husbands, without their names appearing in the body of the contract, that is sufficient to indicate their assent, if the wives are otherwise bound by their signatures.—Wood v. Lett, 71 So. 177.

VII. COMMUNITY PROPERTY.

↪272(3) (La.) Plaintiff, divorced from her husband, alleging error and fraud in exclusion of certain mortgage note from partition of community property, is bound to make out case by clear preponderance of evidence.—Walther v. Walther, 71 So. 344.

↪273(1) (La.) Under Civ. Code, arts. 117, 118, relating to putative marriage, where second wife acts in good faith not knowing of former marriage, the property acquired by husband during existence of second marriage will be divided between the two wives, and their children are

not interested in the property.—Waterhouse v. Star Land Co., 71 So. 358.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

↪297 (Ala.) Evidence *held* sufficient to warrant reasonable allowance to wife for separate maintenance.—Cook v. Cook, 71 So. 986.

IX. ABANDONMENT.

↪313 (Fla.) In the prosecution of a husband for withholding support from his wife, evidence of the wife's general reputation for chastity is inadmissible.—Land v. State, 71 So. 279.

Evidence of occurrences arising after the separation, and having no connection with it, are inadmissible on behalf of a husband, charged with unlawfully withholding support.—Id.

HYPOTHETICAL QUESTIONS.

See Criminal Law, ↪485.

IDENTITY.

See Abatement and Revival, ↪9; Criminal Law, ↪195-200.

ILLEGALITY.

See Bills and Notes, ↪478; Chattel Mortgages, ↪73; Contracts, ↪103.

IMPEACHMENT.

See Judgment, ↪474, 495; Witnesses, ↪311-393.

IMPRISONMENT.

See Arrest; Bail; Habeas Corpus.

IMPROVEMENTS.

See Mechanics' Liens; Municipal Corporations, ↪278, 568; Vendor and Purchaser, ↪334.

INADEQUATE DAMAGES.

See Damages, ↪182.

INCHOATE DOWER.

See Dower.

INCUMBRANCES.

See Insurance, ↪330.

INDEMNITY.

See Guaranty; Pleading, ↪8; Principal and Surety.

INDEPENDENT CONTRACTORS.

See Master and Servant, ↪316.

INDICTMENT AND INFORMATION.

See Bail, ↪49; Bribery, ↪6; Criminal Law, ↪252; Forgery, ↪28, 30; Grand Jury; Habeas Corpus, ↪30; Intoxicating Liquors, ↪219, 223; Larceny, ↪32.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

↪1 (Ala.App.) Under Const. 1901, § 6, providing that accused shall have the right to demand the nature and cause of the accusation, a formal accusation sufficient to apprise the defendant of the nature and cause is a prerequisite to jurisdiction of the offense.—Sherrord v. State, 71 So. 76.

↪2(4) (La.) The anti-trust acts of 1890 and 1915 *held* to sufficiently define a misdemeanor so that an accusation under it was not violative of Const. art. 10, providing that accused shall be informed of the nature of the accusa-

tion.—State v. American Sugar Refining Co., 71 So. 137.

⚡5 (Ala.App.) While irregularities in obtaining jurisdiction of the person may be waived, a formal accusation is essential to complete jurisdiction, and cannot be waived.—Sherrod v. State, 71 So. 76.

Where the offense is one denounced by municipal ordinance, formal accusation cannot be said to be waived in the recorder's court until the accused pleads to the charge without demanding the nature and cause of the accusation.—Id.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

⚡10 (La.) As law only requires concurrence of 9 members of grand jury to find indictment, it does not require presence of more than 9 during deliberations.—State v. Paillet, 71 So. 951.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⚡110(31) (Ala.App.) Count in complaint following the form provided by the statutes for charging a violation of the prohibition law held to cover every violation of the law within 12 months prior to the commencement of the prosecution, whether contrary to Acts 1915, pp. 30, 32, 34, §§ 29½, 32, or 33.—Hancock v. State, 71 So. 973.

IX. ISSUES, PROOF, AND VARIANCE.

⚡176 (Ala.) A crime charged as of one date may be established by proof of its occurrence on another date, but the crime proved must antedate the charge on which defendant is being tried; otherwise there is a fatal variance.—Brown v. City of Tuscaloosa, 71 So. 872.

In a prosecution for crime, evidence of an offense committed later than the charge upon which defendant is being tried was brought is inadmissible and will not support a conviction.—Id.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

⚡191(½) (Ala.App.) Under a complaint for unlawful sale of prohibited liquors, a conviction may be had for either selling or acting as agent or assisting friend of the seller or buyer in procuring an unlawful sale.—Cole v. State, 71 So. 616.

INDIVISION.

See Execution, ⚡219.

INDORSEMENT.

See Alteration of Instruments, ⚡8; Bills and Notes, ⚡226-375.

INFANTS.

See Adoption; Guardian and Ward; Habeas Corpus, ⚡93, 99; Judgment, ⚡474; Master and Servant, ⚡95, 96; Negligence, ⚡33; Railroads, ⚡378.

II. CUSTODY AND PROTECTION.

⚡18 (La.) Under the law giving the juvenile court jurisdiction over neglected children prescribing the conditions which must exist in order that a child should be considered to be a neglected child, no children are neglected or delinquent, for the purposes of its jurisdiction, save those who fall within the classification established by the law.—Brana v. Brana, 71 So. 519.

Under the law vesting the juvenile court with jurisdiction to determine when a child answers the description of a neglected child given by the Constitution, the fact of the condition of the child is not strictly jurisdictional, but is only quasi jurisdictional.—Id.

The jurisdiction of the juvenile court is quasi criminal, and not concurrent with civil juris-

diction of civil district court in a suit for separation between the parents, so that, after the latter court had awarded the child to one parent, the juvenile court might make further order as to its custody.—Id.

VI. CRIMES.

⚡65 (Fla.) A minor husband, who is able to support his wife and child, may be held criminally liable for withholding that support.—Land v. State, 71 So. 279.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Equity, ⚡149; Forgery, ⚡7.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

⚡26(4) (Miss.) Each of several railroads has the right to separately invoke the aid of equity to prevent a multitude of suits against it for a statutory penalty, where the alleged wrongful conduct on their part was continuing in its nature.—Guice v. Illinois Cent. R. Co., 71 So. 259.

INNKEEPERS.

⚡10 (Fla.) Where evidence tends to show that plaintiff, injured by falling into open elevator shaft in hotel, was not a mere licensee, and also tends to show actionable negligence of defendant hotel keeper, verdict for defendant should not be directed.—Haile v. Mason Hotel & Investment Co., 71 So. 540.

⚡11(1) (La.) Where guest pays bill and leaves inn, leaving his trunk, innkeeper becomes merely gratuitous bailee, and liable for loss only when occasioned by his fraud or gross negligence.—Carol v. Monteleone, 71 So. 798.

⚡11(10) (La.) Where delay occurs in delivery of trunk after guest has left and paid bill, attributable as much to fault of guest as to innkeeper, guest is not entitled to damages.—Carol v. Monteleone, 71 So. 798.

INSANE PERSONS.

See Carriers, ⚡281, 295; Criminal Law, ⚡1177; Homicide, ⚡237.

INSOLVENCY.

See Assignments for Benefit of Creditors; Banks and Banking, ⚡77-82; Corporations, ⚡542, 547, 604.

INSPECTION.

See Health, ⚡7; Sales, ⚡168.

INSTRUCTIONS.

To jury, see Criminal Law, ⚡778-830; Trial, ⚡191-296.

INSURANCE.

See Constitutional Law, ⚡101, 130; Evidence, ⚡183, 317, 472; Executors and Administrators, ⚡46; Interest, ⚡39; Jury, ⚡88; Pleading, ⚡131, 180; States, ⚡119, 130; Statutes, ⚡113; Taxation, ⚡24; Trial, ⚡127.

I. CONTROL AND REGULATION IN GENERAL.

⚡4 (La.) Act No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums to be turned over to officers of fire departments of cities, etc., held not unconstitutional.—Citizens' Ins. Co. v. Herbert, 71 So. 955.

☞18 (La.) State has right to exclude foreign insurance company that has established a business in the state.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

☞20 (La.) Act No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to offices of fire departments of cities, towns, and villages, under penalty of \$500 or revocation of license to do business in state, does not levy a "tax."—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

☞93 (Ala.App.) Where it was agreed that an insurance agent's authority was limited to one county, and that on a trip into another county he solicited insurance generally, *held*, that the company was not liable for the agent's retention of premium paid for policy applied for in the second county.—*Springfield Fire & Marine Ins. Co. v. Ferrell*, 71 So. 615.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

☞141(4) (Miss.) Holder of policy of fire insurance, who had possession for a long time before loss, was bound by its terms, though he did not read it.—*Home Mut. Fire Ins. Co. v. Pittman*, 71 So. 739.

(B) Construction and Operation.

☞164(1) (Miss.) Clause of fire insurance policy providing that if interest of insured was not sole, company should not be liable in sum exceeding cash value of insured's interest, *held* to relate to case where ownership was less than perfect legal and equitable title, and fact had been noted on policy.—*Home Mut. Fire Ins. Co. v. Pittman*, 71 So. 739.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

☞244 (Miss.) On surrender of policy payable to deceased wife, administrator *held* to have properly paid cash surrender value to husband to reimburse him for premiums paid after wife's death.—*Montgomery v. Mutual Life Ins. Co. of New York*, 71 So. 162.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

☞250(1) (Ala.) Code 1907, § 4572, relating to sufficiency of false representations or warranties to vitiate the policy, must be given a liberal construction in favor of the insured.—*Metropolitan Life Ins. Co. v. Goodman*, 71 So. 409.

☞256(2) (Miss.) Under a policy provision that all statements of the insured shall, in the absence of fraud, be deemed representations and not warranties, the company cannot contest payment on his death, relying on the "continued good health" clause of his application and his illness when applying for or being delivered his policy, without showing he fraudulently concealed his ill health when he received the policy.—*Fidelity Mut. Life Ins. Co. v. Elmore*, 71 So. 305.

(B) Matters Relating to Property or Interest Insured.

☞282(1) (Miss.) Where fire insurance was taken out by plaintiff who was not owner of property, but a tenant of his wife, the house burned being situated on her land, the policy,

providing that it should be void, unless insured had perfect legal and equitable title, was forfeited.—*Home Mut. Fire Ins. Co. v. Pittman*, 71 So. 739.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

☞330(1) (Fla.) Where a fire policy provides that it shall be void unless otherwise provided if the subject of insurance be personal property and be incumbered by chattel mortgage, execution of chattel mortgage on the property renders it void.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

Provision avoiding fire policy if personal property insured be incumbered by chattel mortgage avoids policy, though no inquiries were made by insurer and no representations by insured.—*Id.*

☞330(2) (Fla.) If without regard to form instrument is in legal effect a chattel mortgage, it will avoid fire policy containing provision that, if insured property is or becomes incumbered by chattel mortgage, policy shall be void.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

(E) Nonpayment of Premiums or Assessments.

☞349(1) (Miss.) A life policy *held* to have lapsed upon insured's nonpayment of premium and interest on a policy loan, and not to be revived upon his application for reinstatement coupled with tender of premiums, which was never accepted.—*Fidelity Mut. Life Ins. Co. v. Oliver*, 71 So. 302.

☞367(1) (Miss.) Where insured, having procured a loan for the full value of the policy, defaulted in payment of premium, interest and principal of loan, the insurance was not automatically extended under a provision for extension after payment of three full premiums in case the policy was free from debt.—*Fidelity Mut. Life Ins. Co. v. Oliver*, 71 So. 302.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

☞375(1) (Miss.) The insurer cannot defeat recovery under a policy on the ground that its agent, who consented to additional insurance, failed to comply with Code 1906, § 2627, requiring agents to obtain a certificate of authority.—*Caledonian Fire Ins. Co. v. Shepherd*, 71 So. 314.

☞383 (Miss.) Waiver of a provision of the policy after its issuance is not within Code 1906, § 2597, requiring all conditions to be expressed in the policy, so that written waiver is unnecessary.—*Caledonian Fire Ins. Co. v. Shepherd*, 71 So. 314.

☞390 (Miss.) Insurer, through its agent issuing policy based on inventory approved by agent, and as to the sufficiency of which nothing had been said to the plaintiff after receipt of premium, *held* estopped from defending on ground that it did not satisfy provision of policy.—*Mitchell v. Aetna Ins. Co.*, 71 So. 382.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(E) Accident and Health Insurance.

☞530 (Miss.) The provision in an accident policy requiring written notice to the insurer, within 15 days after the accident for which claim is made, is void under Code 1906, § 3127, providing that any contract changing "the limitations prescribed in this chapter" shall be null and void.—*Standard Acc. Ins. Co. v. Broom*, 71 So. 653.

XV. ADJUSTMENT OF LOSS.

☞575 (Miss.) Where insured in good faith selected an appraiser, but such appraiser and the one selected by insurer were unable to agree, *held*, that insured might institute action without offering to submit to a second appraisal.—*Providence-Washington Ins. Co. v. Kennington*, 71 So. 378.

☞576(1) (Miss.) Where the insurer failed to include in an arbitration as to extent of loss the mortgagee under a loss payable clause, it did not waive its right to an arbitration as to him.—*Aetna Ins. Co. v. Cowan*, 71 So. 746.

XVI. RIGHT TO PROCEEDS.

☞581 (Miss.) A loss payable clause in a policy of fire insurance in favor of the mortgagee, does not create a new contract with the mortgagee independent of that with the assured, though the provisions of Code 1906, § 2596, stating the conditions and requisites of such clauses, is written in by operation of law.—*Aetna Ins. Co. v. Cowan*, 71 So. 746.

XVIII. ACTIONS ON POLICIES.

☞615 (Fla.) Where one voluntarily accepts fire policy, no fraud being practiced, in action on policy insurer may base defense on failure of insured to comply with lawful provisions of policy.—*Georgia Home Ins. Co. v. Hoskins*, 71 So. 285.

☞640(2) (Ala.) Under Code 1907, § 4572, providing that no misrepresentation or warranty shall invalidate a policy of life insurance unless made with intent to deceive or unless it increased the risk, it is not enough for the plea to allege that the assured falsely warranted that he had not been attended by a physician for a serious disease for a given period; neither of the statutory conditions being thereby fulfilled.—*Metropolitan Life Ins. Co. v. Goodman*, 71 So. 409.

A plea alleging that the insured fraudulently suppressed the fact that he had been attended by a physician for a serious disease, though good under Code 1907, § 4299, relating to suppression of truth, is demurrable where it fails to allege intent to deceive as required by section 4572.—*Id.*

☞665(5) (Miss.) In an action to recover on an accident policy, evidence examined, and *held* sufficient to warrant a finding that death of insured was the result of accident.—*Standard Acc. Ins. Co. v. Broom*, 71 So. 653.

XX. MUTUAL BENEFIT INSURANCE.**(B) The Contract in General.**

☞723(2) (Ala.App.) Under Code 1907, § 4572, where a question in an application for insurance was not answered, although it was done with intent to deceive, if it did not in fact deceive, there was no ground for avoiding the policy.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

☞724(2) (Ala.App.) Where it appears on the face of an application that a question is not answered or is imperfectly answered, the issuance of a policy without further inquiry is waiver of the imperfection.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

(D) Forfeiture or Suspension.

☞755(3) (Ala.App.) Where the evidence showed without dispute that after knowledge of an injury to the insured the grand lodge officers of the insurer accepted premiums for a policy of accident insurance, it was unnecessary to determine to what extent the local officers of the insurer could bind the insurer by waiver or estoppel.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

(E) Beneficiaries and Benefits.

☞782 (Miss.) Where a fraternal order, having issued one policy, issued a second policy on insured's affidavit that the first had been lost or mislaid, *held* that, as order did not object, second policy canceled all rights under original, though second beneficiary was ineligible.—*White v. White*, 71 So. 322.

Where only one of two beneficiaries of the second policy was eligible, *held* that he was entitled to the entire proceeds of the policy issued by a fraternal insurer; the original policy, naming another beneficiary, having been canceled.—*Id.*

☞783 (Miss.) The beneficiary in a mutual benefit policy has no vested interest in it during the life of the insured.—*Sykes v. Armstrong*, 71 So. 262.

☞784(6) (Miss.) Where second policy was issued on false affidavit by member of fraternal order that original had been lost, and rival claimants were required to interplead, objections that the second policy was not issued in accordance with rules of order are not available to original beneficiary.—*White v. White*, 71 So. 322.

☞785 (Miss.) The beneficiary in a mutual benefit policy has no vested interest in it during the life of the insured, so that the proceeds were no part of the estate of the beneficiary of the insured, who had predeceased him.—*Sykes v. Armstrong*, 71 So. 262.

Under constitution and by-laws of mutual benefit order designed to provide a fund to be paid to the widow, orphans, etc., of deceased members, where the named beneficiary was dead, the proceeds were to go to the widow, orphans, etc., in the amounts they would have inherited from the deceased on his intestacy.—*Id.*

In no case where there were any of the class living designated as probable beneficiaries in the policy of a benefit association would the insurance lapse or become uncollectable.—*Id.*

(F) Actions for Benefits.

☞811 (Miss.) Under Code 1906, § 2598, a fraternal benefit association is a life insurance company, which may be sued in the county of beneficiary's residence, under sections 687 and 709.—*Masonic Benefit Ass'n of Stringer Grand Lodge of Mississippi v. Dotson*, 71 So. 266.

☞815(1) (Ala.) In a suit on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

A complaint on a certificate of insurance issued by a fraternal benefit company *held* not demurrable.—*Id.*

☞815(1) (Ala.App.) The form for a complaint on a life insurance policy issued for a definite term of years provided by Code 1907, § 5382, form 12, does not apply to an action on a mutual benefit certificate which is in force only for so long a time as the member remains in good standing, and not for a definite term of years.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

A pleading in an action on a certificate alleging that the insurer with full knowledge by and through its officer, servant, or agent issued and delivered the policy with the true condition of the insured well and thoroughly understood, is sufficient to allege the authority of such officers or agents to waive a condition.—*Id.*

☞818(4) (Ala.) Evidence that deceased was addicted to drinking immediately preceding his death was competent in connection with evidence as to his efforts and purpose to abstain therefrom.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

☞825(3) (Ala.) In an action on a fraternal benefit certificate, evidence *held* sufficient to take to the jury the question whether assured committed suicide.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

INTENT.

See Criminal Law, ⚡21; Evidence, ⚡461; Statutes, ⚡181.

INTEREST.

See Appeal and Error, ⚡150; Banks and Banking, ⚡78; Guardian and Ward, ⚡62; Usury.

III. TIME AND COMPUTATION.

⚡39(2) (Miss.) In a suit to recover the amount of an insurance certificate and for certain money expended by plaintiff at the request of the defendant's agent some time before February 11, 1910, the verdict allowing plaintiff \$100 as expenses should bear interest only from that date.—Woodmen of the World v. Coplin, 71 So. 260.

IV. RECOVERY.

⚡62 (Miss.) Where interest is not due by the terms of the contract, but is simply an incident thereto recoverable as damages, the payment of the principal is a bar to its subsequent recovery.—Yazoo & M. V. R. Co. v. W. C. Craig & Co., 71 So. 561.

⚡67 (La.) Uncorroborated testimony of maker of note on which past-due interest exceeds \$500, is insufficient to establish, as against coheirs of deceased payee, verbal agreement that no interest would be charged.—Rizan v. Rizan, 71 So. 581.

INTERROGATORIES.

See Discovery.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

See Criminal Law, ⚡678, 723, 1171; Fines, ⚡21; Indictment and Information, ⚡110, 191½.

VI. OFFENSES.

⚡150 (La.) In prosecution for retailing liquors without license, question whether sale was in "wet" or "dry" district is immaterial.—State v. Dorr, 71 So. 509.

VIII. CRIMINAL PROSECUTIONS.

⚡219 (La.) State is not required to inform defendant in information or indictment for selling liquor of name of purchaser.—State v. Smith, 71 So. 734.

⚡223(5) (La.) Under Rev. St. § 1063, where indictment charges defendant with selling liquor without license February 7, 1914, which was Saturday, testimony that offense was on Friday between February 1st and 15th is admissible.—State v. McGuire, 71 So. 239.

⚡236(11) (Ala.App.) Evidence held not to show facts from which an inference of guilt for unlawfully selling whisky could be drawn.—Johnson v. State, 71 So. 79.

JITNEYS.

See Constitutional Law, ⚡80; Municipal Corporations, ⚡63.

JOINT LIABILITIES.

See Partnership, ⚡165.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Justices of the Peace; New Trial. ⚡155.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡6 (La.) One accused of violating city ordinance cannot contest legality of appointment of judge on ground of violation of Const. art. 319, requiring officers to be elected by electors of city, the judge being de facto, if not de jure.—City of New Orleans v. Mangiarisina, 71 So. 886.

II. SPECIAL OR SUBSTITUTE JUDGES.

⚡16(1) (La.) Where order of recusation, under Act No. 40 of 1880, § 2, reciting that no lawyer having necessary qualifications could be found to act, appointed judge of adjoining district, and defendant asserts that qualified lawyers could be found who would act, issue of fact is presented, and it is error to insist on appointment made until issue is determined.—State v. McGarrity, 71 So. 730.

⚡16(2) (La.) Where trial judge recuses himself by reason of having been employed in prosecution, Act No. 40 of 1880 requires appointment of lawyer having qualifications of judge of court in which prosecution is pending, and, if no lawyer having necessary qualifications can be obtained, then judge of adjoining district must be appointed.—State v. McGarrity, 71 So. 730.

Judge of adjoining district, to sit in recused case, need not take special oath of office.—Id.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⚡32 (La.) Where trial has been had with full opportunity to cross-examine, but the judge retires from office before giving judgment, his successor may, after hearing argument and without hearing further testimony, give judgment.—Barton v. Burbank, 71 So. 134.

IV. DISQUALIFICATION TO ACT.

⚡47(1) (Ala.) Under Acts Sp. Sess. 1909, p. 263, § 1, judge may hear and try charges against official stenographer, though sworn to by himself.—Ex parte Hill, 71 So. 994.

JUDGMENT.

See Courts, ⚡189; Criminal Law, ⚡1177; Execution.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⚡17(11) (Ala.) Judgment in landlord's attachment suit to enforce lien as against tenant who was brought in by personal service or who appeared, bound him and his interest in the property levied upon, but if he was brought in by levy of the attachment, only bound his interest in the property.—Brothers v. Russell & Duke, 71 So. 450.

⚡27 (La.) The judgment of any tribunal in a matter of which it has no jurisdiction is a mere nullity, and may be treated as such whenever and wherever it is sought to be made a ground of action or defense.—Branca v. Brana, 71 So. 519.

IV. BY DEFAULT.**(A) Requisites and Validity.**

⚡130 (Fla.) Entry by clerk of final judgment on default should recite proofs of claim, and that be ascertained from such proofs amount due, followed by language signifying entry of

judgment for such amount.—*Smith v. Wilson*, 71 So. 919.

⚡131 (Fla.) Gen. St. 1906, § 1425, providing for entry of final judgment on default, requires strict conformity to its terms by clerk of court, who in entering final judgment acts in ministerial capacity.—*Smith v. Wilson*, 71 So. 919.

(B) Opening or Setting Aside Default.

⚡143(11) (Ala.App.) Judgment nil dicit held to have been rendered against defendant without fault on her part, under Code 1907, § 5372, where, through mistake of clerk in making up printed docket, defendant's attorneys did not learn that case was set for trial.—*Williams v. Tyler*, 71 So. 51.

⚡151 (Ala.) Petition for rehearing, after suffering default judgment, failing to state any facts in support of the prayer for relief, held demurrable.—*Reed v. Hammond*, 71 So. 692.

⚡163 (Ala.) Where original petition for rehearing, after suffering default judgment, was demurrable and it did not appear that petitioner offered to amend his petition, it was properly dismissed.—*Reed v. Hammond*, 71 So. 692.

⚡173 (Ala.) A motion to set aside an order denying a rehearing after a default judgment, not accompanied by an offer to amend the petition by sworn statements of the facts showing that the petitioner had a good and meritorious defense to the action, was properly denied.—*Reed v. Hammond*, 71 So. 692.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⚡248 (La.) A judgment not responsive to the pleadings and not covering the case will be set aside on appeal.—*Francigues v. Dupieris*, 71 So. 503.

⚡253(1) (Ala.) In such cases as ejectment and detinue, where the amount recoverable is liquidated and necessarily increases by mere lapse of time after the suit is filed, the plaintiff may recover the full amount due to the date of the judgment, although a smaller sum is claimed as interest or damages.—*Clark v. Watson*, 71 So. 95.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

⚡474 (La.) The decision of juvenile court, having jurisdiction to determine when a child is a neglected child within the constitutional description, cannot be challenged except in a direct action brought therefor or in some appellate tribunal, and hence is not subject to inquiry in the civil district court, but must there be assumed to be correct.—*Branan v. Brana*, 71 So. 519.

(B) Grounds.

⚡495(2) (La.) It is presumed that judgment by one on whom law has conferred authority is based upon conditions required by law, and presumption is not rebutted by ex parte allegation, though supported by affidavit of person condemned that he was not cited, but he must prove that he was not cited, or that appointment of curator ad hoc was not authorized.—*Hamburger v. Purcell*, 71 So. 765.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

⚡570(1) (La.) Res adjudicata cannot be predicated on dismissal as in case of nonsuit.—*Sander v. New Orleans & N. E. R. Co.*, 71 So. 238.

⚡570(11) (La.) Res adjudicata cannot be predicated on dismissal on omission of essential allegations in petition.—*Sander v. New Orleans & N. E. R. Co.*, 71 So. 238.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⚡587 (La.) Where plaintiff's attorney wrongfully pledged mortgage notes on plaintiff's property to the bank for his individual use and after foreclosure the bank agreed to reconvey the property upon payment of the debt, held, a judgment against plaintiff, in an action to set aside the pledge and annul the foreclosure sale, or in the alternative to secure to plaintiff the rights, of said attorney in such contract, was not res judicata of a subsequent action to enforce such contract which plaintiff had secured by assignment.—*Darcourt v. Brunet*, 71 So. 776.

⚡589(2) (Miss.) Judgment for defendant in suit to recover price of goods shipped, does not bar a later suit, upon discovery of the facts, for conspiracy to defraud plaintiff of the value of the goods.—*J. K. Orr Shoe Co. v. Edwards*, 71 So. 816.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

⚡649 (La.) An ex parte judgment obtained by a tutor for his children against the interest of other wards, probating a will, approving his account as executor or sending minor children into possession of the estate, is not res judicata.—*Succession of Hawkins*, 71 So. 492.

(B) Persons Concluded.

⚡683 (Miss.) After notice to the employer of an employee's assignment of a part interest in his claim for personal injury, the assignee is not ordinarily bound by a judgment to which he is not a party, recovered by his assignor.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

⚡707 (Ala.) The mortgagee of cotton, giving a replevy bond in attachment suit by the landlord, was not a party to the suit so as to make a judgment there rendered conclusive against his mortgage lien on property.—*Brothers v. Russell & Duke*, 71 So. 450.

⚡707 (Miss.) Under Code 1906, § 4670, neither the sheriff nor his bondsmen can avoid liability for failure to make return of an execution on the ground that the judgment on which execution issued is invalid, that being a collateral attack.—*Green v. Taylor*, 71 So. 375.

(C) Matters Concluded.

⚡735 (La.) On exceptions of res judicata, an objection that the petition shows that plaintiff at the former trial concealed the fact that he was the assignee of the contract now sued on cannot be considered where the assignment of such contract was not discussed nor adjudicated at such former trial.—*Darcourt v. Brunet*, 71 So. 776.

XV. LIEN.

⚡777 (Miss.) Notwithstanding Code 1906, §§ 819, 1591, 1593, a voucher for the payment of money due is not subject to the lien of an enrolled judgment as "personal property," or "property."—*R. F. Walden & Co. v. Yates*, 71 So. 897.

JUDICIAL NOTICE.

See Criminal Law, ⚡304; Evidence, ⚡10, 32.

JUDICIAL POWER.

See Constitutional Law, ⚡70.

JUDICIAL SALES.

See Execution, ⚡219-319; Taxation, ⚡639-816.

⚡1 (Miss.) Sale by trustee in deed of trust, who was also the receiver in the federal District Court of the mortgagor's business and property, made by permission of that court and confirmed by it, under which he executed a trustee's deed, held not a judicial sale, but a

sale under the deed of trust.—*Finger v. Taylor*, 71 So. 269.

⚡6 (La.) In view of Rev. St., Code Prac. art. 671, must prevail over Rev. St. §§ 64, 576, 3426, and it is therefore essential that the sheriff ten days before proceeding to sell immovable property serve on defendant a written notice to appear and appoint an appraiser.—*Crowley Bank & Trust Co. v. Hurd*, 71 So. 128.

JURISDICTION.

See Courts; Criminal Law, ⚡92-101; Divorce, ⚡62; Equity, ⚡35; Infants, ⚡18; Justices of the Peace, ⚡39½, 44; Taxation, ⚡639.

JURY.

See Bribery, ⚡1; Criminal Law, ⚡631, 858, 863; Eminent Domain, ⚡215; Grand Jury; New Trial, ⚡54.

II. RIGHT TO TRIAL BY JURY.

⚡31(1) (Ala.) Loc. Acts 1915, p. 296, § 16, which is part of the law creating a revenue board for Conecuh county, held invalid under Const. 1901, §§ 6, 175, because providing for vacation without trial of the offices of members, where the board fails to publish required financial statement.—*Dunn v. Dean*, 71 So. 709.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

⚡66(6) (Ala.App.) Where the return of a sheriff on the regular venire was premature, the defendant had no ground of complaint where he was given his full quota of names required by the court under Acts 1909 (Sp. Sess.) p. 317, § 32, providing that in capital cases the court shall order the sheriff to summon not less than 50 nor more than 100 persons.—*Daniel v. State*, 71 So. 79.

⚡68 (Ala.App.) Where a writ of venire was on its face made returnable on a certain day, a return made on that day was not premature.—*Daniel v. State*, 71 So. 79.

⚡70(6) (Ala.App.) Under Acts 1909 (Sp. Sess.) p. 317, § 32, providing that the venire for the trial of a defendant charged with a capital felony shall consist of jurors drawn and summoned for the week of the term in which the case is to be tried and those specially drawn by the court, only those regular jurors who were drawn and summoned could be used.—*Daniel v. State*, 71 So. 79.

⚡72(3) (La.) Under Act No. 182 of 1914, amending Act No. 135 of 1898, § 11, there was no irregularity in sheriff's calling jurors from list which had been made after names were drawn from tales box.—*State v. Ashworth*, 71 So. 860.

Under Act No. 43 of 1882, Act No. 220 of 1902, and Act No. 135 of 1898, § 3, deputy clerk may act for clerk in drawing tales venire from tales jury box.—Id.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

⚡88 (Ala.) In an action on a fraternal benefit certificate, a member of the order has an interest which disqualifies him as juror upon the objection of the defendant.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

JUSTICES OF THE PEACE.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡6 (Miss.) Under Code 1906, § 3473, relative to validity of acts of de facto officials as to all persons affected, attachment issued by mayor of town, who, after he qualified as deputy sheriff, continued to exercise the duties of mayor

and ex officio justice of the peace, held valid, despite Const. art. 1, § 2.—*B. Altman & Co. v. Wall*, 71 So. 318.

II. RIGHTS, DUTIES, AND LIABILITIES.

⚡30 (Fla.) Failure of justice of the peace to pay over to county treasurer, within 10 days after receipt thereof, all fines collected by him, without excuse, is violation of Gen. St. 1906, § 4035, constituting "malpractice in office" within section 3481.—*Smith v. State*, 71 So. 915.

III. CIVIL JURISDICTION AND AUTHORITY.

⚡39½ (Miss.) A justice of the peace has no jurisdiction of a cause against a resident of another district where the debt was contracted and all the liability incurred, and which had a justice qualified to act, and default judgment in such cause is void.—*Molpus v. Bostick Lumber & Mfg. Co.*, 71 So. 16.

⚡44(10) (Miss.) A justice of the peace had jurisdiction of an action on open account which was reduced by plaintiff to a sum below \$200 by the elimination of items previously claimed, but controverted by defendant.—*Kantrovitz v. McNeill*, 71 So. 13.

IV. PROCEDURE IN CIVIL CASES.

⚡135(6) (Miss.) Where a default judgment of a justice of the peace is void because he had no jurisdiction of the cause, the purchaser of land from the debtor after the judgment who sought to have enjoined the sale of the lands under execution on the judgment need not show a good defense to the action in order to prevent the sale.—*Molpus v. Bostick Lumber & Mfg. Co.*, 71 So. 16.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

⚡164(3) (La.) Under Code Prac. art. 898, a suspensive appeal by a defendant from a justice's judgment, when perfected by a lawful bond, should not be dismissed for the justice's failure to seasonably file the transcript.—*Ragan v. Louisiana Ry. & Nav. Co.*, 71 So. 895.

JUVENILE COURTS.

See Infants, ⚡18; Judgment, ⚡474.

LANDLORD AND TENANT.

See Chattel Mortgages, ⚡138; Damages, ⚡62; Eminent Domain, ⚡155; Evidence, ⚡441; Guardian and Ward, ⚡62; Judgment, ⚡17.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

⚡26 (La.) Waivers, such as written consent to sublease under Civ. Code, art. 2725, entered into between lessor and lessee after recordation of the lease, need not be inscribed on the books of conveyance.—*Trichel v. Donovan*, 71 So. 130.

⚡30 (La.) A lease for indefinite term is nudum pactum.—*Bristo v. Christine Oil & Gas Co.*, 71 So. 521; *Calhoun v. Same*, Id. 522; *Dunham v. McCormick*, Id. 523; *Nervis v. Same*, Id.; *Parrott v. Same*, Id.

(B) Construction and Operation.

⚡48(1) (Miss.) In a suit where a lessee of timber for turpentine purposes contended that the land did not contain the amount of timber specified in the contract, evidence held insufficient to show that, if all the timber on the property had been included in the survey, the lessee would not have had the amount of timber

for which the lease called.—*J. J. White Lumber Co. v. McComb City Turpentine Co.*, 71 So. 5.

Where a lessee of timber lands averred that there was a deficiency of acreage, it has the burden of establishing the amount of the shortage.—*Id.*

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

⚡55(3) (La.) Evidence in a lessor's action for damages done to sawmill machinery, *held* not to show any damage other than that resulting from ordinary wear and tear which was excepted by the terms of the lease.—*Eldridge v. Chesbrough & Graves*, 71 So. 152.

(B) Estoppel of Tenant.

⚡63(2) (Miss.) In an action by a landlord against his tenant holding over after expiration of the lease, the landlord's title cannot be questioned by the tenant.—*Wilson v. Peacock*, 71 So. 296.

IV. TERMS FOR YEARS.

(D) Termination.

⚡101 (La.) Under Civ. Code, art. 2697, *held* that the lessee had an absolute right to rescind the lease, where the premises had ceased to be fit for the use, because of fire, for which they were leased, and restoration thereof would amount to reconstruction and not to mere repairs.—*Henry Rose Mercantile & Mfg. Co. v. Smith*, 71 So. 487.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(A) Description, Extent, and Condition.

⚡122 (Miss.) Under a contract letting pine lands for turpentine purposes, *held* that the lessor was not bound to furnish all virgin timber of the acreage specified.—*J. J. White Lumber Co. v. McComb City Turpentine Co.*, 71 So. 5.

Timber lands, let for turpentine purposes, *held* let in bulk, although the approximate number of acres was given, so there could be no recovery for shortage unless it amounted to deception or fraud.—*Id.*

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

⚡205 (Miss.) Where a tenant is paying rent to a creditor of the landlord authorized by the latter to collect rents until his debt is satisfied, upon transfer of the property by the landlord, the tenant's right to possession depends on payment of rent to the transferee unless the tenant is in possession under a valid rental contract made prior to the transfer.—*Cahn v. Wright*, 71 So. 567.

(B) Actions.

⚡229(2) (Ala.) Under Code 1907, § 4748, authorizing attachment of tenant's goods for rent not due where he has or is about fraudulently to dispose of them, actual, not constructive, fraud warrants attachment.—*Seals Piano & Organ Co. v. Bell*, 71 So. 340.

Evidence of an attempt, without landlord's knowledge, to remove tenant's goods to another city, there to be mingled with other goods on which landlord had no lien, the tenant being solvent, *held* not to show a fraudulent disposition of the goods within Code 1907, § 4748, authorizing attachment.—*Id.*

Removal of tenant's goods under such circumstances of secreting or hiding as would show intent to deprive the landlord of his lien is fraudulent intent within Code 1907, § 4748, authorizing attachment.—*Id.*

(C) Lien.

⚡248(1) (Fla.) Under Comp. Laws 1914, § 2237 (Gen. St. 1906, § 2237) subd. 2, landlord's

lien is not superior to lien acquired by another prior to bringing of property on leased premises or to commencement of tenancy.—*Ruge v. Webb Press Co.*, 71 So. 627.

⚡251(2) (La.) Bank, which did not assume payment of rent of leased premises, was liable to lessor, suing *ex delicto*, for removing and selling goods of successor of lessee on the leased premises pursuant to conspiracy with the successor.—*Hyman v. Hibernia Bank & Trust Co.*, 71 So. 598.

Act of bank, creditor of successor of tenant, in conspiring with such successor to remove goods from the leased premises to deprive landlord of his right of pledge and privilege, which was done, *held* an actionable tort.—*Id.*

⚡253(1) (Miss.) In a prosecution for removing from the premises garden produce subject to a landlord's lien, contrary to Code 1906, § 1261, intent to defeat or impair the lien is the gravamen of the charge.—*Dolph v. State*, 71 So. 911.

In a prosecution for removing from the premises garden produce subject to a landlord's lien contrary to Code 1906, § 1261, evidence is admissible to prove defendant's understanding that lien applied only to corn and cotton, not to the produce removed.—*Id.*

X. RENTING ON SHARES.

⚡331(5) (Ala.App.) A complaint, which in setting forth a contract for lease on shares did not describe the land the number of stock and quantity of fertilizer to be furnished to plaintiff, or the quantity of land to be cultivated, or the crop, *held* demurrable for uncertainty.—*T. L. Farrow Mercantile Co. v. Riggins*, 71 So. 963.

In an action for breach of contract for rental of land on shares, an allegation that, in pursuance of the contract plaintiff started a two-horse crop *held* not a sufficient allegation that contract was for a two-horse crop.—*Id.*

⚡331(6) (Ala.App.) In an action for breach of contract for rental of land on shares, evidence of value of growing crop at time of alleged breach of contract *held* inadmissible.—*T. L. Farrow Mercantile Co. v. Riggins*, 71 So. 963.

In action for breach of contract for rental of land, year in which crop was planted being past, evidence as to kind of crops land could produce, plaintiff's methods, average yield per acre of that land and similar land in neighborhood, and probable market value of plaintiff's crop *held* admissible on measure of damages.—*Id.*

LANDS.

See Public Lands.

LAPSE.

See Insurance, ⚡785; Wills, ⚡849.

LARCENY.

See Criminal Law, ⚡252, 351, 400, 444, 531.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

⚡32(6) (Ala.App.) Affidavit, or sworn complaint, charging petit larceny and that the property stolen was the personal property of the "Birmingham Packing Company, a corporation," sufficiently showed that the owner was a corporation.—*Jackson v. State*, 71 So. 977.

(B) Evidence.

⚡51(1) (Ala.App.) Before evidence can be admitted of recent possession of stolen chattels, corpus delicti must be proven aliunde.—*Jackson v. State*, 71 So. 977.

LAST CLEAR CHANCE.

See Railroads, ⚡338.

LAW OF THE CASE.

See Appeal and Error, ⚡1195; Courts, ⚡99.

LEADING QUESTIONS.

See Witnesses, ⚡240.

LEASE.

See Evidence, ⚡441; Landlord and Tenant; Mines and Minerals, ⚡66, 70; Public Lands, ⚡55.

LEAVE OF COURT.

See Pleading, ⚡236.

LEGISLATIVE POWER.

See Constitutional Law, ⚡50.

LETTERS.

See Evidence, ⚡159.

LEVEES.

⚡9 (Miss.) Secretary of board of levee commissioners *held* without authority to bind the board by contract for stationery and supplies.—Board of Levee Com'rs for Yazoo-Mississippi Delta v. Foote & Davies Co., 71 So. 163.

A board of levee commissioners which paid part of an account for office supplies ordered by its secretary without authority was not thereby estopped to deny its liability for the balance.—*Id.*

⚡11 (Miss.) Court *held* without power to go into question of whether rejection by board of levee commissioners of claim on unauthorized contract was arbitrary.—Board of Levee Com'rs for Yazoo-Mississippi Delta v. Foote & Davies Co., 71 So. 163.

⚡16 (La.) Provision in contract to build levee that decision of executive committee of levee board on differences between contractor and board's engineer shall be binding refers only to matters over which engineer has supervision.—Reynolds v. Board of Com'rs of Orleans Levee Dist., 71 So. 787.

To hold that decision of executive committee of levee board on dispute between contractor and engineer on matter not under engineer's direction is binding on contractor would make contract depend on potestative condition and render it void.—*Id.*

Where levee building contract provides that contractor may obtain earth from adjacent batture and contractor has made bid in contemplation thereof and has gone to expense planking road to it, and levee board deprives him of such use, he is entitled to compensation for extra cost of transportation from greater distance.—*Id.*

When levee building contractor and engineer of levee board construe expression in contract "adjacent" battures to include battures extending beyond levee, contract should be carried out accordingly.—*Id.*

Where levee building contract provided for change in extent or location of levee at same rate of compensation, not exceeding 20 per cent. in excess or diminution of price, and committee increased length 27 per cent. contractor doing work under protest is entitled to actual value of extra work.—*Id.*

Under provision in levee building contract whereby contractor assumes risks from accidents and casualties, contractor must bear loss of material and work from sinking of ground under levee.—*Id.*

Where levee building contract authorized contractor to use adjacent batture, and another contractor, in removing old piling, against protest of first contractor, used dynamite, causing batture to recede, first contractor is entitled to

compensation for extra cost of transporting dirt.—*Id.*

LIBEL AND SLANDER.**I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.**

⚡9(1) (Miss.) In an action against a telegraph company where sender of message was, by mistake, notified that plaintiff was "unknown at the courthouse," *held*, that there was no "libel."—Western Union Telegraph Co. v. Ragsdale, 71 So. 818.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

⚡38(1) (La.) A libelous judicial allegation is not privileged unless founded on probable cause.—Glisson v. Biggio, 71 So. 204.

III. JUSTIFICATION AND MITIGATION.

⚡63 (La.) Plaintiff's fault in bringing on sudden quarrel, during which defendant used slanderous language, should be considered in mitigation of damages.—Philip v. Quenqui, 71 So. 800.

LIBERTY OF CONTRACT.

See Constitutional Law, ⚡89.

LICENSES.

See Commerce, ⚡64; Constitutional Law, ⚡101, 130, 230; Intoxicating Liquors, ⚡150, 223; Negligence, ⚡32; Railroads, ⚡300.

I. FOR OCCUPATIONS AND PRIVILEGES.

⚡7(1) (La.) Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, relating to license for dealing in trading stamps, *held* valid.—State v. Underwood, 71 So. 513.

⚡7(1) (La.) Charge imposed on auction sales for benefit of Charity Hospital in New Orleans by Rev. St. 1870, § 145, as amended by Act No. 53 of 1882 and Act No. 46 of 1904, is not tax on property, and is constitutional.—Board of Administrators of Charity Hospital v. Richhart, 71 So. 735.

⚡7(2) (La.) Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, relating to license tax for dealing in trading stamps, is not violative of Const. art. 225, relating to uniformity of taxation.—State v. Underwood, 71 So. 513.

⚡7(4) (La.) Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, relating to license for dealing in trading stamps, is not violative of Const. art. 229, requiring licenses to be graded.—State v. Underwood, 71 So. 513.

⚡15(7) (La.) Person distributing gratuitously to all comers, and bartering with all comers, for coupons exchangeable for premiums, is engaged in issuing trading stamps within Act No. 47 of 1904, amending and re-enacting Act No. 171 of 1898, § 15, and is liable for license tax thereby imposed.—State v. Underwood, 71 So. 513.

⚡34 (Ala.) Under Code 1907, § 2411, as amended and re-enacted by Act Aug. 25, 1909 (Sess. Acts 1909, p. 166), by Act Feb. 22, 1915 (Sess. Acts 1915, p. 120), and by the revisory act of September 14, 1915 (Sess. Acts 1915, pp. 489-533), *held*, that the limitation of two years to recovery of licenses paid under invalid revenue act of March 7, 1907 (Sess. Acts 1907, p. 455), was continued in force.—Allgood v. Sloss-Sheffield Steel & Iron Co., 71 So. 724.

Code 1907, § 2411, providing for a refund of proportionate part of license tax paid for conducting a business afterwards prohibited by law, was intended to promote justice and equity

between the state and county and the taxpayer, and to correct mistakes either of law or fact.—*Id.*

The claim of a taxpayer to recover money paid under an invalid license law, if not prosecuted with reasonable diligence, will be shorn of its remedy on common-law practice, even though not barred by any analogous statute of limitation.—*Id.*

LIENS.

See Agriculture, §12; Attorney and Client, §182-189; Judgment, §777; Landlord and Tenant, §229½-253; Mechanics' Liens; Vendor and Purchaser, §254-280.

LIFE ESTATES.

See Dower.

LIMITATION OF ACTIONS.

See Adverse Possession, §45; Banks and Banking, §82; Evidence, §80; Specific Performance, §105; Taxation, §805; Time, §9, 11.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§35(3) (Miss.) Personal liability of directors under Code 1906, § 923, for illegal payment of dividends is not barred by the one-year statute of limitations of Code 1906, § 3101, as to penalties.—*Metzger v. Joseph*, 71 So. 645.

§39(2) (Miss.) An action for loss of cotton seed transported under a written bill of lading held governed by the six-year statute (Code 1906, § 3097), instead of the three-year statute (section 3099), applicable to unwritten contracts and accounts.—*Illinois Cent. Ry. Co. v. Jackson Oil & Refining Co.*, 71 So. 568.

II. COMPUTATION OF PERIOD OF LIMITATION.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§100(11) (Miss.) Where complainant exercises reasonable diligence, the statute of limitations does not run against a suit by him for fraud until his discovery of fraud.—*J. K. Orr Shoe Co. v. Edwards*, 71 So. 818.

§104(1) (La.) Limitation on action ex delicto of landlord against bank and its debtor, successor of tenant, who, by paying rent prevented his discovering that they were removing from the leased premises goods subject to his right of pledge and privilege, held to run only from date of last payment.—*Hyman v. Hibernia Bank & Trust Co.*, 71 So. 598.

LIMITATION OF LIABILITY.

See Carriers, §218; Insurance, §530; Telegraphs and Telephones, §54.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Carriers, §209-230.

LOGGING RAILROADS.

See Master and Servant, §87.

LOGS AND LOGGING.

See Trespass, §52.

§3(7) (Ala.) The right of "turpentineing" is not embraced in the right to cut, remove, or manufacture timber.—*Yarbrough v. Stewart*, 71 So. 986.

§3(15) (Miss.) Complaint in action for amount due on balance of timber, for rent of mill site and to recover for trees cut and re-

moved and asking for the statutory penalty therefor, held to state a good cause of action.—*Jayne v. Nash Lumber Co.*, 71 So. 10.

LOOKOUTS.

See Railroads, §369, 415.

LUMBER.

See Logs and Logging.

MALICE.

See Malicious Prosecution, §50.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

§18(3) (Miss.) In an action for malicious prosecution, where defendant town marshal was told that a screen door had been stolen, that plaintiff had been seen with a similar door and a door in plaintiff's possession was identified as door stolen, held that defendant had reasonable cause to institute a prosecution.—*Gwaltney v. State*, 71 So. 805.

§20 (La.) The term "probable cause," as used with reference to an action for malicious prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious man to believe that the accused is guilty of the offense with which he is charged.—*Glisson v. Biggio*, 71 So. 204.

IV. TERMINATION OF PROSECUTION.

§35(1) (La.) Dismissal by state of impeachment suit during trial is termination of prosecution.—*Glisson v. Biggio*, 71 So. 204.

V. ACTIONS.

§47 (La.) A petition alleging prosecution with malicious intent and upon false charges of proceeding under Const. art. 222, for removal of plaintiff from office held to state a cause of action.—*Glisson v. Biggio*, 71 So. 204.

§50 (La.) In suit for malicious prosecution, plaintiff is not required to allege specially that defendants knew that charges were false; allegations that charges were false, malicious, and without probable cause being sufficient.—*Glisson v. Biggio*, 71 So. 204.

MALPRACTICE.

See Justices of the Peace, §30; Officers, §121.

MANDAMUS.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§82 (La.) Mandamus does not lie to cancel inscriptions on books of recorder of conveyances.—*State ex rel. New Orleans Land Co. v. Register of Conveyances*, 71 So. 773.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§162 (Fla.) Motion to quash alternative writ of mandamus admits as true all matters of fact sufficiently pleaded.—*State v. Jacksonville Terminal Co.*, 71 So. 474.

§164(2) (Fla.) Return to alternative writ of mandamus to compel railroad to establish agency station, alleging that railroad has agency on one side a trifle more than 2 miles, and on the other only 1.8 miles from designated point, that principal business at such point is during four months, when railroad maintains temporary agent, is not demurrable.—*State v. Florida East Coast Ry. Co.*, 71 So. 543.

⚡165 (Fla.) Demurrer to return to alternative writ of mandamus admits the truth of all matters of fact sufficiently pleaded.—State v. Florida East Coast Ry. Co., 71 So. 543.

⚡168(2) (La.) In mandamus to compel recognition of land warrants or refunding of warrants, burden is on relator to prove that his vendors are sole heirs of original holders.—State ex rel. Albritton v. Grace, 71 So. 203.

⚡168(4) (La.) Where, in mandamus to compel recognition and relocation of land warrants or refunding of warrants to assignee of heirs of original purchaser, there is no proof of heirship and warrants are not produced, proceeding is properly dismissed.—State ex rel. Albritton v. Grace, 71 So. 203.

⚡169 (Ala.App.) A petition for mandamus for permission to revive an action on contract as heirs at law of the original plaintiff, not making a case entitling petitioners to the relief prayed, would be dismissed without the issue of the rule nisi.—State v. Pearce, 71 So. 656.

MANSLAUGHTER.

See Homicide.

MARITIME LIENS.

See Courts, ⚡224.

MARRIAGE.

See Divorce; Husband and Wife.

⚡13 (Miss.) Prior to adoption of Code of 1892, a common-law marriage was recognized as lawful and binding as one contracted pursuant to license and ceremony.—Howard v. Kelly, 71 So. 391.

⚡20(1) (Miss.) Valid common-law marriage held to exist between man and woman living in adultery who publicly announced they were man and wife and assumed all burdens incident to matrimony.—Howard v. Kelly, 71 So. 391.

⚡38 (Ala.) The Constitutional Ordinance of September 29, 1865, legalizing marriages of freed men and women then living together as man and wife, contracted during slavery, did not legalize illicit cohabitation, nor make marriage contracts not intended by the parties.—Bell v. Bell, 71 So. 465.

⚡40(1) (Miss.) Every presumption will be indulged in favor of the legality of a common-law marriage in the same way and to the same extent as the law indulges them in favor of a ceremonial marriage.—Howard v. Kelly, 71 So. 391.

⚡40(4) (Miss.) A meretricious relationship between a man and woman is presumed to have continued until the adulterous cohabitation changed from an unlawful to a lawful relationship.—Howard v. Kelly, 71 So. 391.

⚡40(6) (Miss.) Where a duly solemnized second marriage is shown, the presumption arises that the first wife was either divorced or dead; the burden of proof being on the person claiming rights inconsistent with such presumption.—Howard v. Kelly, 71 So. 391.

⚡40(9) (Miss.) Where a husband contracts a ceremonial marriage before his first wife has been absent seven years, the presumption in favor of the validity of the second marriage overcomes the presumption that the first wife was still alive when it was contracted.—Howard v. Kelly, 71 So. 391.

⚡40(11) (Ala.) Where a woman, who had for more than 25 years been married to one man, undertook to show that such marriage, and that of her claimed slave husband, with another, of like duration, were void in view of the slave marriage, the burden of proof to overcome the presumption of validity of the later marriages was heavy upon her.—Bell v. Bell, 71 So. 465.

⚡54 (La.) Under Act No. 54 of 1894, marriage between persons of white and colored races

is absolutely null, and may be attacked by way of exception or defense, whenever and wherever it is set up.—Carter v. Veith, 71 So. 792.

MARRIED WOMEN.

See Acknowledgment, ⚡55; Husband and Wife.

MASTER AND SERVANT.

See Commerce, ⚡27; Damages, ⚡12; Pleading, ⚡352; Work and Labor.

I. THE RELATION.

(A) Creation and Existence.

⚡3(1) (La.) Where employer writes a contract of employment, which employé signs, and employer agrees to sign it, but before doing so, without cause, discharges employé, employé has cause of action for salary for unexpired term.—Lurie v. Titcomb, 71 So. 200.

(C) Termination and Discharge.

⚡39(1) (Ala.) In an employé's action for compensation after wrongful discharge, defendant's pleas, attempting to set up defense that plaintiff could have received compensation in other employment, held bad on demurrer.—People's Shoe Co. v. Skally, 71 So. 719.

⚡39(2) (La.) In action by employé under Rev. Civ. Code, art. 2749, where defendant denied that his discharge was without good reason, exclusion of his evidence in support of such denial was error.—Lurie v. Titcomb, 71 So. 200.

⚡42(1) (Ala.) An employer sued for wrongful discharge can reduce recovery by showing that the servant obtained other employment, or might have done so, but cannot use fact to defeat servant's cause of action.—People's Shoe Co. v. Skally, 71 So. 719.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

⚡69 (Miss.) Acts 1912, c. 141, §§ 1, 2, imposing a penalty in a reasonable attorney's fee upon every manufacturer for failure to pay employes once in every calendar month, recoverable by suit after demand, held invalid.—Sorenson v. Webb, 71 So. 273.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⚡87 (Fla.) Company operating sawmill and incident thereto steam railroad six or seven miles long, commonly known as log road, is not "railroad company" within Gen. St. 1906, §§ 3148-3150, relating to liabilities for injuries to persons or property.—Ingram-Dekle Lumber Co. v. Geiger, 71 So. 552.

⚡95 (La.) It was negligence to employ child of 16 in can factory without requiring certificate from factory inspector, as required by Act No. 301 of 1908.—Dalbarni v. New Orleans Can Co., 71 So. 214.

⚡96(2) (Ala.) That defendant wrongfully employed plaintiff's minor son without plaintiff's knowledge or consent held not the proximate cause of the son's death, where he was pushed into a river by one of his coemployes as a joke.—Garrett v. Louisville & N. R. Co., 71 So. 685.

(B) Tools, Machinery, Appliances, and Places for Work.

⚡125(1) (Miss.) To hold the master liable for negligence in furnishing an unsafe tool it must appear that the master knew, or by reasonable inspection could have known, of such defect.—Mississippi Cent. R. Co. v. Bennett, 71 So. 310.

(D) Warning and Instructing Servant.

⚡156(2) (Miss.) Where a railroad company employed a young negro boy as a laborer, held

that it had no reason to anticipate that he would jump off or on passing trains, and so was under no obligation to warn him.—*Alabama & V. R. Co. v. Jones*, 71 So. 318.

(E) Fellow Servants.

☞177 (Ala.) A master is not liable for injury to a servant occasioned by the negligence of a fellow servant, in the absence of any negligence in furnishing incompetent and inexperienced fellow servants.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

☞177 (Fla.) At common law, where master has performed duty, he is not liable to servant for personal injuries through negligence of fellow servant in same undertaking, unless fellow servant sustains representative relation, such as vice principal.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

☞179 (Fla.) Common-law principle as to right of servant to recovery for injuries through negligence of fellow servant is in force, except as modified by Gen. St. 1906, §§ 3148-3150, and Acts 1913, c. 6521.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

☞180(1) (Miss.) Under federal Employers' Liability Act, § 2, the fellow-servant rule is abrogated.—*Elliott v. Illinois Cent. R. Co.*, 71 So. 741.

☞198(5) (Fla.) Except as modified by statutes, engineer and track repairer, though in different departments of railroad company, are fellow servants, and track repairer cannot recover for injuries from negligence of engineer in operating engine on which track repairer was riding to place of work.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

(F) Risks Assumed by Servant.

☞204(1) (Miss.) Under federal Employers' Liability Act, § 2, the fellow-servant rule is abrogated, though assumption of risk is preserved but a servant does not assume risks of a fellow-servant's negligence.—*Elliott v. Illinois Cent. R. Co.*, 71 So. 741.

☞213(3) (La.) Where an experienced logging train conductor in holding in place with his foot a frog for putting derailed cars on the track, was injured by a log falling from a logging car, he could not recover for injury, since he assumed the risk.—*Langston v. Tremont Lumber Co.*, 71 So. 771.

☞216(2) (Ala.) Common-law doctrine of assumption of risk by one servant of injury consequent upon negligence of fellow servant has no application to case of mine employé assaulted by foreman, who has particular authority to eject him from mine.—*Tennessee Coal, Iron & Railroad Co. v. Rutledge*, 71 So. 900.

(G) Contributory Negligence of Servant.

☞230(1) (La.) Where injury to employé was caused by permitting foot to rest on treadle, causing die to descend on thumb, there can be no recovery.—*Dalbarni v. New Orleans Can Co.*, 71 So. 214.

☞240(2) (La.) Where an experienced train conductor, in holding in place with his foot a frog for putting derailed cars on the track, was injured by a log falling from a logging car, he could not recover for injury, since he was negligent.—*Langston v. Tremont Lumber Co.*, 71 So. 771.

An experienced conductor of a logging train, who, while holding in place with his foot a railway frog while getting derailed loaded logging cars back on the track, is injured by a log falling from a car, is not relieved from his contributory negligence, barring recovery, by showing that he had previously held the frog in position in this way and had frequently seen others do it.—*Id.*

☞247(4) (La.) Where an experienced logging train conductor was injured by a log falling from a derailed loaded car, which he was attempting to put back on the track by a railway

frog, which he was holding in place with his foot, the proximate cause of his injury was not the first derailling of the cars, but his own contributory negligence.—*Langston v. Tremont Lumber Co.*, 71 So. 771.

(H) Actions.

☞258(10) (Ala.) Count in servant's action for injury held to state a cause of action under Employer's Liability Act (Code 1907, § 3910, subd. 2), and not to necessarily bring the cause of action exclusively under subdivision 3 relating to obeying a negligent order of a superior.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

Employer's Liability Act (Code 1907, § 3910, subds. 2, 3) held to cover in common cases in which a superintendent gives a negligent order, in which cases the complaint may be framed under either subdivision.—*Id.*

☞258(13) (Fla.) Count alleging that railroad track and rails were so wet and locomotive leaked so that water fell on rails and sand box was defective so that sand did not fall on rails, by reason whereof locomotive could not be stopped and collided with derailed engine is not demurrable for failure to allege acts or omissions of defendant causing injury.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

☞258(20) (Ala.) Count in complaint in servant's action for injury held to state a cause of action grounded upon the negligence of defendant's superintendent in furnishing insufficient or incompetent help.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

☞264(3) (Ala.) Assumed risk, when set up as a defense, is subject-matter for a special plea, and cannot be availed of under the general issue.—*Alabama Great Southern R. Co. v. Skotzy*, 71 So. 335.

☞264(7) (Ala.) In servant's action for injury, his complaints as to the manner in which a crane was operated, and complaints of others as to its operation, held inadmissible, as only the competency of operator at the time of the injury was involved.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

☞265(9) (Miss.) A servant has the burden of proving actual or constructive knowledge of the master of a defect in a tool by which the servant was injured.—*Mississippi Cent. R. Co. v. Bennett*, 71 So. 310.

☞276(2) (Miss.) Evidence held to show that an injury to the employé's eye by a splinter struck from an anvil by a fellow servant was an unavoidable accident.—*Mississippi Cent. R. Co. v. Bennett*, 71 So. 310.

☞278(3) (Miss.) The mere fact that a splinter was struck from an anvil by a servant is insufficient to prove that the anvil was too hard, and therefore defective and unsafe.—*Mississippi Cent. R. Co. v. Bennett*, 71 So. 310.

☞278(14) (Miss.) The mere fact that a splinter was struck from an anvil, indicating that the anvil was too hard, does not show even prima facie that the employer knew of such defect or could have discovered it by inspection.—*Mississippi Cent. R. Co. v. Bennett*, 71 So. 310.

☞279(1) (Ala.) In servant's action for injury from negligence of defendant's superintendent in permitting him to work with inexperienced and incompetent men, or in not sending sufficient men to assist him in his work, evidence held not to sustain a verdict against the defendant.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

☞279(2) (Ala.) The single act of negligence on the part of an experienced fellow servant, operating a crane, on the occasion of plaintiff's injury, did not warrant a finding that he was unskilled or incompetent.—*United States Cast Iron Pipe & Foundry Co. v. McCoy*, 71 So. 406.

☞279(5) (Ala.) In action against railroad under Employers' Liability Act (Code 1907, § 3910, subd. 2), evidence held to warrant conclusion

that railroad employé who directed that a car be brought down an incline in a certain manner was a superintendent.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

⇒286(3) (Ala.) In action against railroad under Employers' Liability Act (Code 1907, § 3910, subd. 1), whether there was negligence attributable to defendant either in the existence of a defect in its ways, works, etc., or in failure to remedy the defect, *held* for jury.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

⇒286(27) (Ala.) In action against railroad under Employers' Liability Act (Code 1907, § 3910, subd. 2), whether method adopted by defendant's roundhouse superintendent for bringing a car down an incline was such as due care and precaution approved *held* for jury.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676.

⇒286(31) (Ala.) Evidence that while plaintiff fireman stood on an adjacent track in order to work, another crew switched some cars with no one controlling them and no warning signal into cars which ran over him, and that the switching foreman could have seen the fireman or his tools, *held* to warrant submission of the question of negligence.—Alabama Great Southern R. Co. v. Skotzy, 71 So. 335.

⇒287(8) (Ala.) In a servant's action for injury, evidence as to alleged negligent order of a superintendent *held* for the jury.—United States Cast Iron Pipe & Foundry Co. v. McCoy, 71 So. 406.

⇒288(1) (Ala.) In servant's action for injury, *held* that it could not be said as a matter of law that plaintiff assumed the risk of injury from the negligence of his superintendent.—United States Cast Iron Pipe & Foundry Co. v. McCoy, 71 So. 406.

⇒289(29) (Ala.) Evidence that cars ran over plaintiff fireman, standing on a track adjacent to his engine to straighten his flue auger between wheels of his engine, there being nothing to indicate that cars on that track would be moved during the short time he was engaged, *held* to warrant submission to jury of contributory negligence.—Alabama Great Southern R. Co. v. Skotzy, 71 So. 335.

⇒291(9) (Fla.) Presumption of negligence from injury done by running of locomotives, raised by Gen. St. 1906, § 3148, may be given in charge in case under federal Employers' Liability Act.—Louisville & N. R. Co. v. Rhoda, 71 So. 369.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

⇒302(1) (Ala.) Legal accountability of employer for wrongful acts of servant depends upon whether servant committing wrong was acting in line and scope of his authority.—Tennessee Coal, Iron & Railroad Co. v. Rutledge, 71 So. 990.

(B) Work of Independent Contractor.

⇒316(1) (Miss.) A company which sold a scale and sent an expert to superintend its installation *held* not the employer of a carpenter injured while it was being installed.—Till v. Fairbanks Co., 71 So. 298.

(C) Actions.

⇒330(2) (Ala.) In action for assault and battery by defendant's servant, testimony of declarations by servant, tending to disclose his authority *held* admissible.—Tennessee Coal, Iron & Railroad Co. v. Rutledge, 71 So. 990.

MATERIALITY.

See Alteration of Instruments, ⇒5, 8; Criminal Law, ⇒382.

MECHANICS' LIENS.

See Payment, ⇒39.

III. PROCEEDINGS TO PERFECT.

⇒129 (Ala.) Where a materialman simultaneously furnished materials for the plumbing and the heating of a building, his lien will not be lost because both items were included in a single account.—Jefferson Plumbers & Mill Supply Co. v. Peebles, 71 So. 413.

Where defendant's agent purchased materials from complainant, there being two orders for different classes of materials, *held* as items were entered on one account, it must for the purpose of perfecting mechanic's lien be accepted as a single one.—Id.

⇒132(1) (Ala.) Where a materialman furnished two classes of goods on a single contract and items for one class were furnished within four months and six months periods prescribed by Code 1907, §§ 4758, 4777, for filing lien statement and instituting action, he may have a lien on both classes of items.—Jefferson Plumbers & Mill Supply Co. v. Peebles, 71 So. 413.

⇒157(4) (Ala.) Where a materialman included in the lien claim an item for materials not used in the building, but there was no evidence of fraud or of intent to claim more than he was entitled, such fact will not prevent the materialman from obtaining a lien.—Jefferson Plumbers & Mill Supply Co. v. Peebles, 71 So. 413.

IV. OPERATION AND EFFECT.

(B) Property, Estates, and Rights Affected.

⇒184 (Miss.) Under Code 1906, §§ 3058, 3060, husband having ordered repairs on the house of his wife, materialman *held* entitled to a lien on the building, though not on the land itself.—Planters' Lumber Co. v. Tompkins, 71 So. 565.

MENTAL SUFFERING.

See Telegraphs and Telephones, ⇒27, 68.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

⇒58 (La.) A contract whereby a landowner for a consideration grants the right to drill for oil and gas for one year, with privilege of extending the time to five years, contains no "potestative condition" within Civ. Code, arts. 2024, 2034, by reason of its failure to impose on the grantee any obligation to drill.—Saunders v. Busch-Everett Co., 71 So. 153.

Where the consideration for an option to drill for oil and mineral on lands in unproved territory is 3 per cent. of the market value of the lands for one year and a like amount for the next four years, the price cannot be said to be not "serious" or "out of proportion to the value," within Civ. Code, art. 2404.—Id.

⇒66 (La.) Stipulation in mineral lease that a lessee shall have right without obligation to prevent forfeiture under perpetual lease by paying stipulated rental annually is nudum pactum.—Bristo v. Christine Oil & Gas Co., 71 So. 521; Calhoun v. Same, Id. 522; Dunham v. McCormick, Id. 523; Nervis v. Same, Id.; Parrott v. Same, Id.

⇒70(6) (Ala.) Lessees of a coal mine, who gave notes to the lessor to secure back royalties owed the lessor by another party, were not liable for the original obligation, but only on the notes.—Brown v. Shorter, 71 So. 103.

MINORS.

See Infants.

MISCEGENATION.

See Marriage, ¶54.

MISREPRESENTATION.

See Fraud.

MITIGATION.

See Libel and Slander, ¶63.

MODIFICATION.

See Appeal and Error, ¶1153; Contracts, ¶236-248; Divorce, ¶245.

MONEY PAID.

See Payment, ¶82; Taxation, ¶541, 543; Vendor and Purchaser, ¶334.

MONOPOLIES.

See Indictment and Information, ¶2; Statutes, ¶118.

I. VALIDITY AND EFFECT OF GRANTS.

¶1 (La.) A "monopoly" is a license or privilege allowed for the sole dealing, making, or using of something by one to the exclusion of others.—State v. American Sugar Refining Co., 71 So. 137.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

¶24(1) (La.) Statutory authority to issue a preliminary injunction to protect against unlawful restraint does not authorize the issuance of a notice which would be unjust and deprive defendant of his property rights without a hearing.—State v. American Sugar Refining Co., 71 So. 137.

The anti-trust acts 1890 and 1915 authorize issuance of a preliminary injunction to restrain illegal acts and illegal combinations in restraint of trade, but not to terminate the doing of all business by defendant.—Id.

MORTGAGES.

See Absentees, ¶3; Acknowledgment, ¶55; Adverse Possession, ¶76; Cancellation of Instruments; Chattel Mortgages; Constitutional Law, ¶309; Dower, ¶49; Equity, ¶150; Homestead, ¶118-171; Insurance, ¶576, 581; Public Lands, ¶136; Reformation of Instruments.

I. REQUISITES AND VALIDITY.

(C) Execution and Delivery.

¶56 (La.) Mortgagee's failure to sign act of mortgage does not render it absolutely null, and proceeding to foreclose is acceptance.—Richardson v. McDonald, 71 So. 934.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

¶151(6) (Miss.) Where a purchaser of land who borrowed money to make the last payment notified the lender of the vendor's rights, held that the lender's rights under a deed of trust from purchaser were inferior to those of the vendor; the vendor not receiving payment as agreed upon.—Mayes v. Coleman, 71 So. 14.

¶167 (Miss.) Code 1906, §§ 2877, 2878, and 4001, relating to assignments of leases, held not to apply to question whether lessor's mortgagee was charged with notice of assignment of unrecorded lease.—Corinth Bank & Trust Co. v. Wallace, 71 So. 266.

¶169 (Miss.) Though the lessor's mortgagee be deemed to have constructive notice of facts within the knowledge of the lessee, held that

the fact that a bank of which lessor was president and manager charged the rents against lessee's account was not notice of assignment of lease to bank.—Corinth Bank & Trust Co. v. Wallace, 71 So. 266.

Under Code 1906, §§ 2763, 2787, 4775, a mortgagee for value and without notice is not charged with notice of an unrecorded assignment of a lease on mortgaged premises.—Id.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶199(3) (Miss.) On a bill to cancel a conveyance to a mortgagee in satisfaction of the debt, defendant, agreeing to a reconveyance, was not chargeable with \$25 for "pasture on farm," where he was also charged for the rent of the land.—Tinsley v. Lovett, 71 So. 817.

¶199(4) (La.) Under a contract providing that the creditor will apply the net revenues of property to the debt upon the extinguishment of which he will reconvey the property to the debtor the rendering of one account does not cut off the right of the debtor or his assignee to demand subsequent accounts.—Darcourt v. Brunet, 71 So. 776.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶300 (Miss.) A tender of the amount secured by a mortgage or deed of trust does not discharge the lien evidenced by the instrument.—Smith v. Williams-Brooke Co., 71 So. 648.

Where plaintiff permitted his land to be sold under a trust deed without tendering to the trustee the amount due, he cannot defeat an action by the purchaser to recover possession merely by showing that prior to the sale he tendered to the cestui que trust the amount due.—Id.

¶304 (Miss.) On a bill to cancel a conveyance of land and personality to a mortgagee in satisfaction of the debt, defendant, on agreeing to make a reconveyance, was chargeable with the value of a mill situated on the land if it was personal property, but if it was a part of the realty he would only be chargeable with the value of the mill rocks removed and sold by him.—Tinsley v. Lovett, 71 So. 817.

¶312(1) (Ala.) Mere inadvertence or indifference of mortgagee after payment and notice will not excuse his failure to enter satisfaction of record.—Martin v. Walker, 71 So. 667.

Where mortgagees delivered to mortgagor power of attorney directing probate judge to enter satisfaction of mortgage, held, that mortgagor, who did not enter satisfaction, having apparently acquiesced, could not recover penalty for mortgagees' failure to enter satisfaction, because he lulled the mortgagees into security.—Id.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

¶335 (Miss.) The trustee under a trust deed has a right to foreclose and sell the property notwithstanding tender of the amount due.—Smith v. Williams-Brooke Co., 71 So. 648.

X. FORECLOSURE BY ACTION.

(J) Sale.

¶513 (Ala.) Where a widow joins as surety with her husband's heirs in mortgage covering two pieces of property, theirs and her own, she has the right to have the heirs' property first sold on foreclosure of the mortgage for the relief pro tanto of her own.—Told v. Interstate Mortgage & Bond Co., 71 So. 661.

¶544(5) (Miss.) In an action of unlawful entry and detainer by the purchaser at foreclosure sale under a trust deed, evidence by the defendant of tender before sale of the amount due under the trust deed is inadmissible, since equi-

table defenses cannot be interposed.—*Smith v. Williams-Brooke Co.*, 71 So. 648.

In an action of unlawful entry and detainer by the purchaser under sale by virtue of a trust deed, the plaintiff makes a prima facie case by the introduction of the trustee's deed.—*Id.*

(M) Review.

↪575 (La.) Under Code Prac. arts. 298 (10), 739, 743, where an injunction against the collection of only part of the amount for which executory proceedings issued is dissolved, and a suspensive appeal is taken, plaintiff need not await recording of the mandate of the appellate court before proceeding with seizure and sale for the amount admitted to be due.—*Crowley Bank & Trust Co. v. Hurd*, 71 So. 128.

MOTIONS.

See Continuance; Pleading, ↪352.

MULTIFARIOUSNESS.

See Equity, ↪149, 150.

MULTIPLICITY OF SUITS.

See Injunction, ↪26.

MUNICIPAL CORPORATIONS.

See Arrest, ↪62; Counties; Criminal Law, ↪304, 761; Evidence, ↪32, 344; Health, ↪32; Schools and School Districts; Statutes, ↪8½; Street Railroads; Waters and Water Courses, ↪200.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

↪29(3) (Miss.) Whether extension of corporate limits of town is reasonable depends on whether interests of inhabitants of town as it would remain if territory were to be excluded, and of inhabitants of territory sought to be included, will be conserved by its retention within town.—*Thomas v. Town of Long Beach*, 71 So. 570.

↪33(6) (Miss.) Evidence on petition of residents and property owners of territory embraced in extension of town, brought to exclude such extension under Code 1906, § 3307, held not to sustain judgment declaring corporate limits, including extension, to be reasonable.—*Thomas v. Town of Long Beach*, 71 So. 570.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

↪63(2) (La.) In the case of a municipal ordinance enacted pursuant to general authority to regulate the use of jitneys, the courts will go farther than in the case of a statute, and inquire whether the ordinance is reasonable.—*City of New Orleans v. Le Blanc*, 71 So. 248.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

↪105 (Ala.App.) The omission of the words "Council of" in the caption of an ordinance does not render it void, the provisions of Code 1907, § 1259, requiring such words in the caption, being merely directory.—*Glenn v. City of Prattville*, 71 So. 75.

↪121 (La.) Validity of rat-proofing ordinance cannot be challenged for unreasonableness of provision in respect to which accused is not charged with having violated ordinance.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

↪278(2) (La.) Under Act No. 210 of 1914, questions whether pavement shall be laid, and, if so, what kind, are left to municipal authorities if they take initiative, or to property holders, and neither creditors of municipality nor of property holders need be consulted.—*City of Shreveport v. Hester*, 71 So. 779.

↪282(1) (La.) Where one part of a street needs to be more solid than another, the city council has the authority to adopt specifications for paving work to such need, though the material in that part is more expensive than in the other part.—*City of Shreveport v. Chatwin*, 71 So. 791.

(C) Contracts.

↪365 (La.) An acceptance of paving work by city authorities was binding upon property owners, in the absence of fraud or error.—*City of Shreveport v. Chatwin*, 71 So. 791.

(D) Damages.

↪399 (Miss.) Where a property owner joined in petitioning for the opening and grading of a street, he waived claim for damages to his property by such grading, if properly done, especially where the street grade formerly extended to his line.—*City of Meridian v. Hudson*, 71 So. 574.

(E) Assessments for Benefits, and Special Taxes.

↪413(1) (La.) If property holders ask for unsuitable pavement, municipal authorities let contract, and contractor lays pavement, neither property holders nor their creditors can prevent enforcement of lien for cost.—*City of Shreveport v. Hester*, 71 So. 779.

(F) Enforcement of Assessments and Special Taxes.

↪568(2) (La.) In city's action to recover cost of street paving from abutting owners, evidence as to width of roadbed of street railway was admissible in support of claim that 30 cents per yard of the cost of the concrete under roadbed should be deducted from general cost and charged to railway.—*City of Shreveport v. Chatwin*, 71 So. 791.

↪571 (La.) In a city's suit for the cost of paving a street in front of defendants' abutting lots, a ground of objection to the payment, not urged in the pleadings, could not be considered on appeal.—*City of Shreveport v. Chatwin*, 71 So. 791.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

↪592(2) (La.) Ordinance, requiring rat-proofing to check bubonic plague, is not invalid on ground that bubonic plague is cognizable only by the state board of health.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

↪594(1) (La.) Ordinance, requiring rat-proofing, is not invalid for failure to designate officer to give 30 days' notice.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

↪594(3) (La.) An ordinance, requiring all buildings to be rat-proofed, fixing the penalty at a certain amount for each day, is sufficiently definite and certain.—*City of New Orleans v. Mangiarisina*, 71 So. 886.

↪601 (Ala.) An ordinance, touching the construction of chimneys, flues, and heating apparatus held not to be violated by one, whose house was previously constructed, until after such person had been notified by the inspector as provided therein.—*Tarrance v. Chapman*, 71 So. 707.

(B) Violations and Enforcement of Regulations.

☞639(1) (Ala.App.) Where a complaint avers the existence and violation of an ordinance, a demurrer thereto confesses the averments and cannot set up matters de hors the record as to the irregularity of the proceedings in adopting the ordinance, the demurrer in such case being a speaking demurrer.—Glenn v. City of Prattville, 71 So. 75.

☞641(3) (Ala.App.) Under Code 1907, § 1259, when the book of ordinances was offered in evidence if irregularities were claimed in the adoption of the ordinances, it was incumbent upon the one so claiming to offer the proceedings in evidence and make them a part of the record by bill of exceptions.—Glenn v. City of Prattville, 71 So. 75.

☞642(3) (Ala.App.) The prosecution for a violation of a municipal ordinance is quasi criminal in its nature; and Code 1907, § 6204, obviating the necessity of assigning errors in criminal cases, has no application to quasi criminal appeals, as for the violation of an ordinance.—Craig v. City of Birmingham, 71 So. 983.

☞642(4) (La.) In the absence of evidence to the contrary, the Supreme Court, on appeal from a conviction of violating an ordinance regulating the jitney business and requiring indemnity bond, will assume the existence of conditions requiring the enactment of such ordinance.—City of New Orleans v. Le Blanc, 71 So. 248.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**(A) Streets and Other Public Ways.**

☞647 (La.) Under Act No. 136 of 1898, § 15, empowering aldermen of towns to lay out streets, when a public road along a navigable stream was included within a town, it became one of its streets, and the aldermen had authority over it; Rev. St. § 3360, requiring roads to be laid out by the jury of freeholders appointed by the police jury, not applying.—Village of Moreauville v. Boyer, 71 So. 187.

☞655 (La.) Evidence held to show no imperative need for a greater space for a road along a navigable stream than that left by the abutting owner, and none could be taken.—Village of Moreauville v. Boyer, 71 So. 187.

The determination of the width of a public road belongs to the local authorities and not to the courts.—Id.

☞661(1) (Fla.) The Legislature exercises plenary control over streets in cities and towns.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, 71 So. 42.

☞661(1) (La.) The powers conferred on the city of New Orleans include the power to regulate the use of the streets and to maintain them in a safe condition.—City of New Orleans v. Le Blanc, 71 So. 248.

☞668 (Ala.) The owner of property abutting upon a city street has the right of access to it for the purpose of excavating and laying connections for water mains and similar purposes, his right being a property right and not illegal as a private use of public property.—Birmingham Waterworks Co. v. Hernandez, 71 So. 443.

☞680, 681(5) (La.) Act No. 76 of 1914 did not repeal section 1, par. 7, of Act No. 111 of 1912, so that a company's erection of electric light poles in the streets of a town under authority of an ordinance, though without the consent of the taxpayers obtained at an election, will not be enjoined.—Mandeville Ice & Light Co. v. Town of Mandeville, 71 So. 512.

☞703(1) (La.) A city should, by proper regulations, guard the public against injury from the use of streets by motor vehicles.—City of New Orleans v. Le Blanc, 71 So. 248.

☞705(1) (La.) Where persons running automobiles on a street inflict injuries to persons not contributing to the accident, they are liable in damages.—Walker v. Rodriguez, 71 So. 499.

☞705(10) (La.) Where driver of vehicle in city streets disregards all rules prescribed for traffic and is grossly negligent from standpoint of common experience, he cannot recover for injuries from collision with another vehicle.—Reems v. Chavigny, 71 So. 798.

☞706(3) (Miss.) That a team is running away on a city street, unattended by any person, raises the presumption of negligence against the owner, but no such presumption arises if the team is accompanied by the driver.—Willis v. Semmes, 71 So. 865.

Where plaintiff was injured by a runaway team, when the small boy driver was running along behind the team shouting and trying to overtake it, he was not "accompanying" it, so as to rebut the presumption of negligence arising in the case of an unattended runaway team.—Id.

(C) Public Buildings, Parks, and Other Public Places and Property.

☞721(2) (Miss.) Where land was donated to a municipality for a park, it was not an invasion of the rights of the public to permit a statue of one of the donors to be constructed and placed in the park.—Braham v. City of Meridian, 71 So. 170.

XII. TORTS.**(C) Defects or Obstructions in Streets and Other Public Ways.**

☞755(1) (La.) A city is liable for injuries from its negligent failure to keep its streets safe.—City of New Orleans v. Le Blanc, 71 So. 248.

☞780 (Miss.) Plaintiff, who was injured by a billboard blowing over on him while he walked along a sidewalk, could not recover for his injuries against the city.—Dahmer v. City of Meridian, 71 So. 321.

A city was not liable for injuries to a sidewalk pedestrian, upon whom a billboard was blown which was on private premises and not obviously dangerous to pedestrians; the city having no notice that the board was defective or dangerous, and it appearing to be reasonably safe.—Id.

☞809(1) (Miss.) Plaintiff, who was injured by a billboard blowing over on him while he walked along a sidewalk, could not recover against a party who, by contract with the lessee of the lot on which the billboard stood, had the privilege of using it.—Dahmer v. City of Meridian, 71 So. 321.

☞812(7) (Ala.) Under Code 1907, § 1275, a notice of a claim against a municipal corporation, giving the day, month, and year of the injury, is sufficient.—McKinnon v. City of Birmingham, 71 So. 463.

☞816(2) (La.) Petition for injuries from stepping into hole in sidewalk where brick had been removed, failing to allege what negligent acts consisted of or time when or person by whom brick was removed, did not state cause of action.—Hills v. City of New Orleans, 71 So. 797.

XIII. FISCAL MANAGEMENT. PUBLIC DEBT, SECURITIES, AND TAXATION.**(C) Bonds and Other Securities, and Sinking Funds.**

☞931 (Fla.) Where municipality issues bonds in separate amounts for several purposes and severable amount of the bonds may not legally be issued by city, bonds that are legal may be sustained, and those that are illegal declared invalid.—Munroe v. Reeves, 71 So. 922.

(D) Taxes and Other Revenue, and Application Thereof.

☞958 (Fla.) It is not essential that regulations in Const. art. 9, §§ 1, 3, 5, relating to

valuation of property for taxation be incorporated in charter of city which has powers conferred on municipalities by general laws, but such city may prescribe appropriate regulation to secure just valuations and uniform taxation.—*Graham v. City of West Tampa*, 71 So. 926.

MUNICIPAL COURTS.

See Courts, 189; Statutes, 158.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, 723-825.

NAVIGABLE WATERS.

See Waters and Water Courses.

II. LANDS UNDER WATER.

36(3) (Fla.) Gen. St. 1906, § 643, does not vest in riparian owner unqualified fee in lands between high-water mark and edge of channel, and gives no greater right to beneficial use of such lands and waters above them than any other citizen except right to improve them.—*Panama Ice & Fish Co. v. Atlanta & St. A. B. Ry. Co.*, 71 So. 608.

37(2) (Fla.) State may fix exterior lines of navigable river if rights of people to use of waters and shores are not substantially impaired, and right to submerged lands not within reasonably fixed exterior lines may be granted if it does not impair rights of people to use of waters.—*Panama Ice & Fish Co. v. Atlanta & St. A. B. Ry. Co.*, 71 So. 608.

37(4) (Fla.) A patent to a fractional section of land does not necessarily confer riparian rights because of the presence of meanders.—*Lord v. Curry*, 71 So. 21.

37(4) (Fla.) Rights granted by Gen. St. 1906, § 643, relate to space between shore line and edge of channel, and are not controlled by direction of lines dividing uplands.—*Panama Ice & Fish Co. v. Atlanta & St. A. B. Ry. Co.*, 71 So. 608.

Rights granted by Gen. St. 1906, §§ 643, 644, extend to space between lines drawn at right angles from shore line to edge of channel, where channel runs parallel with shore line.—*Id.*

Conveyance of land by riparian owner may carry riparian rights to submerged lands, unless such rights are reserved or contrary intent appears.—*Id.*

Conveyance of uplands on navigable water with riparian rights covers space between lines at right angles from shore line to edge of channel, where channel runs parallel with shore line, no contrary intent appearing.—*Id.*

III. RIPARIAN AND LITTORAL RIGHTS.

41(1) (La.) The servitude on the estate abutting a navigable bayou for the purpose of levee and road construction created by Civ. Code, art. 455, declaring public the use of banks of navigable streams, does not require that space be also left for a sidewalk and adornment and embellishment of the way, nor for a drain.—*Village of Moreauville v. Boyer*, 71 So. 187.

43(2) (La.) Although the owner of land abutting on a navigable bayou must leave a sufficient space for a road and a levee, he is under no obligation to remove buildings which encroach upon the road, but do not interfere seriously with traffic thereon, such buildings being permitted to remain until rebuilt, under Civ. Code, art. 862.—*Village of Moreauville v. Boyer*, 71 So. 187.

46(3) (Fla.) Alienation of riparian rights can carry no greater right than original owner had.—*Panama Ice & Fish Co. v. Atlanta & St. A. B. Ry. Co.*, 71 So. 608.

NEGLIGENCE.

See Animals, 74; Appeal and Error, 999; Bridges, 37; Carriers, 280-347; Death; Innkeepers, 10; Master and Servant, 87-330; Municipal Corporations, 705, 706, 755-816; Pleading, 53; Railroads, 232-480; Street Railroads; Telegraphs and Telephones, 27-78.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

11 (Ala.) Wanton negligence rests upon the wrongdoer's just apprehension of a probability of untoward consequences of his act.—*Louisville & N. R. Co. v. Porter*, 71 So. 334.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

21 (Ala.) Owner of premises who sets out fire for lawful purpose and in proper manner, without negligence, or if fire accidentally starts without fault, is not liable for damages caused by its spreading unless he is guilty of negligence in failing to control it.—*Poe v. Southern Ry. Co.*, 71 So. 997.

27 (Miss.) The manufacturer or vendor must take reasonable precaution that receptacles are sufficient for the purpose for which they are used.—*Wheeler v. Laurel Bottling Works*, 71 So. 743.

The explosion of a bottle of Coco-Cola when a vendee was removing it from the ice chest was an unforeseen accident for which there was no liability.—*Id.*

(C) Condition and Use of Land, Buildings, and Other Structures.

31 (Ala.) Violation of a statute or of a valid city ordinance, being the proximate cause of an injury, per se creates a cause of action and establishes liability.—*Tarrance v. Chapman*, 71 So. 707.

32(1) (Miss.) A railroad's bare permission to persons to enter upon its premises does not render it liable for injury from the condition thereof; but, if it invites persons thereon it is liable for injury from an unsafe condition resulting from its failure to use ordinary care.—*Allen v. Yazoo & M. V. R. Co.*, 71 So. 386.

A railroad may invite or induce another to enter its premises by providing an easy and convenient pathway across the premises apparently intended for the use of the public, and, with its knowledge, constantly used by the general public.—*Id.*

33(3) (Miss.) As to whether a child is to be classed as a trespasser, his having reached years of discretion is not material.—*Yazoo & M. V. R. Co. v. Huff*, 71 So. 757.

II. PROXIMATE CAUSE OF INJURY.

56(1) (Ala.) The law will consider only the proximate, and not the remote, cause, where there are two or more causes of an injury.—*Garrett v. Louisville & N. R. Co.*, 71 So. 685.

59 (Ala.) A person guilty of negligence is responsible for all consequences which a prudent and experienced man would have thought reasonably possible to follow if they had occurred to his mind.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

62(1) (Ala.) Where one cause merely created the condition, and after the condition had been created, an intervening agency produced the injury, the first cause is not the proximate cause.—*Garrett v. Louisville & N. R. Co.*, 71 So. 685.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

⚡80 (Fla.) In action for negligence, common-law principle preventing recovery if plaintiff's negligence contributed proximately to injuries, has not been modified, except by Gen. St. 1906, §§ 3148-3150, and Acts 1913, c. 6521.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

(D) Comparative Negligence.

⚡100 (Ala.) Where the complaint charged wantonness, contributory negligence is no defense, and charges on that issue should be refused.—*Southern Ry. Co. v. Fricks*, 71 So. 701.

⚡101 (Miss.) Contributory negligence of one crossing railroad tracks at a street which had been discontinued, but was used by many persons, will only diminish the amount of, but will not defeat, recovery.—*Illinois Cent. R. Co. v. Dillon*, 71 So. 809.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.**

⚡108(1) (Fla.) In actions for negligent injuries, it may be necessary to allege only relations between parties out of which duty arises, and act or omission causing injuries coupled with statement that act or omission was negligent.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

⚡110 (Ala.) In an action for damages for the burning of plaintiff's residence caused by a fire in the defendant's house due to defective chimney, the count alleging that plaintiff's house was burned as a result of defendant's negligence, without showing any duty owed by defendant to plaintiff, was insufficient.—*Tarrance v. Chapman*, 71 So. 707.

In an action for damages for burning of plaintiff's residence by defendant's negligence in not repairing a defective chimney, a count, alleging violation of a city ordinance, but not alleging when defendant's house was constructed, will be considered as alleging construction prior to the passage of the ordinance.—*Id.*

⚡111(1) (Fla.) It is not necessary for declaration to set out facts constituting negligence, but allegation of sufficient acts causing injury, coupled with allegation that acts were negligently done, will be sufficient.—*Aultman v. Atlantic Coast Line R. Co.*, 71 So. 283.

(B) Evidence.

⚡121(3) (Miss.) The doctrine of *res ipsa loquitur* does not apply where a bottle of Coca-Cola exploded when the vendee was removing it from the ice chest.—*Wheeler v. Laurel Bottling Works*, 71 So. 743.

⚡134(1) (La.) Plaintiff suing for personal injuries must prove negligence of defendant by preponderance of evidence.—*Dixon v. Vicksburg, S. & P. Ry. Co.*, 71 So. 527.

⚡134(1) (Miss.) Evidence held insufficient to show negligence of a bottling company in bottling liquid and supplying it to plaintiff, who was injured by explosion of a bottle when removing it from the ice chest, where it left the cause of the explosion to speculation.—*Wheeler v. Laurel Bottling Works*, 71 So. 743.

Evidence that one bottle exploded when handled by vendee is insufficient of itself to charge a bottling company with conducting its business in an unusual or unsafe way, or using unsafe appliances.—*Id.*

⚡134(3) (Miss.) Evidence held to warrant a finding that the situation created by the defendant was such as would import its knowledge of plaintiff's probable use of its property so situated and conditioned as to be open to and likely to be subjected to such use.—*Allen v. Yazoo & M. V. R. Co.*, 71 So. 386.

(C) Trial, Judgment, and Review.

⚡136(2) (La.) Questions of negligence and due care are for jury.—*Boylan v. New Orleans Ry. & Light Co.*, 71 So. 360.

⚡136(6) (Ala.App.) The doctrine of "*res ipsa loquitur*" involves no substantive rule of law, but merely means that the attendant facts are of such probative force on the question of inferential negligence as to speak for themselves; that is, to shift the burden of proof.—*Alabama Great Southern R. Co. v. Johnson*, 71 So. 620.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, ⚡939.

NEWSPAPERS.

See Chattel Mortgages, ⚡237.

⚡3(2) (La.) Under Act No. 91 of 1876, §§ 1, 2, advertisements of sheriffs' sales of property seized in executory or ordinary proceedings need not be published in the official journal of the parish, but may be published in any newspaper of the parish wherein the proceedings are had or the sale is to take place.—*Crowley Bank & Trust Co. v. Hurd*, 71 So. 128.

NEW TRIAL.

See Appeal and Error, ⚡856-874; Criminal Law, ⚡939, 1124.

I. NATURE AND SCOPE OF REMEDY.

⚡6 (Fla.) Legal principles, guiding judicial discretion in directing verdict and in granting new trial on evidence, are not the same.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

II. GROUNDS.**(D) Disqualification or Misconduct of or Affecting Jury.**

⚡54 (Fla.) Where counsel for plaintiff in error knew of the alleged misconduct of jurors before verdict and did not complain thereof objection thereto, being waived, was not available as ground for new trial.—*Miller v. Pace*, 71 So. 276.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

⚡155 (Fla.) Under Laws 1905, c. 5403, §§ 2, 3 (Comp. Laws 1914, § 1343a) motion for new trial duly made during term time may be disposed of in vacation.—*Charlotte Harbor & N. Ry. Co. v. Buchan*, 71 So. 842.

NOLLE PROSEQUI.

See Criminal Law, ⚡802.

NOMINAL DAMAGES.

See Damages, ⚡12.

NOMINATION.

See Elections, ⚡151-159.

NONJOINDER.

See Parties, ⚡80.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Attorney and Client, ¶104; Bills and Notes, ¶342; Elections, ¶151; Evidence, ¶185; Execution, ¶222; Judicial Sales; Mortgages, ¶167, 169; Municipal Corporations, ¶812; Newspapers; Railroads, ¶232; Sales, ¶127; Statutes, ¶8½; Taxation, ¶406, 658, 662; Vendor and Purchaser, ¶226.

NOVATION.

¶5 (La.) In action for balance due on note given as collateral for a loan, signed by defendants as indorsers, *held* that, where payee merely received another party as an additional debtor and continued to hold the other claims as still existing, the principal debt and the accommodation indorser's obligation were not extinguished by novation.—*Commercial Nat. Bank v. Sanders*, 71 So. 891.

OBJECTIONS.

See Appeal and Error, ¶192-242; Trial, ¶76-86.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ¶130.

OBSTRUCTIONS.

See Railroads, ¶246.

OFFER.

See Sales, ¶22.

OFFICERS.

See Banks and Banking, ¶50-55, 109; Clerks of Courts; Corporations, ¶399; Counties, ¶61-99; District and Prosecuting Attorneys; Health, ¶7; Judges; Justices of the Peace; Levees, ¶9, 11; Mandamus, ¶82; Schools and Schools, ¶48; Sheriffs and Constables; Statutes, ¶101, 102, 120, 125; Taxation, ¶568.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

¶121 (Fla.) County commissioner is officer within Gen. St. 1906, § 3481, penalizing malpractice in office.—*Jackson v. State*, 71 So. 332.

¶121 (Fla.) In Gen. St. 1906, § 3481, "willfully" is part of definition of extortion, and not of offense of malpractice in office condemned in same section.—*Smith v. State*, 71 So. 915.

OIL.

See Mines and Minerals, ¶58.

OPINION EVIDENCE.

See Criminal Law, ¶448-485; Evidence, ¶472-547.

OPINIONS.

See Courts, ¶104, 107.

OPTIONS.

See Mines and Minerals, ¶58; Vendor and Purchaser, ¶18.

ORDERS.

See Appeal and Error.

ORDINANCES.

See Municipal Corporations, ¶63-121, 592, 601.

ORPHANS' HOMES.

See Taxation, ¶241.

OVERCHARGE.

See Carriers, ¶200.

PARENT AND CHILD.

See Adoption; Death, ¶32; Divorce, ¶298; Guardian and Ward; Habeas Corpus, ¶93; Infants.

PARKS.

See Municipal Corporations, ¶721.

PARTIAL INVALIDITY.

See Statutes, ¶64.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see also the various specific topics.

I. PLAINTIFFS.

(A) Persons Who May or Must Sue.

¶1 (La.) One without pecuniary interest has no judicial standing in courts.—*Waterhouse v. Star Land Co.*, 71 So. 358.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶80(1) (Miss.) A nonjoinder of a person as plaintiff can be availed of by nonsuit if it appears from the evidence at the trial.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

Defendant, to avail himself of a nonjoinder of parties plaintiff as a ground for defeating the action, must comply with Code 1906, § 722.—*Id.*

¶80(2) (Miss.) A nonjoinder of a person as plaintiff, not apparent on the declaration, can be availed of by plea in abatement.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

¶80(4) (Miss.) A defendant, in order to introduce, under the general issue, evidence of the nonjoinder of a party plaintiff and thereby avail of it as limiting the amount of recovery, must comply with Code 1906, § 744.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

¶96(1) (Miss.) A defendant may waive the nonjoinder of parties plaintiff as a ground for defeating the action, and take advantage of it at the trial to the extent of limiting the plaintiff's recovery to a proportionate part of the damages suffered.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

PARTITION.**II. ACTIONS FOR PARTITION.**

(A) Right of Action and Defenses.

¶12(2) (Miss.) Under Code 1906, § 3521, beneficiaries under a testamentary trust, after death of trustee had terminated power of sale for their best interest, *held* entitled to a partition.—*Chandler v. Chandler*, 71 So. 811.

¶12(3) (Miss.) Under Code 1906, §§ 1659, 5086, *held* that, where widow renounced provision of her husband's will and elected to take an undivided interest in the homestead, it could not be partitioned during her widowhood while in her occupation, without her consent.—*Williams v. Williams*, 71 So. 300.

(B) Proceedings and Relief.

¶55(2) (Ala.) Bill for the sale of realty and a distribution of the proceeds between the owners thereof, brought under Code 1886, § 3253 et seq. (Code 1907, § 5222 et seq.), not alleging the respective interests of the complainants in an

undivided one-fourth interest, *held* bad on demurrer.—*Martin v. Cannon*, 71 So. 906.

⚡62 (Ala.) Where a deed, void as a conveyance, if valid as an agreement to convey, passed to the defendant an exclusive equitable interest in the land, his failure to allege the equitable interest and to pray for equitable relief precludes consideration of the equitable title as a defense to a suit for sale of the land and distribution of the proceeds.—*Franklin v. Snow*, 71 So. 93.

PARTNERSHIP.

I. THE RELATION.

(B) As to Third Persons.

⚡41 (Miss.) Corporation is not so defectively organized as to render stockholders liable as partners or otherwise for debts, though charter is not recorded in office of chancery clerk of county where it does business, and though it commenced business with capital stock subscribed, and paid in less than full amount authorized by charter, which does not require a certain amount.—*Diamond Rubber Co. v. Foley*, 71 So. 906.

(C) Evidence.

⚡53 (Fla.) In suit to recover share of property of alleged partnership, evidence *held* insufficient to show existence of partnership.—*McGill v. Chappelle*, 71 So. 836.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

⚡146(1) (La.) A partner of plaintiff firm whose individual business had been continued by the firm *held* authorized to execute two notes to defendants, one in settlement of his own debt, and one for the advance to his firm.—*Montgomery-Ferguson Co. v. William T. Hardie & Sons*, 71 So. 931.

(B) Nature and Extent of Firm Liabilities.

⚡165 (Miss.) The liability of partners is joint and several.—*Dinwiddie v. Glass*, 71 So. 745.

V. RETIREMENT AND ADMISSION OF PARTNERS.

⚡242(5) (La.) In a suit by a firm to recover money due it from defendants for cotton shipped on ground that debt of partner to whose business the firm had succeeded was not the firm's debt, evidence *held* to show that firm's business was merely a continuation of such partner's business.—*Montgomery-Ferguson Co. v. William T. Hardie & Sons*, 71 So. 931.

PART PERFORMANCE.

See Specific Performance, ⚡43; Work and Labor, ⚡14.

PASSENGERS.

See Carriers, ⚡265-347.

PAYMENT.

See Assignments for Benefit of Creditors, ⚡321; Bills and Notes, ⚡432, 439, 511; Chattel Mortgages, ⚡235; Compromise and Settlement; Criminal Law, ⚡252; Fraudulent Conveyances, ⚡121; Insurance, ⚡244; Taxation, ⚡526-543; Tender; Trial, ⚡252; Trusts, ⚡75, 81; Vendor and Purchaser, ⚡169-187, 334.

I. REQUISITES AND SUFFICIENCY.

⚡9 (Ala.App.) Payment by the consent of the party interested may be made other than in money.—*Stovall v. Hamilton*, 71 So. 63.

II. APPLICATION.

⚡39(1) (Ala.) While debtor may in first instance direct application of payment where he does not the creditor may apply as he desires.—*Porter v. Watkins*, 71 So. 687.

⚡39(6) (Ala.) Where a materialman furnished materials which were not used in the building on which he perfected a lien, he may apply a payment, no application being specified, to such unsecured items.—*Jefferson Plumbers & Mill Supply Co. v. Peebles*, 71 So. 413.

⚡45 (Ala.) Without consent a payment cannot be applied to an immature debt when there is an unsatisfied mature one.—*Porter v. Watkins*, 71 So. 687.

⚡46(1) (Ala.) Where no appropriation is made, the law will apply payments to the least secured debt.—*Porter v. Watkins*, 71 So. 687.

V. RECOVERY OF PAYMENTS.

⚡82(1) (La.) Under Civ. Code, art. 1759, no suit will lie to recover what has been paid or given in compliance with natural obligation.—*Wagon v. Schick*, 71 So. 534.

PENALTIES.

See Chattel Mortgages, ⚡73; Corporations, ⚡396; Criminal Law, ⚡1020; Limitation of Actions, ⚡35; Telegraphs and Telephones, ⚡78.

PERPETUITIES.

⚡4(4) (Miss.) Will of testator, bequeathing land to nephews on conditions, *held* to violate the rule against perpetuities as embraced in Code 1906, ⚡2765.—*Nicholson v. Fields*, 71 So. 900.

PERSONAL INJURIES.

See Animals, ⚡74; Bridges, ⚡37; Carriers, ⚡280-347; Damages, ⚡132, 216; Innkeepers, ⚡10; Negligence; Railroads, ⚡276-400; Release, ⚡52; Street Railroads, ⚡98-117.

PETITION.

See Pleading, ⚡48.

PETITORY ACTION.

See Real Actions.

PHYSICIANS AND SURGEONS.

See Criminal Law, ⚡476; Evidence, ⚡472, 547; Payment, ⚡9.

PLEA.

See Criminal Law, ⚡292; Pleading, ⚡88-131.

PLEADING.

See Indictment and Information; Parties, ⚡80.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

⚡8(6) (Ala.) In an action for commission on the sale of defendant's property to the government, a plea *held* to state conclusions and not facts as required by Code 1907, § 5330.—*Russell v. Bush*, 71 So. 397.

⚡11 (Fla.) While declaration must contain allegations of all facts necessary to state cause of action, only ultimate facts need be alleged.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

⚡34(4) (Ala.) A pleading is to be construed most strongly against the pleader, yet the language used should be given a reasonable construction.—*Warren v. Crow*, 71 So. 92.

⚡34(4) (Ala.) A pleading assailed by demurrer must be construed more strongly against the pleader.—*Martin v. Cannon*, 71 So. 996.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

⚡48 (La.) Under Code Prac. art. 172, a "petition," as defined by article 171, must contain a clear concise statement of the object of plaintiff's demand, as well as the nature of the title or cause of action on which it is founded.—*State v. American Sugar Refining Co.*, 71 So. 137.

⚡48 (La.) Whatever must be proven to maintain suit on merits must be alleged, though allegations would be negative.—*Lurie v. Titcomb*, 71 So. 200.

⚡53(2) (Ala.) A complaint containing two counts, charging, respectively, simple negligence and wantonness, is not demurrable.—*Alabama Great Southern R. Co. v. Smith*, 71 So. 455.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

⚡88 (Ala.) A plea professing to answer the whole declaration, and which answers but one count, is bad on demurrer.—*People's Shoe Co. v. Skally*, 71 So. 719.

A plea assuming to answer the whole declaration, but omitting to answer a material part, is bad on demurrer.—*Id.*

(B) Dilatory Pleas and Matter in Abatement.

⚡110 (La.) Plea that suit is premature is not acknowledgment of debt sued for.—*Lurie v. Titcomb*, 71 So. 200.

(C) Traverses or Denials and Admissions.

⚡118 (La.) To deny allegation which plaintiff was compelled to make in petition and sustain with his proof cannot be considered special defense.—*Lurie v. Titcomb*, 71 So. 200.

(D) Matter in Avoidance.

⚡131 (Miss.) Where the petition alleged total destruction of an insured building, a plea in abatement that there was only a partial loss on such building and that an adjustment and appraisal had not been had, is sufficient as a plea in confession and avoidance.—*Aetna Ins. Co. v. Cowan*, 71 So. 746.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

⚡180(2) (Miss.) Where the insured by replication pleaded a waiver of one of the clauses of the policy, breach of which was pleaded in bar by the insurer, there was no departure from the declaration.—*Caledonian Fire Ins. Co. v. Shepherd*, 71 So. 314.

V. DEMURRER OR EXCEPTION.

⚡194(3) (Ala.) A plea directed to the whole complaint must be a complete answer to every count, or it is subject to demurrer.—*Russell v. Bush*, 71 So. 397.

⚡214(1) (Ala.) Facts stated in a petition must be treated as true on demurrer.—*Walker v. Mutual Alliance Trust Co.*, 71 So. 697.

⚡214(1) (Miss.) A demurrer to the declaration admits its allegations as true.—*Batesville Southwestern R. Co. v. Mims*, 71 So. 827.

⚡222 (Miss.) While Code 1906, § 755, requiring an affidavit to the merits of a defense as a prerequisite to pleading over after demurrer to the declaration is overruled, is mandatory, it may be waived by the adverse party.—*Julius Levy Sons Co. v. Orlansky*, 71 So. 571.

Where demurrer to the declaration is overruled and the defendant, without objection by plaintiff, secured permission to answer, the requirement of an affidavit to the merits of the defense under Code 1906, § 755, was waived.—*Id.*

⚡228 (La.) Where a trial and final disposition of exception will put an end to case, it should be disposed of before trial on merits.—*Waterhouse v. Star Land Co.*, 71 So. 358.

⚡228 (La.) Exceptions of no cause of action must be determined from the face of the petition, and where the petition contains no reference to a former action, an objection, based on what transpired at such former action, cannot be considered.—*Darcourt v. Brunet*, 71 So. 776.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚡236(6) (Ala.) In assumpsit by the seller of staves for the balance due for the executed part of the contract, it was discretionary with the court to allow defendant's pleas, in substance amendatory statements of the defense, to be filed.—*Lowy v. Rosengrant*, 71 So. 439.

VII. SIGNATURE AND VERIFICATION.

⚡290(3) (Ala.) Code 1907, § 5332, providing that all pleas in abatement or pleas which deny the execution of the instrument in writing, which is the foundation of the suit, must be verified, does not apply to detinue, wherein trial is had only on a plea of general issue.—*Knight v. Garden*, 71 So. 715.

XI. MOTIONS.

⚡352 (Miss.) In an action by an employee on a claim for personal injury, his motion to strike out the notice accompanying the plea of the general issue to the effect that he had assigned a part interest in his cause of action to certain persons, not parties plaintiff, should have been overruled.—*A. K. McInnis Lumber Co. v. Rather*, 71 So. 264.

XII. ISSUES, PROOF, AND VARIANCE.

⚡387 (La.) Evidence received without objection enlarges pleadings only when it would not have been admissible if objected to.—*City of Shreveport v. Chatwin*, 71 So. 791.

⚡395 (Fla.) Allegata and probata must correspond, and there can be no recovery on cause of action in substance variant from that pleaded.—*Ingram-Dekle Lumber Co. v. Geiger*, 71 So. 552.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡412 (Ala.App.) Where the sufficiency of replications is not tested by demurrer or the allegations avoided by any but a general rejoinder, and the plaintiff proved their truth without dispute, he was entitled to the affirmative charge.—*Knights of Modern Maccabees v. Gillespie*, 71 So. 67.

POLICE POWER.

See Constitutional Law, ⚡81.

POSSESSION.

See Adverse Possession; Trespass, ⚡20.

POST OFFICE.

See Evidence, ⚡71.

POTESTATIVE CONDITIONS.

See Mines and Minerals, ⚡58.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See Fraudulent Conveyances, **421**.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESENTATION.

See Executors and Administrators, **222-228**.

PRESENTMENT.

See Bills and Notes, **394, 398**.

PRESUMPTIONS.

See Appeal and Error, **900-931**; Criminal Law, **1144**; Evidence, **69-83**.

PRINCIPAL AND ACCESSORY.

See Criminal Law, **80**.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, **390**; Evidence, **445**; Insurance, **93, 375**; Master and Servant, **330**; Partnership, **146**.

I. THE RELATION.**(A) Creation and Existence.**

22(2) (Ala.App.) The acts and declarations of an agent, or one purporting to be an agent, are not admissible to show his agency, in the absence of independent proof of agency.—Postal Telegraph-Cable Co. v. Minderhout, 71 So. 89.

In action against postal telegraph-cable company for injuries from being run into by its messenger boy on a bicycle, his statements right after the collision, in view of the other independent evidence of his agency for defendant, held admissible on the issue of agency.—Id.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Powers of Agent.**

107(1) (Miss.) Where the purchaser of a bankrupt stock of goods placed the bankrupt as agent in charge to sell it at retail, depositing the money in a bank to the principal's credit, the agent, with his principal's assent, erecting a sign with the principal's name thereon, it was not within the apparent scope of the agent's authority to pledge the principal's credit for goods to replenish the stock.—Hopkins v. Buckley, Terry & Co., 71 So. 877.

116(1) (Ala.App.) Restrictions upon the authority of a general agent with respect to the necessary, appropriate, or usual incidents of business are not admissible against third persons without notice, who relied on his implied authority.—Springfield Fire & Marine Ins. Co. v. Ferrell, 71 So. 615.

Territorial restrictions upon even a general agent's authority are effectual as to uninformed third persons.—Id.

123(7) (Miss.) Evidence held sufficient to show authority of agent to bind his principal by purchase of goods.—Barton-Parker Mfg. Co. v. Moore, 71 So. 909.

(B) Undisclosed Agency.

145(1) (Miss.) Where active clerk of a partnership merely did as directed, and partners themselves participated in management of business, held, that clerk's creditors could not under Code 1906, § 4784, hold partnership property for clerk's debts.—J. M. Robinson, Norton Co. v. Godsey, 71 So. 312.

146(1) (Miss.) Property in a storehouse which a father owned, but had turned over to his son, held liable for the son's debts under Code 1906, § 4784; the son carrying on the business as manager, and there being nothing to show the father's interest.—Herrman Bros. & Co. v. Watson, 71 So. 375.

PRINCIPAL AND SURETY.

See Appeal and Error, **380**; Bail; Guaranty.

I. CREATION AND EXISTENCE OF RELATION.**(A) Between Individuals.**

42 (Miss.) That creditor did not inform sureties when they executed second contract of suretyship that principal was in default on a prior contract for which they were already bound, will not as a matter of law discharge liability of sureties on second contract.—Southwestern Co. v. Wynnegar, 71 So. 737.

(B) Surety Companies.

54 (La.) Where surety company executing appeal bond held certificate of secretary of state, held that, under Act No. 41 of 1894, § 6, court could not go behind such certificate and inquire into its charter powers and sufficiency of its paid-up capital.—Franek v. Brewster, 71 So. 213.

III. DISCHARGE OF SURETY.

100(3) (La.) Surety company cannot invoke rule of strict construction, where owner and building contractor have dispensed with provision of contract and agreed verbally, instead of in writing, to alter building contract.—Victoria Lumber Co. v. Wells, 71 So. 781.

PRIORITIES.

See Attachment, **287**; Chattel Mortgages, **138**; Mortgages, **151-169**.

PRIVATE SCHOOLS.

See Schools and School Districts, **2**.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, **38**; Witnesses, **195, 204**.

PROBABLE CAUSE.

See Malicious Prosecution, **18, 20**.

PROBATE.

See Wills, **282-324**.

PROCESS.

See Arrest; Attachment; Corporations, **507, 668**; Execution; Garnishment; Judgment, **17**; Mandamus; Prohibition.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

19 (Ala.) Under Code 1907, §§ 5299, 5301, the process of the city court of Birmingham, a court of general jurisdiction, runs to any sheriff of the state, and must be executed by the sheriff or other officer in any county.—Jefferson County Savings Bank v. Carland, 71 So. 126.

II. SERVICE.**(E) Return and Proof of Service.**

146 (La.) Service of citation must be proved only by sheriff's return.—Teal v. Philadelphia & G. S. S. Co., 71 So. 364.

PRO CONFESSO.

See Equity, **419**.

PROHIBITION.**I. NATURE AND GROUNDS.**

⚡3(2) (La.) Case involving overruling by trial court of exceptions to manner in which citation was served is appealable, so that prohibition will not lie.—*Wilson v. Yazoo & M. V. R. Co.*, 71 So. 931.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Fixtures.

⚡9 (Ala.) The possession of real property raises a presumption of ownership.—*Gilliland v. Armstrong*, 71 So. 700.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROXIMATE CAUSE.

See Negligence, ⚡56-62.

PUBLICATION.

See Contempt, ⚡9; Newspapers; Statutes, ⚡8½.

PUBLIC LANDS.

See Boundaries, ⚡54; Railroads, ⚡9, 58.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**(A) Surveys.**

⚡25 (Fla.) Where the issue in ejectment was whether the land in controversy constituted part of a particular government lot when the lot was surveyed and platted, *held*, that the official survey, including the government plat and field notes, must control.—*Lord v. Curry*, 71 So. 21.

(E) School and University Lands.

⚡55 (Miss.) A conveyance of timber by a lessee of land in a sixteenth section, whose unexpired term continues for 55 years, is valid as against one who with notice thereafter purchased from the board of supervisors the right to cut all the timber growing on the land.—*Fernwood Lumber Co. v. Rowley*, 71 So. 3.

The only control which the board of supervisors has over timber in a sixteenth section is to prevent its being cut or destroyed contrary to the rules of good husbandry, unless the right to cut it is purchased; and it can sell such right only to the lessee, or to or with the consent of the person to whom the lessee has sold the timber.—*Id.*

(F) Swamp and Overflowed Lands.

⚡61(1) (Fla.) Swamp, boggy, and marsh land is properly treated as land, and does not pass under a patent as an appurtenance to land.—*Lord v. Curry*, 71 So. 21.

⚡61(2) (La.) Under Act Cong. March 2, 1849, where entire section of swamp lands is listed and approved by Secretary of Interior for conveyance to state, register of land office has no authority to dispose of it as fractional section nor to sell unsurveyed part uncovered by recession of water.—*Bank of Coushatta v. Yarborough*, 71 So. 784.

⚡61(8) (La.) When approved list of swamp lands mentions whole section, entryman buying on basis of estimated acreage under description calling for all of fractional section acquires no title to unsurveyed portion subsequently uncovered by recession of water.—*Bank of Coushatta v. Yarborough*, 71 So. 784.

⚡61(14) (Miss.) Under Act Cong. Sept. 28, 1850, known as the Swamp Act, and Act Cong. March 3, 1905, known as the McLaurin Act, confirming sales by state under Swamp Act, defendants whose remote vendors had purchased from state *held* to have good title, as against complainant entering or purchasing in 1907 under the homestead laws.—*Shoub v. Perkins*, 71 So. 270.

(M) Conveyances, Contracts, and Exemptions.

⚡136 (Fla.) A mortgage given on government land after final proof and certificate, but before issuance of patent, is valid, notwithstanding Rev. St. U. S. § 2296 (U. S. Comp. St. 1013, § 4551).—*Betts Naval Stores Co. v. Whitton*, 71 So. 281.

PUBLIC POLICY.

See Bills and Notes, ⚡494.

PUBLIC SCHOOLS.

See Schools and School Districts, ⚡48, 130.

PUBLIC SERVICE COMMISSIONS.

See Railroads, ⚡9, 58; Taxation, ⚡476.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUNISHMENT.

See Criminal Law, ⚡1208; Fines.

QUALIFICATIONS.

See Elections, ⚡73.

QUANTUM MERUIT.

See Work and Labor.

QUIETING TITLE.

See Taxation, ⚡805-816.

RAILROADS.

See Commerce, ⚡27; Evidence, ⚡69, 123, 344; Mandamus, ⚡164; Master and Servant; Negligence, ⚡32, 101; Street Railroads; Telegraphs and Telephones, ⚡11.

I. CONTROL AND REGULATION IN GENERAL.

⚡9(1) (Fla.) Order by Railroad Commission prior to Acts 1913, c. 6527, without authority of law, is not affected by provision of that act declaring all presumptions in favor of action of Commissioners.—*State v. Jacksonville Terminal Co.*, 71 So. 474.

As Railroad Commissioners can have no jurisdiction or powers except as conferred by statutes, their order cannot be deemed within their jurisdiction and powers, unless there is some basis in statute therefor.—*Id.*

Though Acts 1913, c. 6527, provides that all doubts as to jurisdiction and powers of Railroad Commissioners shall be resolved in their favor, doubts cannot be resolved in favor of power when there is no enactment that can be basis therefor.—*Id.*

Though Gen. St. 1906, § 2893, provides general regulations of common carriers, separate and specific regulations contained in act must be

regarded as expressing precise legislative intent as to matters particularly treated therein.—Id.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

—58 (Fla.) Description, in order of Railroad Commissioners requiring erection of terminal passenger station, of tract as bounded on north by line running parallel with and 200 feet north of line of named street extended west does not show existence of public street through tract in question.—State v. Jacksonville Terminal Co., 71 So. 474.

Neither Gen. St. 1906, § 2893, prior to amendment by Laws 1913, c. 6527, § 3 (Comp. Laws 1914, § 2893), nor such amending act confers on Railroad Commissioners power to order local terminal company operating passenger station to erect new station on different site, nor to order railroads to join with terminal company in erection of new station.—Id.

Acts 1913, c. 6527, § 3, subds. 5, 7, 8, amending Gen. St. 1906, § 2893 (Comp. Laws 1914, § 2893), prescribe regulations applicable to distinct classes of railroad depots and define powers of Railroad Commissioners in regard thereto, and do not afford authority to require terminal company to erect new station on different site.—Id.

Authority delegated by Gen. St. 1906, § 2893, as amended by Laws 1913, c. 6527, § 3 (Comp. Laws 1914, § 2893), to compel two or more railroads to operate joint passenger depot for their exclusive use is different from asserted power to compel two or more railroads to erect station for their use and that of other carriers, or to compel railroads to become joint owners with terminal company in conducting such business.—Id.

Order of Railroad Commissioners requiring local terminal company and railroad companies to join in erection of terminal station on new site cannot be construed to include requirement that railroads erect joint terminal depot for their own use.—Id.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

—95(1) (La.) In crossing public roads, it is duty of railroads and tramways, under Act No. 157 of 1910, to construct roads so as not to hinder or obstruct safe or convenient use of highway.—Jones v. Tremont Lumber Co., 71 So. 862.

—99(1) (Miss.) Code 1906, § 4053, providing that, where a railroad crosses a highway and it is necessary to raise or lower the way, the road shall make the proper grades and bridges, has no application to a plantation road, not a public way.—New Orleans Great Northern R. Co. v. McGowan, 71 So. 317.

—113(2) (Miss.) Where a railroad company properly acquired a right of way for railroad purposes, the grant included the right to make a necessary cut, and the grantee of the original owner cannot recover damages for injuries occasioned by slipping of the land into cut.—Alabama & V. Ry. Co. v. Stingily, 71 So. 876.

X. OPERATION.

(B) Statutory, Municipal, and Official Regulations.

—232 (Miss.) Under Code 1906, § 4857, bulletin board maintained for three railroads all using the same passenger station, consisting of separate column for each road with lines sufficient to show its passenger trains, the time when due, whether late or not, held sufficient.—Guice v. Illinois Cent. R. Co., 71 So. 259.

—246 (Miss.) Where evidence showed that defendant's train blocked street crossings one-half hour at midnight, preventing plaintiff from reaching home, causing illness, and ruining her wearing apparel, peremptory instruction for defendant was error.—Parker v. Southern Ry. Co. in Mississippi, 71 So. 912.

(D) Injuries to Licensees or Trespassers in General.

—276(3) (La.) Where, after seeing a boy trespassing on a flat car, the engineer does not check speed of locomotive and boy jumps off and is injured by cars on main track running without brakes, the railroad is liable for injuries received by him.—O'Neal v. Big Pine Lumber Co., 71 So. 355.

Where a boy of 12, though mere trespasser, is seen on a flat car at distance of 75 yards by engineer, engineer owes a duty to do everything possible to avoid injury, and is guilty of negligence in failing to check speed of locomotive.—Id.

(F) Accidents at Crossings.

—300 (Miss.) One using a crossing at a street which had been discontinued, held, in view of the use by pedestrians, to be a favored licensee entitled to the same care to which persons crossing at a regular crossing were entitled.—Illinois Cent. R. Co. v. Dillon, 71 So. 809.

Where a railroad company is charged with knowledge that a crossing is used by many persons, it is bound to keep a lookout for such persons, while persons crossing the tracks are bound to look out for trains.—Id.

—303(1) (La.) Under Rev. St. 1870, § 691, as amended Act No. 157 of 1910 a railroad company is liable for injuries to travelers from the bad condition of crossing approaches from want of proper repairs.—Darby v. New Orleans, T. & M. R. Co., 71 So. 490.

—303(6) (Miss.) Under Code 1906, § 4058, one traveling a plantation road, not being in any way connected with the plantation, but merely traveling as a member of the general public, could not recover against a railroad for injuries to his mule, when it fell through a defective bridge over the tracks.—New Orleans Great Northern R. Co. v. McGowan, 71 So. 317.

—312(7) (Miss.) Where, after it had been discontinued, many persons used a street to cross railroad tracks, and to the knowledge of the railroad company, warnings of the approach of trains should be given, though the company was under no statutory duty.—Illinois Cent. R. Co. v. Dillon, 71 So. 809.

—320 (Ala.) Where deceased stopped on approaching the crossing as if to wait for a train to pass, the engineer had a right to assume that he would stay in his place of safety.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

—327(1) (La.) One crossing railroad track in city who fails to look and listen and to see and hear danger signals is negligent, and cannot recover for injuries suffered by him.—Ladner v. New Orleans Terminal Co., 71 So. 503.

—333(2) (Ala.) Where deceased, on hearing the approach of a train at a crossing, stopped as if to wait for it to pass and then started across the tracks when it was about 100 feet away, and the danger was imminent, he was guilty of contributory negligence.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

—338 (Ala.) Where deceased, after stopping to wait for a train to pass, left his place of safety to cross the tracks when the engine was 75 to 100 feet away, and the engineer did everything in his power to stop the train, the doctrine of last clear chance had no application.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

—339(1) (Ala.) In an action for death at a railroad crossing, plaintiff could not recover on the ground of wantonness where deceased, after stopping with the apparent intention of allowing the train to pass, started to cross so close to the approaching train that it was impossible to avert the injury.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

—346(1) (Ala.) Where deceased stopped on approaching the crossing as if to wait for a

train to pass, the burden of proof is on plaintiff to show negligence of the engineer after the deceased left his place of safety to go upon the tracks.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

⇒346(1) (La.) In action for death of child at farm crossing, caused by passenger train, burden is on plaintiff to show that engineer was negligent in not keeping proper lookout, or in not stopping train in time.—Thrash v. Vicksburg, S. & P. Ry. Co., 71 So. 197.

⇒346(2) (Ala.) In an action for a death at a railroad crossing, Code 1907, § 5476, putting the burden of proof on the railroad to negative negligence in actions for death, does not apply where the complaint charges wantonness.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

In an action for a death at a railroad crossing, Code 1907, § 5476, providing that where a person is killed by a train, the burden of proof is on the railroad company to negative negligence, does not apply where the deceased was guilty of contributory negligence, as he was in the position of a trespasser.—Id.

⇒348(1) (La.) In action for injuries in collision at railroad crossing, evidence held to show defendant's freedom from negligence.—Dixon v. Vicksburg, S. & P. Ry. Co., 71 So. 527.

⇒348(2) (La.) In action for injuries from fall into pit dug by defendant in constructing tramroad, evidence held to show that pit was dug in highway.—Jones v. Tremont Lumber Co., 71 So. 862.

⇒348(2) (Miss.) In action for death by being struck by switch engine, evidence that accident was probably caused by runaway horse and that railroad company was observing every precaution held not to sustain verdict for plaintiff.—New Orleans, M. & C. R. Co. v. Gassoway, 71 So. 806.

⇒348(6) (Ala.) Where the deceased, after stopping to wait for a train to pass, suddenly left his place of safety to cross in front of the train, evidence held insufficient to sustain a verdict for the plaintiff.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

⇒348(6) (La.) In action for injuries in collision at railroad crossing, evidence held to show contributory negligence of plaintiff.—Dixon v. Vicksburg, S. & P. Ry. Co., 71 So. 527.

⇒350(2) (Miss.) In an action for the death of one run down while crossing railroad tracks at a street which had been discontinued, the question of the company's negligence held for the jury.—Illinois Cent. R. Co. v. Dillon, 71 So. 809.

⇒350(13) (Miss.) In an action for the death of one run down while crossing railroad tracks, the question of his contributory negligence held for the jury.—Illinois Cent. R. Co. v. Dillon, 71 So. 809.

⇒350(34) (Ala.) Wantonness does not, as a matter of law, grow out of passing at great speed a "populous" crossing at grade, but depends upon its reasonableness as measured by conditions to be reasonably anticipated.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

⇒351(23) (Ala.) An instruction that to constitute wantonness, the actual presence of the person injured or killed need not actually be known to those operating the train, although correct in itself, was misleading when coupled with the statement that wantonness consists of passing at great speed of "populous" crossing at grade.—Alabama Great Southern R. Co. v. Smith, 71 So. 455.

(G) Injuries to Persons on or near Tracks.

⇒355(1) (Ala.) A person for purposes of his own catching a ride on a freight train and on

alighting walking down a track to a station held a trespasser.—Louisville & N. R. Co. v. Porter, 71 So. 334.

⇒359(1) (Ala.) A trespasser coming up a track to a crossing is not entitled to the protection or the care required of the railroad as to people using the crossing.—Louisville & N. R. Co. v. Porter, 71 So. 334.

⇒359(2) (Miss.) Although the age of the child may be important in determining his contributory negligence, or the railroad company's duty after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees, not invited or enticed by it, than it is to keep them safe for adults.—Yazoo & M. V. R. Co. v. Smith, 71 So. 752.

⇒369(3) (Miss.) As a general rule, a railroad company is entitled to a clear track, and owes no obligation to keep a lookout for trespassers.—Yazoo & M. V. R. Co. v. Smith, 71 So. 752.

⇒376(2) (Miss.) As a general rule, a railroad company is required only to refrain from injuring trespassers after their position of peril on the track is discovered, the degree of care in such case incumbent upon railroad employes being more or less determined by circumstances.—Yazoo & M. V. R. Co. v. Smith, 71 So. 752.

⇒378 (Miss.) It would be negligent for a railroad company to anticipate that a child seen on the track would take care of itself to the same extent as the ordinary adult would.—Yazoo & M. V. R. Co. v. Smith, 71 So. 752.

A child on railroad tracks, though of tender years, may be classed as a trespasser, as respects the care required of the railroad company.—Id.

In an action for injuries to a child on a railroad track, evidence that when the child was seen, immediately every possible effort was made to stop the train and to save the child showed no negligence available to plaintiff.—Id.

⇒378 (Miss.) In action for death of child on railroad tracks, evidence that, when an unknown object was first detected on the track, engineer gave alarm whistle and, on discovery that the object was a child, made all possible effort to stop the train showed no negligence on part of the company.—Yazoo & M. V. R. Co. v. Huff, 71 So. 757.

Until a child on railroad track is distinguished by an engineer, not indistinctly as a mere object, but as a human being, the engineer is under no obligation to stop his train.—Id.

If an engineer discerns a helpless infant on the track, he, as well as the company, is under the absolute duty of doing everything possible to prevent injury to the child.—Id.

⇒394(6) (Ala.) In an action for running down plaintiff's intestate, complaint held to charge wantonness.—Southern Ry. Co. v. Fricks, 71 So. 701.

⇒396(1) (Ala.) The burden of proof of negligence or wanton negligence resulting in killing a person on a track is upon the plaintiff throughout the case.—Louisville & N. R. Co. v. Porter, 71 So. 334.

⇒396(1) (Miss.) In an action against a railroad for death of one killed by a train, based on Shannon's Code Tenn. §§ 1574-1576, requiring a constant lookout by engine crews and proof thereof by the company in order to escape liability, plaintiff must show not only that deceased was killed by the running of locomotive or cars, but that deceased appeared as an obstruction on the track.—Dixon v. Southern Ry. Co., 71 So. 306.

⇒398(3) (Miss.) Evidence that deceased was found dead on the defendant's right of way six or eight feet from the track, bruised and broken, the weeds bent as if he had been thrown, and that several trains had passed since he was last seen going up the track at night, held sufficient to sustain the conclusion that deceased

appeared as an obstruction upon the railroad track when struck by a train, within Shannon's Code Tenn. §§ 1574-1576.—*Dixon v. Southern Ry. Co.*, 71 So. 306.

⚡398(5) (Ala.) Evidence that a trespasser was run down in the daytime by a slowly running engine near a station where people were frequently on the track during the day does not justify submission of wanton negligence.—*Louisville & N. R. Co. v. Porter*, 71 So. 334.

⚡400(6) (Miss.) In an action for the wrongful death of plaintiff's intestate killed by defendant's train in Tennessee, governed by Shannon's Code Tenn. § 1574, subsec. 4, and sections 1575, 1576, evidence held to make defendant's negligence a question for the jury.—*Wheeler v. Southern Ry. Co.*, 71 So. 812.

(H) Injuries to Animals on or near Tracks.

⚡415(2) (Miss.) There is no obligation on the servants of a railroad to keep a lookout for trespassing stock.—*Yazoo & M. V. R. Co. v. Jones*, 71 So. 309.

⚡441(1) (Ala.) In action against railroad for injury to a horse, where there was no count relying on negligence as for frightening the animal, so that Code 1907, § 5476, was applicable, burden was not on plaintiff to show negligence of road's servants, as it would have been had injury been caused by negligence in frightening the animal.—*Louisville & N. R. Co. v. Davis*, 71 So. 682.

⚡443(1) (Miss.) Evidence, in suit against railroad for the negligent killing of mules, held to sustain the burden imposed upon it by the prima facie statute.—*Yazoo & M. V. R. Co. v. Jones*, 71 So. 309.

⚡446(1) (Miss.) In action against a railroad for killing mules on the track, case held for the jury.—*Dickerson v. Yazoo & M. V. R. Co.*, 71 So. 312.

(I) Fires.

⚡480(1) (Ala.) Where fire is communicated from railroad right of way on account of burning building or car standing on track, rules of evidence as to burden of proof prevail as in other cases of fire communicated from one building or premises to another.—*Poe v. Southern Ry. Co.*, 71 So. 997.

⚡480(2) (Ala.) That fire was communicated to plaintiff's property from burning railroad car or building on railroad's right of way does not make out prima facie case of negligence, as in cases of sparks from passing engines.—*Poe v. Southern Ry. Co.*, 71 So. 997.

⚡480(3) (Ala.) Where, in action against railroad for setting a fire, there is evidence that plaintiff's building was ignited by fire from a locomotive, burden passes to road to show that fire was emitted without negligence in engine's construction, equipment, or operation.—*Poe v. Southern Ry. Co.*, 71 So. 997.

RAPE.

See Bail, ⚡49.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡9 (Fla.) Gen. St. § 3221, defines two phases of the crime of rape, one on a child of the age of 10 years or more, in which case the elements of force and consent are material, the other where committed on a child under the age of 10 years, in which case these elements are not material.—*Russell v. State*, 71 So. 27.

II. PROSECUTION AND PUNISHMENT.

(C) Trial and Review.

⚡59(8) (Fla.) In prosecution for carnal intercourse with unmarried female under 18 years of age, committed prior to Laws 1915, c. 6974, it is not error to charge that previous chaste

character of prosecuting witness is not in issue.—*Gorey v. State*, 71 So. 328.

RAT-PROOFING.

See Health, ⚡32; Municipal Corporations, ⚡121, 592, 594.

REAL ACTIONS.

See Ejectment; Partition.

⚡8(1) (La.) Transfer of real estate in proceedings containing informalities rendering title voidable, cannot be set aside in petitory action against third possessor, but only by direct action of nullity against parties to transaction.—*Richardson v. McDonald*, 71 So. 934.

REASONABLE DOUBT.

See Criminal Law, ⚡561, 789, 798.

REBUTTAL.

See Criminal Law, ⚡378, 683.

RECEIVERS.

See Banks and Banking, ⚡77-82.

RECITALS.

See Bills and Notes, ⚡166; Judgment, ⚡130; Taxation, ⚡761.

RECOGNIZANCES.

See Bail.

RECORDS.

See Appeal and Error, ⚡627-661; Criminal Law, ⚡398, 892, 1086-1124, 1144, 1177; Equity, ⚡428; Homestead, ⚡46, 166; Landlord and Tenant ⚡26; Mandamus, ⚡82.

⚡6 (La.) Affidavit by former owners in form of notarial act disclaiming title to land and acknowledging title and possession in another is proper subject of inscription on books of recorder of conveyances.—*State ex rel. New Orleans Land Co. v. Register of Conveyances*, 71 So. 773.

⚡20 (Ala.) When the validity of the record of a mortgage is put directly in issue by the pleadings of the attacking party, the attack is direct, and the attack is collateral only if there are no proper averments against the record.—*Knight v. Garden*, 71 So. 715.

RECOUPMENT.

See Set-Off and Counterclaim.

RECUSATION.

See Judges, ⚡16, 47.

REDEMPTION.

See Chattel Mortgages, ⚡294, 300.

REFERENCE.

See Equity, ⚡401.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

II. PROCEEDINGS AND RELIEF.

⚡36(1) (Ala.) Bill for reformation and foreclosure of mortgage, executed by defendants and transferred to complainant, held sufficiently definite in its averments to show the land conveyed, the land omitted, and the intent of all the parties with respect to it when executing the mortgage, and good against a demurrer.—*Warren v. Crow*, 71 So. 92.

REGISTRATION.

See Elections, ¶105.

REHEARING.

See New Trial.

RELATIONSHIP.

See Trusts, ¶89.

RELEASE.

See Compromise and Settlement; Dower.

I. REQUISITES AND VALIDITY.

¶24(2) (Ala.) An offer to return money paid under an alleged fraudulent settlement, if within a reasonable time after discovery of the fraud, though rejected, is as effectual to rescind the contract as if accepted, if the plaintiff so considers it.—Beatty v. Palmer, 71 So. 422.

Where the defendant frequently rejected tender of money in attempted rescission of an alleged fraudulent release, she could not alter her status by offering on the trial to accept it and demanding its return.—Id.

II. CONSTRUCTION AND OPERATION.

¶33 (La.) Plaintiff, having sued on several claims, does not by accepting payment of one with express reservation of rights in suit waive right to prosecute suit on remaining claims.—Reynolds v. Board of Com'rs of Orleans Levee Dist., 71 So. 787.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶52 (Ala.) Where plaintiff, injured in a crossing accident, made a settlement, and thereafter, in a suit for damages, alleged incapacity and that so soon as he reasonably could, after discovery of the alleged settlement he made tender to defendant of the sum paid, he sufficiently alleged tender at the earliest practicable moment.—Beatty v. Palmer, 71 So. 422.

Replication in suit for personal injuries in crossing accident held to sufficiently allege that plaintiff did not understand the settlement which he made and later undertook to rescind.—Id.

¶55 (Ala.) The burden is on the plaintiff, who sues for personal injuries after attempted rescission of a release of his claim by tender of money paid under the settlement, to show the reasonable promptitude of his offer to rescind, if it is denied by the defendant.—Beatty v. Palmer, 71 So. 422.

¶56 (Ala.) In an action for damages for personal injuries brought after attempt to rescind a release by tender of money paid thereunder, it is immaterial what plaintiff did with the money after rejection of the tender.—Beatty v. Palmer, 71 So. 422.

In an action for personal injuries brought after attempted rescission of a release by tender of the money paid thereunder, admissibility of the character of the agency and of the identity of principals must be tested, not by its intrinsic force, but by its tendency, in connection with other evidence, to show an interest in such agent in securing the alleged fraudulent settlement.—Id.

Where it is shown that defendant and her husband were absent from their residence for some time after the negotiations of a release of plaintiff's claim, letters from plaintiff's attorney to them seeking to make a rescission of the settlement are admissible on the issue of promptitude of the rescission.—Id.

Admission of the agent's testimony as to his authority in making a tender of money paid in attempted rescission of a release held not erroneous.—Id.

¶58(4) (Ala.) Evidence held to present a question for the jury whether the plaintiff was at the time of making a release incapable of making such contract.—Beatty v. Palmer, 71 So. 422.

¶58(6) (Ala.) Evidence held to present a question for the jury whether a release was fraudulently obtained.—Beatty v. Palmer, 71 So. 422.

REMOVAL.

See Executors and Administrators, ¶35; Health, ¶7; Landlord and Tenant, ¶229½, 251, 253.

RENEWAL.

See Bills and Notes, ¶139.

RENT.

See Landlord and Tenant, ¶205, 253; Mortgages, ¶199.

REOPENING CASE.

See Trial, ¶68.

REPEAL.

See Statutes, ¶158-170.

REPLEVIN.

See Detinue.

IV. PLEADING AND EVIDENCE.

¶69(4) (Miss.) In replevin for possession of property covered by trust deed, under Code 1906, § 4232, evidence that trust deed had been extinguished by payment, or was invalid, is admissible under the general issue.—Munn v. Potter, 71 So. 315.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

¶135 (Miss.) In replevin for a horse and a cow and calf, where the officer levied only on the horse, which was released on defendants' bond, judgment on the bond for value of the horse and cow, including an award for detention, cannot stand, as the cow was not levied upon.—Hill v. Petty, 71 So. 910.

REPLICATION.

See Pleading, ¶180.

REPUGNANCY.

See Statutes, ¶159; Trial, ¶143; Wills, ¶471; Witnesses, ¶380-393.

REPUTATION.

See Criminal Law, ¶379.

RES ADJUDICATA.

See Judgment, ¶570-735.

RESCISSION.

See Cancellation of Instruments; Contracts, ¶252, 264; Sales, ¶117-129; Vendor and Purchaser, ¶92-118.

RES GESTÆ.

See Criminal Law, ¶366; Evidence, ¶121, 123.

RESIDENCE.

See Domicile; Elections, ¶73.

RES IPSA LOQUITUR.

See Negligence, ¶121, 136.

RESOLUTORY CONDITIONS.

See Contracts, ¶252; Vendor and Purchaser, ¶93.

RESTRAINT OF TRADE.

See Monopolies.

RESULTING TRUSTS.

See Trusts, ¶75-89.

RETIRING PARTNERS.

See Partnership, ¶242.

RETREAT.

See Homicide, ¶118.

RETURN.

See Appeal and Error, ¶661; Jury, ¶68; Process, ¶146; Sheriffs and Constables.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, ¶1134-1178.

REVIVAL.

See Abatement and Revival, ¶71, 72; Statutes, ¶170.

REVOCATION.

See Gifts; Wills, ¶179, 183.

RIPARIAN RIGHTS.

See Navigable Waters, ¶41, 43.

ROADS.

See Highways.

RULES OF COURT.

See Courts, ¶82.

RUNAWAYS.

See Municipal Corporations, ¶706.

SALES.

See Auctions and Auctioneers; Commerce, ¶40; Evidence, ¶441; Execution, ¶219-319; Judicial Sales; Justices of the Peace, ¶135; Mortgages, ¶335-575; Municipal Corporations, ¶568, 571; Newspapers, ¶3; Pleading, ¶236; Public Lands, ¶55, 61; Taxation, ¶639-816; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶17 (Miss.) Where contract of sale was in name of retail merchant and draft for purchase money was drawn on him, the fact that others were interested in the purchase *held* not to show that there was no contract between the merchant and the seller.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

¶22(3) (Ala.) An order signed by defendant was conditional, where reserving the right to plaintiff to accept or reject the sale made by its representative and defendant could countermand at any time before acceptance.—Holmes v. Bloch, 71 So. 670.

¶53(1) (Ala.) In an action on a contract of sale, the question whether the buyer countermanded the order by mail before acceptance *held* under the evidence for the jury.—Holmes v. Bloch, 71 So. 670.

II. CONSTRUCTION OF CONTRACT.

¶71(3) (Miss.) In an action for failure to deliver contracted timber, where plaintiff's testimony was that defendant orally contracted to deliver between 2,000,000 and 3,000,000 feet of timber, plaintiff could not recover for more than the smaller amount.—Arthur Delapierre Co. v. Chickasaw Lumber Co., 71 So. 872.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

¶117 (Ala.) On failure to deliver on time, the buyer may treat the contract as terminated, or waive the time limit and insist on delivery within any reasonable time.—Lowy v. Rosengrant, 71 So. 439.

¶127 (Ala.) When the seller of goods fails to deliver, and time is of the essence of the contract, the buyer is under no duty to give notice of his rescission for nondelivery.—Lowy v. Rosengrant, 71 So. 439.

¶129 (Ala.) When the buyer of goods gives notice of his rescission of the contract for nondelivery, he must rescind the whole contract unequivocally and without reservation.—Lowy v. Rosengrant, 71 So. 439.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

¶161(1) (Miss.) Seller of goods shipping on buyer's order, f. o. b. and giving notice of shipment and mailing bill of lading, *held* entitled to recover price, although the buyer did not receive the notice and never received the goods, which were destroyed while in the carrier's possession.—Sethness Co. v. Home Ade Bottling Co., 71 So. 308.

¶161(1) (Miss.) Where a shipper of grain to its own order attached draft to bill of lading directing bank to retain bill of lading until payment of draft, the bank was shipper's agent and delivery of unsound grain was not compliance with the shipper's obligation to deliver sound grain.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

¶168(3) (La.) Where seller of certain brand of flour ships another brand to baker, representing it to be of same grade, and baker uses only enough to find that it is of inferior grade, he is not required to pay for portion used.—Shreveport Mill & Elevator Co. v. Stoehr, 71 So. 961.

¶170 (Ala.) On failure to deliver on time, the buyer may treat the contract as terminated, or waive the time limit and insist on delivery within any reasonable time; and, having done the latter, he cannot put the seller in default without first giving notice of his desire to receive the goods with the offer of reasonable time for making the delivery.—Lowy v. Rosengrant, 71 So. 439.

¶170 (La.) A party under obligation to deliver goods at once cannot wait two years in spite of frequent demands and then seek to compel the other to receive them, but such party does not forfeit his right to deliver by waiting formal demand for delivery.—Watson v. Feibel, 71 So. 585.

¶176(1) (Ala.) Where buyer of goods to whom delivery is not made within stipulated time evidences to the seller a purpose to continue the contract in force or to reserve to himself the right to insist on further performance, he waives the time limit and the parties remain bound for a reasonable time.—Lowy v. Rosengrant, 71 So. 439.

¶179(4) (Miss.) That the purchasers of grain removed it from cars before they paid draft and received bill of lading *held* not to constitute acceptance precluding subsequent recovery because grain was unmerchantable.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

↪181(12) (Ala.) In an action under Code 1907, § 3734, by a purchaser of cotton who claimed that the bale had been water-packed, evidence held insufficient to establish the condition alleged, but showed that there was no fraud by the seller.—Wallace v. Crosthwait, 71 So. 686.

VII. WARRANTIES.

↪272 (Miss.) Where grain is sold to a retail merchant by a wholesaler, there is an implied warranty that it is good and merchantable.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

↪411 (Miss.) In assumption a complaint that defendant willfully refused to perform a contract of sale of lumber made with plaintiff although able to do so, and attaching copies of the contract and pertinent correspondence, held sufficient to state a cause of action.—Logan & Co. v. Chapman, 71 So. 807.

↪418(14) (Miss.) In action for failure to deliver contracted timber for plaintiff's sawmill, held plaintiffs could recover difference between contract and market price, and, if unable to purchase in market a sufficient amount of timber, the profits they would have made on this remainder, and any other proximate damages.—Arthur Delapierre Co. v. Chickasaw Lumber Co., 71 So. 872.

(D) Actions and Counterclaims for Breach of Warranty.

↪425 (Miss.) Where grain delivered does not fulfill the implied warranty that it should be sound and merchantable, the buyer may retain it and recover damages.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

↪437(1) (Miss.) In action by buyer for seller's breach of implied warranty of quality of grain, the pleadings held not to raise the issue that the minds of the parties did not meet.—D. Rosenbaum's Sons v. Davis & Andrews Co., 71 So. 388.

SCHOOLS AND SCHOOL DISTRICTS.

See Constitutional Law, ↪43; Public Lands, ↪55.

I. PRIVATE SCHOOLS AND ACADEMIES.

↪2 (La.) An academy organized as a body corporate and politic could be dissolved by the Legislature by Act No. 24 of 1915 (Ex. Sess.), protecting contract rights of the institution and its creditors, where institution had actually ceased to exist for long term of years.—School Board of Caldwell Parish v. Meredith, 71 So. 209.

An institution of learning organized as a "body politic and corporate" and partially endowed by the state and by the United States is a quasi public corporation.—Id.

The board of trustees of academy are without authority to dissolve or undertake liquidation of corporation in absence of charter provision therefor.—Id.

II. PUBLIC SCHOOLS.

(C) Government, Officers, and District Meetings.

↪48(6) (Miss.) Where the county superintendent of schools erred in judgment and discretion, but there was no fraud, neither he nor his bondsmen are liable for such error which resulted in overpayment of teachers, etc.—State v. Green, 71 So. 171.

(G) Teachers.

↪130 (Miss.) Under Code 1906, §§ 4549, 4590, 4591, held that, where special examinations are

had, the county superintendent should not, such applicants to teach paying a fee of \$2.50, also collect the fee of 50 cents which is collected on regular examinations.—State v. Green, 71 So. 171.

SECONDARY EVIDENCE.

See Criminal Law, ↪398-404; Evidence, ↪159-187.

SECURITY.

See Attachment, ↪131, 138; Costs; Payment, ↪46.

SEDUCTION.

See Criminal Law, ↪451.

II. CRIMINAL RESPONSIBILITY.

↪40 (Ala.App.) In seduction, where defendant's correspondence with prosecutrix was shown, it was permissible for the prosecution to show that some of the letters to the prosecutrix were destroyed at his instance.—Herring v. State, 71 So. 974.

That pregnancy did not result was not material; as pregnancy is not an element of the offense of seduction.—Id.

↪44 (Ala.App.) In seduction it was admissible for the prosecution to show the relations between accused and prosecutrix, his conduct toward her, whether their association was frequent and of an intimate character, and the fact that accused corresponded with her, and its duration and character.—Herring v. State, 71 So. 974.

↪46 (Ala.App.) The uncorroborated evidence of the woman seduced does not authorize a conviction, but corroboratory evidence as to any material fact which satisfies the jury that she is worthy of belief is sufficient.—Herring v. State, 71 So. 974.

SELF-DEFENSE.

See Homicide, ↪116-118, 188, 300.

SENTENCE.

See Criminal Law, ↪982.

SEPARATE ESTATE.

See Husband and Wife, ↪187.

SEPARATE MAINTENANCE.

See Husband and Wife, ↪297.

SEPARATION.

See Trial, ↪41.

SERVANTS.

See Master and Servant.

SERVICE.

See Process.

SERVICES.

See Work and Labor.

SET-OFF AND COUNTERCLAIM.

See Dismissal and Nonsuit, ↪19.

I. NATURE AND GROUNDS OF REMEDY.

↪5 (Ala.App.) A recoupment applies when abatement claimed springs out of or is closely related to contract or transaction on which recovery is sought, while a set-off is based on an independent cause of action.—T. L. Farrow Mercantile Co. v. Riggins, 71 So. 963.

↪6 (Ala.App.) Code 1907, §§ 5860, 5865, permitting a judgment in favor of defendant against

plaintiff on a plea of recoupment, as well as on a plea of set-off for the amount that defendant's claim exceeds that of plaintiff, has not enlarged class of demands which may be the subject of recoupment.—*T. L. Farrow Mercantile Co. v. Riggins*, 71 So. 963.

II. SUBJECT-MATTER.

⚡41 (La.) Defendant cannot plead, in compensation of debt due by him, debt of plaintiff to corporation of which defendant is stockholder.—*Ballard v. Thompson*, 71 So. 605.

III. OPERATION AND EFFECT.

⚡58 (Ala.App.) Under Code 1907, § 5865, on a plea of recoupment, if claim of defendant equals that of plaintiff, judgment must be rendered for defendant, but under section 3666, on a plea of set-off, under such circumstances, defendant would not have judgment, except that he would be entitled to have his costs sustained in establishing set-off taxed against plaintiff.—*T. L. Farrow Mercantile Co. v. Riggins*, 71 So. 963.

SETTLEMENT.

See Account Stated; Compromise and Settlement.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

III. POWERS, DUTIES, AND LIABILITIES.

⚡123 (Miss.) Under Code 1906, § 4670, neither sheriff nor bondsmen can avoid liability for failure to make return of execution on ground that judgment is invalid.—*Green v. Taylor*, 71 So. 375.

SHERIFF'S SALES.

See Newspapers, ⚡3.

SIGNALS.

See Railroads, ⚡312.

SIGNATURES.

See Mortgages, ⚡56.

SLANDER.

See Libel and Slander.

SLAVES.

See Marriage, ⚡38, 40.

SOCIAL CLUBS.

See Taxation, ⚡241.

SPECIAL LAWS.

See Statutes, ⚡162.

SPECIFICATION OF ERRORS.

See Appeal and Error, ⚡725.

SPECIFIC PERFORMANCE.

II. CONTRACTS ENFORCEABLE.

⚡29(2) (Fla.) Specific performance may be decreed against a conditional vendor where the vendor's letters showed the contract in detail, except the identity of the lot sold, and the tenant has been advised of the change of ownership, and the vendor has accounted to the vendee for the rents.—*Harvey v. Hayes*, 71 So. 282.

⚡35 (Ala.) Contract signed by husband having no written authority to convey wife's lands held not binding as against her; compliance with Code 1907, §§ 3355, 4494, providing for

the alienation of lands, not being shown.—*Wood v. Lett*, 71 So. 177.

While equity will dispense with mere form, and enforce a contract which is voidable under the statute of frauds for lack of proper evidence, it cannot enforce a contract of a wife to convey her lands not properly signed by the husband, since that is a condition of the wife's power to contract.—*Id.*

Where a contract could not be specifically enforced when made, because the signature of the husband, assenting to conveyance of the wife's realty, did not comply with statute, subsequent tender of a deed signed by a wife and the husband was of no avail, since the other party was without recourse between the signing of the contract and the tender of the deed.—*Id.*

⚡43 (Ala.) While, under the statute of frauds, a contract, though partially performed, which is invalid, cannot be enforced against the party whose signature is insufficient, the statute is sufficiently complied with by such persons bringing suit for performance of the contract.—*Wood v. Lett*, 71 So. 177.

IV. PROCEEDINGS AND RELIEF.

⚡105(3) (Fla.) Where demand was made on the vendor for a deed only a week before his death, and he put off the vendee on a plea of his physical condition, a suit brought against the vendor's administratrix soon after his death to enforce specific performance was brought with reasonable promptness.—*Harvey v. Hayes*, 71 So. 282.

⚡116¾ (Ala.) On demurrer to the sufficiency of a bill for specific performance, it must be assumed that a husband had no written authority to contract to convey his wife's land, where such authority is not alleged in the bill.—*Wood v. Lett*, 71 So. 177.

⚡121(1) (Ala.) To authorize specific performance of an oral contract to convey land, as taken out of the statute by part performance, its terms must be established by clear, definite, and noncontradictory evidence.—*Barnes v. White*, 71 So. 114.

SPLITTING CAUSES OF ACTION.

See Action, ⚡53.

STATEMENT.

See Trial, ⚡127.

STATES.

See Taxation, ⚡476.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

⚡119 (La.) Act No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to officers of fire departments of cities, towns, and villages, under penalty of \$500 or revocation of license to do business in state, is not violative of Const. art. 58, relating to loan of credit.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

⚡130 (La.) Act No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to officers of fire departments of cities, towns, and villages, under penalty of \$500 or revocation of license to do business in state, is not violative of Const. art. 45, prohibiting payment of money without specific appropriation.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

⚡131 (La.) Dedication to Charity Hospital in New Orleans by Act No. 46 of 1904, of funds from duty on auction sales is not specific appropriation, within Const. art. 45, limiting such appropriations to term of two years.—*Board of Administrators of Charity Hospital v. Richhart*, 71 So. 735.

STATIONS.

See Railroads, ¶58.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

¶8½(1) (La.) Under Const. arts. 48, 50, and Act No. 14 of 1914, incorporating the city of Bogalusa and including the village of Richard-sontown, which was passed without publication, *held* valid.—State v. Landry, 71 So. 763.

¶8½(2) (Ala.) An act of the Legislature, House Bill No. 534, approved February 11, 1915 (Loc. Laws 1915, p. 20), detaching Marengo county from the First judicial circuit, is not violative of Const. 1901, § 106, in that publication of the intent to apply therefor was had only in Marengo county.—Dawson v. State, 71 So. 722.

¶8½(3) (Ala.) In view of provisions of Loc. Acts 1915, p. 293, establishing a board of revenue for Conecuh county, publication of proposed law during a recess of Legislature in 1915 *held* sufficient, under Const. 1901, § 106, to support an enactment at next sitting, though notice declared that enactment of the law would be sought at the next session.—Dunn v. Dean, 71 So. 709.

¶13 (Ala.) Where journals of the House of Representatives showed that Loc. Acts 1915, p. 293, creating board of revenue for Conecuh county, was referred to the standing committee on ways and means and returned approved by committee on mining and manufacturing, the law was invalid, under Const. 1901, § 62.—Dunn v. Dean, 71 So. 709.

¶64(4) (Ala.) The invalidity of section 16, p. 296, Loc. Acts 1915, creating a board of revenue for Conecuh county and providing for vacation of such office, *held* not to overthrow the entire act.—Dunn v. Dean, 71 So. 709.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

¶76(2) (Ala.) Loc. Acts 1915, p. 293, establishing a board of revenue for Conecuh county and abolishing the court of county commissioners, *held* valid under Const. 1901, § 105, not relating to a subject covered by general law.—Dunn v. Dean, 71 So. 709.

¶76(4) (Ala.) Loc. Acts 1915, p. 394, § 1, creating a board of revenue for Monroe county, is not unconstitutional under Const. 1901, § 105, forbidding a local law in a case provided for by a general law.—State v. Slaughter, 71 So. 416.

¶89 (Ala.) Loc. Acts 1915, p. 394, § 1, creating a board of revenue for Monroe county, is not unconstitutional under Const. 1901, § 104, subd. 29, forbidding the Legislature to enact a local law, changing county boundaries.—State v. Slaughter, 71 So. 416.

¶93(3) (Ala.) Population is a valid basis for a classification made in good faith upon which to base a separation of counties in which there shall be a county treasurer from those in which the office is abolished.—State v. Bugg, 71 So. 699.

¶101(1) (Ala.) Loc. Acts 1915, p. 394, § 1, creating a board of revenue for Monroe county, is not violative of Const. 1901, § 104, subd.

29, forbidding enactment of local law for conduct of elections.—State v. Slaughter, 71 So. 416.

¶101(1) (Ala.) Loc. Acts 1915, p. 293, creating the board of revenue for Conecuh county and providing for the selection of one member from each district *held* not invalid under Const. 1901, § 104, subd. 29, as relating to the conduct of elections or designating the place of voting, etc.—Dunn v. Dean, 71 So. 709.

¶102(2) (Ala.) Loc. Acts 1915, p. 293, creating the board of revenue for Conecuh county and abolishing the county commissioner's court, relieving the probate judge of his duties and also his allowance, *held* not invalid under Const. 1901, § 104, subd. 24, as diminishing or increasing, etc., the compensation of public officers.—Dunn v. Dean, 71 So. 709.

III. SUBJECTS AND TITLES OF ACTS.

¶113(3) (La.) Act No. 295 of 1914, entitled "An act to declare and define the conditions upon which foreign fire insurance companies, etc., doing business in this state, may engage and carry on business, etc., and to provide for the distribution of funds arising from the compliance with this act," is not violative of Const. art. 31, requiring object of act to be expressed in title.—Citizens' Ins. Co. v. Hebert, 71 So. 955.

¶118(1) (La.) Acts Extra Sess. 1870, No. 8, § 3, relating to marking animals and entitled "An act relative to crimes and offenses," is not violative of Const. 1888, art. 114, relating to titles of acts.—State v. Dickerson, 71 So. 347.

¶118(2) (La.) The anti-trust acts of 1890 and 1915 *held* not violative of Const. art. 31, relative to title and subject-matter of statutes.—State v. American Sugar Refining Co., 71 So. 137.

¶120(3) (Ala.) Loc. Acts 1915, p. 293, entitled, "An act to establish a board of revenue for Conecuh county, * * * and abolish the court of county commissioners, * * *" is not invalid under Const. 1901, § 45, declaring that it shall contain but one subject, which shall be clearly expressed in its title.—Dunn v. Dean, 71 So. 709.

¶121(1) (La.) Provision of Act No. 182 of 1906, § 3, requiring each taxpayer to make sworn return of property, is within scope of title of act, relating to equalization of assessments, and not violative of Const. art. 31, relating to subjects and titles of acts.—Calcasieu Trust & Savings Bank v. Wetherell, 71 So. 765.

¶123(4) (Fla.) Laws 1911, c. 6208 (Comp. Laws 1914, §§ 884a-884q), relative to roads and bridges and revenue for maintenance and repair of same, *held* not violative of Const. art. 3, § 16, relative to the title and subject-matter of statutes.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, 71 So. 42.

¶125(1) (Ala.) Gen. Acts 1915, p. 348, entitled "An act to abolish the office of county treasurer," is not invalid under Const. 1901, § 45, as not clearly expressing its subject, though the act does not abolish all county treasurers in the state.—State v. Bugg, 71 So. 699.

IV. AMENDMENT, REVISION, AND CODIFICATION.

¶138(2) (Miss.) Laws 1912, c. 232, entitled "An act to amend and enlarge section 8074, Code of 1906, and to extend and enlarge the provisions of the same," etc., *held* violative of Const. § 61, providing that no law shall be amended by reference to its title only.—Seay v. Laurel Plumbing & Metal Co., 71 So. 9.

¶141(2) (La.) Act No. 182 of 1906, relating to equalization of assessments, is independent legislation, not purporting to amend or re-enact any law, and is therefore not within Const. art.

32, requiring republication of acts amended.—*Calcasieu Trust & Savings Bank v. Wetherell*, 71 So. 765.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§158 (Fla.) A statute does not repeal prior statutes by implication, unless such is clearly the legislative intent.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

§159 (Fla.) Where there is a material repugnancy in statutory regulations or anything from which an intent that a later statute shall supersede a prior one may be inferred, it will be given that effect.—*Sparkman v. State*, 71 So. 34.

§159 (Fla.) The earlier of two acts is not repealed by implication, unless the two are manifestly inconsistent with and repugnant to each other.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

A legislative intent to repeal prior statutes or portions thereof may be made apparent, when there is an irreconcilable repugnancy between the two acts.—*Id.*

§161(1) (Ala.) Where a new law, whether in the form of an amendment or otherwise, covers the whole subject-matter of a former law and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication.—*Allgood v. Sloss-Sheffield Steel & Iron Co.*, 71 So. 724.

§161(1) (Fla.) That a statute relates to matters covered in whole or in part by a prior statute does not repeal the older statute.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

Two statutes which may operate on the same subject-matter without repugnancy should each be given the effect designed for them, unless a contrary intent appears.—*Id.*

§162 (Fla.) A general statute covering an entire subject and designed to embrace all regulations of the subject may supersede a former statute covering a portion only of the subject where such is the clear intent, though the two are not wholly repugnant.—*Sparkman v. State*, 71 So. 34.

§162 (Fla.) The rule that subsequent laws abrogate prior laws in conflict with them does not apply where the prior act is special and the subsequent act general.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

A general act will not be construed to repeal or modify a special one embraced within its general terms, unless it is a general revision of the whole subject, or the two acts are so repugnant as to indicate a legislative intent that one should repeal or modify the other.—*Id.*

§164 (Ala.) Where an amendment changes the whole law in its substantial provisions, it must by a necessary implication repeal the old law so far as they are in conflict.—*Allgood v. Sloss-Sheffield Steel & Iron Co.*, 71 So. 724.

Where a statute is amended "so as to read as follows," the amendatory act becomes a substitute for the original, which then ceases to have the force of an independent enactment, and so much of the act as is omitted is repealed.—*Id.*

§170 (Ala.) The repeal and simultaneous reenactment of substantially the same statutory provisions is to be construed, not as an implied repeal of the original statute, but as a continuation thereof.—*Allgood v. Sloss-Sheffield Steel & Iron Co.*, 71 So. 724.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§181(1) (Fla.) The legislative intent is to be determined from the language used, the subject-matter, the purpose, and all other relevant matters.—*Sparkman v. State*, 71 So. 34.

§190 (Ala.) Where a statute is plain and unambiguous, there is no room for construction to determine its meaning.—*Louisville & N. R. Co. v. Western Union Telegraph Co.*, 71 So. 118.

§197 (Miss.) "And" will be construed as "or" in Code 1906, § 4252, providing for exemption of "all the property belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes," so as to exempt property of religious institutions.—*Adams County v. Catholic Diocese of Natchez*, 71 So. 17.

§206 (Miss.) A statute should not receive such a construction as would render any of its provisions vain and useless.—*McKenzie v. Boykin*, 71 So. 382.

§211 (La.) Where the title of a statute refers to unlawful acts, and the body of the act leaves out the word "unlawful," the whole act will be construed to refer to unlawful acts.—*State v. American Sugar Refining Co.*, 71 So. 137.

§214 (La.) The statute as to defaults having been taken from the civil law, in construing it, the construction of the civil law by courts and law-writers may be consulted.—*Watson v. Feibel*, 71 So. 585.

§219 (Fla.) When the meaning of an act, such as Laws 1915, c. 7120, relative to the fishing industry, is plain, a construction contrary to that meaning will not be given it because an executive officer grants a general license operative outside the purview of the act.—*Ex parte Perry*, 71 So. 174.

§225 (Fla.) In the absence of express repeal or irreconcilable repugnancy, the effect of a later statute on a former one relating to the same subject-matter depends on the legislative intent.—*Sparkman v. State*, 71 So. 34.

§225 (Fla.) Statutes should be construed with reference to the Constitution and the purpose to be accomplished, and in connection with other laws in pari materia, though they do not refer to each other.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

Where a statute embraces only part of a subject covered comprehensively by a prior law, the two should be construed together, unless a different legislative intent appears; the latter being an exception or qualification of the former only so far as they are repugnant.—*Id.*

§225½ (Fla.) Two acts in pari materia, passed at the same session, should be read together, and, if possible, so construed that both may be effective.—*Ex parte Perry*, 71 So. 174.

Where there is a necessary conflict between a general act and a subsequently enacted local act passed at the same session, the latter will prevail.—*Id.*

§225½ (Fla.) On conflict between general and local acts passed at the same session, the latter will prevail.—*Ex parte Perry*, 71 So. 174.

VII. PLEADING AND EVIDENCE.

§285 (Ala.) In determining whether a statute was enacted with constitutional formalities, the courts may look only to the journals of the legislative houses.—*Dunn v. Dean*, 71 So. 709.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14. 248, 273, 513, 984
Art. 1, § 8. 513

STATUTES AT LARGE.

1849, March 2, ch. 87, 9
Stat. 352. 784
1850, Sept. 28, ch. 84, 9
Stat. 519. 270
1887, Feb. 4, ch. 104, § 20,
24 Stat. 386. Amended
by Act 1906, June 29, ch.
3591, § 7(11), (12), 34
Stat. 595. 283
1905, March 3, ch. 1485, 83
Stat. 1258. 270
1906, June 29, ch. 3591, §
7(11), (12), 34 Stat. 595
161, 283, 338
1908, April 22, ch. 149, 35
Stat. 65. 369
1908, April 22, ch. 149, 35
Stat. 65. Amended by
Act 1910, April 5, ch.
143, 36 Stat. 291. 369
1908, April 22, ch. 149, § 2,
35 Stat. 65. 741
1910, April 5, ch. 143, 36
Stat. 291. 369
1910, June 18, ch. 309, §
7, 36 Stat. 544. 750

REVISED STATUTES.

§ 2296. 281

COMPILED STATUTES
1913.

4551. 281
8563. 750
8592. 161, 283, 338
§ 8657-8665. 336, 369
8658. 741

ALABAMA.

CONSTITUTION.

6. 76, 709
23. 118
§ 42, 43. 709
45. 699, 709
62. 709
104, subsec. 24. 709
104, subsec. 29. 416, 709
105. 416, 709
106. 709, 722
175. 709
§ 215, 222, 224. 448
232. 82
242. 118

CODE 1886.

§ 3253 et seq. 996

CODE 1896.

§§ 1244, 1246. 118

CODE 1907.

11. 659
§ 210, 211. 684
455. 108
1259. 75
1275. 463
1500. 664
2082, subsec. 9. 100
2223, 2260, 2266. 427
2272, 2297. 700
2340-2347. 100
2403. 99

2411. 724
2411. Amended by Laws
1909 (Sp. Sess.) p. 166;
Laws 1915, p. 120. 724
2485. 685
2496, 2497, 2499. 656
2590, 2593. 106
2841. 683
2961. 989
3011. 180
3018. 106
3019. 659
3312. 108
3355. 177
3413. 411
3509. 419
3510, 3511, 3516. 109
3642-3653. 82
3666. 963
3734. 668
3744. 419
§ 3789, 3791. 618
3793, subsec. 3. 696
3867. 118
3882. 717
3910, subsec. 1. 676
3910, subsec. 2. 406, 678
3910, subsec. 3. 406
4055. 397
4058. 397, 404
4105. 109
4197. 661, 694
4299. 409
4494. 177
4572. 67, 409
4743. 963
4748. 340
§ 4758, 4777. 413
4785. 661, 694
4899. 618
5025. 681
5222 et seq. 996
§ 5299, 5301. 126
5326. 989
5330. 397
5332. 106, 715
5334. 618
5372. 51
5382, form 12. 67
5476. 456, 682
5732. 979
5817. 118
§ 5860, 5865. 963
5882. 108
5965. 118
5999. Amended by Laws
1915, p. 595. 706
§ 6039-6043. 450
§ 6069, 6071, 6072, 6074. 430
6110. 126
6256. Amended by Laws
1915, p. 708. 972
6264. 978, 983
6419. 617
§ 6628, 6629. 82
6664, 6666. 690
6703. 977
6888. 690
6955, subsec. 1. 430
7350. 76
§ 7620, 7635. 979
7897. 96

LOCAL LAWS.

1911, p. 58. 979
1915, pp. 20, 62. 722
1915, p. 293. 709
1915, p. 296, § 16. 709

LAWS.

1907, p. 455. 724
1909 (Sp. Sess.) p. 126. 82

1909 (Sp. Sess.) p. 166. 724
1909 (Sp. Sess.) p. 258, §
2. 976
1909 (Sp. Sess.) p. 263, §§
1, 4. 994
1909 (Sp. Sess.) p. 317, §
32. 79
1909 (Sp. Sess.) p. 320, §
32. 96
1909 (Sp. Sess.) p. 339, § 6.
Amended by Loc. Laws
1915, p. 62. 722
1911, p. 83. 697
1911, p. 91. 690
1911, p. 184, §§ 33e, 33g. 99
1915, pp. 30, 32, 34, §§
29½, 32, 33. 973
1915, p. 120. 724
1915, p. 134. 983
1915, p. 239. 679
1915, p. 244, § 15. 678
1915, p. 348. 699
1915, p. 392, § 8. 99
1915, p. 394, § 1. 416
1915, p. 397, § 16. 99
1915, pp. 489-533. 724
1915, p. 495, § 18. 99
1915, pp. 573-575, §§ 1, 5,
9. 704
1915, p. 595. 706
1915, p. 708. 972
1915, p. 815. 967, 982
1915, p. 940, § 3. 976

FLORIDA.

CONSTITUTION.

Art. 3, § 16. 42
Art. 5, § 15. 634
Art. 8, §§ 1, 2. 42
Art. 9, § 1. 34, 926
Art. 9, §§ 3, 5. 42, 926
Art. 10, §§ 1, 4. 31

GENERAL STATUTES 1906.

§§ 643, 644. 608
1425. 919
1624. 374
1698. 540
1904. 329
2237. 627
2462. 31
2677. 374
§ 2892, 2893. 474
2893. Amended by Laws
1913, ch. 6527, § 3. 474
§§ 2985, 3046. 630
3148. 369, 552
§ 3149, 3150. 552
3221. 27
3476. 277
3481. 332, 915
§ 4012, 4035. 915

COMPILED LAWS 1914.

§§ 884a-884q. 42
1343a. 842
2237, subsec. 2. 627
2462. 31
2893. 474
4072. 278

LAWS.

1899, ch. 4749. 625
1906, ch. 5403, §§ 2, 3. 842
1907, ch. 5596. 34
1907, ch. 5596, §§ 16-18,
23, 24, 66. 34
1907, ch. 5605. 34
1907, ch. 5651. 278
1907, ch. 5717. 760

1907, ch. 5717, § 4.....	760
1907, ch. 5762.....	42
1911, ch. 6208.....	42
1911, ch. 6208, Amended by Laws 1915, ch. 6879..	42
1913, ch. 6521.....	552
1913, ch. 6527.....	474
1913, ch. 6527, § 3.....	474
1913, ch. 6527, § 3, subsecs. 5, 7, 8.....	474
1913, ch. 6678, Amended by Laws 1915, ch. 7145..	42
1913, ch. 6806, Amended by Laws 1915, ch. 7120..	174
1915, ch. 6879.....	42
1915, ch. 6974.....	328
1915, ch. 7120.....	174
1915, ch. 7145.....	42

LOUISIANA.**CONSTITUTION 1868.**

Art. 114.....	347
---------------	-----

CONSTITUTION 1879.

Arts. 219, 220.....	149
Arts. 235, 237.....	137

CONSTITUTION 1898.

Art. 117.....	951
Art. 190.....	137
Art. 233.....	536
Art. 247.....	149

CONSTITUTION 1913.

Art. 2.....	934
Art. 10.....	137
Arts. 16, 17.....	248
Art. 31.....	137, 765, 955
Art. 32.....	765
Art. 45.....	735, 955
Arts. 48, 50.....	703
Art. 58.....	955
Art. 85.....	769
Art. 95.....	524, 894
Art. 141.....	886
Art. 197, § 1.....	768
Art. 222.....	204
Art. 224.....	955
Art. 225.....	513
Art. 227.....	955
Art. 229.....	513
Art. 247.....	149
Art. 264.....	196
Art. 286.....	945
Art. 319.....	886

REVISED CIVIL CODE.

Arts. 117, 118.....	358
Art. 214.....	492
Arts. 455, 862.....	187
Art. 1468.....	492
Art. 1469.....	215
Arts. 1481, 1491.....	846
Arts. 1655, 1691, 1693.....	215
Art. 1710.....	846
Arts. 1721, 1723.....	215
Art. 1759.....	534
Art. 1890, 1911, 1912.....	585
Arts. 2024, 2034.....	153
Art. 2047.....	585
Art. 2245.....	215
Art. 2463.....	534
Art. 2464.....	153
Arts. 2557, 2563.....	585
Art. 2632.....	770
Art. 2645.....	206
Art. 2697.....	487
Art. 2725.....	130
Art. 2749.....	200
Art. 3042, Amended by Laws 1908, No. 225.....	248
Arts. 3478, 3543.....	536

CODE OF PRACTICE.

Art. 17.....	534
Arts. 171, 172.....	137

Art. 240, par. 4.....	849
Art. 245.....	191
Art. 298, subd. 10.....	128
Arts. 325, 484.....	215
Art. 511.....	770
Art. 567.....	529
Art. 671.....	128
Arts. 732, 733.....	147
Art. 737.....	934
Arts. 739, 743.....	128
Art. 898.....	895
Art. 907.....	894
Art. 1059.....	215

REVISED STATUTES.

§ 64.....	128
131.....	137
145, Amended by Laws 1882, No. 53; Laws 1904, No. 46.....	735
576.....	128
592.....	770
667.....	860
691, Amended by Laws 1910, No. 157.....	490
1063.....	239
§ 3369, 3371.....	187
3426.....	128

CITY CHARTERS.

New Orleans, § 21, Laws 1912, No. 159.....	886
---	-----

LAWS.

1860, No. 195.....	209
1870 (Ex. Sess.) No. 8, § 3..	347
1874, No. 66.....	849
1874, No. 66, §§ 1-3.....	849
1874, No. 105, § 5.....	536
1876, No. 91, §§ 1, 2.....	128
1880, No. 40.....	730
1880, No. 40, § 2.....	730
1880, No. 98, § 3.....	951
1880, No. 114.....	149
1882, No. 43.....	860
1882, No. 53.....	735
1888, No. 80.....	536
1890, No. 86.....	137
1894, No. 41, § 6.....	213
1894, No. 54.....	792
1898, No. 101.....	765
1898, No. 107.....	134
1898, No. 135, § 3.....	860
1898, No. 135, § 11.....	
Amended by Laws 1914, No. 182.....	860
1898, No. 136, § 15.....	187
1898, No. 152, § 55.....	496
1898, No. 152, § 55.....	
Amended by Laws 1900, No. 132.....	496
1898, No. 170.....	244
1898, No. 171, § 15.....	
Amended by Laws 1904, No. 47.....	513
1900, No. 132.....	496
1902, No. 220.....	860
1904, No. 46.....	735
1904, No. 47.....	513
1904, No. 54, § 1, Amend- ed by Laws 1903, No. 284.....	196
1904, No. 54, § 2.....	196
1904, No. 71.....	213
1904, No. 137.....	524, 804
1906, No. 63.....	244
1906, No. 124.....	774
1906, No. 182.....	765
1906, No. 182, § 3.....	765
1907 (Ex. Sess.) No. 14..	945
1908, No. 38.....	765
1908, No. 225.....	248
1908, No. 284.....	196
1908, No. 284, Amended by Laws 1912, No. 243..	196
1908, No. 301.....	214
1910, No. 157.....	490, 862
1910, No. 163.....	735

1912, No. 111, § 1, par. 7..	512
1912, No. 159, § 21.....	886
1912, No. 198, § 6.....	727
1912, No. 243.....	196
1914, No. 14.....	763
1914, No. 74, § 7.....	195
1914, No. 76.....	512
1914, No. 182.....	860
1914, No. 210.....	779
1914, No. 205.....	955
1915 (Ex. Sess.) No. 11..	137
1915 (Ex. Sess.) No. 24..	209

MISSISSIPPI.**CONSTITUTION.**

2.....	318
14.....	273
§ 61, 112.....	9
147.....	567, 645, 737
159f.....	745
195.....	750
250.....	382

ANNOTATED CODE 1892.

§ 851.....	644
------------	-----

CODE 1906.

536.....	745
601.....	576
603.....	289
649.....	824
687.....	266
§ 707-711.....	907
709.....	266
717.....	264
721.....	391, 878
§ 722, 744.....	264
755.....	571
819.....	897
920.....	16
922.....	644
923.....	645
1073.....	572
1261.....	911
§ 1591, 1593.....	897
1606.....	866
1659.....	300
1916.....	166
1999.....	801
2065.....	162
§ 2490, 2491, 2494, 2509, 2516, 2516a.....	868
2596.....	746
2597.....	314
2598.....	266
2627.....	314
2763.....	266
2765.....	900
2768.....	291
2782.....	315
2787, 2877, 2878.....	266
3058, 3060.....	565
3074, Amended by Laws 1912, ch. 232.....	9
§ 3097, 3099.....	568
3101.....	645
3103.....	866
3127.....	653
3307.....	570
3456.....	867
3473.....	318
3521.....	811
§ 3927, 3932.....	907
4001.....	266
§ 4053, 4058.....	317
§ 4160, 4175.....	382
4232.....	315
4233.....	910
4251.....	17
4251d.....	289
4252.....	17, 289
4328, Amended by Laws 1908, ch. 199.....	577
4332.....	577
§ 4549, 4590, 4591.....	171

§ 4670	375
4775	266
4784	312, 375
§ 4839, 4840.....	827
4853	161
4857	259
5078	4
5080	300

LAWS.

1892, ch. 93.....	902
1892, ch. 93, § 13.....	902
1908, ch. 76.....	904
1908, ch. 199.....	577
1908, ch. 239.....	9
1912, ch. 124.....	871
1912, ch. 141, §§ 1, 2.....	273

1912, ch. 144. Amended	
by Laws 1914, ch. 209..	643
1912, ch. 196, § 13.....	380
1912, ch. 198, § 5.....	320
1912, ch. 232.....	9
1914, ch. 124.....	645
1914, ch. 163.....	867
1914, ch. 209.....	643

STEALING.

See Larceny.

STENOGRAPHERS.

See Courts, ¶57.

STIPULATIONS.

¶14(1) (La.) A stipulation between the parties held to authorize a presumption that the right to file motion for new trial was intended to be waived, and to preclude dismissal of an appeal on the ground that it was taken prematurely before expiration of the delay within which ordinarily a motion for new trial may be filed.—Succession of Lefort, 71 So. 215.

¶18(1) (Miss.) In action for overflow of land caused by defendant's railroad embankment, agreement that conditions at the trial were substantially the same as those existing at a former trial, in which plaintiff had recovered, held an admission of liability, leaving only the question of damages for the jury.—Yazoo & M. V. R. Co. v. Sibley, 71 So. 167.

STOCK.

See Corporations, ¶90.

STOCK LAWS.

See Animals, ¶50.

STORAGE.

See Warehousemen.

STREET RAILROADS.**II. REGULATION AND OPERATION.**

¶81(1) (La.) Those in charge of street car are under duty even without notice to inform themselves of conditions along railway and be on constant lookout to avoid accidents.—Boylan v. New Orleans Ry. & Light Co., 71 So. 360.

¶85(1) (La.) Cars have right of way because they are more cumbersome and difficult to stop, but in other respects rights to use of highway are equal.—Boylan v. New Orleans Ry. & Light Co., 71 So. 360.

¶85(2) (La.) Where fire apparatus of city is given right of way by statute, ordinance, or rule of railroad company, persons in charge of street car must yield to fire apparatus and use every reasonable precaution to avoid collision.—Boylan v. New Orleans Ry. & Light Co., 71 So. 360.

¶98(8) (La.) Persons crossing street car tracks in a city should look and listen for approaching cars.—Walker v. Rodriguez, 71 So. 499.

¶110(2) (Ala.) Where the complaint in an action against a street railroad for damages to an automobile charged a negligent failure to guard an excavation with sufficient danger signals, a plea alleging by way of conclusion that plaintiff "assumed the risk" of driving between the lights was a plea of the general issue.—Kearns v. Mobile Light & R. Co., 71 So. 993.

¶117(3) (Ala.) The sufficiency of signals or barriers to give reasonable warning against danger in a street, especially with respect to its

character, is generally a question of fact for the jury.—Kearns v. Mobile Light & R. Co., 71 So. 993.

On evidence in action for damages to an automobile driven into an excavation, the question whether two rows of red lights about eight feet apart on each side of street railroad track, between the rails of which there was an excavation, constituted a reasonable warning to travelers, held for the jury.—Id.

STREETS.

See Highways; Municipal Corporations, ¶647-706.

STRIKING OUT.

See Criminal Law, ¶696, 1167; Pleading, ¶352; Trial, ¶92.

SUBMERGED LANDS.

See Navigable Waters, ¶36, 37.

SUBSCRIPTIONS.

See Corporations, ¶80, 624.

SUBSTITUTED SERVICE.

See Constitutional Law, ¶809.

SUFFRAGE.

See Elections.

SUICIDE.

See Evidence, ¶472; Insurance, ¶825.

SUMMONS.

See Process.

SUPPORT.

See Vendor and Purchaser, ¶254.

SURETY COMPANIES.

See Appeal and Error, ¶380.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Boundaries, ¶54; Public Lands, ¶25.

SURVIVAL.

See Abatement and Revival, ¶48-53.

SWAMP LANDS.

See Public Lands, ¶61.

TALESMEN.

See Jury, ¶72.

TAXATION.

See Constitutional Law, ¶284; Counties, ¶190, 195; Highways, ¶122; Insurance, ¶20; Municipal Corporations, ¶958; Statutes, ¶121, 141.

I. NATURE AND EXTENT OF POWER IN GENERAL.

⇒20 (La.) Taxation power of state has no jurisdiction over persons, or property outside of state.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

⇒24 (La.) Assessments for local purposes do not come within Const. arts. 224, 227, providing Legislature can itself directly exercise taxing power only for state purposes.—*Citizens' Ins. Co. v. Hebert*, 71 So. 955.

Act No. 295 of 1914, requiring foreign fire insurance companies to pay state treasurer 1 per cent. of premiums, to be turned over to offices of fire departments of cities, towns, and villages, under penalty of \$500 or revocation of license to do business in state, is not violative of Const. arts. 224, 227.—*Id.*

⇒25 (Fla.) The legislative determination as to what constitutes a "county purpose" for which taxes may be assessed will not be made ineffectual by the courts, unless some constitutional provision is violated, or the particular enactment can have no legal or practical relation to any county purpose.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

⇒29 (Fla.) There is no express constitutional provision as to special assessments for local improvements, or as to the formation of taxing districts for particular purposes.—*Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County*, 71 So. 42.

Where the case does not conclusively fit it, the determination of what shall be a taxing district rests with the Legislature, free from control by the courts, except as the legislative power may be limited by constitutional provisions.—*Id.*

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

⇒44 (Miss.) Laws 1908, c. 239, authorizing an assessment in a named county, does not violate Const. § 112, requiring equality and uniformity of taxation and assessment.—*Horton v. King*, 71 So. 9.

⇒49 (Fla.) The "just valuation" required by Const. art. 9, § 1, is not secured where the valuation of some property is higher proportionately than the valuation of other property assessed for the same purpose.—*Sparkman v. State*, 71 So. 34.

III. LIABILITY OF PERSONS AND PROPERTY.

(D) Exemptions.

⇒204(2) (Miss.) Statutes creating exemptions from taxation must be strictly construed; but the rule is relaxed as to exemptions to religious and educational institutions, as to which legislative intention governs.—*Adams County v. Catholic Diocese of Natchez*, 71 So. 17.

⇒204(2) (Miss.) Statutes exempting property from taxation are to be strictly construed against the exemption.—*New Standard Club v. McRaven*, 71 So. 289.

⇒241(1) (Miss.) The property of a social club which incidentally dispensed charity, is not exempt under Code 1906, § 4251, par. d, exempting from taxation the property of charitable corporations.—*New Standard Club v. McRaven*, 71 So. 289.

⇒241(2) (Miss.) Lands of incorporated Catholic diocese, rents of which were used to maintain orphans' homes, held exempt from taxation under Code 1906, §§ 4251, 4252, providing exemptions of property used for charitable purposes.—*Adams County v. Catholic Diocese of Natchez*, 71 So. 17.

⇒241(3) (Miss.) A social club which collected dues and used part for charitable purposes, cannot escape taxation under Code 1906, § 4252, as a benevolent order, where not run on

the lodge plan.—*New Standard Club v. McRaven*, 71 So. 289.

⇒251 (Miss.) One claiming to fall within a statute exempting property from taxation has the burden of proof.—*New Standard Club v. McRaven*, 71 So. 289.

V. LEVY AND ASSESSMENT.

(B) Assessors and Proceedings for Assessment.

⇒317(1) (Fla.) County commissioners have no general power to make tax assessments, but have only such power as is specially conferred on them by Acts 1907, c. 5596, §§ 16, 17, 18, 23, 24, 66, to secure equalization of tax values.—*Sparkman v. State*, 71 So. 34.

(C) Mode of Assessment in General.

⇒347 (Fla.) Valuations for taxation must have just relation to real value of property, and there must be no substantial inequality in valuations of various kinds and items of property.—*Graham v. City of West Tampa*, 71 So. 926.

While law accords range of discretion to officer substantially complying with law in valuing property for taxation, if steps required are not in good faith actually taken and valuations are essentially unjust, assessment is invalid.—*Id.*

⇒362 (Ala.) Code 1907, § 2260, expressly confers upon the county tax commissioner authority to make assessments for escaped taxes not more than five years preceding.—*State v. Doster Northington Drug Co.*, 71 So. 427.

After an escape assessment is made, it becomes due and payable and enforceable, except only that under the terms of Code 1907, § 2266, 10 per cent. penalty is added.—*Id.*

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

⇒406 (Ala.) Under Code 1907, § 2082, subd. 9, providing for taxation of corporations, a corporation's failure to make statement of its solvent credits so that they could be deducted from assessment of its corporate stock, while improper, does not render it liable to subsequent taxation on such credits as if they were omitted property.—*Bower v. American Lumber & Export Co.*, 71 So. 100.

⇒406 (Miss.) Where a foreign corporation which it was claimed did business in the state, paid no taxes, court of chancery cannot, in suit by the revenue agent, assess and equalize omitted taxes, and render a personal decree therefor; it not being authorized to assess taxes.—*Johnston v. Puffer Mfg. Co.*, 71 So. 377.

(E) Assessment Rolls or Books.

⇒421(1) (Miss.) A description of land on assessment roll held sufficient without the aid of parol testimony.—*Standard Drug Co. v. Pierce*, 71 So. 577.

⇒446 (Ala.) The assessment and valuation of property is a determination in its nature judicial, and is final, unless impeached for fraud or lack of jurisdiction.—*State v. Doster-Northington Drug Co.*, 71 So. 427.

Where the county tax commissioner has duly assessed escaped taxes, and the taxpayer has concurred and the taxing authorities seek no annulment or review within the tax year, the assessment becomes final and binding on the taxpayer and taxing authorities after the expiration of the tax year.—*Id.*

(F) Equalization of Assessments.

⇒448 (Fla.) Acts 1907, c. 5596, covering the general subject of assessment and collection of taxes, held to supersede the previously enacted chapter 5605, which covers only a portion of the subject-matter covered by the later statute.—*Sparkman v. State*, 71 So. 34.

⇒449(1) (Fla.) Where county commissioners have exercised the power specially conferred on

them to secure equalization of tax values and final adjournment has been taken, their power as a board of equalization ceases.—*Sparkman v. State*, 71 So. 84.

(G) Review, Correction, or Setting Aside of Assessment.

§453 (Fla.) Where essential requirements of law are not observed in valuing property for taxation, and valuations are shown by admissions to be excessive and unequal, relief may be had in equity, though proceedings for relief from administrative officers have not been utilized.—*Graham v. City of West Tampa*, 71 So. 926.

§468 (La.) Acts No. 170 of 1898 and No. 63 of 1906 impose the mandatory duty on police jury, sitting as board of reviewers, to take initiative in interest of state and correct assessment if too low.—*Haynes v. Police Jury of Ouachita Parish*, 71 So. 244.

§476 (Ala.) Although the right of general and complete supervision is given to the state tax commission by Code 1907, § 2223, yet, in view of section 2260 and other statutes, its power to set aside tax valuations and assessments must be exercised before the end of the current tax year.—*State v. Doster-Northington Drug Co.*, 71 So. 427.

§485(2) (La.) The police jury, sitting as board of reviewers, is not prohibited from obtaining information as to value of property from other sources than assessors and taxpayers.—*Haynes v. Police Jury of Ouachita Parish*, 71 So. 244.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

§526 (Ala.) Under Revenue Law, § 16, Code 1907, § 2403, and Acts 1911, p. 184, §§ 33e, 33g, and despite Acts 1915, p. 495, § 18, and section 8 of the Revenue Law, corporation franchises are payable on January 1st, and the franchise should be issued for the whole year.—*Williams v. State*, 71 So. 99.

§526 (Ala.) The tax year commences October 1st and ends September 30th.—*State v. Doster-Northington Drug Co.*, 71 So. 427.

§530 (Ala.) Where a tax charged on a subject of taxation has been once seasonably paid, it cannot be again rightfully collected or assessed.—*Bower v. American Lumber & Export Co.*, 71 So. 100.

Where taxes on solvent credits had already been paid as a part of the value of a corporation's capital stock, *held*, that the fact that the corporation at the demand of the tax collector voluntarily furnished a return of such credits does not render it liable to taxation thereon.—*Id.*

§541 (Ala.) Where a corporation which had omitted a statement of its solvent credits at the request of the tax collector furnished a report of such credits, and, though taxes were not due, paid them to avoid the collector's levying execution on its property, it was entitled to recover such payment.—*Bower v. American Lumber & Export Co.*, 71 So. 100.

§543(1) (Ala.) Where a corporation, to avoid levy of execution on its property paid taxes illegally assessed, *held*, that it was not entitled to equitable aid in recovering such taxes; for it might have withheld payment or invoked the remedy provided by Code 1907, §§ 2340-2347.—*Bower v. American Lumber & Export Co.*, 71 So. 100.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

§568(6) (Ala.) Application of taxes paid by tax collector to county treasurer to payment of

taxes for preceding year by authority or consent of collector was conversion creating liability on collector's bond.—*State v. Tingle*, 71 So. 991.

(C) Remedies for Wrongful Enforcement.

§604 (Ala.) Equity will afford no relief to or for a complaining taxpayer or one assessed as a taxpayer, unless his case presents some special matter of equitable cognizance; mere illegality, hardship, or irregularity being insufficient.—*Bower v. American Lumber & Export Co.*, 71 So. 100.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§639 (Ala.) The power of the probate court in proceedings for the sale of property for delinquent taxes is limited and statutory, and, to sustain its judgment, the record, in the absence of other proof of the regularity of the proceedings that went before, should show the facts essential to its jurisdiction.—*Gilliland v. Armstrong*, 71 So. 700.

§658(3) (Ala.) Under Code 1907, § 2272, notice of proceeding for sale of land for delinquent taxes, while importing notice to the party named who had died before the decree was rendered, *held* not to import notice to her personal representative.—*Gilliland v. Armstrong*, 71 So. 700.

§662 (Ala.) Where a notice of a tax sale to the person assessed or his personal representative has been lost or mislaid, it is competent to prove its contents.—*Gilliland v. Armstrong*, 71 So. 700.

§669 (Miss.) Where taxes were assessed against the joint owners, *held*, that one of them having paid his assessment, the collector could not apportion the assessment against each, and on the failure of the other validly sell his interest.—*Fountain v. Joullian*, 71 So. 2.

§689(2) (La.) A sale of property by the state under Act No. 80 of 1888 is not a "sale of property for taxes" within Const. 1898, art. 233, providing that no such sale shall be set aside, except for certain causes, unless proceeding be instituted within three years.—*Gilmore v. Frost-Johnson Lumber Co.*, 71 So. 536.

XI. TAX TITLES.

(B) Tax Deeds.

§761 (Miss.) Under Code 1906, § 4328, amended by Laws 1908, c. 199, and Code 1906, § 4332, a tax deed dated subsequent to the day for tax sales is not void, but continuance of the sale to that day may be proved by parol.—*Standard Drug Co. v. Pierce*, 71 So. 577.

§764(2) (Miss.) A description of land in tax deed as "south $\frac{1}{2}$ of north $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2," Forest county, Miss., together with the assessment roll and parol testimony identifying the description, *held* sufficient to identify the land.—*Standard Drug Co. v. Pierce*, 71 So. 577.

§775 (Miss.) Describing land in the tax deed as "south $\frac{1}{2}$ of north $\frac{1}{2}$, lot 5, block 113, Kamper & Whinnery No. 2," Forest county, Miss., *held* sufficient to make competent the assessment roll and parol testimony identifying the land as being in a certain city.—*Standard Drug Co. v. Pierce*, 71 So. 577.

§788(5) (Ala.) Under Code 1907, § 2297, the probate judge's deed in a tax sale is only "prima facie evidence of the regularity of all proceedings subsequent to the judgment recited therein," and does not cure defects in the record of the judgment and its necessary antecedent proceedings.—*Gilliland v. Armstrong*, 71 So. 700.

(C) Actions to Confirm or Try Title.

⚡805(2) (La.) The prescription of three years under Act No. 106 of 1874, § 5, like the five-year prescription under Civ. Code art. 3543, cannot defeat an action of nullity founded on a radical defect in a tax sale.—*Gilmore v. Frost-Johnson Lumber Co.*, 71 So. 538.

⚡805(4) (La.) The three-year prescription under Const. 1898, art. 233, does not commence until the tax deed is duly recorded, whether the tax sale was made before or after adoption of the Constitution.—*Gilmore v. Frost-Johnson Lumber Co.*, 71 So. 538.

⚡809(2) (La.) Under Act No. 101 of 1898, relating to suits for confirmation of tax titles, failure to verify petition does not justify conclusion that appointment of curator ad hoc was not without sufficient showing as to existence or whereabouts of former owner.—*Hamburger v. Purcell*, 71 So. 765.

⚡816 (La.) Judgment of court having jurisdiction of subject-matter, under Act No. 101 of 1898, confirming title of purchaser at tax sale, cannot be collaterally attacked in suit by owner, under Act No. 38 of 1908, to establish title.—*Hamburger v. Purcell*, 71 So. 765.

TEACHERS.

See Schools and School Districts, ⚡130.

TELEGRAPHS AND TELEPHONES.

See Commerce, ⚡8; Eminent Domain, ⚡47; Libel and Slander, ⚡9.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⚡11 (Ala.) Code 1907, § 5817, does not, in connection with Const. 1901, § 242, give telegraph companies an easement along railroad rights of way.—*Louisville & N. R. Co. v. Western Union Telegraph Co.*, 71 So. 118.

A contract, giving a telegraph company the right to maintain its wires along a railroad right of way, held not to give it a permanent easement.—*Id.*

II. REGULATION AND OPERATION.

⚡27 (Ala.) The damages recoverable for breach of a contract made in Alabama, to transmit a message to Illinois, includes damages for mental distress, though such damages could not be recovered under the laws of Illinois.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡36 (Ala.) It is the duty of a telegraph company to exercise due care and skill to transmit and deliver telegrams with substantial accuracy.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡39 (Ala.) Telegraph company held guilty of breach of duty in changing a message so as to lead plaintiff to believe that his wife, instead of her father, was operated upon, rendering it liable at least to nominal damages.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡54(5) (Miss.) Under Const. 1890, § 195, stipulation limiting amount of damages in un-repeated telegraph message held void, so that the defendant was liable for actual damages for mistake in transmitting a message.—*Western Union Telegraph Co. v. Bassett*, 71 So. 750.

⚡66(2) (Ala.) Where, in an action for damages due to a change in the wording of a telegram, the question was whether the addressee was justified in concluding that his wife instead of her father had been operated upon, held, that evidence that she had not entirely recovered from a prior operation was properly admitted.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡67(1) (Ala.) Where plaintiff is induced by a change in a telegram to believe that his wife instead of her father has been operated upon, the

expense of a prompt trip undertaken by him to be with her held part of the damages recoverable under a count stating a cause of action in tort.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡67(5) (Ala.) Action of the addressee of a telegram in promptly making a trip to be with his wife, in consequence of a change in a telegram whereby he was induced to believe that she had been operated upon, held to be a consequence of the breach which was within contemplation of the contracting parties.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡67(5) (Miss.) Expenses incurred by plaintiff in taking his baseball team to games by reason of the change of the words "no guaranty" in a message relating to such games, to the words "to guaranty," held a direct consequence of the negligence, and recoverable.—*Western Union Telegraph Co. v. Bassett*, 71 So. 750.

⚡68(1) (Miss.) Where sender of message was, by mistake, notified that plaintiff was "unknown at the courthouse," held plaintiff could not recover compensatory damages for mental suffering.—*Western Union Telegraph Co. v. Ragsdale*, 71 So. 818.

⚡69 (Miss.) In an action against a telegraph company, where it appeared that the mistakes were not made by willful or gross negligence, but in good faith, punitive damages were not recoverable.—*Western Union Telegraph Co. v. Ragsdale*, 71 So. 818.

⚡70(1) (Ala.) In an action for damages from change in a telegram sent plaintiff by his wife, in consequence of which plaintiff made a trip to see his wife, held, that the damages recoverable included not only the expense of the trip, but the cost of the message and the value of the time lost by him.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡73(1) (Ala.) Whether the addressee of a telegram which as delivered read "have operated on" instead of "papa operated on," was reasonably warranted in concluding from the message that the sender, his wife, had been operated on, held for jury.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡73(5) (Miss.) Where a telegraph company failed to deliver a message within proper limits, and due to neglect of its servants to transmit, and without other excuse, and the addressee sued for punitive damages, it was error to refuse to submit that issue to the jury.—*Postal Telegraph-Cable Co. v. Ross*, 71 So. 904.

⚡74(5) (Ala.) Where the petitioner in an action for damages for the incorrect transmission of a telegram contained two counts, one ex delicto, the other ex contractu, and it appeared that damages for mental distress, though recoverable under the latter count could not be recovered under the other, error could not be predicated on the refusal of instructions which failed to recognize this distinction.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡78(1) (Miss.) It is error to instruct peremptorily for plaintiff in her suit for the statutory penalty of \$25, provided by Laws 1908, c. 76, for failure to deliver a message; the statute expressly applying only to delay in delivery or incorrect transmission.—*Postal Telegraph-Cable Co. v. Ross*, 71 So. 904.

TENANCY IN COMMON.

See Taxation, ⚡669.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡15(2) (Fla.) Open, notorious, continuous adverse possession by one cotenant will ripen into title as against other cotenant only when character of possession has been brought home to the latter and continued thereafter for seven years.—*Christopher v. Mungen*, 71 So. 625.

TENDER.

See Mortgages, ¶300, 335; Release, ¶52.

¶18 (Miss.) A tender once made is ineffectual for any purpose if not kept good.—*Smith v. Williams-Brooke Co.*, 71 So. 648.

¶24 (Miss.) When the benefit of tender is claimed, the money must be produced and placed in the custody of the court so that it may be awarded to the proper party.—*Smith v. Williams-Brooke Co.*, 71 So. 648.

THEFT.

See Larceny.

THREATS.

See Homicide, ¶158.

¶10 (Miss.) Where the mayor commissioner and ex officio justice of the peace of a city in good faith and out of friendship informed a mother that her son was suspected of burning buildings, and advised her to take him and leave the city, he is not liable in an action for threat of malicious prosecution of the son to punitive damages.—*Meek v. Harris*, 71 So. 1.

TIMBER.

See Logs and Logging; Trespass, ¶52.

TIME.

See Adverse Possession, ¶41; Appeal and Error, ¶344-345, 627; Bills and Notes, ¶394; Continuance; Contracts, ¶211, 301, 305; Elections, ¶105; Eminent Domain, ¶124, 320; Exceptions, Bill of; Frauds, Statute of, ¶49, 50; Homestead, ¶55; Homicide, ¶204; Indictment and Information, ¶176; Interest, ¶39; Intoxicating Liquors, ¶223; Justices of the Peace, ¶164; Mechanics' Liens, ¶132; Municipal Corporations, ¶812; Taxation, ¶476; Trial, ¶76, 92.

¶3 (Ala.) The use of the word "within" as a limit of time, or decree, or space, embraces the last day, or degree, or entire distance, covered by the limit fixed.—*Rice v. J. H. Beavers & Co.*, 71 So. 659.

¶8 (Ala.) As defined by statute and within the meaning of the law, a day means 24 hours, the period of time between any midnight and the midnight following.—*McKinnon v. City of Birmingham*, 71 So. 463.

¶8 (Ala.) Under Code 1907, § 3019, where judgment was entered May 19th, and bill of exceptions was presented on August 19th, 92 days thereafter, a motion in the Supreme Court to strike the bill of exceptions will be granted.—*Rice v. J. H. Beavers & Co.*, 71 So. 659.

¶9(1) (Ala.) Under Code 1907, § 11, as to computing time, where a statute fixes the time within which an act may be done, the first day must be excluded and the last day included.—*Rice v. J. H. Beavers & Co.*, 71 So. 659.

¶9(2) (Miss.) Under Code 1906, §§ 1606, 3103, as to limitation of actions, where judgment was rendered on October 31, 1907, suit thereon, begun October 31, 1914, was not barred.—*Hattiesburg Grocery Co. v. Tompkins*, 71 So. 866.

¶9(7) (Ala.) A bill of exceptions presented to the trial judge June 28th was more than 90 days from March 29th, the date on which judgment was rendered and would be stricken on motion of the appellee.—*Clark v. Watson*, 71 So. 95.

¶11 (Miss.) In computing the period for bar of an action by lapse of time, fractions of days will not be considered.—*Hattiesburg Grocery Co. v. Tompkins*, 71 So. 866.

TITLE.

See Adverse Possession; Ejectment, ¶14; Eminent Domain, ¶320; Insurance, ¶282, 330; Landlord and Tenant, ¶63; Statutes, ¶211; Taxation, ¶761-816; Vendor and Purchaser, ¶239.

TOOLS.

See Master and Servant, ¶125.

TORTS.

See Conspiracy; Death; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, ¶87-330; Municipal Corporations, ¶755-816; Negligence; Threats; Trespass; Trover and Conversion.

¶2 (Ala.) The measure and elements of the recovery for tort is that prescribed by the law of the place where the tort is committed.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.
¶27 (La.) In action of tort, plaintiff has burden of proving nature of harm, and defendant's share in causing it, and defendant has burden of showing other circumstances which would leave plaintiff without claim.—*Boylan v. New Orleans Ry. & Light Co.*, 71 So. 380.

TOWNS.

See Municipal Corporations.

TRACKS.

See Evidence, ¶536.

TRADE FIXTURES.

See Fixtures, ¶27.

TRADING STAMPS.

See Commerce, ¶64; Constitutional Law, ¶230; Licenses, ¶7, 15.

TRANSCRIPTS.

See Criminal Law, ¶1104; Justices of the Peace, ¶164.

TRANSFER OF CAUSES.

See Appeal and Error, ¶344-380; Courts, ¶485; Criminal Law, ¶101.

TRAVERSE.

See Pleading, ¶118.

TREES.

See Logs and Logging.

TRESPASS.

See Negligence, ¶33; Railroads, ¶276, 359, 378.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

¶10 (Ala.) Damage to personal property inflicted on entering land, under probate decree condemning it for a railroad right of way, does not constitute a trespass against the realty.—*Smith v. Jeffcoat*, 71 So. 717.

II. ACTIONS.**(A) Right of Action and Defenses.**

¶20(2) (Ala.) A lessor not in possession cannot sue in trespass for the wrongful removal of fixtures placed on the premises by lessee.—*Midleton v. Alabama Power Co.*, 71 So. 461.

(D) Damages.

¶52 (Miss.) The measure of damages recoverable by a grantee of the timber rights from a

lessee of a sixteenth section whose lease has 55 years to run, for the wrongful cutting of timber is the value of the timber cut and removed.—*Fernwood Lumber Co. v. Rowley*, 71 So. 8.

(E) Trial, Judgment, and Review.

⚡67 (Miss.) In an action for cutting trees on plaintiff's land by defendant's agents, the question of plaintiff's actual damages held for the jury.—*Hall v. Shean*, 71 So. 323.

TRESPASS TO TRY TITLE.

See Abatement and Revival, ⚡72; Ejectment.

TRIAL.

See Continuance; Costs; Criminal Law, ⚡631-892; Jury; New Trial; Stipulations; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

⚡41(1) (Miss.) The rule of excluding witnesses from the courtroom is but a rule of court, and is not enforced unless invoked by parties.—*Wilson v. Peacock*, 71 So. 296.

⚡41(3) (Miss.) Before a party can be kept from testifying under the rule for the exclusion of witnesses, he must be given the alternative of testifying first or leaving the courtroom.—*Wilson v. Peacock*, 71 So. 296.

(B) Order of Proof, Rebuttal, and Re-opening Case.

⚡68(1) (La.) Under Code Prac. art. 484, the matter of opening up a case to permit introduction of further testimony after all parties have announced that the testimony is closed rests in the court's discretion.—*Succession of Lefort*, 71 So. 215.

(C) Objections, Motions to Strike Out, and Exceptions.

⚡76 (Ala.) Objections to questions propounded to witnesses, not made until after answer, come too late, unless questions are answered before counsel can object.—*People's Shoe Co. v. Skally*, 71 So. 719.

⚡85 (Ala.) Where a portion of a letter is inadmissible, a general objection to the admission of the entire letter is insufficient to present the question of admissibility of the particular portion.—*Beatty v. Palmer*, 71 So. 422.

⚡86 (Ala.) Where the petition in an action for damages from the incorrect transmission of a telegram contained two counts, one *ex delicto* the other *ex contractu*, and a deposition admissible under the former but not under the latter, was offered without any specification of its purpose, its exclusion on general objection was not ground for reversal.—*Western Union Telegraph Co. v. Favish*, 71 So. 183.

⚡92 (Ala.) Where a witness testified to a fact several times without objection, the court's refusal to sustain a motion made at the close of all the evidence to exclude such evidence was proper.—*Phillips v. Shotts*, 71 So. 94.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⚡110 (Ala.) Exclamation of plaintiff's counsel while defendant's chief witness was being examined, and immediately following his denial of a fact which seemed to have been overwhelmingly established by the other witness, "Look out now! hold on! watch how you testify! somebody may be indicted for perjury!" was improper.—*Headley v. Harris*, 71 So. 695.

⚡127 (Ala.) The allowance of a request in an action for injuries in a street collision that the

jurors be qualified on the point whether they were interested in any indemnity company, the plaintiff's attorney stating that he understood an indemnity company was interested in the case, is not erroneous, since it was insufficient to create bias.—*Beatty v. Palmer*, 71 So. 422.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚡136(1) (Ala.App.) A requested charge held properly refused as invading the province of the jury to determine the contents of a lost written order.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

⚡138 (Ala.) The relevancy and competency of the evidence is for the court.—*Russell v. Bush*, 71 So. 397.

⚡139(1) (Ala.) The weight of the evidence is for the jury.—*Russell v. Bush*, 71 So. 397.

⚡139(1) (Ala.) The weight and value of opinion evidence is a question for the jury.—*Beatty v. Palmer*, 71 So. 422.

⚡139(1) (Fla.) When evidence would not have supported verdict for defendant, and no material error was committed in admitting or excluding evidence, directed verdict for plaintiff is proper.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡140(1) (Ala.) The credibility of the witnesses is for the jury.—*Russell v. Bush*, 71 So. 397.

⚡141 (Fla.) Where there is no opposing evidence, it is not necessary to submit case to jury when evidence clearly shows right of plaintiff to recover.—*Bland v. Fidelity Trust Co.*, 71 So. 630.

⚡142 (Fla.) Where on evidence adduced there is room for difference of opinion between reasonable men as to existence of facts from which ultimate fact is to be established or as to inferences which might be drawn from conceded facts, court should submit case to jury.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

⚡143 (Ala.) Where there is a conflict in the evidence, refusal of an affirmative charge is proper.—*Metropolitan Life Ins. Co. v. Goodman*, 71 So. 400.

⚡143 (Ala.) Where evidence is in dispute on controverted facts on which recovery depends, it is proper for court to decline to peremptorily instruct or to give affirmative charge.—*People's Shoe Co. v. Skally*, 71 So. 719.

(D) Direction of Verdict.

⚡170 (Fla.) Where evidence clearly shows right of recovery in plaintiff, and there is no evidence to sustain verdict of defendant, verdict for plaintiff may be directed.—*American Mercantile Co. v. Circular Advertising Co.*, 71 So. 607.

⚡171 (Fla.) Legal principles, guiding judicial discretion in directing verdict and in granting new trial on evidence, are not the same.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

In directing verdict, court is governed practically by same rules applicable to demurrers in evidence.—*Id.*

Duty devolving on court in reference to directing verdict may become, in many cases, one of delicacy, to be cautiously exercised.—*Id.*

⚡178 (Fla.) Party moving for directed verdict admits not only facts stated in evidence, but also every conclusion favorable to adverse party that jury might reasonably infer.—*Haile v. Mason Hotel & Investment Co.*, 71 So. 540.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⚡191(3) (Ala.App.) A requested charge that the burden was on defendant to prove that the transferee had knowledge of defenses is erroneous as assuming he was a purchaser for value.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

(B) Necessity and Subject-Matter.

☞208 (Ala.) Where defendant's counsel offered his answers to interrogatories in evidence, but withdrew them before they were read to the jury, no instruction to disregard such evidence was necessary.—*Russell v. Bush*, 71 So. 397.

(D) Applicability to Pleadings and Evidence.

☞248 (Ala.App.) A requested charge predicting a verdict for plaintiff on a finding that there was no agreement to make the machine work satisfactorily *held* abstract.—*Citizens' Nat. Bank v. Bucheit*, 71 So. 82.

☞251(8) (Ala.) Where the complaint charged wantonness, contributory negligence being no defense, charges on that issue should be refused.—*Southern Ry. Co. v. Fricks*, 71 So. 701.

☞252(1) (Ala.) Requested charges inapt to the evidence are properly refused.—*Louisville & N. R. Co. v. Davis*, 71 So. 682.

☞252(9) (Ala.) In an action for injuries in a collision at a crossing, where there was some evidence of conditions which would require the observance of the statute relating to lookout and signals, there was no error in charging the jury thereon.—*Louisville & Nashville R. Co. v. Lovell*, 71 So. 995.

☞252(19) (Ala.) Where there was no evidence that debtor directed application of payment to a particular note, a requested charge that the debtor had the right to direct payment was abstract and properly refused.—*Porter v. Watkins*, 71 So. 687.

☞253(1) (Ala.) A proper charge on a single issue, which ignored the other issues made by special counts and required a verdict on the whole case, was properly refused.—*Brown v. Shorter*, 71 So. 103.

☞253(9) (Ala.) In an action by a passenger injured in alighting from a moving train, a charge on the duty of a railroad company to stop *held* properly refused as not presenting the question whether the passenger had been notified the train had reached her destination.—*Central of Georgia Ry. Co. v. Mathis*, 71 So. 674.

(E) Requests or Prayers.

☞255(4) (Ala.App.) The party against whose interest evidence was properly admitted, entitled to have its consideration limited to the purpose for which it was competent, had the duty of asking a proper instruction from the court to that effect.—*Postal Telegraph-Cable Co. v. Minderhout*, 71 So. 89.

☞256(2) (Ala.) A judgment will not be reversed because charges possess misleading tendencies and could have been refused for that reason, where the opposing party who could and should have corrected such misleading tendencies by countercharges failed to do so.—*Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 71 So. 111.

☞256(9) (Ala.) Where part of oral charge possessed misleading tendencies, they should have been removed by requested explanatory charges.—*Louisville & N. R. Co. v. Davis*, 71 So. 682.

☞260(1) (Ala.) Requested charges fully covered by others given are properly refused.—*Louisville & N. R. Co. v. Davis*, 71 So. 682.

☞261 (Ala.App.) The trial court is not in error for refusing a charge incorrectly stating the law or confusing, though its only fault lies in the fact that it is too favorable to the adverse party.—*Dunaway v. Roden*, 71 So. 70.

(G) Construction and Operation.

☞295(4) (Ala.) Although some expressions, when isolated from the remainder of the charge, are in the abstract and somewhat misleading,

they are not erroneous where the charge as a whole correctly and fairly submitted the matters in controversy.—*Beatty v. Palmer*, 71 So. 422.

☞296(3) (Ala.) In an action against a railroad for injuries to a horse, instruction possessing misleading tendencies, standing alone, *held* cured by other charges.—*Louisville & N. R. Co. v. Davis*, 71 So. 682.

TROVER AND CONVERSION.

See Evidence, ☞155; Taxation, ☞568.

II. ACTIONS.**(A) Right of Action and Defenses.**

☞16 (Ala.) A lessor not in possession may sue in trover for the wrongful removal of fixtures placed on the premises by lessee.—*Middleton v. Alabama Power Co.*, 71 So. 461.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Assignments for Benefit of Creditors; Equity, ☞401; Monopolies; Partition, ☞12; Wills, ☞683.

I. CREATION, EXISTENCE, AND VALIDITY.**(B) Resulting Trusts.**

☞75 (Ala.) An attorney who approved a settlement requiring the transfer of land to a corporation of which his client was president *held* not entitled to claim a resulting trust because of furnishing part of the consideration.—*Harton v. Amason*, 71 So. 180.

☞81(2) (Ala.) Under Code 1907, § 8413, a resulting trust arises in favor of a wife where the husband purchases land with her money, but takes title in his own name.—*Marshall v. Lister*, 71 So. 411.

☞89(1) (Fla.) In suit to recover share of property of alleged partnership, evidence *held* insufficient to show that the legal title to property was held in trust.—*McGill v. Chappelle*, 71 So. 836.

☞89(5) (Fla.) Burden rests on person seeking to establish resulting trust by parol evidence to remove every reasonable doubt as to its existence by clear and unequivocal evidence.—*McGill v. Chappelle*, 71 So. 836.

(C) Constructive Trusts.

☞95 (Ala.) An attorney's consent to a settlement negatives any fraud on his rights which would give him a constructive trust in the property conveyed.—*Harton v. Amason*, 71 So. 180.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

☞243 (Miss.) Where a trustee under a will was given power to sell the land in his discretion, the power of sale was a purely personal one, which upon the trustee's death was extinguished.—*Chandler v. Chandler*, 71 So. 811.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.**(B) Right to Follow Trust Property or Proceeds Thereof.**

☞357(1) (Ala.) Under Code 1907, § 8413, a wife, though entitled to a resulting trust in property which her husband bought with her money, taking title in his own name, cannot defeat the rights of the husband's creditors who had no notice.—*Marshall v. Lister*, 71 So. 411.

TURPENTINE.

See Landlord and Tenant, ¶48, 122; Logs and Logging, ¶3.

UNDISCLOSED AGENCY.

See Principal and Agent, ¶145, 146.

UNIFORMITY.

See Taxation, ¶44.

USURY.**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(B) Rights and Remedies of Parties.**

¶124 (Fla.) Where decree finding conveyance a usurious mortgage is supported by ample evidence, it will not be reversed.—*Brown v. Banning*, 71 So. 827.

VACATION.

See Dismissal and Nonsuit, ¶43; Equity, ¶419; Judgment, ¶143-173; Taxation, ¶476, 689.

VARIANCE.

See Pleading, ¶387, 395.

VENDOR AND PURCHASER.

See Adverse Possession, ¶63; Evidence, ¶230; Execution, ¶219-319; Fixtures; Frauds, Statute of, ¶71, 72; Husband and Wife, ¶187; Navigable Waters, ¶46; Newspapers, ¶8; Public Lands, ¶55, 61; Sales; Specific Performance; Taxation, ¶639-816.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶6 (La.) A contract to sell the property of another is null.—*Watson v. Feibel*, 71 So. 585.
 ¶18(1) (La.) Option for indefinite term is nudum pactum.—*Bristo v. Christine Oil & Gas Co.*, 71 So. 521; *Calhoun v. Same*, Id. 522; *Dunham v. McCormick*, Id. 523; *Nervis v. Same*, Id.; *Parrott v. Same*, Id.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

¶73 (Miss.) A contract for the conveyance of land held to require the purchaser to pay the consideration in cash at a named place before he was entitled to a deed.—*Mayes v. Coleman*, 71 So. 14.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(B) Rescission by Vendor.**

¶92 (La.) A sale will not be rescinded on ground of noncompliance with its conditions when full performance is tendered in answer to the suit.—*Watson v. Feibel*, 71 So. 585.

¶93 (La.) Enforcement of the resolatory condition of a credit sale contract is a secondary remedy to be enforced only when the primary one of enforcing payment fails.—*Watson v. Feibel*, 71 So. 585.

The dissolution of the contract of sale never becomes the creditor's absolute right, since Civ. Code, art. 2047, gives the court power to allow a reasonable time for performance after suit.—Id.

¶98 (La.) Under Civ. Code, art. 2463, if promise to sell has been made with giving of earnest, each contracting party may recede from promise; he who gives the earnest by forfeiting it, and he who receives it by returning double.—*Wagon v. Schick*, 71 So. 534.

¶99 (La.) A cloud on title to land which one has agreed to buy, instead of being a reason

for refusing a purchaser further time in which to perform, is a full justification for refusal to pay under Civ. Code, art. 2557, and a defense to action for rescission.—*Watson v. Feibel*, 71 So. 585.

¶104 (La.) Where the holder of the vendor's notes had never consented to assumption thereof by the purchaser, he was not a necessary party to the vendor's suit to rescind, nor did he become a necessary party on the purchaser's tender of performance after default; such holder's rights accruing under Civ. Code, art. 1890, only on his assenting to the assumption.—*Watson v. Feibel*, 71 So. 585.

(C) Rescission by Purchaser.

¶116 (La.) Under Civ. Code, art. 2463, if promise to sell has been made with giving of earnest, each contracting party may recede from promise; he who gives the earnest by forfeiting it and he who receives it by returning double.—*Wagon v. Schick*, 71 So. 534.

IV. PERFORMANCE OF CONTRACT.**(D) Payment of Purchase Money.**

¶169 (La.) Where the vendor demands that the purchaser perform, thus putting him in default, under Civ. Code, art. 1911, the purchaser may still make valid tender of performance, which the vendor must accept, unless time of performance is the essence of the contract.—*Watson v. Feibel*, 71 So. 585.

Under Civ. Code, art. 1911, stating how the debtor may be put in default, the act of putting in default is a simple demand for performance, but does not cut off the right to perform.—Id.

¶185 (La.) Especially in sales of immovables delay in performance should not be allowed to be cut off by putting in default.—*Watson v. Feibel*, 71 So. 585.

Since by Civ. Code, art. 2503, the purchaser, who stipulates that the sale shall be dissolved of right in case he does not pay the price within the term, may nevertheless make payment after the expiration of the term if judicial demand has not been made, the same right extends to the purchaser who has not made a definite resolatory condition.—Id.

That the purchaser has been dilatory in performance is no ground for refusing to allow him further time in which to perform.—Id.

The mere fact that a purchaser having leaped of possible cloud upon the title sought to discover the purported holders of the title which made a cloud, is insufficient to show that he was seeking to undermine the title so as to prevent allowance of further time in which to perform.—Id.

¶186 (La.) A cloud on title to land which one has agreed to buy, instead of being a reason for refusing a purchaser further time in which to perform, is a full justification for refusal to pay under Civ. Code, art. 2557, and a defense to action for rescission.—*Watson v. Feibel*, 71 So. 585.

¶187 (Miss.) A vendor held not to have waived by her conduct and that of her agent the right to demand payment of the consideration in cash at place fixed so the purchaser, having made payment by a draft which was dishonored, was not entitled to a deed.—*Mayes v. Coleman*, 71 So. 14.

V. RIGHTS AND LIABILITIES OF PARTIES.**(C) Bona Fide Purchasers.**

¶226(2) (Ala.) A bona fide purchaser for value and without notice will be protected to extent pro tanto that he pays before notice of latent equity.—*House v. Davis*, 71 So. 685.

¶239(1) (Miss.) Plaintiff, a bona fide purchaser of land without notice of a parol reservation by a previous owner of the right to remove a building, held entitled to maintain trespass against such original owner for removal of

the building over plaintiff's protest.—*McLeod v. Clark*, 71 So. 11.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

§254(4) (Miss.) Failure to support a grantor as promised, as consideration for his deed, does not entitle him to have a lien fixed on the land to secure an allowance decreed.—*Lowrey v. Lowrey*, 71 So. 309.

§279 (Ala.) Where bill sought to perfect and enforce vendor's lien subject to prior mortgage, mortgagee is not necessary party; for proceedings would not affect his title.—*House v. Davis*, 71 So. 685.

§280(1) (Ala.) Bill to enforce vendor's lien is not subject to demurrer, though showing that complainant's grantee had transferred the land, where not showing that last grantee was bona fide purchaser, etc.—*House v. Davis*, 71 So. 686.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§334(1) (La.) Payment of earnest money by wife out of separate funds, without authorization of husband, is discharge of natural obligation (Code Prac. art. 17) which arises on contract by person disqualified to contract, and neither wife nor husband can recover same.—*Wagon v. Schick*, 71 So. 534.

VENUE.

See Corporations, §508; Criminal Law, §564; Insurance, §811; Jury, §68, 70; Justices of the Peace, §39½.

II. DOMICILE OR RESIDENCE OF PARTIES.

§26 (Ala.) The venue statute held not to apply to a personal and transitory action where the defendants are nonresidents.—*Jefferson County Savings Bank v. Carland*, 71 So. 126.

A personal and transitory action may be maintained against a nonresident on service in a county of the state other than that in which the suit is brought.—*Id.*

§32(1) (Ala.) The privilege which a resident of the state has under Code 1907, § 6110, of being sued in the county of his permanent residence is personal to him.—*Jefferson County Savings Bank v. Carland*, 71 So. 126.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§46 (Miss.) Acts 1892, c. 93, dividing Coahoma county into two court districts, made the county, as to venue of actions, two counties, and if a defendant is sued in the wrong district, he has right to change of venue to the proper district.—*Hurlburt v. Westbrook*, 71 So. 902.

Under Acts 1892, c. 93, dividing Coahoma county into two court districts, section 13, defendant, resident of second district, sued in replevin in first district, the sheriff replevying property in the second district, was not entitled to dismissal, but merely to have case transferred to second district.—*Id.*

VERDICT.

See Appeal and Error, §999-1006; Criminal Law, §878, 892.

VERIFICATION.

See Appeal and Error, §192.

VESTED RIGHTS.

See Constitutional Law, §101.

VICE PRINCIPALS.

See Master and Servant, §279.

VOTERS.

See Elections.

WAGES.

See Exemptions.

WAIVER.

See Appeal and Error, §22, 1078; Attorney and Client, §186; Contracts, §305; Criminal Law, §898, 1178; Estoppel; Homestead, §166-175; Indictment and Information, §5; Insurance, §375, 383, 576, 724, 755; Pleading, §412; Sales, §176; Vendor and Purchaser, §187; Venue, §32.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

§24(3) (Miss.) Compress company's failure to notify shipper of arrival of cotton as requested held not to render it liable where it did not know of shipper's custom to insure cotton on receipt of such notice.—*Laurel Compress Co. v. Power*, 71 So. 161.

WARNING.

See Master and Servant, §156.

WARRANT.

See Arrest; Counties, §166, 167.

WARRANTY.

See Sales, §272, 425, 437.

WASTE.

See Landlord and Tenant, §55.

WATERS AND WATER COURSES.

See Drains; Levees; Navigable Waters.

II. NATURAL WATER COURSES.

(E) Bed and Banks of Stream.

§98 (La.) To entitle purchaser of public lands to recover as riparian proprietor land unsurveyed and uncovered by recession of water, he must allege and show conditions prescribed by law, as, alluvion or reliction.—*Bank of Coushatta v. Yarbrough*, 71 So. 784.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§194 (Ala.) The rule that a water company must extend the same public service to all in like circumstances without discrimination does not make it the duty of water company to make connections for private consumers.—*Birmingham Waterworks Co. v. Hernandez*, 71 So. 443.

Charter of waterworks company held to make the question whether connections for private consumers should be paid for by the company or the consumer dependent upon special contract and not upon charter duty.—*Id.*

The duty to maintain service pipes for supplying private consumers with water is the same as that to lay them, and rests upon the same party, whether the company or consumer.—*Id.*

Municipalities in granting franchises for the furnishing of water may require the company, if the statute so authorizes, to connect service pipes with mains as a part of the consideration for the franchise; but, unless the charter or

contract so provides, such connections are left to the agreement of the parties.—Id.

In the absence of special contract provision, the court will be slow to hold that a consumer of water has become bound by acquiescence of other consumers, over whom he has no control, in a custom requiring consumers to pay for connections with the water mains.—Id.

The custom of a water company requiring private consumers to install service pipes for connections with the mains is not unreasonable in the absence of franchise provisions to the contrary, and the courts will not by mandamus require the company to pay for such installation.—Id.

☞200(1) (Ala.) Where the municipal authorities contract with a water company for supply, it will be presumed that they acted competently as the agent of all the people of the city and that they knew the state of the matter in which they undertook to act.—Birmingham Waterworks Co. v. Hernandez, 71 So. 443.

WAYS.

See Highways.

WEAPONS.

☞10 (Ala.App.) The word "carry" in Acts 1909, p. 258, § 2, making it a misdemeanor for one to carry a pistol on premises not owned or controlled by him, means to bear such weapons, and does not necessarily import the idea of locomotion.—Danal v. State, 71 So. 976.

☞17(4) (Ala.App.) Evidence held sufficient to support conviction by court without jury for unlawfully carrying arms contrary to Acts 1909, p. 258, § 2.—Danal v. State, 71 So. 976.

☞17(5) (Ala.App.) In a prosecution for unlawfully carrying arms on premises not owned or controlled by defendant contrary to Acts 1909, p. 258, § 2, intent is a question of fact for the jury or for the court sitting without a jury.—Danal v. State, 71 So. 976.

WELLS.

See Contracts, ☞171, 176, 241, 247, 248; Work and Labor, ☞12, 14.

WIDOWS.

See Dower.

WILD LANDS.

See Adverse Possession, ☞63, 114.

WILLS.

See Descent and Distribution; Executors and Administrators, ☞14; Perpetuities; Trusts.

IV. REQUISITES AND VALIDITY.

(D) Holographic Wills.

☞130 (Miss.) Under Code 1906, § 5078, concerning wills, a letter directing the disposition the testatrix wished made of her property after her death, fully written and subscribed by the testator, was admissible to probate as a part of her last will and testament.—Hewes v. Hewes, 71 So. 4.

☞132 (Miss.) Under Code 1906, § 5078, concerning wills, it was error to admit to probate as a part of the holographic will of the testatrix, the will of another referred to in the instrument, where such extrinsic document was not in the writing of the testatrix.—Hewes v. Hewes, 71 So. 4.

(G) Revocation and Revival.

☞179 (La.) Under Civ. Code arts. 1691, 1693, 1723, where a posterior testament does not expressly revoke a prior one, both must be executed, unless the last tacitly revokes the first as a whole.—Succession of Lefort, 71 So. 215.

☞183 (La.) Under Civ. Code, arts. 1691, 1693, 1723, where a posterior testament and a prior

one conflict only in part, the provisions of the later must prevail.—Succession of Lefort, 71 So. 215.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(G) Petitions, Objections, and Pleadings.

☞282 (La.) Allegation that testatrix was insane for six months preceding death and unable to revoke dispositions in favor of legatee for acts of ingratitude, etc., does not amount to allegation that such acts were committed, and states no cause of action.—Succession of Deubler, 71 So. 846.

(H) Evidence.

☞295 (La.) Civ. Code art. 1655, relative to probate proceedings, applies to probate of a testament not opposed, and not where probate is opposed on the ground of fraud and forgery; and the rules governing all contests involving the genuineness of signatures, including Civ. Code, art. 2245, and Code Prac. art. 325, relative to proof of signatures by comparison or experts, control in the latter case.—Succession of Lefort, 71 So. 215.

☞302(2) (La.) The declaration of two credible witnesses, corroborated by expert testimony and recitals of the will and extraneous facts, will prevail over the unsupported testimony of two witnesses that a part of the date was not written by testator.—Succession of Lefort, 71 So. 215.

(I) Hearing or Trial.

☞324(1) (Miss.) Under Code 1906, § 1999, on the trial of an issue devisavit vel non, decedent's will having been admitted to probate, and the entire probate proceedings being in the record, failure to submit them to the jury was reversible error.—Edgington v. Mabry, 71 So. 801.

VI. CONSTRUCTION.

(A) General Rules.

☞456 (Miss.) In seeking the intention of a testator, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected; so that, where there is no ambiguity in the words, there is no room for interpretation.—Harvey v. Johnson, 71 So. 824.

☞469 (Miss.) An item which is incorrect and of doubtful construction should never be considered as governing the phrases of an independent item which is clear and unambiguous when considered alone.—Harvey v. Johnson, 71 So. 824.

Where the two items of a will dealt with different property and in a different manner, they were to be construed independently, unless such constructions, when considered together with all the provisions of the will, were contradictory, and showed that the construction of either one or the other items must be incorrect.—Id.

☞470 (Miss.) The intention of the testator is to be gathered from the entire will considered as a whole.—Harvey v. Johnson, 71 So. 824.

It is only in cases of ambiguous or doubtful meaning in the construction of one item that resort should be had to the whole, to ascertain the testator's intention.—Id.

☞471 (Miss.) Where an interest is created in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon the meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive, as the words giving the interest.—Harvey v. Johnson, 71 So. 824.

(B) Designation of Devisees and Legatees and Their Respective Shares.

☞506(1) (Miss.) Items of will giving remainder to a testatrix's legal heirs and item giving real and personal property to persons incorrectly named as her heirs construed, and held not

to show an intent to devise other than to her legal heirs as fixed by Code 1906, § 1649.—*Harvey v. Johnson*, 71 So. 824.

(E) Nature of Estates and Interests Created.

⚡607(1) (Miss.) A devise of an estate tail is converted into a fee simple by Code 1906, § 2765.—*Nicholson v. Fields*, 71 So. 900.

(H) Estates in Trust and Powers.

⚡688 (La.) Under Rev. Civ. Code, arts. 1481, 1491, 1710, petition by heir of testatrix for nullity of special and universal legacy, alleging that the testatrix made donations which are void because of incapacity of donee and has attempted to disguise them by legacy to intermediary, states cause of action.—*Succession of Deubler*, 71 So. 846.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

⚡849 (Miss.) Where a will devised realty to a husband for life, and he died before the testatrix, there was at her death no life estate in the property so devised, and it vested at once in her legal heirs.—*Harvey v. Johnson*, 71 So. 824.

WITNESSES.

See Evidence, ⚡588; Trial, ⚡41, 140.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

⚡37(1) (Ala.App.) In prosecution for selling cotton seed upon which there was an unsatisfied mortgage lien, testimony of employe of defendant as to whether he gave her the proceeds of the seed cotton held admissible, without showing she was present at the sale or knew the source of money.—*Wilson v. State*, 71 So. 971.

⚡64(1) (Miss.) Divorced husband held competent witness against wife as to her indorsement of stock certificates pledged by him during the marriage.—*Hesdorffer v. Hiller*, 71 So. 166.

Code 1906, § 1916, held to leave common-law rule applicable to divorced husband's competency to testify against wife, where there is no controversy between the husband and the wife.—*Id.*

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⚡150(3) (Ala.) A party to a contract with decedent is incompetent to testify thereto for persons claiming under him against the heirs of decedent.—*Barnes v. White*, 71 So. 114.

(D) Confidential Relations and Privileged Communications.

⚡195 (Miss.) A divorced husband could not testify against his wife as to a confidential communication between him and his wife.—*Hesdorffer v. Hiller*, 71 So. 166.

⚡204(1) (Ala.) In an action on a fraternal benefit certificate, a letter written by the defendant's attorney recommending a compromise held inadmissible as a privileged communication by an attorney.—*Sovereign Camp of Woodmen of the World v. Ward*, 71 So. 404.

III. EXAMINATION.

(A) Taking Testimony in General.

⚡236(4) (Ala.App.) The question asked a witness, "Do you know what Mr. D. was doing?" was properly ruled out as indefinite in fixing the time.—*Daniel v. State*, 71 So. 79.

⚡240(4) (Ala.App.) The question asked a witness, "Did D. strike the first lick?" was objectionable as leading.—*Daniel v. State*, 71 So. 79.

⚡240(4) (Ala.App.) In prosecution for selling cotton seed upon which there was unsatisfied mortgage lien, question to servant of defendant held objectionable as leading.—*Wilson v. State*, 71 So. 971.

(B) Cross-Examination and Re-Examination.

⚡268(1) (Ala.) In cross-examination of witnesses great liberty should be allowed by the court in order to afford the defendant the full right of cross-examination.—*Wilson v. State*, 71 So. 115.

⚡268(3) (Ala.) In an action for personal injuries brought after attempted rescission of a release by tender of the money paid thereunder, where plaintiff alleged that the compromise was fraudulently obtained, he was entitled to great latitude in examining the agent who obtained the compromise on the issue whether he represented the defendant or an indemnity company.—*Beatty v. Palmer*, 71 So. 422.

⚡277(3) (Fla.) On cross-examination of defendant, who voluntarily becomes witness, wide latitude is allowed to test credibility, and it is not error to permit questions as to previous statements, though tendency is unfavorable to defendant.—*Gorey v. State*, 71 So. 328.

⚡289 (Ala.App.) Where accused cross-examines as to an immaterial dispute between himself and his alleged murder victim, he cannot complain because the matter is fully developed on redirect examination.—*Murphy v. State*, 71 So. 987.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

⚡311 (Ala.) Although the jury is not to accept the testimony of a biased witness without reserve, the testimony of a witness is not to be rejected capriciously.—*Alabama Great Southern R. Co. v. Smith*, 71 So. 455.

(B) Character and Conduct of Witness.

⚡338 (Ala.App.) The court did not err in allowing the state to show the bad character of the defendant's witness.—*Daniel v. State*, 71 So. 79.

⚡345(1) (Ala.App.) That a witness had served a sentence on the streets was not admissible to impeach his testimony, unless it was for an offense involving moral turpitude.—*Herring v. State*, 71 So. 974.

⚡346 (Ala.) In action for compensation for wrongful discharge, it was competent for plaintiff to prove, proper predicate being laid, that general manager of defendant company, a witness, defense depending on his testimony, has told witness he must change his proposed testimony.—*People's Shoe Co. v. Skally*, 71 So. 719.

⚡358 (Ala.App.) On cross-examination as to accused's good character, it is permissible as a test of witness' information to ask if the witness has not heard persons in the neighborhood impute particular wrongful acts to accused.—*Lewis v. State*, 71 So. 617.

(D) Inconsistent Statements by Witness.

⚡380(5) (La.) District attorney may read to his own witness from testimony at coroner's inquest and ask whether witness is not now making different statement.—*State v. Ashworth*, 71 So. 860.

⚡383 (Ala.App.) The contents of a bastardy warrant sworn out against defendant by the prosecutrix were not admissible to impeach her; as her pregnancy was an immaterial matter.—*Herring v. State*, 71 So. 974.

☞388(2) (Ala.) To impeach a witness by contradictory statements, a predicate is required to prevent surprise and give him an opportunity to explain; the rule being that, if his attention is called to time and place, circumstances and persons involved, and statements made, the rule is satisfied.—*People's Shoe Co. v. Skally*, 71 So. 719.

☞389 (Ala.) In an action against a railroad company for the running down of plaintiff's intestate, evidence of a statement by the engineer, after the accident, that deceased ought to have been killed, though engineer denied it, is inadmissible in impeachment.—*Southern Ry. Co. v. Fricks*, 71 So. 701.

☞389 (Ala.) Witness cannot defeat introduction of contradictory statements to impeach him by stating he does not remember, etc.—*People's Shoe Co. v. Skally*, 71 So. 719.

☞389 (Ala.App.) In a prosecution for crime, testimony of witness that he did not remember a certain matter *held* insufficient predicate to impeach him, by showing previous contradictory statements.—*Spinks v. State*, 71 So. 623.

☞393(3) (La.) Testimony of witness at inquest may be admitted to discredit his testimony at trial.—*State v. Ashworth*, 71 So. 860.

WOODS AND FORESTS.

See Trespass, ☞52.

WORDS AND PHRASES.

"Abandonment."—*Dabbs v. Dabbs* (Ala.) '71 So. 696; *Stevens v. Allen* (La.) 71 So. 936.

"Accompany."—*Willis v. Semmes* (Miss.) 71 So. 865.

"Acquiescence."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.

"Actual."—*Louisville & N. R. Co. v. Western Union Telegraph Co.* (Ala.) 71 So. 118.

"Actually."—*State v. Abraham* (La.) 71 So. 769.

"Additional."—*Searcy v. Cullman County* (Ala.) 71 So. 664.

"Adjacent."—*Reynolds v. Board of Com'rs of Orleans Levee Dist.* (La.) 71 So. 787.

"Administrators of succession."—*Succession of Lefort* (La.) 71 So. 215.

"Admission."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.

"Adverse possession."—*Christopher v. Mungen* (Fla.) 71 So. 625; *Klump v. Howcott* (La.) 71 So. 353.

"Alluvion."—*Bank of Conshatta v. Yarbrough* (La.) 71 So. 784.

"After the effect of note."—*Bland v. Fidelity Trust Co.* (Fla.) 71 So. 630.

"And."—*Adams County v. Catholic Diocese of Natchez* (Miss.) 71 So. 17.

"Assemble."—*Citizens' Nat. Bank v. Buchelt* (Ala. App.) 71 So. 82.

"Assessment."—*Johnston v. Puffer Mfg. Co.* (Miss.) 71 So. 377.

"Assigns."—*Commercial Nat. Bank v. Jordan* (Fla.) 71 So. 760.

"Authentic act."—*Colonial Trust Co. v. St. John Lumber Co.* (La.) 71 So. 147.

"Bill of exceptions."—*State v. Matassa* (La.) 71 So. 190.

"Body politic and corporate."—*School Board of Caldwell Parish v. Meredith* (La.) 71 So. 209.

"Bond."—*Littlejohn v. Littlejohn* (Ala.) 71 So. 448.

"Broker."—*Portsmouth Cotton Oil Refining Corp v. Madrid Cotton Oil Co.* (Ala.) 71 So. 111.

"Carry."—*Danal v. State* (Ala. App.) 71 So. 976.

"Catastrophe."—*Reynolds v. Board of Com'rs of Orleans Levee Dist.* (La.) 71 So. 787.

"Casualty."—*Reynolds v. Board of Com'rs of Orleans Levee Dist.* (La.) 71 So. 787.

"Charity."—*New Standard Club v. McRaven* (Miss.) 71 So. 289.

"Collateral attack."—*Knight v. Garden* (Ala.) 71 So. 715.

"Commercial paper."—*Littlejohn v. Littlejohn* (Ala.) 71 So. 448.

"Common carrier."—*State v. Jacksonville Terminal Co.* (Fla.) 71 So. 474; *City of New Orleans v. Le Blanc* (La.) 71 So. 248.

"Conspiracy."—*State v. American Sugar Refining Co.* (La.) 71 So. 137.

"Conspire and confederate."—*Schaffter v. Irwin* (La.) 71 So. 241.

"Contract."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.

"Contract of sale."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.

"County."—*Keggin v. Hillsborough County* (Fla.) 71 So. 372.

"County warrant."—*Littlejohn v. Littlejohn* (Ala.) 71 So. 448.

"Crime."—*State v. Dickerson* (La.) 71 So. 347.

"Criminally."—*State v. Dickerson* (La.) 71 So. 347.

"Cut, remove and manufacture."—*Yarbrough v. Stewart* (Ala.) 71 So. 986.

"Cut shells."—*White v. State* (Ala.) 71 So. 452.

"Day."—*McKinnon v. City of Birmingham* (Ala.) 71 So. 468.

"Debt."—*Littlejohn v. Littlejohn* (Ala.) 71 So. 448.

"Debtor."—*City of New Orleans v. Le Blanc* (La.) 71 So. 248.

"Direct attack."—*Knight v. Garden* (Ala.) 71 So. 715.

"Discontinuance."—*Porter v. Watkins* (Ala.) 71 So. 687.

"Doing business."—*Citizens' Nat. Bank v. Buchelt* (Ala. App.) 71 So. 82.

"Domicile."—*Stevens v. Allen* (La.) 71 So. 936.

"Domicile of matrimony."—*Stevens v. Allen* (La.) 71 So. 936.

"Dwelling."—*Stevens v. Allen* (La.) 71 So. 936.

"Equal protection of the law."—*City of New Orleans v. Le Blanc* (La.) 71 So. 248.

"Evident."—*Russell v. State* (Fla.) 71 So. 27.

"Express revocation."—*Succession of Lefort* (La.) 71 So. 215.

"Extended."—*State v. Jacksonville Terminal Co.* (Fla.) 71 So. 474.

"Feloniously."—*State v. Dickerson* (La.) 71 So. 347.

"Forced heir."—*Succession of Hawkins* (La.) 71 So. 492.

"Forge."—*Everage v. State* (Ala. App.) 71 So. 983.

"Forgery."—*Everage v. State* (Ala. App.) 71 So. 983.

"Former jeopardy."—*Brown v. City of Tuscaloosa* (Ala.) 71 So. 672.

"Final judgment."—*Dickerson v. Western Union Telegraph Co.* (Miss.) 71 So. 385.

"Fraudulently dispose of."—*Seals Piano & Organ Co. v. Bell* (Ala.) 71 So. 340.

"Freeholder."—*Orleans-Kenner Electric Ry. Co. v. Christina* (La.) 71 So. 770.

"Fresh-water river."—*Ex parte Perry* (Fla.) 71 So. 174.

"General revocation."—*Succession of Lefort* (La.) 71 So. 215.

"Homestead."—*McKethan v. Currie* (La.) 71 So. 346.

"Implied invitation."—*Allen v. Yazoo & M. V. R. Co.* (Miss.) 71 So. 386.

"In."—*Ex parte Perry* (Fla.) 71 So. 174.

"Interstate commerce."—*Alabama Great Southern R. Co. v. Skotzy* (Ala.) 71 So. 335; *American Mercantile Co. v. Circular Advertising Co.* (Fla.) 71 So. 607.

"Intrastate commerce."—*Batesville Southwestern R. Co. v. Mims* (Miss.) 71 So. 827.

"Judicial sale."—*Finger v. Taylor* (Miss.) 71 So. 269.

"Just valuation."—*Sparkman v. State* (Fla.) 71 So. 34.

"Legal heirs."—*Harvey v. Johnson* (Miss.) 71 So. 824.

"Legal representative."—*State v. Pearce* (Ala. App.) 71 So. 656.

- "Liability."—*Littlejohn v. Littlejohn* (Ala.) 71 So. 448.
- "Life insurance company."—*Masonic Benefit Ass'n of Stringer Grand Lodge of Mississippi v. Dotson* (Miss.) 71 So. 266.
- "Malpractice in office."—*Smith v. State* (Fla.) 71 So. 915.
- "Manifest."—*Russell v. State* (Fla.) 71 So. 27.
- "Manslaughter."—*State v. McGarrity* (La.) 71 So. 730.
- "Material alteration."—*Bank of Lauderdale v. Cole* (Miss.) 71 So. 260.
- "Merchants and dealers."—*State v. Underwood* (La.) 71 So. 513.
- "Monopoly."—*State v. American Sugar Refining Co.* (La.) 71 So. 137.
- "Multifariousness."—*Mitchell v. Cudd* (Ala.) 71 So. 660.
- "Municipal corporation."—*Keggin v. Hillsborough County* (Fla.) 71 So. 372.
- "Natural obligation."—*Wagnon v. Schick* (La.) 71 So. 534.
- "Neglected child."—*Brana v. Brana* (La.) 71 So. 519.
- "Next."—*Hattiesburg Grocery Co. v. Tompkins* (Miss.) 71 So. 866.
- "Next of kin."—*Wheeler v. Southern Ry. Co.* (Miss.) 71 So. 812.
- "Not to be performed within one year."—*Mrs. K. Edwards & Sons v. Farve* (Miss.) 71 So. 12.
- "Officer."—*Jackson v. State* (Fla.) 71 So. 332.
- "Open account."—*Illinois Cent. Ry. Co. v. Jackson Oil & Refining Co.* (Miss.) 71 So. 568.
- "Or."—*Swift & Co. v. Bonvillain* (La.) 71 So. 849.
- "Party."—*State ex rel. Labbe v. Millsaps* (La.) 71 So. 496.
- "Party in interest."—*State v. Pearce* (Ala. App.) 71 So. 656.
- "Particular revocation."—*Succession of Lefort* (La.) 71 So. 215.
- "Penal."—*Metzger v. Joseph* (Miss.) 71 So. 645.
- "Penalty."—*Metzger v. Joseph* (Miss.) 71 So. 645.
- "Permanent injuries."—*Alabama Great Southern R. Co. v. Taylor* (Ala.) 71 So. 676.
- "Personal property."—*R. F. Walden & Co. v. Yates* (Miss.) 71 So. 897.
- "Petition."—*State v. American Sugar Refining Co.* (La.) 71 So. 137.
- "Police power."—*Citizens' Ins. Co. v. Hebert* (La.) 71 So. 955.
- "Potestative condition."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.
- "Principal place of business."—*Plummer-Lewis Co. v. Francher* (Miss.) 71 So. 907.
- "Probable cause."—*Glisson v. Biggio* (La.) 71 So. 204.
- "Property."—*R. F. Walden & Co. v. Yates* (Miss.) 71 So. 897.
- "Property tax."—*Board of Administrators of Charity Hospital v. Richhart* (La.) 71 So. 735.
- "Proximate cause."—*Garrett v. Louisville & N. R. Co.* (Ala.) 71 So. 685.
- "Public offices."—*Ware v. State* (Miss.) 71 So. 868.
- "Purchaser for value."—*Citizens' Nat. Bank v. Bucheit* (Ala. App.) 71 So. 82.
- "Putting in default."—*Watson v. Feibel* (La.) 71 So. 585.
- "Railroad company."—*Ingram-Dekle Lumber Co. v. Geiger* (Fla.) 71 So. 552.
- "Rape."—*Russell v. State* (Fla.) 71 So. 27.
- "Real and actual interest."—*City of Alexandria v. Police Jury of Rapides Parish* (La.) 71 So. 928.
- "Recoupment."—*T. L. Farrow Mercantile Co. v. Riggins* (Ala. App.) 71 So. 963.
- "Residence."—*Stevens v. Allen* (La.) 71 So. 936.
- "Res ipsa loquitur."—*Alabama Great Southern R. Co. v. Johnson* (Ala. App.) 71 So. 620.
- "Sale for taxes."—*Gilmore v. Frost-Johnson Lumber Co.* (La.) 71 So. 536.
- "Salus populi est suprema lex."—*City of New Orleans v. Beck* (La.) 71 So. 883.
- "Serious consideration."—*Saunders v. Busch-Everett Co.* (La.) 71 So. 153.
- "Set-off."—*T. L. Farrow Mercantile Co. v. Riggins* (Ala. App.) 71 So. 963.
- "Sovereign power."—*Citizens' Ins. Co. v. Hebert* (La.) 71 So. 955.
- "Specific."—*Louisville & N. R. Co. v. Western Union Telegraph Co.* (Ala.) 71 So. 118.
- "Specific appropriation."—*Board of Administrators of Charity Hospital v. Richhart* (La.) 71 So. 735.
- "Successor."—*State v. Pearce* (Ala. App.) 71 So. 656.
- "Sum payable."—*Bland v. Fidelity Trust Co.* (Fla.) 71 So. 630.
- "Tacit revocation."—*Succession of Lefort* (La.) 71 So. 215.
- "Tax."—*Citizens' Ins. Co. v. Hebert* (La.) 71 So. 955.
- "Tax sale."—*Gilmore v. Frost-Johnson Lumber Co.* (La.) 71 So. 536.
- "Trading stamps."—*State v. Underwood* (La.) 71 So. 513.
- "Transacting business."—*Citizens' Nat. Bank v. Bucheit* (Ala. App.) 71 So. 82.
- "Turpentine."—*Yarbrough v. Stewart* (Ala.) 71 So. 986.
- "Uncertain date."—*Succession of Lefort* (La.) 71 So. 215.
- "Undivided."—*Lisso v. Williams* (La.) 71 So. 365.
- "Unlawfully."—*State v. Dickerson* (La.) 71 So. 347.
- "Void."—*Commercial Nat. Bank v. Jordan* (Fla.) 71 So. 760.
- "Voluntary."—*Dabbs v. Dabbs* (Ala.) 71 So. 696.
- "Voluntary manslaughter."—*State v. McGarrity* (La.) 71 So. 730.
- "Water-packed."—*Wallace v. Crosthwait* (Ala.) 71 So. 666.
- "Within."—*Rice v. J. H. Beavers & Co.* (Ala.) 71 So. 659.

WORK AND LABOR.

See Mechanics' Liens.

⇒9 (Ala.App.) Though plaintiff can recover only on an express contract where there is one and cannot resort to an implied one, yet where an express contract has been fully performed, only payment in money remaining to be done, he can recover either under the common counts, a special count based on the express contract, or both.—*Dunaway v. Roden*, 71 So. 70.

⇒12 (Ala.App.) A contractor for a well, whom the other party directed, upon reaching water, to bore one more day and quit, could recover, under a common count for work and labor done at request, on the modification of the contract by mutual consent before full performance, irrespective of an acceptance of the work.—*Dunaway v. Roden*, 71 So. 70.

⇒14(1) (Ala.) Recovery may be had on quantum meruit for services rendered in the partial performance of a contract abandoned by mutual consent or rescinded by the other party.—*Russell v. Bush*, 71 So. 397.

⇒14(1) (Ala.) Recovery on a quantum meruit can be had for the balance due for the executed part of a contract, subject to recoupment for resulting damages, from failure to complete performance, that can be calculated with any degree of certainty.—*Lowy v. Rosengrant*, 71 So. 439.

⇒14(1) (Ala.App.) Where plaintiff contracted to bore a well for defendant to produce enough water to supply defendant's family and live stock, which it failed to do, but, after plaintiff reached water, defendant told him to work one more day and quit, plaintiff could recover on a common count for work and labor done at defendant's request.—*Dunaway v. Roden*, 71 So. 70.

¶14(3) (Ala.) Where plaintiff's contract to drive a well was entire, and he failed to substantially perform, he could not, without more, recover the value of the labor expended in its partial performance.—Hartsell v. Turner, 71 So. 658.

A party having the right to insist on the full performance of an entire contract, and voluntarily accepting the benefit of part performance, is liable for the benefit thus voluntarily accepted.—Id.

In an action on quantum meruit, defendant held liable for use of well which plaintiff had contracted to drill, but had left before its completion.—Id.

¶30(2) (Ala.) In an action to recover on a quantum meruit for the value of a well bored for defendant, held, that the amount of recovery was for the jury.—Hartsell v. Turner, 71 So. 658.

WRITS.

See Attachment; Certiorari; Execution, ¶15; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Prohibition; Replevin.

Of error, see Appeal and Error.

YEAR.

See Taxation, ¶526.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and KEY-NUMBER

TABLES OF SOUTHERN CASES

IN

STATE REPORTS

VOL. 191, ALABAMA REPORTS

Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.	Ala. Rep.	South. Rep.					
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.					
1	67	989	96	68	48	195	67	985	318	68	153	450	67	663	628	68	136	661	67	1017
3	67	981	99	68	49	205	67	1015	322	68	157	454	67	989	634	68	55	662	66	1008
7	67	1010	101	67	978	210	67	1003	333	67	695	457	67	613	638	68	151	663	66	1009
13	67	979	104	67	668	215	67	999	339	67	609	476	67	678	643	68	56	663	67	1017
16	67	997	109	67	990	218	68	27	349	67	600	484	67	691	646	68	154	664	67	1018
21	68	57	111	67	675	228	68	37	352	67	976	494	67	697	654	65	1033	665	67	1019
29	67	1007	119	67	591	238	68	43	356	67	839	498	67	675	655	65	666	666	67	1017
31	67	667	137	67	681	248	68	1	369	67	696	500	67	702	655	65	1034	666	67	1019
34	67	1006	142	67	992	258	68	46	372	67	995	508	67	683	656	65	1034	667	66	1009
36	67	990	146	67	994	263	68	17	378	68	63	513	67	687	657	65	1034	667	67	1018
38	67	673	148	67	1000	271	68	141	392	67	586	520	67	701	657	65	1035	668	66	1009
45	67	977	150	67	699	274	68	41	398	67	604	524	67	664	658	65	1035	668	67	1018
48	67	1004	158	67	684	280	68	137	411	67	601	531	68	60	658	66	1008	669	67	1018
54	67	838	166	67	1000	287	68	51	419	67	582	539	68	22	658	67	1017	670	67	1018
58	67	833	168	67	1008	291	68	20	424	67	670	553	68	30	659	66	1008	671	66	1009
75	67	389	175	67	983	297	68	52	429	67	589	572	68	4	659	67	1017	671	67	981
80	67	1012	182	67	689	305	68	143	436	67	597	618	68	49	660	66	1008	671	67	1002
87	67	1001	189	67	1003	310	68	149	444	67	608	622	68	139	660	67	1017	671	67	1018
90	67	894	190	67	991	316	68	142	448	67	672	626	68	142	661	66	1008	672	67	981
98	67	1016																		

VOL. 191, ALABAMA REPORTS

	Page		Page
Alabama Great Southern R. Co. v. H. Altman & Co. (67 So. 589).....	429	Carroll v. Henderson (68 So. 1).....	248
Alabama Great Southern R. Co. v. Smith (68 So. 56).....	643	Carter v. State (67 So. 981).....	3
Alabama Power Co. v. Adams (67 So. 838).....	54	City of Anniston, Ex parte (66 So. 1008)...	660
Alabama Power Co. v. Keystone Lime Co. (67 So. 833).....	58	City of Birmingham v. Carle (68 So. 22)...	539
American Oak Leather Co. v. Atwood (67 So. 663).....	450	City of Huntsville v. Phillips (67 So. 664).....	524
Anders v. Sandlin (67 So. 684).....	158	City of Montgomery v. McDade (66 So. 1008).....	659
Anniston, City of, Ex parte (66 So. 1008)...	660	Clark v. Smith (67 So. 1000).....	163
Athey v. Tennessee Coal, Iron & R. Co. (68 So. 154).....	646	Coffey v. Gay (67 So. 681).....	137
Barber v. State (66 So. 1008).....	658	Continental Gin Co., Ex parte (66 So. 1008).....	660
Barfield v. South Highlands Infirmary (68 So. 30).....	553	County of Montgomery v. City of Montgomery (67 So. 1018).....	668
Bidwell v. Johnson (67 So. 985).....	195	Davis v. McColloch (67 So. 701).....	520
Biles v. Schultz (67 So. 981).....	671	Drennen v. White (68 So. 41).....	274
Birmingham, City of, v. Carle (68 So. 22)...	539	E. A. Foy Co. v. Haddock (67 So. 978)....	101
Birmingham Ledger Co., Ex parte (66 So. 1008).....	659	Embry v. Adams (68 So. 20).....	291
Birmingham Ry., Light & Power Co. v. Bason (68 So. 49).....	618	F. B. Fisk Cotton Co., Ex parte (67 So. 1017).....	661
Birmingham Ry., Light & Power Co. v. Morrison (67 So. 1017).....	658	Fidelity Mortg. Bond Co. v. Morris (68 So. 153).....	318
Birmingham Water Works Co. v. Brown (67 So. 613).....	457	Fields v. Woods (67 So. 1016).....	93
Blanton v. Blanton (67 So. 1000).....	148	Fisk Cotton Co., Ex parte (67 So. 1017)...	661
Borok v. City of Birmingham (67 So. 389).....	75	Fletcher, Ex parte (66 So. 1008).....	661
Braasch v. Worthington (67 So. 1003)....	210	Foy Co. v. Haddock (67 So. 978).....	101
Brannon v. State (67 So. 1007).....	29	Francis v. Collier (65 So. 1033).....	654
Brantley, Ex parte (66 So. 1008).....	660	Franklin v. Long (68 So. 149).....	310
Brown v. Alabama Great Southern R. Co. (67 So. 702).....	500	Fricke v. Wilhite (65 So. 1033).....	654
Brown v. Mitchell (67 So. 1017).....	659	Goldberg & Lewis, Ex parte (67 So. 839)...	356
Burgin, Ex parte (68 So. 49).....	99	Gowan v. Mullen (67 So. 1017).....	666
Burnwell Coal Co. v. Setzer (67 So. 604)...	398	Guston, Ex parte (66 So. 1008).....	662
Carden, Ex parte (67 So. 1017).....	660	Hallett Mfg. Co. v. H. Curjel & Co. (67 So. 995).....	372
Carmack v. State (67 So. 989).....	1	Hannis Distilling Co. v. Lanning (68 So. 137).....	280
		Hartley v. Frederick (67 So. 983).....	175
		Harwell, Ex parte (66 So. 1008).....	662

191 ALA.—Continued.		Page		Page
Hatcher v. Southern R. Co. (68 So. 55).....	634		Patterson v. State (67 So. 997).....	16
Head v. J. M. Robinson, Norton & Co. (67 So. 978).....	352		Phillips v. Gaither (67 So. 1001).....	87
Higginbotham v. Langston (67 So. 1017).....	668		Pinehurst Co. v. City of Tuscaloosa (67 So. 1018).....	669
Holland, Ex parte (66 So. 1008).....	662		Powell v. Nance (67 So. 1018).....	669
Holton v. Rogers (67 So. 1004).....	48		Pratt v. Birmingham Ry., Light & Power Co. (68 So. 151).....	633
Hood, Ex parte (67 So. 1017).....	663		Pratt Consol. Coal Co. v. Short (68 So. 63).....	378
Howerton v. State (67 So. 979).....	13		Quick, Ex parte (66 So. 1009).....	663
Hubbard v. Coffin & Leak (67 So. 697).....	494		Rains v. Patton (67 So. 600).....	349
Huntsville, City of, v. Phillips (67 So. 864).....	524		Randall v. Ashland Baptist Church (67 So. 1018).....	669
Hynes v. Underwood (67 So. 994).....	90		Reynolds v. Love (68 So. 27).....	218
Jackson v. Johnson (67 So. 1017).....	666		Richardson v. State (68 So. 57).....	21
Jackson v. Wadsworth (66 So. 1009).....	667		Robertson v. Robertson (68 So. 52).....	297
Jefferson County Sav. Bank v. Ben F. Barbour Plumbing & Electric Co. (68 So. 43).....	238		Robinson v. Steers (67 So. 1018).....	670
John Silvey & Co. v. Cook (68 So. 37).....	228		Salter v. Fox (67 So. 1006).....	34
Jones v. Dimmick (67 So. 1018).....	667		Saunders v. McDonough (67 So. 591).....	119
Jones v. Myrick Lumber Co. (67 So. 672).....	448		Silvey & Co. v. Cook (68 So. 37).....	228
J. R. Kilgore & Son, Ex parte (67 So. 1002).....	671		Skipper v. Holloway (67 So. 991).....	190
Kilgore v. Tennessee Coal, Iron & R. Co. (67 So. 1002).....	189		Sledge v. State (67 So. 1018).....	670
Kilgore & Son, Ex parte (67 So. 1002).....	671		Sloss-Sheffield Steel & Iron Co. v. Cole (68 So. 142).....	626
Kimbrell v. Louisville & N. R. Co. (67 So. 586).....	392		Sloss-Sheffield Steel & Iron Co. v. Reid (68 So. 136).....	628
Kimbrell v. Strickland (65 So. 1033).....	654		Sloss-Sheffield Steel & Iron Co. v. Terry (67 So. 678).....	476
Kirby v. Arnold (68 So. 17).....	263		Smith v. Gibson (68 So. 143).....	306
Lacey v. Pearce (68 So. 46).....	258		Smith v. Smith (67 So. 1018).....	670
Langston v. Phillips (66 So. 1009).....	667		Southern Bell Telephone & Telegraph Co. v. Floyd (67 So. 1018).....	670
Lee v. Jefferson County Building & Loan Ass'n (67 So. 999).....	215		Southern Bitulithic Co. v. Perrine (67 So. 601).....	411
Long v. Whitt (67 So. 1018).....	668		Southern R. Co., Ex parte (66 So. 1009).....	663
Louisville & N. R. Co. v. Godwin (67 So. 675).....	498		Southern R. Co. v. Harrison (67 So. 597).....	436
Louisville & N. R. Co. v. Gray (67 So. 687).....	514		Southern R. Co. v. Huntsville Lumber Co. (67 So. 695).....	333
Louisville & N. R. Co. v. Jones (67 So. 691).....	484		Southern R. Co. v. Irvin (68 So. 139).....	622
Louisville & N. R. Co. v. Sharp (65 So. 1034).....	655		Southern R. Co. v. Turner (65 So. 1034).....	656
Love v. Love (65 So. 1034).....	655		Standard Portland Cement Co. v. Thompson (67 So. 608).....	444
Lovelady v. Loveman, Joseph & Loeb (68 So. 48).....	96		State, Ex parte (67 So. 1018).....	664
McAdams v. Windham (68 So. 51).....	287		State ex rel. Attorney General v. Lawler (65 So. 1034).....	657
McCalley v. Penney (67 So. 696).....	369		State ex rel. Attorney General v. Speake (State ex rel. Attorney General v. Circuit Judge, 65 So. 1034).....	657
McCormick v. Badham (67 So. 609).....	339		Tarrant, Ex parte (67 So. 1018).....	664
McDuffy v. Murphy (67 So. 1018).....	668		Tatum v. Tatum (67 So. 977).....	45
McGowin v. Simmons (65 So. 1034).....	655		Thomas v. Holden (67 So. 992).....	142
McLaughlin v. Beyer (66 So. 1009).....	668		Thompson, Ex parte (67 So. 1018).....	664
McPherson v. Hood (67 So. 994).....	146		Tidwell v. McCluskey (67 So. 673).....	38
McQuiddy v. King (67 So. 1015).....	205		Toney v. State (67 So. 1018).....	671
Malaney v. Ladura Consol. Mines Co. (65 So. 666).....	655		Tucker v. Mobile Infirmary Ass'n (68 So. 4).....	572
Manfredo v. Manfredo (68 So. 157).....	322		Van Houtan v. Black (67 So. 1008).....	168
Manley v. Birmingham Ry., Light & Power Co. (68 So. 60).....	531		Vinemont, Mayor and Town Council of, v. Allison (68 So. 142).....	316
Mayor and Town Council of Vinemont v. Allison (68 So. 142).....	316		Wadsworth v. Wadsworth (66 So. 1009).....	671
Meyers v. Jasper Coal & Coke Co. (65 So. 1034).....	656		Walker, Ex parte (67 So. 1019).....	665
Miles v. Meade (67 So. 1012).....	80		Warten v. Weatherford (67 So. 667).....	31
Minge v. First Nat. Bank (68 So. 141).....	271		Welch v. Borger (65 So. 1035).....	667
Mitchell v. State (65 So. 1034).....	656		Western Union Tel. Co., Ex parte (67 So. 1019).....	665
Montgomery, City of, v. McDade (66 So. 1008).....	659		Western Union Tel. Co. v. Hughston (67 So. 670).....	424
Montgomery County v. City of Montgomery (67 So. 1018).....	668		Wilbourne v. Kinney (65 So. 1035).....	658
Morrison v. Formby (67 So. 668).....	104		Williams v. State (67 So. 981).....	672
Murphy v. Pipkin (67 So. 675).....	111		Willoughby, Ex parte (67 So. 1019).....	666
Musgrove v. Cordova Coal, Land & Improvement Co. (67 So. 582).....	419		Wilson v. State (67 So. 1010).....	7
National Jewish Hospital for Consumptives v. Coleman (67 So. 699).....	150		Wray v. Barber (65 So. 1035).....	658
New Taxicab Co. v. William Wise Co. (65 So. 1034).....	656		Wylie v. Flowers (67 So. 980).....	36
Norton v. Orendorff (67 So. 683).....	508		Yarbrough v. P. H. & A. E. Stewart (67 So. 989).....	454
O'Neal v. Cooper (67 So. 689).....	182		Yarbrough v. Taylor (67 So. 990).....	109

VOL. 192, ALABAMA REPORTS

Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		Ala. Rep.	South. Rep.		
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	
1	68	334	82	68	373	176	68	349	307	68	909	415	68	289	501	68	353	611	69	15	
5	68	864	91	68	871	179	68	276	312	68	306	422	68	339	507	68	361	617	69	66	
8	68	261	95	68	811	181	68	182	322	68	880	428	68	323	515	68	246	620	68	987	
9	68	322	98	68	813	188	68	353	341	68	886	430	68	278	520	68	330	629	69	57	
10	68	253		100	68	812	195	68	900	343	68	888	434	68	313	528	68	418	639	69	60
12	68	285	103	68	902	200	68	267	346	68	184	440	68	236	532	68	871	651	68	1008	
16	68	261	111	68	259	206	68	186	351	68	280	447	68	315	534	68	417	662	68	1011	
19	68	345	117	68	253	215	68	363	354	68	291	453	68	342	538	68	473	665	69	73	
23	68	254	118	68	255	218	68	379	362	68	269	456	68	281	542	68	814	676	69	69	
27	68	296	129	68	885	223	68	309	364	68	274	462	68	327	546	68	887	684	68	322	
31	68	319	134	68	322	235	68	374	369	68	269	465	68	350	548	68	862	685	68	1018	
35	68	263	136	68	905	250	68	271	373	68	283	467	68	238	550	68	891	686	68	1018	
42	68	317	146	68	889	254	68	265	380	68	271	471	68	348	568	68	867	687	68	1018	
50	68	873	150	68	303	261	68	328	383	68	287	474	68	343	574	68	870	687	68	1019	
53	68	363	153	68	866	265	68	890	389	68	321	480	68	341	576	69	4	688	68	418	
64	68	419	162	68	334	269	68	897	392	68	277	483	68	870	593	69	56	688	68	1019	
69	68	359	164	68	297	280	68	351	396	68	298	486	68	815	596	68	911	689	68	1019	
72	68	324	169	68	332	287	68	369	403	68	328	494	68	356	601	68	990	690	68	1020	
76	68	273	173	68	325	301	68	367	410	68	294										

VOL. 192, ALABAMA REPORTS

	Page		Page
Adams v. Davidson (68 So. 267).....	200	De Graffenried v. Breitling (68 So. 265)...	254
Adler & Co. v. Western Ry. of Alabama (68 So. 361).....	507	Dennis v. Chilton County (68 So. 889)....	146
Alabama City G. & A. R. Co. v. Chasteen (68 So. 322).....	684	Dickerson v. State (68 So. 1018).....	686
Alabama Great Southern R. Co. v. McDaniel (69 So. 60).....	639	Doe ex dem. Evers v. Matthews (68 So. 182).....	181
Aldrich Min. Co. v. Pearce (68 So. 900)...	195	Donaldson v. Wilkerson (68 So. 812).....	100
American Coal Corp. v. Roux (68 So. 970)...	574	Drennen Motor Car Co. v. Evans (68 So. 303).....	150
Atlanta & St. Andrews Bay R. Co. v. Fowler (68 So. 283).....	373	Edwards v. Kilgore (68 So. 888).....	343
Best Park & Amusement Co. v. Rollins (68 So. 417).....	534	Evers v. Matthews (68 So. 182).....	181
Bethea-Starr Packing & Shipping Co. v. Mayben (68 So. 814).....	542	Farmers' Bank & Trust Co. v. Shut & Keihn (68 So. 363).....	53
Birmingham, E. & B. R. Co. v. Feast (68 So. 294).....	410	Farmers' Mut. Ins. Ass'n of Alabama v. Stewart (68 So. 254).....	23
Birmingham Ry., Light & Power Co. v. Ayer (69 So. 56).....	593	Ferguson v. Starkey (68 So. 348).....	471
Birmingham Ry., Light & Power Co. v. Orenshaw (68 So. 327).....	462	Forcheimer v. Foster (68 So. 879).....	218
Birmingham Ry., Light & Power Co. v. Strickland (68 So. 911).....	596	Going v. Southern R. Co. (69 So. 73).....	665
Birmingham Ry., Light & Power Co. v. Washington (69 So. 65).....	617	Graves & Gross v. Leach (68 So. 297).....	164
Birmingham Water Works Co. v. Watley (68 So. 330).....	520	Harris v. Hanchey (68 So. 276).....	179
Bodden v. Foster (68 So. 879).....	218	Hart v. Coleman (68 So. 315).....	447
Brooks v. Greil Bros. Co. (68 So. 874)....	235	Harwell v. State (68 So. 1019).....	689
Brown v. Long (68 So. 324).....	72	Hayes v. Hayes (68 So. 351).....	280
Brown v. State (68 So. 1018).....	685	Hereford v. Brentz (68 So. 350).....	465
Burks v. Parker (68 So. 271).....	250	H. H. Hitt Lumber Co. v. Ambrester (68 So. 338).....	467
Burnett v. Roman (68 So. 353).....	188	Hilton v. Birmingham Ry., Light & Power Co. (68 So. 343).....	474
Bush v. Seaboard Air Line R. Co. (68 So. 1011).....	662	Hitt Lumber Co. v. Ambrester (68 So. 338).....	467
Carter v. State (68 So. 1018).....	685	International Agricultural Corp. v. Abercrombie (68 So. 873).....	50
Central of Georgia R. Co. v. Gross (68 So. 291).....	354	J. A. Lindsey & Co. v. Steenson (68 So. 332)...	169
Chabert v. Henley (68 So. 1018).....	685	Jefferson County Sav. Bank v. Compton (68 So. 261).....	16
Clinton Min. Co. v. Bradford (69 So. 4)....	576	Johnson v. State (68 So. 1018).....	686
Copeland v. Jefferson County (68 So. 285)...	12	Jones v. Dunn Hardware Co. (68 So. 811)...	95
Corry v. Sylvia Y Cia (68 So. 891).....	550	Jones v. Hert (68 So. 259).....	111
Creamer v. Bliss (68 So. 1018).....	685	Kansas City, M. & B. R. Co. v. Stiles (68 So. 1018).....	687
Crews & Green v. Parker (68 So. 287)....	353	Kimball v. Cunningham Hardware Co. (68 So. 309).....	223
Crow v. McKown (68 So. 341).....	480	King v. Livingston Mfg. Co. (68 So. 897)...	269
Davis v. Curtis (68 So. 419).....	64	Knowlton v. Central of Georgia R. Co. (68 So. 281).....	456
Davis v. First Nat. Bank of Blakely (68 So. 261).....	8	Langham v. State (68 So. 1019).....	687
Davis v. Hendrix (68 So. 863).....	215	L. C. Adler & Co. v. Western Ry. of Alabama (68 So. 361).....	507
Davis v. State (68 So. 1018).....	686		
Day, Ex parte (68 So. 1018).....	686		
Deason v. Gray (69 So. 15).....	611		

192 ALA.—Continued.		Page		Page
Levine v. Ferlisi (68 So. 269).....	362	Saxon v. Davie (68 So. 253).....	10	
Ligon v. Roberts (68 So. 319).....	31	Shepard v. Mt. Vernon Lumber Co. (68	322	
Lindsey & Co. v. Steenson (68 So. 332)....	169	So. 880).....	173	
Little Cahaba Coal Co. v. Aetna Life Ins.	42	Shotts v. Scott (68 So. 325).....	117	
Co. (68 So. 317).....	629	Singleton, Ex parte (68 So. 253).....	301	
Louisville & N. R. Co. v. Abernathy (69	532	Slaughter v. Grand Lodge (68 So. 367)....	69	
So. 57).....	494	Sloss-Sheffield Steel & Iron Co. v. Payne		
Louisville & N. R. Co. v. Jones (68 So.	453	(68 So. 359).....	689	
871).....	392	Smith v. Tallassee Falls Mfg. Co. (68 So.	129	
Louisville & N. R. Co. v. Rayburn (68	312	1019).....	346	
So. 356).....	35	Smith v. Tennessee Coal, Iron & R. Co.	389	
Louisville & N. R. Co. v. Travis (68 So.	369	(68 So. 865).....	415	
342).....	5	Southern Bell Telephone & Telegraph Co.	515	
Louisville & N. R. Co. v. Turner (68	307	v. Miller (68 So. 184).....	528	
So. 277).....	687	Southern R. Co. v. Brown (68 So. 321)....	620	
McCrary v. Donald (68 So. 306).....	1	Southern R. Co. v. Farquhar (68 So. 289)...	568	
McGowin Lumber & Export Co. v. R. J.	134	Southern R. Co. v. Grady (68 So. 346)....	440	
& B. F. Camp Lumber Co. (68 So. 263)...	265	Southern R. Co. v. Jordan (68 So. 418)....	380	
McKinney v. Darden (68 So. 269).....	687	Southern R. Co. v. Renes (68 So. 987)....	76	
Madley v. State (68 So. 864).....	1	Southern R. Co. v. Slade (68 So. 867)....	483	
Manning v. Carter (68 So. 909).....	136	Southern R. Co. v. Vessell (68 So. 336)....	118	
Matthews v. Matthews (68 So. 1019).....	261	Southern Sewer Pipe Co. v. Hawkins (68	689	
Matthews v. State (68 So. 334).....	688	So. 271).....	548	
Mayhall v. Woodall (68 So. 322).....	9	Southern States Fire & Casualty Ins. Co.	601	
Middleton v. Foshee (68 So. 890).....	103	v. Lunsford (68 So. 273).....		
Mobile Item Co. v. State ex rel. Attorney	688	Spenny v. Mobile & O. R. Co. (68 So. 870)...		
General (68 So. 1019).....	486	State ex rel. Attorney General v. Pratt		
Mobile Light & R. Co. v. Roberts (68	136	(68 So. 255).....		
So. 815).....	261	State ex rel. Weatherly v. Birmingham		
Mobile & B. R. Co. v. Louisville & N. R.	688	Waterworks Co. (68 So. 1019).....		
Co. (68 So. 905).....	103	Steagall-Cheairs Fertilizer Co. v. Kennedy		
Moore v. Altom (68 So. 326).....	688	(68 So. 862).....		
Moore v. City of Birmingham (68 So. 1019)	688	Stith Coal Co. v. Sanford (68 So. 990)....		
National Surety Co. v. City of Huntsville	82	Tennessee Coal, Iron & R. Co. v. Moody		
(68 So. 373).....	206	(68 So. 274).....		
Nichols v. Nichols (68 So. 186).....	103	Tennessee Coal, Iron & R. Co. v. Wright		
Phoenix Ins. Co. v. Seegers (68 So. 902)...	688	(68 So. 339).....		
Pizitz v. Winsett (68 So. 418).....	9	Thomas v. Hackney (68 So. 296).....		
Porter, Eppes & Redd v. Tate Furniture	546	Thomas v. State (68 So. 1020).....		
Co. (68 So. 322).....	158	Touart v. City of Mobile (68 So. 1020)....		
Pratt Consolidated Coal Co. v. Bozeman	176	Turner v. Thornton (68 So. 813).....		
(68 So. 887).....	688	Vines v. A. B. Vandegrift & Sons (68		
Price, Ex parte (68 So. 866).....	162	So. 280).....		
Ramsey v. Sibert (68 So. 349).....	91	Walker v. Trotter Bros. (68 So. 345).....		
Ray v. Lancaster (68 So. 1019).....	501	Wall v. Graham (68 So. 298).....		
Reed v. Hughes (68 So. 334).....	403	Webb v. Butler (68 So. 369).....		
Reliance Life Ins. Co. of Pittsburgh, Pa.,	675	Western Ry. of Alabama v. Price (68		
v. Garth (68 So. 871).....	688	So. 278).....		
Republic Iron & Steel Co. v. Luster (68	434	Whaley v. Crittenden (68 So. 886).....		
So. 358).....		Williams v. Smith (68 So. 323).....		
Republic Iron & Steel Co. v. Self (68 So.		Wise v. Barr (68 So. 1020).....		
328).....		Woodward Iron Co. v. Steel (68 So. 473)...		
Rhodes v. McWilson (69 So. 69).....		Woodward Iron Co. v. Wade (68 So. 1008)...		
Roach v. Page (68 So. 1019).....		Youngblood v. Commissioners' Court, Blount		
Saxon v. Central of Georgia R. Co. (68		County (68 So. 1020).....		
So. 313).....				

VOL. 138, LOUISIANA REPORTS

La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.	La. Rep.	South. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	69	853	115	70	56	294	70	230	421	70	420	598	70	527	806	70	810
4	69	854	117	70	56	297	70	231	423	70	421	602	70	529	809	70	812
7	69	855	119	70	57	303	70	233	428	70	423	609	70	531	813	70	813
8	69	855	121	70	61	306	70	234	433	70	425	633	70	539	823	70	848
10	69	856	134	70	63	315	70	237	437	70	426	652	70	548	829	70	850
11	69	856	142	70	66	325	70	213	440	70	428	654	70	572	835	70	852
14	69	857	154	70	70	338	70	318	454	70	448	656	70	573	848	70	857
15	69	858	159	70	72	345	70	321	457	70	473	657	70	573	852	70	868
17	69	858	173	70	76	348	70	322	460	70	475	663	70	575	860	70	861
20	69	859	183	70	80	350	70	322	463	70	476	666	70	605	867	70	863
21	69	860	184	70	80	355	70	324	469	70	478	678	70	609	879	70	867
32	70	27	184	70	92	361	70	326	479	70	481	682	70	610	886	70	870
59	70	37	197	70	96	366	70	328	483	70	483	693	70	614	889	70	871
63	70	38	198	70	96	371	70	330	488	70	487	697	70	616	897	70	874
66	70	39	201	70	97	373	70	330	507	70	493	702	70	617	900	70	875
69	70	40	206	70	99	375	70	331	527	70	500	709	70	620	902	70	875
72	70	41	207	70	99	377	70	332	532	70	501	714	70	621	906	70	877
76	70	43	218	70	103	383	70	334	543	70	505	722	70	781	911	70	878
81	70	44	220	70	104	389	70	336	555	70	509	731	70	784	917	70	910
89	70	47	224	70	106	391	70	337	562	70	514	737	70	786	938	70	918
94	70	49	228	70	107	393	70	337	566	70	516	739	70	787	941	70	919
95	70	49	237	70	110	395	70	338	567	70	516	743	70	789	949	70	921
97	70	50	243	70	113	398	70	339	568	70	516	763	70	796	958	70	925
102	70	52	279	70	224	407	70	342	574	70	519	774	70	799	974	70	1010
107	70	53	283	70	226	410	70	343	583	70	522	789	70	804	975	70	1011
113	70	55	288	70	228	415	70	418	596	70	526	793	70	806			

VOL. 138, LOUISIANA REPORTS

	Page		Page
Adams v. McCoy (70 So. 420).....	421	City of Lake Charles, State ex rel., v. St. Louis, I. M. & S. R. Co. (70 So. 621)...	714
Addington v. Times Pub. Co. (70 So. 784)	731	City of New Orleans, In re (70 So. 212)...	243
Alex Hutchinson & Son v. Riggs-Terrell Lumber Co. (70 So. 324).....	355	City of New Orleans v. Kaufman (70 So. 874).....	897
Alfred Hiller Co. v. Hotel Grunewald Co. (70 So. 234).....	305	City of Shreveport v. Simon (70 So. 418)	415
American Lumber Co. v. Day Brick & Lumber Co. (69 So. 853).....	1	Clarke v. Natal (71 So. 149).....	1038
Baldwin Lumber Co. v. Dalferes (70 So. 493).....	507	Cojoe v. Reynolds (70 So. 52).....	102
Barataria Land Co. v. Louisiana Meadows Co. (70 So. 423).....	428	Colonial Trust Co. v. St. John Lumber Co. (71 So. 147).....	1033
Barataria Land Co., State ex rel., In re (70 So. 423).....	428	Connell Iron Works Co., In re (70 So. 617)	702
Barton v. Burbank (71 So. 134).....	907	Crowley Bank & Trust Co. v. Hurd (71 So. 128).....	978
Baton Rouge, City of, v. Hubbs (70 So. 38)	63	Crowley, City of, v. Police Jury of Acadia Parish (70 So. 487).....	488
Bayle v. Garden Dist. Pottery Co. (70 So. 330).....	371	Cusack Co. v. Ford (71 So. 196).....	1096
Bender v. Bailey (70 So. 425).....	433	Davis v. Orr & Stringfellow (70 So. 49)...	94
Bennett, In re (70 So. 1011).....	975	Davis v. Safety First Oil Co. (70 So. 47)...	89
Board of Directors of Public Schools of Parish of Orleans v. New Orleans Land Co. (70 So. 27).....	32	De Bellevue, State ex rel., v. Egan (70 So. 97).....	201
Board of School Directors of Jackson Parish v. McBride (70 So. 527).....	598	Demboun, In re (70 So. 330).....	371
Bodin, State ex rel., v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 516).....	567	Dillard, In re (69 So. 859).....	20
Braley v. Pine Wood Lumber Co. (70 So. 57).....	119	Dreyfous v. Cade (70 So. 231).....	297
Breard v. New York Life Ins. Co. (70 So. 799).....	774	Drummers' Oil Co., In re (70 So. 49).....	94
Brooks v. Bank of Acadia (70 So. 573)...	657	Eldridge v. Chesbrough & Graves (71 So. 152).....	1046
Brown v. Staples (70 So. 529).....	602	Elkins v. Board of School Directors of Parish of Union (70 So. 99).....	207
Burkenroad Goldsmith Co. v. Illinois Cent. R. Co. (70 So. 44).....	81	Farmerville State Bank v. Police Jury of Union Parish (70 So. 852).....	835
Capps v. Parish Board of School Directors of Winn Parish (70 So. 322).....	348	Fleddermann, State ex rel., v. Long (69 So. 855).....	8
Castile v. O'Keefe (70 So. 481).....	479	Foley v. Democratic Parish Committee of Parish of Orleans (70 So. 104).....	220
Caulfield v. Cravens (70 So. 226).....	253	Frickie, In re (69 So. 855).....	7
C. C. Hardeman Co. v. Caddo Concrete Const. Co. (70 So. 53).....	107	Fulco v. Shreveport Traction Co. (70 So. 812).....	809
C. F. Petty Stave Co. v. Houck (70 So. 72)	159	Gallagher v. Conner (70 So. 539).....	633
Charbonnet v. Forschler (70 So. 224).....	279	German-American Nat. Bank v. Front Lawn Co. (70 So. 918).....	938
Chopin v. Freeman (70 So. 421).....	423	Gibbsland State Bank, In re (70 So. 72)...	159
City of Baton Rouge v. Hubbs (70 So. 38)	63	Gonsoulin v. Gonsoulin (70 So. 919).....	941
City of Crowley v. Police Jury of Acadia Parish (70 So. 487).....	488	Gorum v. Henry (70 So. 526).....	596
		Gray v. Edgar Lumber Co. (70 So. 877)...	906
		Guillory v. Latour (70 So. 66).....	142

138 LA.—Continued.		Page	Page
Gulf Refining Co. of Louisiana v. Hayne (70 So. 509).....	555	Mouton v. Southern Saw Mill Co. (70 So. 813)	813
Hardeman Co. v. Caddo Concrete Const. Co. (70 So. 53).....	107	Murff v. McCloskey (70 So. 41).....	72
Hart v. Dupont (69 So. 858).....	15	Murray v. Hawkins (70 So. 476).....	463
Henderson v. American Lumber Co. (70 So. 620)	709	New Orleans, City of, In re (70 So. 212) ..	243
Hernandez, Succession of (70 So. 63).....	134	New Orleans, City of, v. Kaufman (70 So. 874)	897
Hibernia Bank & Trust Co. v. Dresser (70 So. 37)	59	New Orleans Ry. & Light Co. v. Laverne (70 So. 921).....	949
Hiller Co. v. Hotel Grunewald Co. (70 So. 234)	305	Orleans Parish, Board of Directors of Public Schools of, v. New Orleans Land Co. (70 So. 27).....	32
Hirst v. Xeter Realty (70 So. 339).....	398	Orleans Plantation Co. v. Board of Levee Com'rs of Orleans Levee Dist. (70 So. 870).....	886
Holloway v. Dumas (70 So. 321).....	345	Orr & Stringfellow, In re (70 So. 49).....	94
Hunt v. Hill (70 So. 522).....	583	Pace & Co. v. Alexandria Electric Rys. Co. (70 So. 867).....	879
Hurry v. Hurry (70 So. 337).....	391	Parish of Jackson, Board of School Directors of, v. McBride (70 So. 527).....	598
Hutchinson & Son v. Riggs-Terrell Lumber Co. (70 So. 324).....	355	Parish of Orleans, Board of Directors of Public Schools of, v. New Orleans Land Co. (70 So. 27).....	32
Iddle v. Hamler Boiler & Tank Co. (70 So. 50)	97	Patout Bros. v. Mayor & Board of Trustees of City of New Iberia (70 So. 616) ..	697
Illinois Cent. R. Co., In re (70 So. 44)....	81	Percival, Succession of (70 So. 505).....	543
Interstate Trust & Banking Co. v. Irwin (70 So. 313).....	325	Persche v. Persche (70 So. 56).....	115
Jackson, In re (70 So. 96).....	197	Petty Stave Co. v. Houck (70 So. 72).....	159
Jackson v. Cousin (70 So. 96).....	197	Pillsbury v. Frickie (69 So. 855).....	7
Jackson Parish, Board of School Directors of, v. McBride (70 So. 527).....	598	Pouncy v. Gunby's Estate (69 So. 856)....	10
Jallans v. Rohm (70 So. 49).....	95	Red Cross Lumber Co. v. Frank I. Abbott Lumber Co. (71 So. 191).....	1082
J. D. Connell Iron Works Co., In re (70 So. 617)	702	Reeves v. Dean (70 So. 871).....	889
J. D. Pace & Co. v. Alexandria Electric Rys. Co. (70 So. 867).....	879	Reilly, Succession of, v. American Bonding Co. of Baltimore, Md. (70 So. 237).....	315
Jones v. J. F. Ball & Bro. Lumber Co. (70 So. 575)	663	Reno v. Yazoo & M. V. R. Co. (70 So. 43)	76
Karcher v. Karcher (70 So. 228).....	288	Reynaud v. Police Jury of Parish of St. John the Baptist (70 So. 39).....	66
Koepp v. Crawford (70 So. 858).....	852	Rice v. Key (70 So. 483).....	483
Krone v. Krone (70 So. 605).....	666	Roe v. Caldwell (70 So. 548).....	652
Laenger v. Laenger (70 So. 501).....	532	Ruppert, In re (70 So. 331).....	375
Lake Charles, City of, State ex rel. v. St. Louis, I. M. & S. R. Co. (70 So. 621)....	714	Ruppert v. Fontenot (70 So. 331).....	375
Landry v. J. M. Burguières Co. (70 So. 875)	902	Russell v. Producers' Oil Co. (70 So. 92) ..	184
Lapouyade v. New Orleans Ry. & Light Co. (70 So. 110)	237	Safety First Oil Co., In re (70 So. 47)....	89
Leathers v. Odd Fellows' Rest (69 So. 858) ..	17	Salassi v. Dougherty (71 So. 194).....	1089
Le Blanc v. City of New Orleans (70 So. 212)	243	Saunders v. Busch-Everett Co. (71 So. 153)	1049
Leidigh-Dalton Lumber Co. v. Houck (70 So. 72)	159	Schlumbrecht, Succession of (70 So. 76) ..	173
Lynch v. Lynch (71 So. 195).....	1094	Schwartz v. Dennis (70 So. 857).....	848
McClendon v. Busch-Everett Co. (70 So. 781)	722	Schwartzberg v. Schwartzberg (70 So. 230)	294
McInnis v. Wingate (70 So. 610).....	682	Shaw v. Board of Com'rs of Bayou Terre-Aux-Bœufs Drainage Dist. (70 So. 910) ..	917
Maisonneuve v. Dalferes (70 So. 500).....	527	Shreveport, City of, v. Simon (70 So. 418)	415
Marks, In re (70 So. 857).....	848	Slattery v. Arkansas Natural Gas Co. (70 So. 806)	798
Marston v. Elliott (70 So. 519).....	574	Spence v. Lucas (70 So. 796).....	763
Martin v. Pichon (70 So. 850).....	829	Standard Oil Co. of Louisiana v. Drummers' Oil Co. (70 So. 49).....	94
Mercier v. Yazoo & M. V. R. Co. (71 So. 150)	1043	State v. Abraham (71 So. 193).....	1087
Mermentau Shingle Mill, Third Opposition of (70 So. 500).....	527	State v. American Sugar Refining Co. (71 So. 137)	1006
Meunier v. Thibodeaux (70 So. 337).....	398	State v. Bacon (70 So. 572).....	654
Millet, State ex rel., v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 514).....	562	State v. Banks (71 So. 194).....	1090
Milliken & Farwell v. Roger (70 So. 848) ..	823	State v. Barkley (70 So. 336).....	389
Monfre, Ex parte (70 So. 786).....	737	State v. Barnette (70 So. 614).....	693
Monfre, Ex parte (70 So. 786).....	739	State v. Boylston (69 So. 860).....	21
Monfre v. Marrero (70 So. 786).....	737	State v. Boylston (70 So. 80).....	183
Monfre v. Marrero (70 So. 787).....	739	State v. Boylston (70 So. 80).....	184
Montegut, State ex rel. v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 516).....	566	State v. Bryan (70 So. 318).....	338
Moreauville, Village of, v. Boyer (71 So. 187)	1070	State v. Celestin (70 So. 342).....	407
Morgan's Louisiana & T. R. & S. S. Co. v. Railroad Commission of Louisiana (70 So. 332)	377	State v. Cullom (70 So. 338).....	395
		State v. Curtis (70 So. 878).....	911
		State v. Defatta (71 So. 195).....	1092
		State v. Dorsey (70 So. 343).....	410
		State v. Doyle (70 So. 322).....	350
		State v. Dunson (70 So. 61).....	131
		State v. Elliott (70 So. 473).....	457
		State v. Feducia (70 So. 1010).....	974

138 LA.—Continued.		Page		Page
State v. Fulco (71 So. 133).....	993	State ex rel. De Bellevue v. Egan (70 So. 97)	201	
State v. Fulco (71 So. 134).....	995	State ex rel. Fleddermann v. Long (69 So. 855)	8	
State v. Gallot (70 So. 106).....	224	State ex rel. Millet v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 514).....	562	
State v. Gueriniere (69 So. 854).....	4	State ex rel. Montegut v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 516).....	566	
State v. Higginbotham (70 So. 328).....	366	State ex rel. Williams v. Democratic Executive Committee of Bienville Parish (70 So. 516).....	568	
State v. Latino (69 So. 857).....	14	Sterkx v. Sterkx (70 So. 428).....	440	
State v. Legendre (70 So. 70).....	154	Strother v. Mangham (70 So. 426).....	437	
State v. McCarroll (70 So. 448).....	454	Teutonia Bank & Trust Co. v. Heaslip (70 So. 861).....	860	
State v. McLaughlin (70 So. 925).....	958	Thomas Cusack Co. v. Ford (71 So. 196).....	1096	
State v. Maroun (71 So. 133).....	993	Trichel v. Donovan (71 So. 130).....	985	
State v. Matassa (71 So. 190).....	1079	Viavant v. Bonneval (70 So. 99).....	205	
State v. Matassa (71 So. 191).....	1081	Village of Moreauville v. Boyer (71 So. 187)	1070	
State v. Milano (71 So. 131).....	989	Vincent v. Sibley, L. B. & S. R. Co. (70 So. 810)	806	
State v. Miller (70 So. 330).....	373	Wall v. Brooks-Scanlon Co. (70 So. 875).....	900	
State v. Nejm (71 So. 133).....	992	Wall v. Rabito (70 So. 531).....	609	
State v. O'Neal (70 So. 1011).....	977	Wells v. Honeycutt (69 So. 859).....	20	
State v. Phelps (69 So. 856).....	11	Wichers v. Wichers (70 So. 40).....	69	
State v. Pool (70 So. 107).....	228	Williams, Succession of (70 So. 334).....	383	
State v. Pool (70 So. 804).....	789	Williams, State ex rel., v. Democratic Executive Committee of Bienville Parish (70 So. 516).....	568	
State v. Rather (70 So. 96).....	198	Wise v. Lavigne (70 So. 103).....	218	
State v. Rogers (70 So. 863).....	867	Wolf v. Shreveport Gas, Electric Light & Power Co. (70 So. 789).....	743	
State v. Serio (70 So. 609).....	678			
State v. Sharp (70 So. 573).....	656			
State v. Sinigal (70 So. 478).....	469			
State v. Steuer (70 So. 233).....	303			
State v. Taylor (70 So. 56).....	117			
State v. Torris (70 So. 475).....	460			
State v. Tuminello (71 So. 190).....	1078			
State v. Warren (70 So. 326).....	361			
State v. Xenos (70 So. 55).....	113			
State ex rel. Barataria Land Co., In re (70 So. 423).....	428			
State ex rel. Bodin v. Democratic Parish Executive Committee of Parish of St. John the Baptist (70 So. 516).....	567			
State ex rel. City of Lake Charles v. St. Louis, I. M. & S. R. Co. (70 So. 621)...	714			

GARRET W. MCENERNEY
2002 HOBART BUILDING
SAN FRANCISCO, CAL.